Compromise as a Means of Settling Labor Disputes

I. Introduction

Of the total labor cases brought to the Labor Relations Commission (hereinafter referred to as "the Labor Commission"), the percentage of cases resolved through compromise has gradually increased: 25% in 2010, 32% in 2011, 34% in 2012 and 34 % in 2013.[1] This reflects the Labor Commission's view that compromise is one of the most important methods to resolving labor disputes, a view it has held since the provision 'Compromise' was introduced into the Labor Commission Act in April 2007.[2] Labor Commission judgments result in one party winning all the benefits, while the other loses all, which may result in an appeal that extends the labor dispute beyond what was expected.

Compromise plays a role in preventing resolution of labor cases from such delays, and aims for amicable conclusion between the company and employee concerned. Despite this important role, the compromise system is regarded as a method of "anything goes" to solve disputes in actual practice. Accordingly, it is necessary to understand the use of compromise through actual labor cases resolved reasonably in such a way, and seek how to make more frequent use of it.

II. The Legal Status of Compromise and its Use

1. The legal status of compromise

The Civil Law stipulates (in Articles 731 and 732) that a compromise shall become effective when the parties have agreed to terminate a dispute between them by mutual concessions. A contract of a compromise shall have the effect that the rights conceded by one of the parties are thereby extinguished and the other party will, in turn, acquire the pertinent rights by virtue of the compromise. Judicial rulings have agreed that when reaching a compromise, the previous agreement is extinguished by virtue of the newly established effects of the compromise, and the compromise becomes legally binding regardless of any contradicting content in the previous agreement.[3]

According to Article 16-3 of the Labor Commission Act, a Labor Commission may recommend conciliation or present a proposal for such at the request of the parties concerned or by virtue of its authority before a judgment, order or decision is rendered pursuant to Article 84 of the Labor Union & Labor Relations Adjustment Act or Article 28 of the Labor Standards Act. The conciliation statement shall have the same effect as a compromise imposed by the courts in accordance with the Civil Procedure Act.

2. Use of compromise

(1) Designing the compromise

The compromise process in an unfair dismissal case brought to the Labor Commission begins with the necessary time to consider the compromise, when a judge in the judgment hearing has suggested

[1] Ministry of Employment & Labor, "White Paper on Labor and Employment, 2014"
[2] Lee, Sungil/Cho, Sungkwan, "A Study on the Improvement of Operations of the Labor Relations Commission", 「Thesis Papers on Labor Laws」 No. 27, Comparative Labor Law Society, 2013.
[3] Supreme Court ruling on Sep 22 1992: 92da25335

a compromise and one of the parties has accepted it. In general, the party requesting a compromise in the course of an unfair dismissal case is regarded as having a weaker claim, and so a compromise is seldom requested before the judgment hearing starts.

If the employer feels likely to lose the case, a compromise is quite acceptable. This is the case also if the employer feels he has the potential to win the case, if the cost of settlement is much lower, as the compromise will prevent the employee from appealing. From the employee's viewpoint, a compromise is desirable if he/she does not wish to continue working for the employer, has gotten a new job, or feels he/she cannot win the case.

(2) Settlement money

Settlement money is normally calculated based upon the employee's wage. In cases where the employee has a favorable position in the dismissal case, he/she requests monetary compensation up to one year's wages, considering the wages that should have been received during the dismissed period and the ability to earn more upon reinstatement at the workplace. However, if the employee has an unfavorable position in the dismissal case, he/she usually accepts a compromise with the settlement money covering only the period of dismissal. Accordingly, after the Labor Commission has investigated the facts related to the justification of dismissal in the judgment hearing, it will suggest a compromise including a cash settlement.

Should a considerable gap exist between what each party feels is acceptable, the Labor Commission will endeavor to narrow the gap through mediation to encourage settlement. Nevertheless, if there is no compromise reached, the Labor Commission tends to avoid a quick judgment and instead opts to give both parties time to consider ways to reach a compromise.

(3) Compromise form

In actual practice, compromises require filling out a 'Settlement Agreement' form similar to the one below.

Seoul Labor Relations Commission – Letter of Compromise

Case number: Seoul2014buhae2689 000 Korea, Application for Remedy for Unfair Dismissal
Employee: 000
Company: 000 Korea

Conditions for Settlement

1. The employee and the company in this case agree that employment is terminated as of September 15, 2014.
2. By Wednesday, November 26, 2014, the company will transfer 00.0 million won (in actual payment) to the employee's bank account as settlement money that includes severance pay.
3. When the above conditions are fulfilled, both parties in this case will not take further civil, criminal or other administrative actions regarding the termination of this employment.

We, the undersigned, agree on the above conditions regarding this labor case of application for remedy for unfair dismissal, and hereby confirm that this conciliation statement shall have the same effect as a compromise imposed by the courts in accordance with the Civil Procedure Act in accordance with Article 16-3 (5) of the Labor Relations Commission Act.

November 19, 2014.

Employee's labor attorney: O O O (Signature)
Employer's labor attorney: O O O (Signature)

Seoul Labor Relations Commission – Commissioner, 0000 (Signature)

3. Difference between a compromise and monetary compensation

Monetary compensation is a system where the company shall provide the employee with monetary compensation if the employee does not desire reinstatement upon such a verdict in an unfair dismissal case (Article 30 of the Labor Standards Act). Any requirement for monetary compensation shall begin when an employee receives notification of the judgment hearing date, with the calculation period for compensation calculated from dismissal date to judgment date (Articles 64 and 65 of the Labor Relations Regulation). Accordingly, monetary compensation can be claimed for wages missed during the period after dismissal, and as this amount cannot include compensation for emotional damage, the compensation is relatively low and limited.[4] On the other hand, since a compromise is not related to the level of monetary compensation, the greater the possibility for unfair dismissal to be determined, the higher the compensation request will be, while the lower the possibility for unfair dismissal to be determined, the lower the compensation request will be: for example, one month's wage, equivalent to the one month compensation requirement for a failure to give advance notice of dismissal.

III. Labor Cases Resolved through Compromise

1. A case brought against "Company A"

"Company A", a Taiwanese semiconductor company with five Korean employees at its Korean branch is selling semiconductor components to Korean electronics companies. For the past few years, this company has been in deficit, and determined that the branch manager's poor sales skills were to blame. The company dismissed the branch manager without notice, and paid him the required one month compensation in August 2014. The branch manager then applied to the Labor Commission for remedy for unfair dismissal.

The Labor Commission held a judgment hearing on November 19, 2014 where the branch manager claimed that the poor sales performance that the company claimed was partly due to the high prices of the company's semiconductors, his legal status was not as an employer since he only worked as a sales manager, and the Korean branch was a sales office and not an autonomous organization. These claims greatly weakened the company's chances to win the case.

The Labor Commission estimated that as the branch manager had lost the company's confidence, he would be unable to work effectively upon reinstatement, and suggested a compromise be reached, which both parties accepted. In the judgment hearing, the employee demanded 12 months' wages as a condition for settlement, while the company responded with an offer for 3 months' wages in consideration of the already-paid compensation for no advance notice of dismissal, and the labor attorney's service fees. The Labor Commission judge then proposed compensation equal to 8 months' wages to both parties, but the company rejected it. The Labor Commission then explained that the parties would have one week to consider methods for settlement, and that a judgment would be made if the two parties were unable to reach agreement by that time.

When the company's labor attorney explained to the company that the Labor Commission was

[4] Cho, Sunghye, "Critical Review on the Monetary Compensation System for Unfair Dismissal", 「Labor Strategy Studies」, 2009, volume 9, page 154.

more in favor of the employee's claims and additional costs would result if they appealed a verdict of unfair dismissal, the company agreed to increase the settlement to 5 months' wages. The company's labor attorney then persuaded the employee's labor attorney (whose client had already accepted the judge's proposal for 8 months' wages) that the employee's severance pay would be reduced by two months considering that there had been fewer than 5 employees for some years previously. The employee then reduced his claim by an additional two months and accepted 6 months' wages as a settlement. In the end, the company's labor attorney successfully persuaded the company for this small difference, and also accepted the employee's compromise. Ultimately, 5 1/2 months' wages in compensation was accepted by both parties.

2. A case brought against "Company B"

"Company B" is a Korean branch office of a multinational company with head offices in Switzerland. The employee was assigned to the Korean branch office as a senior director on December 1, 2012, signing a two year contract. He had adjusted to Company B very well and worked faithfully, but suddenly received a letter of dismissal from Company B on August 30, 2013. The reason given for dismissal was suspicion that the employee had been involved in unfair price transactions with a customer while working at the head office in 2012. However, Company B did not investigate the incident thoroughly, and simply dismissed the employee immediately pursuant to a request from the head office. The judgment hearing at the Labor Commission was held for this case on December 17, 2013.

As the company had dismissed the employee pursuant to a request from the head office without observing the disciplinary process stipulated in the Rules of Employment, it was very clear that unfair dismissal would be the verdict. The Labor Commission Chairman suggested the parties settle the case, to which both parties agreed.

However, settlement was difficult due to significant difference of opinion on adequate compensation. The employee was unwilling to return to work, while the company could not win the case. When he considered that there were only 11 months left in his contract and he was unsure about continuing to work at the head office after completing the contract, the employee decided to accept 9 months' average wage as compensation. The company agreed, and the settlement was finalized as 9 months' average wage.

VI. Conclusion

The compromise system in the Labor Commission is advantageous to a verdict in terms of preventing one party from losing entirely, maintaining an amicable relationship afterwards, and terminating a dispute. However, each party's objective circumstances and subjective emotions can determine whether a compromise is acceptable or not, making it an at-times difficult solution to labor disputes. In order to reduce uncertainties regarding compromise, it is necessary to improve the monetary compensation system so that it grants additional compensation for an employee's number of service years plus compensation for the period after dismissal. Combining compromise with this improved monetary compensation system will greatly increase its use.

Case Study: Dismissal of a Korean Branch Manager (Recommended Resignation)

I. Introduction

As more foreign-invested companies have come into the Korean market, dismissals of Korean branch managers have occurred more frequently. Generally, in cases where the branch manager represents a virtually-independent workplace in Korea, he or she can be regarded as a commissioned employer rather than an employee under an employment contract, and therefore not subject to employee protections under the Labor Standards Act. However, during the beginning stages of investment, there is a high possibility that branch managers of foreign companies may be considered employees in practice, since foreign companies generally start up Korean sales offices or liaison offices at the beginning. Later, the status of "employer" may be accepted for the branch manager as these offices gradually expand their business and become independent in corporate operation, management of personnel, and accounting.

In cases where the branch manager is an employee to whom the Labor Standards Act applies, the employer can only dismiss them for 'justifiable reason'. In cases where he or she feels the dismissal has been unfair, the branch manager may seek legal remedy from the Labor Relations Commission in accordance with the remedy application process, which may include reinstatement, retroactive pay during the period of dismissal, or monetary compensation. Of course, if the branch manager is considered to have employer status, termination of commissioned relations is easier, in accordance with the details of the commission agreement signed by the foreign company head office and the branch manager. However, as the branch manager's legal status is not always clear, a pragmatic approach which seeks peaceful resolution involving mutual compromise will help to avoid legal risk. One such approach is for a company to recommend resignation.

In this article, I will deal with the characteristics of branch managers in terms of both employee and employer, and then through an actual labor case, I will explore the use of company-recommended resignation as a way of resolving potentially difficult cases.

II. Determination of a Branch Manager's Employment Status

1. A branch manager's status according to the Labor Standards Act

The term "employee" in the Labor Standards Act means "a person who offers work to a business or workplace to earn wages, regardless of the kind of job he/she is engaged in." Factors necessary to be considered an employee include 'regardless of the kind of job', 'in a business or workplace', and 'a person who offers work…to earn wages.' In the definition of "employee", wages is the central concept[5], with the secondary factor being whether there is a subordinate relationship with an employer. This means that "employee" refers to a person who provides work in a subordinate relationship to earn wages.[6]

As a Supreme Court ruling[7] has stipulated, "Whether it is appropriate to regard a director as an employee defined by the Labor Standards Act has nothing to do with the manner in which the contract is made but whether the director was paid to provide a service that requires him to be subordinate to another. Regardless of whether he/she is holding the position or title of a company director or auditor, in the real sense or just in name, as long as he/she receives remuneration as compensation for providing a specific labor service under the direction and supervision of the employer or he/she receives remuneration as compensation for taking charge of a specific labor service under the direction and supervision of persons such as the representative director in addition to the duties assigned to him/her by the company, such a director can be regarded as an employee as

[5] Lee Byungtae, 『Labor Law』, 9th edition, Chungang Economy Co. 55th page
[6] Lim Jongryul, 『 Labor Law』, 11th edition, Parkyoung Co. 29th page 제 11 판
[7] Supreme Court ruling on December 7, 2006. 2004da29736.

defined by the Labor Standards Act." This judicial ruling determines that whether a branch manager is an employer or not depends on whether or not he/she has independent operational authority.

In addition, the Supreme Court ruling suggests that the following items shall be considered substantially and collectively when determining whether a person is an employee or not:

1) Whether the Rules of Employment or service regulations apply to the person in question, and whether that person has been supervised or directed during his/her work performance specifically and individually by the employer;
2) Whether his/her working hours and workplaces are designated and restricted by the employer;
3) Who owns the equipment, raw materials, or working tools; and
4) Whether payment is remuneration for work, whether the basic wage or fixed wage is determined in advance and whether income tax is deducted for withholding.

2. Criteria for judgment on a branch manager's status

Judicial rulings related to employee characteristics under the Labor Standards Act offer the following three guidelines:

(1) Employee status 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 the type of contract;

(2) Employee status shall be decided by actual practice regardless of whether the contract is an employment contract, a commissioned contract or service agreement under Civil Law. That is, employee status shall be determined by the substantial relations implemented in actual practice, not as stated in a formal contract format; and

(3) Employee status under the Labor Standards Act shall be decided by whether that person 'provides labor service' in a subordinate relationship. The subordinate relations shall be determined by considering several standard factors collectively.

III. Dismissal of a Branch Manager: A Case Study

1. Summary

A French law firm requested legal advice regarding the dismissal of a Korean branch manager at the Korean branch of a French company in early December 2014. The labor lawyer from this particular French law firm had received the necessary information regarding legal determination of the branch manager's status, preparation of dismissal proceedings, details on legal risks, as well as practical methods on implementation of the dismissal, and was double-checking them by phone. Several days later, the vice-president of the Asia head office located in Tokyo, Japan, visited and made substantial inquiries about legal relations, the company's responsibilities according to the employment contract, the dismissal process, required documents for dismissal, and advice on successfully terminating the employment relationship face to face. After making preparations based on this legal information, the vice-president met the branch manager on December 17 and terminated the employment relationship peacefully through a recommended resignation rather than outright dismissal.

2. Basic information on the branch manager

1) Number of employees for whom responsible: 100 (30 at the Seoul head office, 70 at the Busan plant)
2) Position and type of contract: President, employment contract signed in Korea
3) Nationality: Australian[8]

[8] Korean national law applies to labor disputes occurring in Korea in accordance with the 'territorial principle'. Even though both employer and employee have foreign nationality, Korean labor laws are preferentially applied. The following

4) Contract signing date: April 2, 2012 (Service period: 2 years and 8 months)
5) Basic annual salary: 300 million won plus 20% performance bonus
6) Status: Registered representative director with limited authority to operate company business at the Korean branch, and manage personnel and accounting
7) Articles related to termination in the employment contract: 60 days' average wage for each service year in terms of severance pay; termination possible with 30 days advance notice in the event poor business performance is determined.

IV. Legal Review & Evaluation of the Case, and Use of Recommended Resignation

1. Legal review

In dealing with this case, I provided a legal review of the branch manager's status to the labor lawyer of French law firm "A" from early December 2014. The process of dismissal in this case was well-implemented and followed the termination procedures suitable to the branch manager's status and according to relevant documentation. Following are the questions asked by law firm "A" and the responses given by this labor attorney.

Q: What is the best way to breach the employment contract?

A: In reviewing the employment contract and judging the branch manager as having "employer" status, it is possible to dismiss him or terminate the employment contract by recommending resignation in accordance with the contract details where the branch manager can be dismissed due to poor business performance results.

Q: In the event of failure of negotiations for recommended resignation, is there possibility for legal dispute?

A: If the branch manager rejects the recommended resignation and plans to take legal action and claim employee status, the company can terminate his employment with 30 days' notice according to Article 6.2 "Termination of the Employment Agreement". As the branch manager has "employer" status, he cannot apply for remedy. Current labor law protects employees only. However, if the branch manager's status is judged as an employee, the company may encounter serious problems in this dismissal case.

Q: What are the required documents for the recommended resignation procedure?

A: The company shall prepare two documents: (1) the Settlement Agreement for Voluntary Resignation, and (2) a Dismissal Notice. The company shall notify the branch manager of its intention to terminate the employment contract due to poor sales results in a final discussion with the branch manager, and recommend that he resign. If the branch manager refuses to resign, the company should deliver to the branch manager the strong message that the company can dismiss him immediately and only pay the dismissal allowance in lieu of 30 days' notice.

Q: What can be expected as the worst-case scenario if the branch manager refuses to resign?

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shows the relevant content and basic reference for governing law.

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 not provide labor service in a particular country, the governing law shall be the law of the country where the business office exists that hired the employee.

A: The branch manager is not protected by the Labor Standards Act, and there should be no problem even if he refuses to resign. In civil law, there is a law regarding the responsibility for non-implementation of a contract, but termination due to the branch manager's poor sales results can be enough for the company to terminate this commissioned relationship justifiably. As termination of the contract can be accepted as justifiable, there would be no possibility for the branch manager to begin proceedings for a civil suit.

However, if the branch manager is judged to be an employee, he could apply for remedy for unfair dismissal with the Labor Relations Commission, or litigate in civil court to nullify the dismissal. The company should be prepared to counter these things, as they can cause significant difficulties for the company in Korea, and cost a lot of money.

Q: How much will handling a recommended resignation cost?

A: Even though the branch manager's performance was insufficient, he has contributed to the company so far and has maintained a relationship in good faith with other employees of the branch office. Therefore, an amicable termination of the employment contract would be desirable, which of course can be done through a recommended resignation. The basic cost for that would be 4 months' wages as severance pay for the two years' service, as well as a termination bonus equivalent to (X) months' wages. This termination bonus should consider previous precedents, the company's ability to pay, the branch manager's service years and his expectations, etc.

2. Evaluation

Although foreign company branch managers work as the head of the Korean branch offices in a capacity seemingly identical to employers, they actually work according to instructions from company headquarters and are therefore more like employees to whom Korean labor law applies. If a company intends to dismiss such branch managers, there should be justifiable reasons for dismissal. If the reason cannot be sufficiently explained, a termination settlement would be desirable which includes a termination bonus upon agreement to resign. The above case involving dismissal of a branch manager can serve as a good example where the company involved sought advice from a professional legal advisory service as to the legal risks and then was able to make sufficient preparations to amicably terminate labor relations.

3. Use of the recommended resignation system

Recommended resignations can be the most desirable way to avoid labor disputes between employers and individual employees because employment relations are terminated after mutual agreement. As labor laws in Korea do not allow employers to dismiss employees without justifiable reason, companies use many methods to encourage employees to agree to resign. In cases of employee redundancy, if the relevant employee refuses to agree to resign, it can be quite difficult to resolve the situation in a satisfactory way for both parties.

As recommended resignations with monetary compensation are used only by companies seeking to resolve particular situations, employees who are suddenly pressured to resign generally feel that the compensation offered is not equal to the potentially long-term uncertainty and urgency of getting another job. This has usually led to long labor disputes. Accordingly, in order to prepare for cases where an employer shall terminate employment unilaterally without any of the justifiable reasons required by the Labor Standards Act, companies can prevent labor disputes in the near future by introducing a mutually-agreed monetary compensation package in the Rules of Employment or the individual employment contract.

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

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.[9]

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 regular employees shall follow the calculation method stipulated by Article 7-2 of the LSA's Enforcement Decree.[10]

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[9] 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.

[10] 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.

The Administrative Interpretation is as follows. [11]

(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[12]

"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 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.

[11] Administrative Interpretation (Labor Improvement-438, Jan 28, 2014)
[12] National Labor Relations Commission's decision (2013 buhae 417)

(2) Appeal by Rareetan Computer regarding decision of unfair dismissal[13]

"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 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.[14]

A Supreme Court ruling (Supreme Court 2008 da 27035) adds, "Whether a person is considered an

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

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

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).

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[15] (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

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

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.[16]

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.

[16] **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 not provide labor service in a particular country, the governing law shall be the law of the country 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 ordinarily at the end of employment. If the employee does not or did not provide labor service ordinarily in a particular country, the employee can take legal action against the employer in the country where the business office that hired him is located.

Limitations on Application of the Labor Standards Act: Employees at Workplaces Ordinarily Employing Fewer than Five People, and Domestic Workers

I. Introduction

Some workers are not protected by Korean labor law, or have limits to the protection offered. Representative examples include **1) workers at workplaces ordinarily employing fewer than five people,** and **2) domestic workers**. The Labor Standards Act (LSA) stipulates that "The Labor Standards Act shall apply to all businesses or workplaces in which five or more workers are ordinarily employed. This Act, however, shall not apply to any business or workplace which employs only relatives living together, or to workers hired for domestic work." (Article 11 of the LSA)

In relation to such limitations on application of the Labor Standards Act, some problems have recently emerged. The first problem is that while labor rights are not completely applicable to people employed by workplaces ordinarily employing fewer than five people, they are now finding themselves eligible for severance pay, which in the past was not the case. This new situation has been at the heart of more labor disputes for those workers looking out for their own labor rights. Accordingly, it is necessary for workplaces ordinarily hiring fewer than five people to be aware of which articles of the LSA are applicable to their workers. The second problem is that while it is evident that domestic workers exclusively working for a particular house are completely excluded from application of the LSA, this gets confusing when someone works for a company but is paid to be a housekeeper, butler, driver, etc. at the company president's house. In particular, there are disputes related to workers getting injured at work, or whether the workers should receive severance pay or not.

II. Employees at Workplaces Ordinarily Employing Fewer than Five People

1. Background

In December 2012, employees at workplaces employing fewer than five people became eligible for severance pay. This has brought a lot of attention to those workers in inferior situations. Major articles of the LSA that are not applicable to such workers include, among others, 1) restrictions on dismissal, 2) suspension allowances, 3) restrictions on extended work, 4) extended work, night work and holiday work, and 5) annual paid leave. Due to their exclusion from these protections, such employees often work in inferior working environments. In the following pages, I would like to look at and explain conditions which require and do not require LSA application.

<Laws applicable to workplaces ordinarily employing fewer than five people>

Division		Applicable articles
Labor Standards Act	Chapter 1. General Provisions	Article 1~Article 13
	Chapter 2. Labor Contract	Article 15, Article 15, Article 17, Article 19-(1), Article 20, Article 20 ~ Article 22, Article 23-(2), Article 26, Article 35 ~ Article 42
	Chapter 3. Wages	Article 43 ~ Article 45, Article 47 ~ Article 49
	Chapter 4. Working Hours and Recess	Article 54, Article 55, Article 63
	Chapter 5. Females and Minors	Article 64, Article 65-(1) & (3) (restricted to pregnant women and minors), Article 66~Article 29, Article 70–(2)&(3), Article 71, Article 72, Article 74
	Chapter 6. Safety & Health	Article 76
	Chapter 8. Accident Compensation	Article 78 ~ Article 92
	Chapter 11. Labor Inspectors, etc.	Article 101 ~ Article 106
	Chapter 12. Penal Provisions	Article 107 ~ Article 116 (restricted to cases where an employer violates articles applying to businesses and workplaces ordinarily employing fewer than 5 people)
Minimum Wage Act		All employees
Equal Employment Act		All employees
Industrial Accident Compensation Insurance Act		All employees: Companies in certain sectors (including companies in agriculture, forestry and fisheries with 4 employees or fewer) are excluded.
Employment Insurance Act		All employees: Companies in certain sectors (including companies in agriculture, forestry and fisheries with 4 employees or fewer) are excluded.

2. Major articles applicable to workplaces ordinarily employing fewer than five people

Topics related to major articles applicable to workplaces ordinarily employing fewer than five people include, among others, 1) written statement of the employment contract, 2) weekly holidays, 3) recesses, 4) accident compensation, 5) payment of money and valuables, 6) payment of wages, 7) restrictions on dismissal timing, 8) advance notice of dismissal, and 9) maternity leave.

Even though the restrictions on dismissal are not applicable, advance notice of dismissal is required, which means that an employer shall give at least thirty days' advance notice to a worker the employer intends to dismiss. If notice is not given thirty days before the dismissal, ordinary wages of at least thirty days shall be paid to the worker. Most articles regarding wages to be paid for labor service are also applicable. That is, minimum wage applies, payment of wages shall be observed, and penal provisions for delayed payment of wages are applicable. Of particular note, severance pay became mandatory December 1, 2010 for the first time: for the two years until December 1, 2012, the employer shall pay 50% of full severance pay to resigning employees, and shall pay 100% for the period beginning January 2013. Regardless of the length of service, severance pay only starts accruing from December 1, 2010. Also, according to Industrial Accident Compensation Insurance requirements, accident compensation for occupational injury, including medical treatment,

suspension compensation, handicap compensation, etc. are applicable in the same way as for regular employees.

3. Major articles not applicable to workplaces ordinarily employing fewer than five people

As the following LSA provisions do not apply to workers at workplaces ordinarily employing fewer than five people, working conditions for such employees are quite inferior.

(1) Restrictions on dismissal, etc, a) An employer can arbitrarily dismiss or discipline workers without justifiable reason; b) Even though a worker is unfairly dismissed, the worker cannot apply to the Labor Relations Commission for remedy; c) An employer does not have to notify workers in writing of reasons for dismissal; d) As the restrictions on dismissal for managerial reasons do not apply to such workers, an employer can dismiss workers at any time if business conditions deteriorate; e) The two-year limitation on the use of temporary workers such as dispatch employees or short-term contract workers does not apply, and the employer can dismiss such workers at any time.

(2) Allowances during suspension of business: When an employer suspends business operations, the workers cannot receive suspension allowances. Even though business operations are suspended for reasons attributable to the employer, the employer does not have to pay allowances to workers during such suspensions.

(3) Restrictions on working hours: Workplaces ordinarily employing fewer than five people do not have to follow the 40 hours per week limitation or keep to a 5 day workweek. There are no restrictions on extending the work day beyond 8 hours, or even beyond 12 hours, nor does he/she have to pay additional allowances (50%) for overtime, night shift (22:00 pm to 06:00 am) or holiday work.

(4) Annual paid leave: When a worker at a workplace employing at least five people has worked continuously for one year, 15 days of annual paid leave are granted, but workers at workplaces ordinarily employing fewer than five people are not guaranteed any paid, non-statutory holidays. A worker at such workplaces must get permission to take a day off, and the employer can deduct one day's salary.

III. Domestic Workers Employed by a Company

1. Background

"Domestic worker" refers to a person paid to engage in work that runs a particular home as a housekeeper, a cleaner, a nanny, a butler, etc. As "domestic work" exclusively involves housekeeping related to an individual's private life, it is not preferable for the nation to intervene in and audit working hours or wages, which is why domestic workers are excluded from the Labor Standards Act. Therefore, even though a domestic worker for a company president is employed by the company, the LSA is not applicable. However, in cases where a worker is employed by a company and is covered by company regulations, but was assigned to work as a gardener, guard, butler, driver, etc. at the company president's house, the situation is different. I would like to review some cases that deal with this issue.

2. Domestic worker not covered by the Labor Standards Act[17]

This labor case involved an application for remedy for unfair dismissal, but was dropped as the

[17] Gyunggi Labor Relations Commission: 2012 buhae 1130

domestic worker was not covered by the Labor Standards Act. The ruling stated: "Even though this worker claimed he applied for a position posted by the company, his workplace was the summer house owned privately by the company president, and was employed by the president and her husband. Caretaking of the summer house was not related to the company's main business of construction. In addition, the worker has not done anything to contribute to the profit gaining activities of the company. In light of these facts, this worker, privately employed by the employer, is considered a domestic worker to which Article 11 of the LSA applies. It is therefore not necessary to review the facts of the dismissal or its justification."

3. Domestic worker covered by the Labor Standards Act[18]

In looking into the background to the worker beginning to work at the CEO's house, it was found that he had been employed by the company to work in the Management Department, and then was immediately assigned to work at the CEO's house. Since that time, the company had managed the worker's general matters regulated by labor law such as wages, service regulations, and payment of severance pay. The company had also handled the worker's social security insurance and other income deductions. Even though the type of work was at the discretion of the CEO, the worker still belonged to the company organization. This worker is clearly different from a worker hired independently by an individual as a private housekeeper, driver, or gardener. Accordingly, the decision by the Employee Welfare Corporation to reject the family's application for the survivors' pension because of the worker's supposed status as a domestic worker was inaccurate.

3. Judgment

A review of these two cases reveals two things: 1) In cases where a worker is employed by a company and is exclusively engaged in housekeeping duties, the worker shall be regarded entirely as a housekeeper excluded from coverage by the Labor Standards Act; 2) However, in cases where a worker was employed by the company and assigned to the company president's house as a guard, exclusive driver, gardener, etc., that worker is likely considered to be covered by the LSA. In light of this, it is necessary to consider the worker's job characteristics, job scope, and work relations with the company in deciding whether the LSA applies or not.

IV. Conclusion

Employees of workplaces ordinarily employing fewer than five people are at times excluded from or have restrictions on their coverage by the Labor Standards Act. Such restrictions or exclusion from basic labor rights normally granted to other workers have resulted in poorer working conditions for them in terms of dismissal, disciplinary action, restrictions on working hours, etc. To protect their minimum labor rights, protections in three more areas shall be given: restrictions on working hours, allowances for suspension of business due to the reasons attributable to the employer, and additional allowances for extended work, night time work, and holiday work. As for domestic workers, although they are workers (since they work for payment), because they work exclusively for a particular house as housekeeper, butler, gardener, etc., they are not considered as workers according to the LSA. However, in cases where a domestic worker is assigned to a particular director's house, if the company manages his/her payment etc., and supervises his/her work, the person can be regarded as a worker under the LSA. This requires an understanding by employers of the concrete details of the work performed by the domestic worker, regardless of his/her title of "domestic worker".

[18] Industrial Accident Compensation Insurance Review Committee 2004-910, Sep 14, 2004

Statutory Retirement Age and Labor Law

I. Introduction of Retirement Age System

The 'Retirement Age System' is a system whereby the employer-employee relationship is terminated when an employee reaches the appropriate retirement age as stipulated by the Rules of Employment or an employment contract, regardless of any intention on the part of the employee to renew the employment contract or his/her ability to work. Previously, Korean labor law regarding retirement age gave only a recommendation, not a compulsory stipulation, but a statutory retirement age system became effective in May of 2013. Accordingly, any retirement age system that had considered retirement age to be lower than 60 years of age became null and void, and retirement age automatically set to 60. In addition to this, a rank-based retirement age system is now considered justifiable if it was the result of a labor-management agreement, but with the introduction of the statutory retirement age system, any retirement age set at less than 60 years of age is now invalid. In situations where a company that did not previously have a retirement age regulation introduces one due to the introduction of the compulsory retirement age law, it is recognized that this can be a disadvantageous revision of working conditions, and such unilateral revision is invalid as well.

This revision includes both the introduction of the statutory retirement age and the necessary measures to revise the wage structure, but in actual practice, only the statutory regulation will be applied to companies. Because a revision of the wage structure could result in disadvantageous conditions, it requires agreement from the employee representative (or the representative of the labor union representing a majority of employees). Outlined below, I would like to review the legal considerations regarding the various applications: mainly the enactment of the statutory retirement age, the changes resulting from wage restructuring, and introduction of the wage-peak system.

<Act on Prohibition of Age Discrimination in Employment & Aged Employment Promotion, May 22, 2013>

(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[19]

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 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

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

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.

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	Varies with the number of family dependents	Non-ordinary wage (not related to work)

Allowance	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.

Disguised Outsourcing Cases and Criteria for Judgment

I. Introduction

Issues surrounding the use of irregular workers in Korea began with the introduction of two legal provisions during the Asian economic crisis in 1998: 'dismissal for managerial reasons' in the Labor Standards Act and the Employee Dispatch Act. The increased use of irregular workers by companies hoping to save on labor costs and ensure flexibility in management of personnel has resulted in greater polarization of society. As this polarization has worsened, laws designed to protect and benefit irregular employees began coming into effect in July 2007, with the aim of encouraging employers to hire them as regular employees. The main thrust of the laws is to limit the use of irregular employees to two years, and eliminate any discrimination between them and regular employees doing the same work. Even though the laws have restricted the increase in the use of irregular workers, many companies have been using loopholes in the laws to continue hiring irregular employees. There have been two recent cases heard by the Supreme Court which provide good examples of this. In this article, I would like to look at the details of the Supreme Court rulings and review the criteria used in making their decisions.

II. Dismissal of Employees Outsourced to Hyundai Mipo Shipbuilding Company

1. Summary

Hyundai Mipo Shipbuilding Company (hereinafter "the Shipbuilder") terminated its service contract with Yongin Company (hereinafter "the Subcontractor") when a labor union was established inside the Subcontractor. Right after termination of this contract, all 30 employees (hereinafter "the applicants") of the Subcontractor were dismissed, and the company closed down on January 31, 2003. The applicants filed a "claim for confirmation of employee status" against the Shipbuilder. Busan Appellate Court rejected this claim on the grounds that the service agreement between the Shipbuilder and the Subcontractor could be recognized as an outsourcing contract, but the Supreme Court overturned the Appellate Court's decision, stating that it was possible to recognize the Shipbuilder and the Subcontractor's employees as having an implied employment contract.

2. Supreme Court Ruling (July 10, 2008, Supreme Court 2005da75088)

A. Legal principles for implied employment: As a person hired by the original employer provides labor service for a third party at the third party's location, to be regarded as an employee of the third party, his employment shall satisfy the following: 1) The original employer does not have independence in management and works as an agent of the third party in managing employees; 2) The original employer's business entity is nothing more than formal and nominal, and the employee shall be subordinate to the third party in reality; 3) The party that actually pays wages to the employee is the third party; 4) The party to which the person provides labor service is the third party. Based on these criteria, it should be concluded that there was already an implicit employment contract made between the employees and the third party (Supreme Court, Sep 23, 2003

2003du3420).

B. Confirmed facts: The Subcontractor where the applicants had been employed had worked exclusively for the Shipbuilder as an outsourcing partner to inspect and repair marine engine heat exchangers, safety valves, etc. for the previous 25 years. The Shipbuilder required that employees who wished to work for the Subcontractor pass a skills test before being hired by the Subcontractor. They were then qualified to receive an additional allowance directly paid by the Shipbuilder. Furthermore, the Shipbuilder had substantive authority for employment and promotion of the Subcontractor's employees, including the ability to demand disciplinary action or choosing candidates for promotion.

In addition, the Shipbuilder directly monitored the applicants' attendance (including if they left work early), leaves, overtime, hours worked, and their work attitude. The Shipbuilder also determined the volume of work, working methods, work orders, and when and how the applicants would cooperate, and directly assigned work duties or placed applicants for substantive work duties through the Subcontractor's responsible manager. The Shipbuilder required the applicants to complete its own work assignments in addition to work given by the Subcontractor, paying a certain wage even when there was no work from the Subcontractor by assigning other duties such as receiving education, cleaning of the workplace, and assisting other departments in their work. The Shipbuilder directly supervised and managed the applicants.

Furthermore, the Subcontractor was, in principle, supposed to receive a service fee calculated by multiplying each time unit by the volume received, to which the Shipbuilder added the wages paid when Subcontractor employees were engaged in other Shipbuilder-assigned work not directly related to the Subcontractor duties (such as fixing the marine engines). The Shipbuilder also paid bonuses and severance pay directly to the applicants.

While the Subcontractor handled income tax deductions, income reports, and bookkeeping for its employees under its own business name and registration, it used offices provided by the Shipbuilder, as well as all required facilities such as rooms for its own employee education.

C. Judgment: Upon review of the confirmed facts in B above, and based on the legal principle mentioned in A, it can be determined that even though the Subcontractor had made a formal outsourcing contract with the Shipbuilder and had a formal structure in which its own employees (the applicants) performed the necessary labor service, the Subcontractor did not substantially manage itself in terms of work performance or management of its business. The Subcontractor worked just like a department of the Shipbuilder would, or as a labor management agency for the Shipbuilder. Rather, as it is assumed that the Shipbuilder received subordinate labor service from the applicants and decided their working conditions (including wages), an implied employment should be estimated to exist between employees of the Subcontractor and the Shipbuilder, just as if the Shipbuilder had hired the applicants directly.

III. Disguised Outsourcing Case of Hyundai Motors Company

1. Summary

While Yesung Company (hereinafter "the Subcontractor"), an in-house outsourcing company of the Hyundai Motors Factory – Ulsan (hereinafter "HMC"), was engaged in assembling automobile parts, it dismissed its 15 employees (hereafter "the applicants") on February 2, 2005, due to union activities. The applicants then filed for 'remedy for unfair dismissal and unfair labor practices' against HMC and the Subcontractor, immediately after the Subcontractor closed down. The applicants' claims were not accepted in the lower courts, who determined that the Subcontractor, who had already closed down, was their real employer, and not HMC. While the Supreme Court did not determine an implied employment relationship existed between HMC and the Subcontractor, it determined that a dispatch relationship did. According to the Employee Dispatch Act before its revision, in cases where a dispatched employee has served more than two years, the applicant is determined to be a direct employee of the using employer.

2. Supreme Court Ruling (February 23, 2012, 2011du7076)

A. Legal principles for employee dispatch: Whether employment is employee dispatch or not shall, regardless of the formal and nominal contract made between the two parties, be determined by collectively considering the purpose of the contract or job characteristics, specialty and technology, business registrations of the contracting parties and managerial independence, and the using employer's actual command and control.

B. Confirmed facts: Of the work processes directly and indirectly necessary to produce cars, assembly on the conveyer belt system does not require the Subcontractor to possess much in the way of technological or specialized skills, and the Subcontractor can give few instructions to its employees in this process.

The applicants were placed on either side of the conveyor belt assembly line together with regular employees of HMC, carrying out simple and repetitive tasks according to the various instructions prepared and distributed by HMC, and using HMC's own facilities, parts, and supplies. In this manufacturing process, the Subcontractor did not supply its own unique technology or make capital investment.

HMC possessed the general rights to give the applicants their work duties and change their work area, and determined the volume of work to be finished, working methods and working procedures. HMC directly managed the applicants or indirectly gave them substantial work orders through an on-site manager of the Subcontractor. In considering the characteristics of the applicants' work, the responsibility of the on-site manager was simply as the messenger of HMC orders to the applicants.

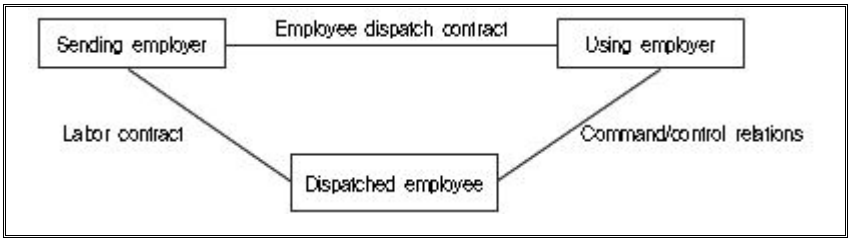
HMC decided the starting and finishing times of each work shift, recess hours, overtime and night work, shift duties, the pace of manufacturing, etc., for the applicants, and in cases where HMC's regular employees were absent due to occupational accidents or leaves, the applicants would fill in.

C. Judgment: The Appellate Court ruled that, based upon legal principles for employee dispatch and the confirmed facts, the employees were, in actuality, working under HMC's direct supervision after hiring by the Subcontractor and dispatch to HMC.

IV. Criteria for Evaluation

1. Guidelines for determining "employee dispatch"[20]

A. Employment relations: 'Employee dispatch' refers to a business situation where the 'Sending Employer', who acts as an employee dispatch agency, hires an employee and sends him/her to a third party (the 'Using Employer') according to the employee dispatch contract. The dispatched employee carries out his/her duties in accordance with the using employer's directions at the using employer's workplace.



B. Judgment method

1) Whether employment is subject to rules under 'employee dispatch' shall be determined by whether the sending employer who made the employment contract with the employee can retain the substantive entity of "employer".

2) In cases where the sending employer is not considered to have the substantive entity of "employer", the using employer (who did not hire the dispatch employee) shall be judged as having directly hired the dispatch employee.

3) In cases where the sending employer is considered to have the substantive entity of "employer", the situation of the corresponding employee shall be investigated as to whether he/she is under the direction or authority of the using employer. The corresponding employment contract shall also be evaluated to determine whether his employment is direct or dispatch.

C. Criteria for judgment

1) Determination of a sending employer as having the substantive entity of "employer"

If the sending employer does not have authority over the following items, it is unlikely that he/she shall be considered as having the substantive entity of "employer": ① Rights to hire, dismiss, etc.; ② Responsibility to raise funds and make the necessary expenditures; ③ An employer's legal responsibilities (the four social security insurances, corporate taxes, etc.); ④ Responsibility for providing machinery, facilities, tools and instruments; and ⑤ Responsibility and authority to make plans related to professional skills and experience.

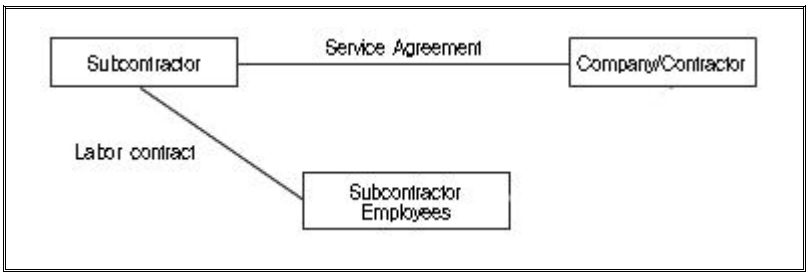
2) Judgment on directions and orders from the using employer

If the using employer has authority over the following items for a dispatched employee, the sending employer has engaged that employee in work under the direction and authority of the using employer: ① Decision-making regarding work assignments and transfers; ② Directing and supervising work; ③ Monitoring sick leaves and other types of leave etc. and the right to take disciplinary action; ④ Evaluating work performance; and ⑤ Decision-making regarding assignment of overtime, holiday and night work.

[20] Joint guidelines of the Ministry of Labor and the Ministry of Justice, April 19, 2007

2. Guidelines for auditing internal outsourcing (July 2004, The Ministry of Labor)

A. Employment relations: Outsourcing is a business situation where one party promises to complete a particular work, and the other party promises to pay compensation in return for completing that work (Civil Law, Article 664). Internal outsourcing (subcontracting) is a type of outsourcing where a company (the Contractor) assigns a certain task or tasks at its workplace to a Subcontractor, who is to complete the work.



B. Method and criteria for judgment

If the Subcontractor's situation does not satisfy the criteria of both 'independence in personnel management' and 'independence in management of business,' the Subcontractor shall be regarded as an 'employee dispatch business.'

1) "Independence in personnel management" refers to the Subcontractor being the source of work instructions to its employees and being the exclusive manager of the following items: ① Hiring, dismissing etc.; ② Decision-making regarding work assignments and transfers; ③ Directing and supervising work; ④ Jurisdiction over working methods and evaluation of work performance; ⑤ Whether the Subcontractor's employees work with the Contractor's employees, and the difference of work between them; ⑥ Monitoring sick leave and other forms of leave, etc.; ⑦ Decision-making regarding assignment of overtime, holiday and night work; ⑧ Other conditions determining status as an employer according to the Labor Standards Act and the Labor Union Act.
2) "Independence in management of business" refers to the Subcontractor carrying out its work duties independently from the Contractor in terms of the following:
① Responsibility to raise funds and make the necessary expenditures; ② Retention of an employer's legal responsibilities; ③ Responsibility for providing machinery, facilities, tools and instruments; and ④ Planning, professional skills and experience.

V. Conclusion

The two cases in this article are typical examples of disguised outsourcing. The first, with Hyundai Mipo Shipbuilding, shows the most common disguised subcontract where, despite the fact that an outsourcing service contract was made between the two parties, an implied employment relationship existed, in light of the lack of Subcontractor independence in personnel management or management of business. The second, with Hyundai Motors, deals with an illegal employee dispatch. Even though a service contract was evidently recognized between the two parties, the Contractor was the one who directed and supervised both its own and the Subcontractor's employees while they worked together in the conveyor belt assembly line, which, again, means there was no subcontractor independence.

The Inclusive Wage System and Its Limits

I. Introduction

The inclusive wage system where an employer pays a fixed monthly salary is convenient for management, but can only be applied in some situations, as it can easily violate the Labor Standards Act. The inclusive wage system is a salary payment system where the employer determines the total wages, which include statutory allowances such as overtime, night, and holiday work allowances in consideration of job characteristics and convenience in calculating wages, and then pays a fixed wage every month. This system is often designed for use at workplaces where it is hard to measure working hours due to the job characteristics or for the convenience of calculating working hours even though those working hours are measurable. However, this inclusive wage system is also commonly used to avoid paying various allowances required under the Labor Standards Act.

Originally, statutory allowances under the Labor Standards Act were meant to be paid for actual work provided. If an employer pays wages that include statutory allowances in advance, this could violate the Labor Standards Act, but is allowed, albeit with strict limitations as determined in judicial rulings and administrative guidelines.

There are two generally-accepted types of inclusive wage systems. The first is for special work where it is difficult to measure working hours. The second is for convenience of calculation. In the following paragraphs, I would like to look into the two types of inclusive wage systems, and then review their respective restrictions.

II. The Inclusive Wage System and Related Judicial Principles[21]

Article 17 of the Labor Standards Act stipulates, “An employer shall clearly state wages, contractual working hours, and other working conditions. For matters as to constituent items of wages and the calculation and payment methods of wages shall be specified in writing.” Article 56 of the LSA regulates, “An employer shall pay an additional fifty percent or more of the ordinary wages for extended work, night work, or holiday work.” Based upon these regulations and the rules stipulated concerning ordinary wages, in making an employment contract, the employer shall first determine basic pay, and then from this basic pay, shall calculate the statutory allowances such as overtime, night work, and holiday work allowances according to actual working hours.

In principle, the payment of wages is according to the number of working hours. There are exceptional cases where working hours cannot be measured when considering actual hours worked, employment types and job characteristics like surveillance and intermittent work. In this case, the employer can make a wage payment contract that follows an inclusive wage system where the employer and employee can determine a monthly or daily wage that reflects all allowances, including statutory, without deciding the basic pay in advance, or the employer can make an employment

[21] Supreme Court ruling on August 19, 2005, 2003Da66523

contract with fixed amounts inclusive of all statutory allowances, based only upon the previously determined basic pay, without considering the actual number of hours worked. This inclusive wage system is permissible when there is no disadvantage to the related workers or as a justifiable method in view of special situations related to those jobs.

However, if working hours of a specific job are measurable, the principle is to pay wages according to working hours as reflected in the Labor Standards Act, unless a special situation exists where the LSA requirements do not apply. Therefore, for an employer to create a wage payment contract that uses an inclusive wage system (paying a fixed amount for statutory allowances) regardless of the number of working hours, is to violate the Labor Standards Act in principle and is not allowable by law.

III. Inclusive Wage System for Jobs with Certain Characteristics

1. Application

Judicial rulings allow inclusive wage systems due to the special nature of work for cargo truck drivers whose working hours are difficult to measure, guards engaged in surveillance and intermittent work, workers contracted on a daily basis, part-timers with remarkably shorter contractual working hours, shift workers on 24-hour shifts, and other similar jobs. As for other jobs where the working hours cannot be measured in reality, if the employer and the employees agree to fixed overtime and holiday work allowances for a certain number of working hours each month, and if the employees have received those fixed allowances without complaint for a certain period of time, this inclusive wage system is allowed unless there is disadvantage to the employees when considering all circumstances.[22]

2. Related cases

(1) In cases where an inclusive wage payment system has been agreed upon in the employment contract, the inclusive wage that the employee receives for overtime work allowance and other allowances equivalent to overtime, night, and holiday allowances (in accordance with the Labor Standards Act) is an acceptable inclusion of overtime allowance, night work allowance and holiday work allowance. In cases where the inclusive wage payment system has been agreed upon at a workplace, the employer does not pay the difference in allowances for overtime.[23]

(2) The labor service that the employees provided to Construction Company “S” was to guard and patrol workplaces for 24 hours straight every second day: surveillance work with lower mental and physical stress. This work naturally included overtime, night, and holiday work exceeding standard working hours under the Labor Standards Act. The employment contract made between the employees and the Company was not one with an ordinary type of wage payment (basic pay plus

[22] Wage Team - 2534, Sep 1, 2006
[23] Supreme Court ruling on June 14, 2002, 2002Da16958

various allowances), but an inclusive wage system that paid a fixed amount monthly that included various allowances, as it is difficult to measure the employees' working hours in terms of overtime, night, and holiday work due to the specific job characteristics. When they were initially hired, the employees agreed on such an inclusive wage system in consideration of the specific type of work, and had never complained about the validity of this system until their employment at Apartment G was terminated. Considering the aforementioned items, the inclusive wage system in this case shall not be determined null and void. [24]

(3) The "basic labor fees" included in "service expenses" that KBS paid to its workers, in accordance with its broadcasting production expense regulations, is remuneration for work from 9am to 9pm. On the other hand, KBS has paid a fixed daily wage, in accordance with its payment criteria for temporary workers, regardless of the quantity or quality of their working hours in cases where workers have worked from 9am to 9pm. KBS workers, including the workers in this case, agreed to this fixed payment and have received it without complaint. Furthermore, as this fixed daily wage could not have been regarded as disadvantageous in view of the Rules of Employment applying to them, the inclusive wage system (which includes overtime) for work from 9am to 9pm between KBS and its workers is acceptable. Therefore, the related workers are not eligible for overtime allowances for work between 6pm and 9pm. [25]

IV. Inclusive Wage Systems for Convenience of Calculation

1. Application

When a job's working hours are measurable, but overtime and night hours are not included in the working details, the job description or job characteristics shall not contain an inclusive wage system. However, payment of an additional fixed allowance for overtime in accordance with the Rules of Employment or labor contract is acceptable if it makes calculation simpler and encourages people to work those hours. A typical example is a fixed overtime allowance. In this case, if an employee works more overtime than previously determined for the fixed overtime allowance, the employer shall pay an extra statutory allowance. However, if the employee has worked less overtime than previously determined for the fixed overtime allowance, the employer shall still pay the fixed overtime allowance. For an example, if the inclusive wage incorporates overtime allowance for 10 hours per week, the employment contract shall specify basic pay and the fixed overtime allowance in the salary details. The payroll data should have a separate item for fixed overtime allowance in the constituent items of wages.

2. Cases violating the inclusive wage system

(1) An employment contract designed around an inclusive wage system was agreed upon, and

[24] Seoul Appellate Court ruling on July 23, 2004, 2004Na2740
[25] Supreme Court ruling on April 28, 2006, 2004Da66995

incorporated a lower monthly leave allowance than the allowance stipulated in the Labor Standards Act, and an annual leave allowance had not been agreed upon by the employer and employees. As these working conditions could be estimated as disadvantageous, an employment contract with such an inclusive wage system is null and void in terms of the sections on monthly and annual leave allowances.[26]

(2) When it has been agreed that the employment contract would include compensation in the monthly wage for unused annual and monthly leave, this is only valid in cases where the employer allows the employees receiving those allowances to take annual or monthly leave. In cases where the use of annual or monthly leave is not allowed, such a contract is not valid because the right to use annual or monthly leave is restricted. [27]

(3) In cases where an inclusive wage contract includes a fixed overtime allowance due to the unreasonable difficulty in calculating working hours, the employer shall pay the fixed overtime allowance even though the employee has not worked overtime. [28]

(4) Even though an inclusive wage system was agreed upon, such agreement is not valid in cases where the fixed overtime allowance is significantly lower than the amount calculated in accordance with the Labor Standards Act. In reviewing employment type and job characteristics, this wage structure was designed as an inclusive wage system that paid a certain fixed amount for overtime allowance, even though measuring the number of hours worked is not difficult in this case. After a "service allowance" ceased to be paid (since May 1, 2004), the fixed overtime allowance became noticeably lower than the overtime allowance calculated in accordance with the Labor Standards Act. Accordingly, the agreement to pay a lower amount under the inclusive wage system is null and void, and the company shall pay back a suitable amount that was not paid. [29]

V. Conclusion

The inclusive wage system is applicable to such employees as cargo truck drivers, guards, shift workers, daily workers, etc., where it is difficult to measure working hours due to the job characteristics. Applying this inclusive wage system to these types of jobs can provide reasonable and suitable wages, motivate employees, and make calculation of wages simpler. In cases where working hours are measurable, some companies have introduced inclusive wage systems that include all statutory allowances, as well as annual and monthly leave allowances and severance pay. This creates a high risk of violating the Labor Standards Act and can lead to labor disputes with the related employees. Therefore, employers need to well understand the inclusive wage system and its purposes, and need to refrain from abusing it, ensuring their employees receive appropriate wages that include statutory allowances, so as to avoid discouraging them.

[26] Suwon Court ruling on Jan 11, 2008, 2007Na17199
[27] Labor Standards - 7485, Oct 19, 2004
[28] Kwangju Court ruling on Jun 30, 2010, 2009Na4816
[29] Supreme Court ruling on May 13, 2010, 2008Da6052

Major Changes to Labor Laws in 2014 – 2016

No.	Subject	Prior to Change	After Change	Relative Law/Enactment
1	**Minimum Wage (increased 7.1%)**	-Hourly wage: ₩5,210 -Daily wage (8 hours): ₩41,680 -Monthly wage (40-hour week = 209 hours): ₩1,088,890	-Hourly wage: ₩5,580 -Daily wage (8 hours): ₩44,640 -Monthly wage (40-hour week = 209 hours): ₩1,166,220	Minimum wage for 2015
	Surveillance/intermittent Employees	Wages shall be at least 90% of minimum wage.	Wages must equal minimum wage at least.	Effective December 31, 2014
2	**Maternity Leave**	(1) Employers shall grant pregnant employees 90 days of maternity leave (120 days if a woman is pregnant with two or more babies), to be used before and after childbirth. A minimum of 45 days (60 days for multiple babies) shall be allocated after childbirth.		Article 74 of the Labor Standards Act (July 1, 2014)
3	**The Hiring Process Law**	『The Act regarding the Fair Process in Hiring』 is being gradually applied to the companies according to size. ○ Prohibition against false information in employment adverting ○ Requirement to notify applicants of process to receive documents submitted for employment purposes ※ Violations are punishable by a fine of no more than three million won. ○ After the hiring process is completed, the rejected applicant may request the return of their submitted documents.		-300 persons or more : Jan. 1, 2015 -100 ~ 300: : Jan. 1, 2016 -30 ~ 100 : Jan 1, 2017
4	**The Statutory Retirement Age**	Introduction of the statutory retirement age (60 years of age) ○ 300 persons or more: from January 1, 2016 ○ Less than 300 persons: from January 1, 2017 (The Act on Prohibition of Age Discrimination in Employment and Aged Employment Promotion)		The Law: Article 19
5	**Report of Industrial Accidents to the Labor Office**	If an industrial accident is reported to the Employee Welfare Corporation, it is exempted from being reported to the Labor Office.	When an industrial accident happens, the company shall report it on the Industrial Accident Details Form within one month of the occurrence. An industrial accident is any accident which results in death or requires medical treatment for three days or longer.	Enforcement rule, the Occupational Safety and Health Act (July 1, 2014)
6	**Statement of Working Conditions**	If an employer fails to provide a Statement of Working Conditions for short-term and/or part-time employees, a correction order will be issued. If the employer ignores this correction order, a fine of up to 5 million won will be charged.	If an employer fails to provide a Statement of Working Conditions for short-term and/or part-time employees, a fine up to 5 million won will be charged immediately.	Article 17 of the SP Act -related Labor Inspectors' Work Regulation revision (Aug. 1, 2014)

<Summary of statutory social insurances (2015)>

<table>
<tr><th colspan="2"></th><th>Employment insurance</th><th>Industrial accident compensation insurance</th><th>National pension</th><th>Health insurance /Long-term Care insurance</th></tr>
<tr><td colspan="2">Employees covered</td><td>Those below age 65</td><td>All employees</td><td>Employees aged 18 or older but younger than 60</td><td>All employees</td></tr>
<tr><td colspan="2">Those excluded</td><td>Employers, foreigners</td><td>Employers</td><td>Employees who have worked less than 1 month</td><td>Employees who have worked less than 1 month</td></tr>
<tr><td colspan="2">Coverage for foreigners</td><td>Employee's option</td><td>Shall be covered</td><td>In principle, they shall be covered, depending on their nationality.</td><td>Shall be covered</td></tr>
<tr><td rowspan="3">Insurance contribution</td><td rowspan="2">Employee</td><td rowspan="2">Total wage × 0.65% (unemployment benefit)</td><td rowspan="2">None</td><td rowspan="2">Standard monthly income × 4.5%</td><td>Health insurance=Standard monthly income × 3.035%</td></tr>
<tr><td>Long-term Care insurance=Health insurance× 6.55%</td></tr>
<tr><td rowspan="2">Employer</td><td rowspan="2">-Unemployment benefit: total wage × 0.65%
- Employment security/ Vocational ability development program: total wage × 0.25~0.85%</td><td rowspan="2">Total wage × 0.007~0.340 (varies depending on industrial sector)</td><td rowspan="2">Standard monthly income × 4.5%</td><td>Health insurance=Standard monthly income × 3.035%</td></tr>
<tr><td>Long-term Care insurance=Health insurance× 6.55%</td></tr>
<tr><td colspan="2">Benefits guaranteed</td><td>Unemployment benefit/employment security program/ vocational skills development program</td><td>Medical care, suspended work, disability, and survivor benefits, funeral expenses, injury/disease compensation annuity, nursing benefits, vocational rehabilitation benefits</td><td>Old-age pension, disability pension, survivor pension</td><td>Medical care, expenses, medical checkups, Appliance expense for the disabled</td></tr>
<tr><td colspan="2">Governing body</td><td colspan="2">Ministry of Labor (Korea Labor Welfare Corporation, Job Center)</td><td>Ministry of Health and Welfare (National Pension Corporation)</td><td>Ministry of Health and Welfare(National Health Insurance Corporation)</td></tr>
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