The Private Information Protection Act and Personnel Management

I. Introduction

Private information is easily obtained in our internet-driven information society, and there have been many cases of abuse. Recently, financial companies, search engines, game companies, and others have been the victims of information hacking, resulting in a plethora of spam mail, illegal use of other people's names, voice phishing, and identity theft. Accordingly, in the endeavor to provide a consistent code to protect private information, the "Private Information Protection Act" was signed into law on March 29, 2011, and enforced from September 20, 2011. This act is a general law that combines all laws related to protection of private information and contains strong penal provisions. This law also covers all processes of gathering private information, both on- and offline. I would like to explain the main points of the Private Information Protection Act, and then guide in understanding what companies need to do to prepare for appropriate management of their labor force.

II. Major Details of the Private Information Protection Act

The Private Information Protection Act regulates matters concerning the use of private information in order to protect and promote people's rights and interests by protecting them from unwanted collection, leakage, illegal use and abuse of their private information. The law includes the following six major subjects.

1. Expansion of Scope

The Private Information Protection Act is a general law applying to the relationship between individuals and those collecting their private information. Previously, private information was protected in specifically designated ways through separate laws such as the Information & Communication Act and the Credit Information Act, but the protections offered there have been expanded and applied to all handlers of private information working in either the public or private sector. Accordingly, this law also applies to companies that do not conduct any online business.

2. Expansion of Protection

The scope of protection of private information covers not only information processed electronically, but also paper records such as those used in Civil Service Offices, etc. "Private information" means data that distinguishes or reveals individual identity (including name, resident registration number, date of birth, address, etc.) and data that reveals an individual's past and current conditions and situations (including educational

background, financial status, medical history and health, etc.).

3. Restrictions on use of unique identifying information

Unique identifying information provided to the individual by law, such as resident registration numbers, shall be prohibited, in principle, from processing. In cases where a specific law requires such information, or an employer receives individual consent, gathering such information is permitted. Individual resident registration numbers shall not be required on websites. Any person violating this shall be punished with imprisonment of up to five years or with a fine not exceeding fifty million won.

4. Restrictions against use of video recording devices

Installation and operation of video recording devices in open places is now restricted. A “video recording device” is any instrument, such as CCTV (closed-circuit television) or network cameras, which is installed and remains in a designated place and is meant to videotape objects and/or people, or transmit the video recordings through a wired or wireless network. The arbitrary use of such operations in a way that differs from its intended purpose, recording video in places other than the originally intended area, and recording of voices, are all prohibited. Any person violating this shall be punished with imprisonment of up to three years or with a fine not exceeding thirty million won.

5. Collection and use of private information

The collection of private information must satisfy certain criteria, and any information gathered shall only be used in the specified way. These criteria are: 1) The target person must have agreed to give such information; 2) an article of law exists which requires the collection of such information in order to observe the law; 3) it is needed by a public agency to carry out duties assigned by related law; 4) it is necessary for one party to enter into or implement a legal contract with the individuals concerned; 5) such information is urgently necessary to protect life, body, and interest of individuals and/or third parties; 6) it is necessary for the justifiable interests of the handler of such information, and is more important than the rights of individuals. In this last case, it shall be closely related to the justifiable interest of the handler of such information, and shall not exceed a reasonable scope. A person who violates this shall be punished with a fine for negligence up to fifty million won.

6. Duty to report leaks of private information

When recognizing that private information has been leaked, the handler of such information shall notify the individuals concerned of this fact without delay, and shall

include: 1) the details of the leaked private information; 2) the time the leak occurred, and any related details; 3) information about how the individual can minimize any damage caused by the leak; 4) any countermeasures the handler of such information has taken, and procedures for remedy for any damage; and 5) the contact information of the department individuals can contact to report any resulting damage.

Any person violating this duty to report leaks of private information shall be punished with a fine for negligence of up to thirty million won. Any person responsible for failing to report to the appropriate government authority on the way the organization handled the leak shall be punished with a fine for negligence of up to thirty million won.

III. Management of Personnel and Private Information

Laws related to the protection of private information are applied equally to most companies. Regarding the management of personnel, the main issues are the management of employees' private information and the company use and management of video recording devices.

1. Details on management of employees' private information

Collecting and using private information is tightly restricted, but in cases where an employee enters into an employment contract to offer work in return for wages from the employer, the employer shall know the employee's name, resident registration number, address, wage information, and other necessary data, as this is an example of "it is necessary for one party to enter into or implement a legal contract with the individuals concerned." These items of private information are essential to management of personnel regarding the four social insurances, year-end income tax adjustment, and issuance of various certificates. Accordingly, no individual agreement is necessary regarding the use of private information in this way. However, it is still necessary for the employer to inform the employee of the collection and use of his/her private information related to the making of an employment contract. This notification shall include the purpose for collecting the private information, where to read and/or correct such information, the period it will be retained, and management after he/she leaves the company, etc.

Can private information obtained through resumes, etc. at the time of hiring be exempt from the requirement for consent from employees to collect or use their information, as it can be considered "necessary for one party to enter into or implement a legal contract with the individuals concerned"? [1]

According to the Enforcement Decree (Article 27) of the Labor Standards Act, the employer shall record the employees' name, resident registration number, matters on the basis of wage calculation, and other working conditions in the wage ledger. In other cases such as the collection and use of job seekers' private information, consent does not have to be given, according to Article 1 (subparagraph 4) of the Enforcement Decree of the Labor Standards Act (making and implementing a contract). The information about individual employees shall generally be used not only for employment contracts, but also other purposes such as welfare, labor union management, training, etc. Furthermore, as companies are likely to gather such sensitive information, it is greatly desirable to inform the employees concerned of the use of private information from employment-related documents, and the period of use, etc.

In cases where the employer collects unique and sensitive identifying information such as resident registration number at the time of employment, excluding where there are concrete reasons to gather such information due to related law, it shall be necessary for the employer to receive separate agreement from the employees concerned.

2. Company use and management of video recording devices

Video recording devices shall not be installed or operated in public places. Exceptions are as follows: 1) In cases where its use is concretely permitted by law and/or decree; 2) In cases where its use is necessary to prevent or investigate crime; 3) In cases where its use is necessary for facility security and prevention of fire; 4) In cases where its use is necessary to enforce traffic laws; and 5) In cases where its use is necessary to collect, analyze and distribute traffic information. While use of video recording devices is permitted in these cases, the company shall set up a board notifying employees of the presence of such recording devices.

'Public places' refers to places like roads, parks, plazas, and other places the public is free to use. The lobby of a company building can be used by many unspecified people, so it is included in the restrictions on installing a video recording device. However, the inner rooms and hallways of the company building, where access is strictly controlled and only to internal employees and those receiving permission, would be considered closed to the public, and so are excluded from restrictions on installation of video

[1] "Explanation of Laws and Decrees Concerning Protection of Private Information" (the Ministry of Public Administration & Security, Dec. 2011, pg. 90)

recording devices. Provided, in cases where the video recording device was installed and is in operation to collect individual imagery information, other protections of privacy still apply. That is, when a company obtains the employee's permission, and when the recording is necessary to accomplish the justifiable interests of the handler of such information, installing and operating a video recording device is allowed.

Case: Monitoring the Workplace[2]

Some companies install and operate video recording devices to monitor work activities. Such video recording devices installed in the workplace have been the cause of conflict between the employer's authority to supervise work and workers' right to privacy.

Workplaces off-limits to outsiders are in principle 'closed places', and Article 25 (Restrictions on use of video recording devices) does not apply, while the principle of general protection of privacy does. In relation to this, "the Act concerning the Promotion of Worker Participation and Cooperation" stipulates that management shall consult employees before installing video recording devices such as CCTVs, which can be done through labor-management discussions, where a balance between monitoring work and protecting privacy may be struck.

IV. Conclusion

The Private Information Protection Act regulates matters concerning use of private information in order to protect and promote people's rights and interests by protecting people from unwanted collection, leaks, illegal use and abuse of their private information. The Private Information Protection Act is a general law designed to protect people's privacy, and has very strong penal provisions. Accordingly, companies shall keep employees' private files only for personnel management, and shall require 'employee consent for the use of private information' for other purposes, to prevent legal disputes. Also, in using CCTV at the workplace, companies should ensure that workers are not led to believe they are simply being 'watched', and labor union office entrances should be avoided when placing video recording devices.

[2] "Explanation of Laws and Decrees Concerning Protection of Private Information" (the Ministry of Public Administration and Security, December 2011, Page 166)

Ordinary Wage

I. Introduction

Recent judicial rulings concerning rules for calculation and scope of ordinary wages have differed from Ministry of Employment & Labor guidelines, something which has caused much confusion for corporate management. However, the Supreme Court, with all judges in attendance, has offered clarification on December 18, 2013: " 'Ordinary wages' means wages which are determined to be paid periodically or in a lump sum to an employee for his/her prescribed work or whole work. This ordinary wage is used as the standard wage to calculate added allowance for overtime, night and holiday work, annual paid leave allowance, dismissal pay, and for paid leaves that employers have to provide under the Labor Standards Act. If this ordinary wage has not been calculated properly, it is not as simple as re-calculating and paying the correct amount from now on, but the employer shall recalculate all kinds of allowances such as overtime, night and holiday work, and other allowances that were paid over the past three years. Furthermore, the employer shall recalculate the severance pay for resigned/dismissed employees and pay the difference."

II. Legal criteria for determining ordinary wages

(1) Ordinary wages means wages that an employer pays to an employee as remuneration for his/her prescribed work or whole work, and those which are paid regularly and uniformly are considered ordinary wages in principle. In consideration of the purpose for legislating the Labor Standards Act and the function and necessity of ordinary wages, what should be included as ordinary wages shall be fixed wages paid regularly and uniformly, meaning non-fixed wages are not ordinary wages, as they are not paid regularly and uniformly and may or may not be paid, or the amount paid is according to actual work performance. Here, being paid 'uniformly' not only means payment is made to all employees, but also to all employees qualified according to certain conditions or criteria. Here, 'certain criteria' means 'fixed conditions' in considering the concept of ordinary wage that is designed to calculate 'fixed and generally accepted regular wage.' [3];

(2) Even though a particular allowance or bonus, etc., may be paid for a period exceeding one month, if these are paid regularly and uniformly, these components can be included in ordinary wages. [4]

[3] Supreme Court ruling on Jan 29, 2010:2009da74144
[4] Supreme Court ruling on Feb 1996: 94da19501; SC ruling on Jun 13, 2003: 2002da74282

(3) Mutual agreements between employer and employees that exclude a particular allowance considered ordinary wages according to the Labor Standards Act are null and void because such an agreement sets conditions lower than that of the Labor Standards Act. [5]

III. Application of Ordinary Wage

1. Bonuses

Bonuses are included into the realm of ordinary wages even if they are not paid regularly every month. “Rules for calculating ordinary wages” explains the bonus as follows[6] (Revised after the Supreme Court ruling on December 18, 2013):

Name of payment made to employees	Ord. Wage	Avg. Wage	Other Paymt
Bonuses A. In cases where payment conditions, amounts, and payment rates are regulated in the Rules of Employment, or where employees are paid habitually and naturally expect to get paid: regular bonuses, exercise subsidies, etc. B. In cases where payment is not made habitually, but paid temporarily or definitely in accordance with company profits according to the employer's discretion and favor	○	○	○

(1) “As the regular bonus is paid regularly and uniformly (100% paid every even month) as fixed wages for labor service, it shall be considered ordinary wages stipulated in the Labor Standards Act.” [7]

(2) The bonus in this case is only applicable to employees working for six months or more with a certain amount paid quarterly, and calculated according to the number of years of service. This bonus is paid every quarter, distinguishing it from annual salary divided into monthly payments, but this difference in payment time does not preclude it from being considered as ordinary wage. As the bonus in this case has been previously fixed, it shall be considered ordinary wage as it is a fixed wage paid regularly and uniformly.[8]

[5] Supreme Court ruling on Nov 29, 2007: 2006da 81523
[6] Regulation of the MoEL-476, Jan 22, 2002 plus Supreme Court ruling
[7] Inchon district court ruling on Feb 23, 2012: 2011gahap6096; Seoul Appellate Court ruling on Oct1,2010: 2010na34618
[8] Supreme Court ruling on Mar 29, 2012: 2010da91046

2. Payments made for an employee's living costs or welfare, regardless of working hours

Name of payment made to employees	Ord. Wage	Avg. Wage	Other Paymt
① Commuting allowance, vehicle maintenance subsidies			
A. If rendered periodically and uniformly to all employees	○	○	
B. If rendered variably according to the number of days in attendance or to a few employees			○
② Company housing allowances, winter fuel allowances, kimchi allowances	○	○	
A. If rendered periodically and uniformly to all employees			
B. If rendered temporarily or to a few employees			○
③ Family allowances, education allowances			
A. If rendered uniformly to all employees regardless of marital status	○	○	
B. If rendered only according to the number of family members or to a few employees (paid as child education allowances, employee training allowances, etc.)			○
④ Meals or meal allowances	○	○	
A. If rendered uniformly to all employees by means of a labor contract, Rules of Employment, or etc.			
B. Actual meals paid in accordance with the number of days in attendance			○

(1) “The company has paid all cleaning workers a fixed meal allowance, household subsidy, transportation subsidy, morning meal costs, sanitation allowance, and snack allowances as fixed amounts every month, all of which shall be considered ordinary wages to be paid regularly and uniformly as reward for labor service.” [9]

(2) “If a welfare allowance has been paid uniformly, regularly, and at a fixed rate to all employees of the same business according to the collective wage agreement, this is not money paid temporarily and according to favor for welfare, but wages paid as reward for labor service according to employment relations. In addition, this is not wages paid individually or at a variable rate, but fixed wages for ordinary working days and working hours, so shall be considered ordinary wage.” [10]

(3) “Even though some employees with lower work attendance rates have been paid transportation and meal allowances differently than other workers, these allowances have been paid to all employees and shall be considered ordinary wages.” [11]

[9] Ulsan district court ruling on Feb 3, 2006: 2005gadan8384
[10] Busan Appellate Court ruling on Sep 25, 1996: 96gu2583
[11] Seoul district court ruling on May 18, 2006: 2005gahap57290

(4) “Even though a company enters into an agreement with employees that it will not calculate into ordinary wage the meal allowances that have been paid at a fixed rate to all employees, this shall be considered an illegal employment contract.” [12]

(5) “Service allowances have accumulated according to the length of service for all cleaning workers employed for at least one year; meal, transportation, sanitation, and hazard allowances have been paid at a fixed rate every month to all cleaning workers. Quarterly, attendance, exercise, and traditional holiday allowances have been paid to all cleaning workers regularly and at a fixed rate if they meet certain criteria. As these allowances are fixed wages paid regularly and uniformly as reward for labor service, they shall be considered ordinary wages.” [13]

[12] Supreme Court ruling on Feb 22, 1994: 93da9620
[13] Supreme Court ruling on Sep 8, 2011: 2011da22061

Supreme Court Decision on Ordinary Wage

I. Rulings (Two Cases Related to Ordinary Wage)

1. First case (Supreme Court ruling on December 19, 2013, 2012da89399)

(1) Background: The defendant company (hereinafter, referred to as "the company") has paid bonuses on every even month, in accordance with the company's Bonus Payment Regulation, with the full amount paid to employees with more than two months of service. However, a different amount calculated by application of a pre-determined rate, according to the corresponding period of the bonus payment, is paid to new employees with less than two months of service, those who have just returned after taking at least two months of leave, and those who are on leave. As for those who resigned during the corresponding period of bonus payment, the company pays the pro-rated amount according to the number of days worked. When determining the amount of wages to be included in ordinary wages in the collective agreement concluded on October 8, 2008, the company and the labor union excluded the bonuses in the calculation of ordinary wage, assuming that the bonuses in this case were not included in ordinary wage in the Labor Standards Act.

(2) Controversial points related to this case:

1) Whether or not the bonuses in this case are included in "ordinary wage"; 2) Although the company and the union agreed to exclude the bonuses in the calculation of ordinary wages, if an employee applied for additional wage, claiming that the agreement was invalid, whether or not this claim violated the good-faith principle.

(3) Court ruling:

1) Even though the company paid the bonus for a period exceeding one month (every two months during each period of wage payment), this amount has satisfied the requirement of periodic payment, as this was paid periodically. Also, since whether or not the payment was made, and the amount of the payment had already been determined uniformly for all employees, the bonus qualifies as uniform and fixed. As the bonus payment varies according to the particular service period (as of two months), it could be misunderstood that there is no uniformity or it could incorrectly be regarded as money not previously determined. However, in considering it in the situation of overtime work (when the ordinary wage needs to be calculated), whether the employees concerned had served two months or not was already determined. As those who resigned received their bonus in proportion to the number of days they worked, the bonus is recognized as uniform and fixed. As explained above, those on leave were treated differently, due to their

extraordinary situation, and so it is not an obstacle to admit that payment as ordinary wage. Accordingly, the regular bonus in this case shall be included in ordinary wage.

2) A labor contract which establishes working conditions that do not meet the standards provided for in the Labor Standards Act shall be null (Article 15 of the Labor Standards Act). Accordingly, even though the employer and the union agreed to exclude the regular bonus as legally included in ordinary wage, this mutual agreement is invalidated as being in violation of the Labor Standards Act. As the above agreement was invalid, it is a principle that the employer should recalculate the overtime work allowance, adding the wages included in legal ordinary wage, and that the employee can apply for retroactive payment of the variance from the amount already paid. However, the additional wage claim based upon the regular bonus can be restricted due to the good-faith principle. In those workplaces where there were no agreements on the exclusion of ordinary wages, additional wages for different amounts recalculated by including the regular bonus in the ordinary wage can be claimed. Provided, that this retroactive claim can be valid only for the amount payable for the past three years.

2. Second case (Supreme Court ruling on December 19, 2013, 2012da94643)

(1) Background and controversial points: 1) Whether the amount of Kimchi bonus should be determined based on whether it belongs to the ordinary wage or not; 2) Whether Lunar New Year and Chuseok (Korean Thanksgiving) bonuses, summer leave bonuses, gift allowances, birthday allowances, individual pension premium subsidies, group insurance, etc., which were paid to incumbent employees as of a particular time period, are included in ordinary wage or not.

(2) Court ruling: Even though there is a possibility that the above bonuses etc., which were paid only to those in active service as of a particular time period, may be seen as ordinary wage, the subordinate judicial ruling that considers them as ordinary wages is overturned as being incorrect.

II. Judgment Criteria for Ordinary Wages

1. The concept of "ordinary wage"

"Ordinary wage" is the wage determined to be paid uniformly when contractual labor service is provided. All allowances which legally qualify as ordinary wage shall be included in ordinary wage regardless of the title of the allowance. It is recognized as the

basic wage when calculating additional wages for extended work, night-time and holiday work, allowance replacing advance notice of dismissal, and the unused annual leave allowance. Additional wages under the Labor Standards Act shall be 150%, calculated by adding 50% of ordinary wage.

2. Criteria for inclusion in "ordinary wage"

(1) Conceptual signs and requirements of ordinary wage: Since ordinary wage becomes the basic wage used to calculate additional wages, it should be considered a financial reward reflecting the value of labor service provided ordinarily for contractual working hours in accordance with the employment contract (remuneration for labor). Accordingly, the additional wages paid for special work provided, and not for assigned work as per the employment contract, shall not be considered ordinary wage. In addition, this ordinary wage must have been determined before providing actual overtime work. The reason for this is that the previously determined ordinary wage calculation shall be used immediately when the overtime work is actually provided. Requirements of the ordinary wage shall be comprised of all three components: ① periodicity; ② uniformity, and ③ fixedness.

(2) Requirement of periodicity: It should be a wage which is paid periodically for a previously-determined period. Even if it is paid for a period exceeding one month, if it is paid periodically for a regular period, it is included in ordinary wage.

[Regular bonuses] Employees are paid their regular wage once a month in return for work, but their regular bonus is paid either every two months, once per quarter, or once a year, varying with the company. These bonuses are regarded as having a character of periodicity if they are paid periodically, despite being paid every two months, every quarter, every half year or each year. Accordingly, the regular bonus normally paid for a period exceeding one month can be included into the ordinary wage.

(3) Requirement of uniformity: It is "ordinary wage" only when it is paid to "all employees" or "all employees meeting the identical conditions or criteria." Even though the bonus is not paid to all employees, but only to those employees who meet the identical conditions or criteria, it is considered to have a characteristic of uniformity. Accordingly, "identical condition" here means that it is not changeable from time to time, but must be fixed. Even though there may be some restrictions concerning payment of a particular wage to an employee on leave, returning from leave, or under disciplinary measures, these restrictions are designed to consider the individual special circumstances, but cannot deny the uniformity of wages to normal employees maintaining a regular employment

relationship. Therefore, this wage is included in ordinary wage.

As ordinary wage is the concept evaluating the value of contractual work, "the identical conditions or criteria" shall be conditions as related to "work." Accordingly, the family allowance payable only to those employees with dependent family cannot be considered ordinary wage, as the payment condition is not related to work performed. Provided, that in cases where the company pays a fixed allowance under the description of "family allowance" to all employees, and then pays an additional amount to employees with a dependent family, the fixed amount that is paid to all employees uniformly as remuneration of work shall be included in ordinary wage, but the additionally-paid family allowance shall not.

(4) Requirement of fixedness: When an employee works overtime, whether or not the company has to pay shall be determined in advance, regardless of any achievements, performance or other additional conditions. In this case, such payment is considered as having a characteristic of fixedness. Accordingly, "fixed wage" means the least amount to be guaranteed to be paid as remuneration for labor to the employee who provided that labor for contractual working hours, even if the employee resigned the next day, and regardless of what that wage may be called. A general regular bonus is considered as fixed as this is determined for its regular payment. An allowance that is paid only upon satisfaction of an additional condition or any other allowance that is paid a varying amount dependent upon whether or not it satisfies a certain condition shall not be considered ordinary wage as there is no fixedness. In this instance, an additional condition suggests an unclear condition for its achievement in considering it at the time of performing overtime work. Provided, that caution should be taken that the part of wage not affected by the condition shall be the ordinary wage as a fixed wage. The incentive pay conditional upon actual performance results is the most suitable example, and shall not be ordinary wage as its payment is not fixed. Provided, even in this instance, as much as the least amount guaranteed for payment regardless of performance is fixed, that portion shall be included in ordinary wage.

(5) Judgment criteria: In order to become ordinary wage designed to calculate additional wages for night-time, holiday, and extended work, in its evaluation for overtime work, the wage to be paid for the work stipulated in the employment contract shall be paid periodically for a certain period (periodicity), be paid uniformly to "all employees" or "all employees corresponding to the identical conditions or criteria related to work" (uniformity), and be previously determined to be paid regardless of achievement, performance results, or other additional conditions (fixedness). When the above conditions

are satisfied, it is ordinary wage regardless of what it may be called.

III. Substantial Applications

1. Wage changed according to the length of service period (service allowance)

Service period is related to the employees' proficiency and so corresponds to **"**identical conditions or criteria related to work," and all employees meeting these conditions and criteria shall be paid uniformly. In considering this during overtime work, the employees' service period is not an unclear condition for either its period or its fulfillment. Therefore, as there is uniformity, this is ordinary wage.

2. Wage variance based on the number of working days

This wage requires the additional condition of fulfillment of working days in addition to the provision of work, and so, as this wage is not determined at the time of providing overtime work, it cannot be a fixed amount, and therefore is not ordinary wage. That is, as the employee must complete the correct number of working days in order to get paid, the wage corresponding to this cannot be guaranteed to be paid.

3. Wage to be paid only for incumbent employees during a particular period

This wage, because of its payment to incumbent employees regardless of work performed, is not paid in return for contractual work. In considering it at the time of performing overtime work, whether the employee is working in a particular period or not is not certain, and so there is no fixedness. If an employee resigns before a particular period, that employee cannot receive that particular allowance. Provided, that even if the employee resigned before the particular period, if he/she receives an amount calculated in proportion to the number of working days, the amount prorated for working days is the ordinary wage.

Let us assume, for example, that a bonus is paid every even month, and an additional bonus is paid for the Chuseok and Lunar New Year holidays. The bonus paid every second month is paid on a pro-rated basis at the time of resignation, but traditional holiday bonuses are not paid to employees who resign before the particular traditional holiday. In this case, the bonus paid every two months is fixed to be paid, and is paid on a pro-rated basis of working days, regardless of a resignation prior to the payment day, and so this bonus is included in ordinary wage. However, as the traditional holiday bonus is not paid in situations of resignation prior to those holidays, it is not included in ordinary wage.

4. Wage paid according to special skills, experience, etc. (technology, qualifications, license allowances, etc.)

These allowances are paid to all employees with special skills and experience related to work, corresponding to the identical conditions or criteria, which satisfies the requirement of uniformity. When considering it while the employee is providing overtime work, as the corresponding technology and particular experience are already determined, this can be considered as fixedness, and so is included in ordinary wage.

5. Wages depending on performance results

Incentives are the bonuses payable upon favorable evaluation of the performance results for the specific period worked, and by determining whether or not payment is due and the amount to be paid. At the time of providing overtime work, performance evaluation and follow-up incentive, plus the amount of payment, are not yet determined. Accordingly, as this payment has a condition that cannot be determined in advance and thereby not admissible as fixed, it is not ordinary wage. However, even if an employee receives the lowest scores in his/her work performance evaluation, if a minimum is still paid, this minimum amount can be determined as being paid for sure, and is included in ordinary wage, as it is fixed. In cases where the incentive is already determined to be paid this year based upon the performance results of last year, as the payment and amount are already guaranteed at the time of working overtime, this incentive is fixed and belongs to the ordinary wage. Provided, that if the incentive that should have been paid last year was delayed only in its payment, this is not a fixed amount and is not included in ordinary wage.

[Specific cases]
- Work performance was scored as A, B, or C: those receiving the lowest grade, C, were paid 1 million won, those receiving a B were paid 2 million won, and those receiving an A were paid 3 million won. Therefore, a minimum of 1 million won was guaranteed, and this 1 million won shall be included in ordinary wage. The additional money paid for the higher grades are not ordinary wages.
- Work performance was scored as A, B, or C: those receiving the lowest grade, C, were paid nothing, those receiving a B were paid 2 million won, and those receiving an A were paid 3 million won. In this case, as those receiving a C will not be paid at all, the incentive bonuses are not included in ordinary wage.

6. Amount of Kimchi bonus not confirmed

The collective agreement stipulates that ‘a Kimchi bonus is paid during Kimjang (the Kimchi-making period), with the amount determined through labor-management

consultation.' The amount was determined in this way just prior to the payment date. In this case, the amount to be paid cannot be confirmed at the time of overtime work performance, and therefore cannot be regarded as a fixed payment or included in ordinary wage.

Type of Wage	Characteristics of Wage	Ordinary Wage or Not
Technology Allowance	Allowance paid to employees with technological or other qualifications (qualification, license allowances, etc.)	Ordinary wage
Service Allowance	Wage which varies according to the length of service	Ordinary wage
Family Allowance	Varies with the number of family dependents	Non-ordinary wage (not related to work)
	Paid regardless of the number of family dependents	Ordinary wage (described as family allowance, but it is paid uniformly.)
Incentive Bonus	Wage paid for which both payment and amount are determined by work performance	Non-ordinary wage (Condition is variable, and it is not considered fixed.)
	Minimum amount guaranteed	The lowest fixed amount is ordinary wage (paid uniformly and in a fixed amount)
Regular Bonus	Bonus (regular bonus) paid periodically	Ordinary wage
	Temporary and/or irregular bonus paid at the employer's discretion (Incentive/Performance-based incentive)	Non-ordinary wage (not determined in advance or paid in a non-fixed amount)
Allowances paid at a particular period	Allowance paid to incumbent employees at a specific period (holiday bonus or vacation allowance)	Non-ordinary wage (Not remuneration for labor, not fixed)
	If resignation takes effect before the payment day, the allowance is paid on a pro-rated basis.	Ordinary wage (pro-rated pay and fixed amount)

IV. Claim of additional wage due to inclusion of regular bonus into ordinary wage, and application of good-faith principle

Any labor-management agreement that excludes regular bonus corresponding to the statutory ordinary wage in the calculation of ordinary wage is null and void due to it being a violation of the Labor Standards Act. However, both the company and the labor union have believed for a long time that regular bonuses are not included in ordinary wage, according to social recognition and working practices, and have agreed to exclude it from

the calculation of ordinary wage, determining wage increases and other working conditions on the basis of that belief.

① When the company and the labor union are agreeing to wage increases, the increase is generally determined as based on total wage, not the detailed components of the wage, within the company's labor cost limits. ② If the company and the labor union had been aware that the regular bonus was included in ordinary wage, the company may have changed other conditions and striven to adjust the amount to maintain the previously agreed-upon wage level. ③ If the employees are able to apply for additional wages, claiming that the non-inclusion of the regular bonus into the ordinary wage was null and void, the fact remains that they have already received all the wage increases in accordance with the collective agreement between the company and the union for those days, and this would allow them to receive additional wages, exceeding the company's labor cost limits as a result. This would result in unexpected, excessive costs to the company, leading to severe managerial difficulties, which cannot be acceptable in light of the notion of justice and equity. In this type of situation, the employees' claim is not granted due to it being a violation of the good-faith principle. That is, in this case, the employees cannot retroactively claim a recalculated overtime work allowance based on regular bonuses being included in ordinary wage.

Ordinary Wage & Added Allowance for Weekly Holiday Work (Sundays)

I. Introduction

Work on the weekly holiday (Sunday) has not been considered as overtime hours (exceeding 40 hours per week) so far, but only as holiday work. A recent judicial ruling shows that as work on weekly holidays is work done in excess of 40 hours per week and is also holiday work, both allowances shall be paid. So far, companies have not followed Ministry of Employment & Labor guidelines that apply weekly holiday work to overtime, but have simply recognized it as holiday work. Due to this recent judicial ruling, it is expected that the maximum working hours per week will be limited to 52, and employees may file a collective lawsuit to receive unpaid overtime allowance for weekly holiday work that has not been given so far. Due to the fact that it has become a major source of disputes between employer and employees these days, in this article I would like to look into the application of overtime allowance for work on weekly holidays.

II. Added Allowance for Work on Weekly Holidays

Article 56 of the Labor Standards Act stipulates, “Employers shall pay an additional fifty percent or more of the ordinary wages for extended work, night work (work provided from 10 p.m. to 6 a.m.) and holiday work.” That is, the employer shall add an allowance equal to 50% of ordinary wages for work exceeding 8 hours per day, and/or exceeding 40 hours per week, night work and holiday work. If the overtime exceeding 8 working hours is also between the hours of 10 p.m. and 6 a.m., **an additional 50%** of the ordinary wage shall be paid beyond the 50% already being paid for extended work. However, if work on the weekly holiday (Sunday) means the work week is beyond 40 hours per week, only the 50% additional pay required for weekly holiday allowance must be given.[14]

However, a recent judicial ruling considered all working hours exceeding 40 hours as overtime. In cases where overtime overlaps with weekly holiday work, an additional 50% of the ordinary wage shall be paid for **each** type of work: 50% for overtime and 50% for the weekly holiday work. The related judicial ruling on weekly holiday work is as follows:

“In cases where an employee’s weekly holiday work means that his work week has exceeded 40 hours, shall he be paid an allowance equal to 50% of ordinary wages for both weekly holiday work and overtime? Article 50 (paragraph 1) of the Labor Standards Act stipulates, ‘weekly working hours cannot exceed 40 hours, excluding recess hours.’ Paragraph 2 of the same Article also stipulates, ‘daily working hours cannot exceed 8 hours per day.’ Article 56 regulates, ‘Employers shall pay an additional 50% or more of

[14] Gungi 68207-2855 on Sep 19, 2000; Gungi 68207-3125 on Oct 28, 2002

the ordinary wages for extended work, night work (work provided from 10 p.m. to 6 a.m.) and holiday work.' The Labor Standards Act and the Collective Agreement related to this case only stipulated that working hours per week shall not exceed 40 hours, which cannot be interpreted to mean that weekly holiday work shall not be considered part of the weekly working hours. Accordingly, in cases where working hours per week meet or exceed 40 hours on weekdays (without including the weekly holiday), work on weekly holidays shall be considered holiday work and at the same time extended work, and shall require that both holiday work and overtime allowances be paid." [15]

III. Conclusion

Weekly holiday work shall be compensated not only by a holiday work allowance but also an overtime allowance. This means that weekly working hours shall be limited to 40, with 12 additional working hours in weekly maximum overtime. Accordingly, the weekly working hour limits have not been easy for the automobile industry as they have only two shifts (day and night). In order to maintain current production volumes and stay within legal working hour limits, such companies may need to introduce a three-shift system, worked by three (or even four) groups. This would of course necessitate the hiring of more employees.

[15] Daegu district court ruling on Jan 20, 2012: 2011gahap3576

(Before revision) **Article 19 (Retirement Age)**
When an employer sets a retirement age, he/she shall endeavor to set it at 60 years of age or older.

(After revision) **Article 19 (Retirement Age)**
① When an employer sets a retirement age, he/she shall set it at 60 years of age or older.

② **Regardless of Subparagraph ①, in cases where the employer has previously set a retirement age at less than 60 years of age, his/her retirement age policy shall be regarded as having been set at 60 years of age.**

Article 19-2 (Changing the Wage system, etc. due to Extension of the Retirement age)

The employer of a business or workplace who extends the retirement age in accordance with Subparagraph ① of Article 19, and a labor union which is formed by the majority of all workers (or a person representing the majority of all workers if such a labor union does not exist) shall take the steps necessary to revise the wage system, etc. according to the conditions pertaining to the business or workplace concerned.

The Ministry of Employment & Labor may provide necessary support (such as an employment support subsidy, etc., in accordance with the Presidential Decree) to an employer or the employees of a business or workplace that has implemented the required measures in accordance with Subparagraph ①.

The Ministry of Employment & Labor may provide necessary support (such as consultation for the revision of wage structures, etc., in accordance with the Presidential Decree) to an employer or the employees of a business or workplace which extends the retirement age to 60 years of age or above.

Addenda

This Act shall enter into force one year from the date of enforcement of its promulgation. Provided, that the revised rules of Article 19, Paragraph ① and of Article 19-2 shall enter into force in accordance with the following:
Businesses or workplaces with 300 or more full-time workers, public institutes in accordance with Article 4 of the Act on the Operation of Public Institutions, local public enterprises and local corporations under Articles 49 and 76 of the Local Public Enterprises Act - effective January 1, 2016.
Businesses or workplaces with fewer than 300 workers, national and local governments - effective January 1, 2017.

II. Applications of the statutory retirement age system[16]

1. In cases where a company has a previously-established retirement age lower than the statutory retirement age:

Any retirement age that was previously established at lower than the statutory age of 60 years is null and void due to the enforcement of the statutory retirement age, and such

[16] Reference: Ministry of Employment & Labor Guidelines related to handling the retirement age system《Kungi68201-690, March 3, 2010》

invalid retirement age system will be revised so it is in accordance with the compulsory retirement age of 60 years. Accordingly, any such previous retirement age system that a company has stipulated in their regulations is null and void due to the introduction of the statutory retirement age, and that statutory retirement age shall become the company's retirement age.

2. In cases where a company which did not previously have a retirement age establishes one due to the introduction of the statutory retirement age:

1) Judicial ruling (Supreme Court ruling on May 16, 1997, 96da2507): In a situation where a transportation company that did not have a regulation for retirement age established a retirement age, the company's employees could have worked without any age restriction until such time as the company established a retirement age regulation. Once the company established the retirement age regulation, only those employees who passed a review committee could work past the retirement age. This introduction of a retirement age regulation is considered to be an unfavorable change in the working conditions, because it deprives employees of their existing rights and interests.

2) Judicial ruling (Busan District Court ruling on September 7, 2007, 2007gahap2704): The employees had worked continuously without any age limitation until the company established a new retirement age regulation. Because of the new retirement age regulation, employees who reached 60 years of age could continue to work as daily workers afterwards. Therefore, this new regulation of the retirement age deprives the employees of their rights and interests, and is considered to be a disadvantageous revision of working conditions.

3. In cases where a company continues to use employees after reaching retirement age:

If an employee has continued to work with the employer's implied consent after reaching retirement age, the employer cannot terminate employment just because the employee has exceeded the retirement age unless there are special circumstances. When re-employing retirees after their retirement age, the expiration of their contract period is: if the contract period is fixed, the expiration of such contract period is reason to terminate employment; and if the contract period is not fixed, it is possible to dismiss the employee only when there is a justifiable reason for the dismissal.

4. In cases where the company has a rank-based retirement age system under the statutory retirement age system:

If the retirement age can be regulated differently in accordance with title or rank within the workplace, and if the company has established reasonable criteria regarding work characteristics, content, and type of work that the employees provide, the company can then regulate the retirement age by rank (rank-based retirement age system) or as tenure-

based employment that cannot be renewed (the tenure-based retirement age system) (Supreme Court ruling on April 9, 1991, 90da16245). The company can also implement two retirement age systems at the same time: a general retirement age system and a rank-based tenure system (Labor Standard Team-856, October 31, 2005). However, this regulation becomes null and void once the statutory retirement age is introduced, but is possible and valid for the period exceeding the statutory retirement age.

5. In cases where an employee is undergoing medical treatment:

In cases where an employee is receiving medical treatment due to an occupational accident, the employment relationship shall be continued up to the retirement age (Gungi 01254-9824, July 6, 1991).

6. In cases where the company has hired an employee who was older than the retirement age at the age of hiring:

In cases where the company was aware that the employee was older than the retirement age stipulated by the Rules of Employment, and hired the employee anyway, it is unfair to dismiss the employee due to the retirement age in the Rules of Employment (Gungi 68207-658, April 18, 1994).

7. Retirement age and retirement date

The retirement date should be clearly stipulated in order to prevent dispute between the employer and employees. If the retirement date has not previously been stipulated, but has habitually continued on a certain day in practical repetition, such habitual practice is the date of termination. In the following samples, I clarify the appropriate retirement dates in various situations where the employee was born on April 1, 1958:

1) If the retirement age was stipulated as 60 years of age, the retirement date becomes the first day exceeding 60 years of age, which means April 1, 2018.

2) If the retirement date is the first day of retirement age, the effective date would be April 1, 2018.

3) If the retirement date is stipulated as the last day of the month after reaching retirement age, the retirement date would be April 30, 2018.

4) If the retirement date is stipulated as the last day of the quarter after reaching retirement age, the retirement date would be July 30, 2018.

5) If the retirement date is the last day of the first half-year after reaching retirement age, the effective date would be June 30, 2018.

6) If the retirement date is the last day of the year when retirement age is reached, retirement becomes effective on December 31, 2018.

7) If the retirement date is the last day of retirement age, the effective date would be March 31, 2019.

III. Change of the Wage Structure and Introduction of the Peak Wage System

<Wage differences per service year for each country (for companies employing 10 or more employees as of 2010). The number shown is percentage (%)>

	Korea	Germany	Spain	France	Italy	Sweden	England	Japan
Less than 1 year	**100.0**	100.0	100.0	100.0	100.0	100.0	100.0	100.0
1~less than 6 years	**134.9**	128.4	114.6	113.2	126.6	110.9	116.1	129.8
6~less than 10 years	**188.0**	157.6	125.0	124.5	129.2	115.7	125.0	148.5
10~less than 15 years	**211.1**	166.2	133.5	132.6	136.9	116.1	134.3	168.7
15~less than 20 years	**261.9**	170.6	149.8	143.3	140.6	114.6	139.2	202.5
20~less than 25 years	**313.0**	191.2	168.2	146.3	152.7	110.8	156.7	241.6

Reference: Jinho Jung (2011), Jiman Lee ('Wage policy to adjust to the retirement age of 60 years of age,' Symposium held by Seoul Univ. Employment Welfare Law Center on January 22, 2014).

1. Change of wage structures

As the wage structures of Korean companies are mostly based upon seniority-based salary systems determined by service years, the extension of the retirement age creates an additional burden to employers' labor costs. Because of this, Subparagraph 1 of Article 19-2 stipulates: "The employer of a business or workplace who extends the retirement age, and the labor union which is formed by the majority of all workers (or a person representing the majority of all workers if such a labor union does not exist) shall take the necessary steps to revise the wage system, etc. according to the conditions of the business or workplace concerned." This provision explains that, while the employer should change the wage structure to adjust to the statutory retirement age of 60 years, in cases where this change is connected to productivity and performance (a job-based salary system), the employer shall obtain agreement from the majority of employees at the workplace concerned, just as for a procedure requiring a disadvantageous change of working conditions. In cases where the employer makes unilateral changes to the wage structure, the changes do not apply to existing employees, but only to those hired after the rule-change was made. Provided, that if the disadvantageous change in wage structure is recognized as reasonable in social norms in both its necessity and content, the change of rules is applicable to target employees even without the employer receiving consent from the majority of employees concerned. Here, the acceptable reasonableness in social norms is significantly restricted. The related Supreme Court ruling (on January 28, 2010, 2009da32362) states: *"In principle, it is not permissible for the employer to establish or revise the Rules of Employment unilaterally, to deprive existing rights or interests that employees previously obtained, or to apply disadvantageous working conditions. However, when establishing or revising the Rules of Employment becomes necessary enough to recognize the acceptable rationality in social norms in terms of both necessity and content, such application cannot be denied just because the company did not receive consent from*

the majority of employees for whom the previous working conditions or Rules of Employment had applied. On the other hand, whether there is reasonableness according to social norms as mentioned here shall be collectively judged by considering: 1) the degree of disadvantageous conditions affecting employees as a result of the revision of the Rules of Employment, 2) the degree and details of the employer's necessity for change, 3) reciprocity of the content in the Rules of Employment after revision, 4) improvement of other working conditions, including the employer's measures having equivalent effect, 5) procedures for collective bargaining with the labor union and reaction from the labor union or other employees, and other general situations within the company regarding this issue. Provided, that this exceptional stipulation shall be significantly restricted in application, as this measure actually precludes the requirement under the Labor Standards Act that the employer shall receive consent from the majority of employees when revising the Rules of Employment disadvantageously."

2. Introduction of a peak wage system

The peak wage system is a method of reducing labor costs in return for extending the retirement age in seniority-based wage systems, which are not connected to productivity and wage. Since the statutory retirement age is determined to be age 60, the peak wage system is only applicable during the period exceeding the retirement age previously determined through mutual agreement between labor and management or individual reemployment. The introduction of the peak wage system for the period within the statutory retirement age becomes a disadvantageous revision of working conditions and requires consent from the representative of the labor union representing the majority of employees (or the employee representative in case there is no such labor union). Without this procedure, it is not possible to reduce wage levels in return for extension of the retirement age once the statutory retirement age is introduced. Accordingly, the introduction of the peak wage system within the statutory retirement age belongs to the category of being a disadvantageous revision of working conditions and requires the collective consent of the corresponding employees.

Blind Spots in Labor Law Protection for Native English Instructors

I. Introduction

In order to equip the country to be more globally competitive, English proficiency is essential. To this end, the cheapest way to improve one's English skills is to regularly attend English conversation classes taught by a native English instructor in Korea. The immigration data from the Department of Justice indicate that the number of native English instructors working in Korea has remained relatively constant at 20,000 in recent years, with this number expected to be maintained in the future. Native English teachers are highly educated with bachelors' degrees or higher from their home countries, where English is their mother tongue. Accordingly, it is necessary to induce competent, qualified native English instructors to stay longer by strengthening their legal protections. As all native English instructors are foreigners and have fixed-term contracts, they are not well-protected by Korean labor laws. In this article, I would like to point out the problems they face due to the weakness of the legal protection granted to them.

II. Unfair Dismissal

1. Difficulties in getting reinstated in reality

Korea's immigration law trumps labor law for Native English instructors because they entered Korea for employment. In cases where native English instructors are dismissed without justifiable cause, they can apply to the Labor Relations Commission for remedy. However, as native English instructors can stay only under the work-permission visa according to immigration law, they face many limitations in the course of seeking remedy. They may find their visa has expired or been cancelled while they are fighting unfair dismissal through the Labor Relations Commission. Even should the Commission order an employer to reinstate a native English instructor, they must go through the complicated process of getting a new E-2 visa (foreign language instructor visa). Many instructors do not wish to return to an employer who has mistreated them, so these cases often result in monetary settlement and an instructor who returns to their home countries.

2. No remedy possible for dismissals occurring two months before contract expiry

If a native English instructor is dismissed two months or less before the expiration of the contract, they cannot find remedy in reality. The Labor Relations Commission needs about 60 days from the time of receiving a claim for unfair dismissal, to hold a judgment hearing and make its decision. A claim for reinstatement or remedy will expire if a native English instructor's contract expires during the remedy process. This period of time represents one of the blind spots in Korean labor law.

3. Non-fixed term contract impossible after renewal of the fixed-term contract for two years

Native English instructors remain fixed-term employees, even when they have worked in excess of two years at the same job. Korean employees, on the other hand, must become regular employees if their employer wishes to keep them, but this protection is not afforded to foreigners.

4. Limitations in application of orders to make monetary compensation

Monetary compensation may be requested by the native English instructor in lieu of reinstatement in an unfair dismissal dispute. In the event the Labor Relations Commission (LRC) rules in the instructor's favor, the employer shall compensate the instructor instead of reinstating him or her. However, for fixed-term employees, this monetary compensation system can be useless in actual practice, as the employer can appeal the Commission's decision with the National Labor Relations Commission. The contract period (and therefore, the employment visa) of the native English instructor may expire during this appeal process. In this case, the National Labor Relations Commission judges that the remedy for monetary compensation shall not be dealt with by the Labor Relations Commission, but by civil court, and the first decision by the LRC is canceled. Native English teachers find it almost impossible to pursue a monetary compensation lawsuit in civil court, due to the fact that they are not permitted to get another job as long as the lawsuit is ongoing.

5. Requesting a letter of release is regarded as agreeing to termination of employment

In cases where native English instructors find employment with another business during their original contract period, they need to receive a Letter of Release from the institute owner and submit it to the Immigration Office with an Application for Workplace Transfer. If an instructor has been dismissed, it is very difficult to get a new job without this Letter of Release due to the complicated process of having a new E-2 visa issued. This, plus the fact that the Letter of Release is required to continue staying in Korea, means the dismissed instructor usually requests a Letter of Release from the employer who dismissed them. The Labor Relations Commission and the court often view such requests for a Letter of Release as "agreed termination," or "implied agreed termination."

III. Wages and Working Hours

1. Unpaid wages

There are not many cases of intentionally delayed payment of wages, but when an institute deteriorates financially, wages are delayed. In these cases, the following steps can be taken:

① The native English instructor submits a petition for unpaid wages to the Labor Office;

② Should the institute continue to delay payment of wages, risking criminal charges, the native English instructor can present a Confirmation of Unpaid Wages, issued by the Labor Office, to the

Legal Aid Corporation of the Ministry of Justice, after which the Corporation places the institute's property into foreclosure and retrieves the unpaid wages;

③ Should the institute become virtually insolvent or bankrupt before wages are paid, a native English instructor can request insolvency payment through the Labor Office, in accordance with the Wage Claim Guarantee Act just as a Korean employee can. This will amount to wages for only the final three months of employment, and unpaid severance pay for the final three years of employment, within insolvency payment limits. The process of receiving unpaid wages is so complicated and takes so much time that native English teachers must often give up on receiving their unpaid wages.

2. Statutory severance pay

The employer shall pay employees who resign after serving one year or longer, 30 days' average wages per each continuous service year, except for part-time employees whose average contractual working hours per week are fewer than 15 hours for four consecutive weeks. Severance pay is a system that other countries do not have, which is to be paid later according to the Korean wage structure. Employers of native English teachers (who are not accustomed to the severance pay system) have at times created contracts in an attempt to allow the employer to avoid paying severance pay, and in some cases, have terminated the employment contract just ahead of one year. Generally institute owners recognize their obligation to pay severance pay, but some employers still find ways to avoid paying it, which is in violation of the Labor Standards Act.

A. Cases where the employment contract has been renewed every 10 months

"A International Foreign School" in Seoul had employment contracts with its native English instructors for 10 month periods, excluding the summer vacation, in an attempt to evade their obligation to pay severance pay. Their native English instructors had continued working for them for four years on average, with their contracts renewed continuously unless their teaching skills were significantly inferior. Once they resigned from this school and did not receive their severance pay, 7 native English instructors brought a claim for unpaid severance pay to the Labor Office. The school continued to refuse to pay severance pay until the Supreme Court made it clear that the employer was obligated to pay it.[17]

B. Freelance contracts

"C language institute", which had its head office in Seoul, had freelance contracts with its instructors and did not pay severance pay to them. Only employees who have provided continuous labor service for one year or longer can receive severance pay, while independent contractors or

[17] Supreme Court ruling on December 9, 2010, 201da58490: Unpaid severance pay for foreign teachers at International Foreign School

freelancers are excluded. Even though native English instructors agree to freelance contracts rather than employment contracts, if they work under the employer's supervision and control and the characteristics of their income are similar to that of wages paid as remuneration for labor service, they shall be regarded as employees, and the employer shall pay severance pay. Twenty-four native English instructors who resigned from "C language institute" had not received severance pay and submitted a petition to the Labor Office for this unpaid severance pay, insisting that they were entitled to severance pay as employees. The Seoul district court ruled that while some factors existed that would seem to deny these native English instructors had been employees, they had provided labor service under considerable control and restrictions by the employer, and it was reasonable to consider them as employees.[18]

C. In cases where an employment contract has been terminated before one year of service

If a native English teacher is dismissed one or two months prior to expiration of the contract period, they are not protected by Korean labor law. As employees who have not worked for one full year are not entitled to severance pay, if the employees are terminated with advance notice of dismissal just before expiration of the contract period, they do not fall under the protection of labor law. In these cases, the returning airfare stipulated in the contract is not paid, nor is severance pay. As their visa will be cancelled at the same time, time will be short for them to find another job before they must leave the country.

3. Working hours

Controversial issues in relation to working hours are whether all hours that native English teachers are required to stay in the institute should be calculated into wage or whether only teaching hours should. ① In general, if the employment contract stipulates, "Monthly wages are 2.2 million won. Working hours are six hours per day, 30 hours per week, including preparation time for classes", this can be interpreted as a mutual agreement that working hours should include class time and preparation time. In such a case, paid class preparation time shall be limited to the maximum weekly working hours allowed by law, which is 40 hours per week total. ② However, if the employment contract stipulates, "Class hours shall be 30 hours per week and 120 hours per month. If the employee agrees to work overtime, the institute shall pay 15,000 won per each additional hour", then the mandatory time to prepare for classes shall be considered as overtime and additional payment calculated as overtime wages. The Labor Standards Act also agrees with this, as it stipulates, "Waiting hours the worker spends while under the employer's direction and supervision for work shall be regarded as working hours."

[18] Seoul district court ruling on December 9, 2010, 2011gahap121413: C language institute's unpaid severance pay

IV. Conclusion

Protection for native English instructors, in terms of labor law, is considerably limited for two reasons: 1) they are foreigners staying by permission for employment according to immigration law, and 2) they are considered short-term employees providing services for a fixed time period. Many native English instructors have faced extreme difficulty in receiving remedy for unfair dismissal, and often return home after receiving minimal compensation. Competent native English instructors should be encouraged to stay long-term and an environment provided where they receive adequate protection under Korea's labor laws. As the most basic requirement for this purpose, if a native English instructor is unfairly dismissed, they should be allowed to obtain a D-10 employment visa so they can work elsewhere without needing the previous employer to issue a Letter of Release. In addition, in cases where someone is staying under a Lawsuit Visa (G-1) to pursue a case of unfair dismissal, a D-10 employment visa should be issued to the instructor if he/she wins the lawsuit.

Criteria for Judging Whether Infection with the H1N1 Flu Virus Shall Be Considered an "Occupational Disease" or Not

(Employee Welfare Corporation, September 2009)

I. Summary of the H1N1 Flu Virus

The Influenza A (H1N1) flu virus (hereinafter referred as "the H1N1 flu virus") is a new type of varietal virus that causes respiratory problems, and has infected people all over the world.

Division	Content
Infection Route	•The H1N1 flue virus spreads in a similar way to the seasonal influenza virus, infecting other people through droplets in the air caused by coughs and sneezes of an infected patient.
Diagnostic Criteria	• One or more of the following experimental methods is used to confirm whether a patient with acute febrile respiratory illness has been infected by viral agents of the H1N1 flue virus : - Experimental methods: 1) Real-time RT-PCR; 2) Virus cultivation; 3) Conventional RT-PCR
Latent Period	• The latent period has not been confirmed, but is presumed to be from one to seven days.
Clinical Symptoms	• Normal symptoms are fever, runny nose, sore throat, coughing, etc. Some people may have nausea, diarrhea, vomiting, pneumonia, or feelings of helplessness, etc.
Treatment	• The infected patient must be immediately isolated at a hospital or at home and receive antiviral medication for five days.

II. Related Laws

Criteria for Recognition of Work-related Accidents (Article 37 of the IACI Act)

(1) If a worker sustains an injury, a disability or disease, or dies from any of the causes described in the following subparagraphs, the injury, disease, disability or death shall be considered a work-related accident. This shall not apply in cases where there is no causal relationship between the work and the accident:

(2) Work-related diseases

A. A disease which occurs due to the handling of, or exposure to, harmful or hazardous elements while the worker is performing his/her duties;

B. Other diseases which occur in relation to work

(3) The specific criteria for recognizing work-related accidents shall be prescribed by Presidential Decree.

【Criteria for Recognition of Work-Related Diseases】

(Article 34 of the Enforcement Decree of the IACI Act)

(1) If a worker's illness is included in the scope of work-related diseases referred to in Article 44 (1) and Table 5 of the Enforcement Decree of the Labor Standards Act, and meets all of the following conditions, the illness shall be seen as a work-related disease under Article 37(1) 2 A of the Act.

1. The worker has handled, or been exposed to, harmful or hazardous elements while performing his/her duties;

2. It is deemed possible for the illness to arise in light of the number of hours which the worker has handled or been exposed to harmful or hazardous elements, the period during which the worker has been engaged in such work, work environment, etc., and

3. It should be medically recognized that the worker's exposure to or handling of harmful or hazardous elements has caused the illness.

※ Reference

【Scope, etc. of Occupational Disease (Article 44 of the Enforcement Decree of the Labor Standards Act)】

(1) The scope of occupational disease and medical treatment as prescribed in Article 78 (2) of the Act is shown in Table 5.

【The scope of occupational disease and medical treatment(Table 5)】

33. Various contagious diseases encountered while carrying out duties of a job with potential risk of being contaminated while diagnosing, treating, and nursing patients or by doing other similar activities.

38. Other diseases that occur and are attributable to work-related activities

(3) Specific criteria for recognition of occupational diseases under paragraph (1) are shown in Table 3.

【Specific criteria for recognition of occupational diseases (Table 3)】

21. Diseases occurring due to causative agents like bacteria and viruses

In cases where infection is confirmed from causative agents, where the employee

contacted infectious bacteria or other sources of infection, and where the latent period was long enough for infection to occur after contact, the disease shall be regarded as an occupational disease if there is causality between the infection and work.

A. Infection considered to be work-related for those who are working in health and medical facilities or related collective accommodations:

1) Employees infected by diseases transmitted through blood, such as Hepatitis B, Hepatitis C, Syphilis, AIDS, etc.

2) Employees infected by diseases transmitted through the air, such as Tuberculosis, Rubella, Measles, Influenza, etc.

3) Employees infected by other contagious diseases, such as Hepatitis A.

B. Infection considered to be work-related of those who are not engaged in health or medical facilities:

1) Leptospirosis due to working in humid workplaces

2) Scrub Typhus from working outdoors

3) Anthrax, Erysipelas, Brucellosis from handling animals and their carcasses, animal fur, skin, etc.

4) Epidemic Hemorrhagic Fever and Malaria occurring in those engaged in or organizing outdoor activities in workplaces where Epidemic Hemorrhagic Fever and Malaria exist, or in employees working in a laboratory

5) Legionella infection from contaminated coolant

III. Judgment of an H1N1 Viral Infection being an Occupational Disease

1. Criteria for Determination as an Occupational Disease

The H1N1 flue virus is a new type of varietal virus that has not appeared before, and has various infection routes and causes. If an employee's infection with the H1N1 flue virus is to be considered an occupational disease, the disease shall clearly be attributable to the work, and there should be considerable causal relationship between the work being performed and the occurrence of the disease.

Because the H1N1 flue virus spreads in much the same way as seasonal flu viruses (through droplets in the air from infected people), in cases where an employee working in the health and medical field has been infected with H1N1, the illness shall be regarded as an occupational disease according to Article 34 of the Enforcement Decree of the IACI Act and its Table 3 (21-A).

In other employees who do not work in the health and medical field, if there is definitely a considerable medical causal relationship (exposure period to the H1N1 flue virus, intensity, scope, occurrence, etc.) between the work required and infection (unavoidability of exposure during performance of work duties), it shall be regarded, in a limited way, as an occupational disease according to Article 34 of the IACI Act decree and its Table 3 (21-B).

2. Handling Guidelines

- In cases where employees working in hospital or medical accommodation facilities are infected with the H1N1 flue virus, if such infection is medically determined to have been caused by contact with infected patients in the course of work performance, it is regarded as an occupational disease.
- It is not so simple to determine infection of other employees as an occupational disease, but if there is considerable medical evidence of a causal relationship (exposure period to H1N1, intensity, scope, occurrence, etc.) between the work and infection (unavoidability of exposure during performance of work duties), it shall be regarded, in a limited way, as an occupational disease.

A. Regarding those who are engaged in the health and medical field (the Article 34 of the IACI Act Decree and its Table 3 (paragraph 21-A**)**

Medical personnel who work at a designated hospital that accommodates or treats patients infected with the H1N1 flue virus, and become infected by the H1N1 flue virus, are considered to have caught an occupational disease, because the infection route is quite apparent. Infection that occurs after a sufficient latent period in employees who are in close contact with patients diagnosed with the H1N1 flue virus, is estimated to be related to work. “In close contact” means that the employee is with the patient for more than one hour, at a distance of one to two meters.

Besides medical professionals, infection of other medical staff who handle patients’ clothes or blankets, handkerchiefs, books, etc., and are infected with the H1N1 flue virus, can be accepted as an occupational disease as the H1N1 flue virus can survive for 12 to 24 hours away from a host. However, as the H1N1 flue virus can be transmitted from person to person, if there is a possibility that the employee was infected from the community outside the workplace, it will be difficult to prove the infection is an occupational disease.

B. Those who do not work in the health and medical field (Article 34 of the IACI Act Decree and its Table 3 (21-B), Article 44 of the LSA Decree and its Table 5 (38)**)**

The H1N1 flue virus is transmitted from person to person through contact or the air. In each case, it is difficult to find the exact reason for infection, so if the infected employee unknowingly spent time exposed to the H1N1 flue virus, it is difficult to prove the infection came from work. To be considered an occupational disease, the employee's work and duties shall be supervised by the employer, according to the employment contract. Infection shall come due to the risk associated with the work, not from any contact with the patient outside of work, or with family, friends, or the outside community. When an infected employee has an occupation that involves a high risk of coming into contact with the H1N1 flue virus, or who is frequently at risk of infection during work performance, the infection can be accepted as an occupational disease. Some examples follow in the next paragraph.

However, even though an employee becomes infected with the H1N1 flue virus while on a business trip to one of the eleven countries where risk of infection is greatest, or even though multiple employees in the same company become infected with the H1N1 flue virus, this infection cannot be recognized as an occupational disease unless the patient can satisfy the criteria required to determine it as an occupational disease.

【Target Employees】

- A quarantine officer inspecting an airport, port, etc.
- An employee traveling on business to a country where risk of infection of the H1N1 flue virus is highest:
  ※ The US, Mexico, Canada, Chile, England, Spain, Thailand, Australia, New Zealand, the Philippines, Hong Kong, or other countries later determined to be in the high-risk category.
- A person taking care of a patient on an airplane, or a person traveling for one hour or longer in the same seat row or within three rows before and behind a person a) diagnosed with the H1N1 flue virus and b) not wearing a face mask
- An employee infected by a coworker with the H1N1 flue virus due to occupational contact

【Requirements for Determination as an Occupational Disease】

- For employees in the above situations, infection with the H1N1 flue virus shall be declared an occupational disease if the following conditions are met:

① There shall be a match between the scope of occupational activities and

the infection route.

② There shall be visible duties where infection is likely.

③ There shall be medically acceptable evidence of exposure to the H1N1 flue virus.

④ Infection did not occur from activities outside of work (contact with infected family or relatives).