Minimum Wage Act

I. Introduction

The minimum wage system is the nation intervening in the decision-making process between employer and employee, designed to protect employees earning low wages by stipulating and legally requiring employers to pay minimum wage levels or higher. The minimum wage is determined on August 5th every year by the Minimum Wage Council, composed of 9 representatives from each of the following groups: labor, management and government. The minimum wage they determine is effective from January 1 to December 3 the following year. The minimum wage mainly influences small and medium-sized companies who employ low-income workers such as guards, janitors, migrant workers, etc., and this directly affects the process of making decisions on salary. Here, I would like to explain the employer's duties related to minimum wages.

II. Minimum Wage Application

The minimum wage shall apply to all businesses or workplaces.

(1) Deduction from application of minimum wage: a 10% deduction is applicable for a person who is still in a probationary employment period and three months have not passed from the beginning of employment.

(2) Exclusion from application of minimum wage: 1) A person who has remarkably low abilities to work due to a mental or physical handicap and for whom the employer has obtained approval from the Ministry of Labor; and 2) Any business using only relatives living together, those hired for household work, seamen who are subject to the Seaman Act, or ship owners employing such seamen.

III. Minimum Wage and Employer Obligations

1. Obligation to give notice

When the minimum wage is announced, the employer shall inform employees of 1) The

minimum wage rate, 2) Scope of wages excluded from application of minimum wage, and 3) Effective date. This notice must be posted in places where it can easily be seen by employees, or through other appropriate methods.

2. Obligation to pay minimum wage

An employer shall pay the minimum wage in full to employees covered by the minimum wage rules. If a labor contract between an employer and employee provides for a wage that is less than the minimum wage rate, such provision shall be null and void and the invalidated provision shall be regarded as stipulating that the same wage as the minimum wage rate shall be paid.

3. Joint liability for contractor

In the event that a project is carried out under contract, if the contractee has paid his/her employees wages lower than the minimum wage rate for reasons for which the contractor is liable, the contractor, along with the contractee, shall take joint liability. The reasons a contractor will be considered liable are 1) A contractor's act of determining unit labor costs lower than the minimum wage rate at the time of the signing of the contract; and 2) A contractor's act of lowering unit labor costs to below the minimum wage rate in the middle of the contract period.

4. Penal provisions for violation of the minimum wage level

(1) Imprisonment of up to three years or a fine not exceeding 20 million won
- paying lower than the minimum wage rate
- lowering the previous wages on grounds of the minimum wage, according to the 'Minimum Wage Act'
- failure to pay the required supplement allowance if reduced contractual working hours result in reduced wages

(2) Fine not exceeding one million won
- failure to inform employees of the minimum wages announced by decision of the Minister of Labor

Minimum Wage and the Employer's Obligations

I. Introduction

On July 18, 2017, the Minimum Wage Council decided that the minimum wage, to be applied in 2018, would be KRW 7,530 per hour, which is equivalent to KRW 1,573,770 for a 40-hour week. This is an increase of 16.4% over the previous year, which is twice the average increase rate in the minimum wage, and it is expected that the impact on Korea's small and medium-sized companies will be severe. To address this, the day after the announcement of the minimum wage the government announced that it would subsidize the additional labor cost with taxes in excess of the average increase rate of the previous minimum wage to alleviate the impact of the minimum wage and support the SMEs. In reality, however, it is unclear how much the government's grant will help companies that have to fulfill the legal responsibilities of complying with the new minimum wage. The increase in minimum wage is the most desirable way to reduce the difference in wages between regular and irregular employees, but a great change is expected in the case of SMEs and small-scale service companies that are unable to pay the minimum wage.

According to the current minimum wage system in Korea, one minimum wage is applied at all workplaces, without distinction as to the type of industry or region, and all employers are obligated to pay at least the minimum wage.

In the following, I will explain the employer's obligations, the criteria for determining violations of minimum wage, calculation of hourly wage for minimum wage, and the practical applications thereof.

II. Application of the Minimum Wage

1. The employer's obligation

The minimum wage system guarantees the minimum amount of hourly wage for employees. An employer can pay more than the minimum wage, and an employment contract stipulating a wage which is less than the minimum wage shall be invalid only for that part, and any wage that was paid at less than the minimum wage must be paid additionally. In cases of violation of this, the employer shall be punished by imprisonment for up to three years or a fine not exceeding KRW 20 million (Articles 6 and 28 of the Minimum Wage Act). In addition, when a minimum wage is announced, the employer shall inform employees of 1) the new minimum wage rate, 2) the scope of wages excluded from application of minimum wage, and 3) the effective date.

This notice must be posted in places where it can be easily seen by all employees, or through other appropriate methods. In case of violation of this, the employer shall be punished by a fine up to KRW one million (Article 11 and Article 31 of the Act). Exceptions to the application of the minimum wage are: ① persons who are in a probationary period and who are within 3 months of the day of probation (except for employment contracts of less than one year) and ② surveillance or intermittent work approved by the Minister of Employment and Labor.[1]

2. Criteria for determining violation of minimum wage

To determine whether the wages paid by a workplace are less than the minimum wage, ① the total wages included in the minimum wage from the wages paid monthly, ② will be divided by the monthly contractual working hours, and then hourly minimum wage will be calculated, ③ and then the amount will be compared with the minimum wage.[2]

The scope of wages to be included in calculation of minimum wage according to the Minimum Wage Act includes 1) wages or allowances to be paid according to wage items stipulated in a collective agreement, the Rules of Employment, and/or an employment contract, or repeated regular payments; and 2) wages or allowances to be paid periodically or in a lump sum once or more every month for contractual labor according to previously agreed-upon payment conditions and payment rate (Article 2 of Enforcement Regulation of the Act (Table 2).

Wages excluded from minimum wage rules are as follows (Table 1 of the Act):

1) Wages, other than those paid regularly once or more every month

① Diligence allowances paid for superior attendance over periods exceeding one month;

② Long-service allowances paid for continuous work over periods exceeding one month;

③ Incentives, efficiency allowances, or bonuses presented for various reasons over periods exceeding one month; and

④ Other allowances paid temporarily or incidentally, such as marriage allowances, winter fuel allowances, kimchi allowances, exercise subsidies, etc., and which have no fixed payment date or are irregularly paid, even though payment conditions were determined in advance.

2) Wages, other than those paid for contractual working hours or contractual working days

① Annual or monthly paid allowances, work allowance on paid leave, work allowance on paid holidays;

② Wages and additional allowances for extended work or holiday work;

[1] If workers engaged in surveillance and intermittent work have not obtained approval from the Minister of Employment and Labor under subparagraph 3 of Article 63 of the Labor Standards Act, the minimum wage in accordance with Article 5 (1) of the Minimum Wage Act will be applied (Supreme Court ruling on June 11, 2015 2003 da 38695).

[2] Supreme Court ruling on June 29, 2007 2004 da 48836 (Calculation of minimum wage).

③ Additional allowances for night work;

④ Day & night-duty allowances; and

⑤ Wages not admitted to be paid for a contractual working day, regardless of how such payments are termed.

3) Other wages deemed inappropriate to be included in the minimum wage:

Allowances paid to assist employees such as family allowances, meal allowances, housing allowances, transportation allowances, etc., or actual or similar expenses to support employee welfare such as meals, dormitory accommodation or other housing, company shuttle buses, etc.

3. Hourly wage calculation for the minimum wage

The minimum wage shall be determined in units of hours, days, weeks, or months. When determining the minimum wage in units of days, weeks or months, the hourly wage should also be indicated. The hourly wage determined for a month shall be the monthly amount divided by the number of contractual working hours in one month. In order to calculate the hourly wage of the monthly wage, the amount of the wage divided by the number of working hours per month becomes the hourly minimum wage (Article 5 of the Act, Article 5 of the Enforcement Decree). The prescribed working time of one month includes paid weekly holiday allowances (Article 55 of the Labor Standards Act) and paid allowances on off-days according to a collective agreement. The related court ruling and administrative interpretations are as follows:

(1) Court ruling

The court ruling for the contractual working hours per month is that "Article 5 of the Enforcement Decree of the Minimum Wage Act stipulates that the wages paid on a weekly or monthly basis shall be wages divided by the number of contractual working hours per week or month. The so-called "weekly holiday allowance", which is a wage for a paid holiday, is a wage that is regularly paid at least once a month for given work. Therefore, this regularly paid weekly holiday allowance should be included in the wage calculation."[3] In a sample case of 40 hours per week, the contractual working hours for the month is 209, including the weekly holiday allowance.

(2) Labor Ministry guideline

According to Article 5-2 of the Minimum Wage Act and Article 5 of the Enforcement Decree of the same Act regarding wages for application of the minimum wage, the monthly wage prescribed for a monthly period shall be the wage divided by the number of contractual working hours per month. In a workplace that conducts a 40-hour workweek each month, 'if 8

[3] Supreme Court ruling on January 11, 2007, 2006 da 64245 (Case related to minimum wage)

hours of Saturday work are treated as paid working hours' even though there is no work duty provided on this Saturday, the number of hours worked in a month for the application of the minimum wage is calculated as 243 hours including paid weekly holiday allowance [{40 hours + 8 hours (Saturday paid work) + 8 hours (paid weekly holiday)} x 365⁄7 ÷ 12 ≒ 243 hours].[4]

III. Practical Applications of the Minimum Wage

1. Transportation expenses / lunch expenses / quarterly incentives / meal allowances and vehicle maintenance expenses

(1) Since welfare benefits for employees are not appropriate to be included as wages for the minimum wage, transportation fees, meal allowances and quarterly incentives shall not be considered as part of the minimum wage.[5]

(2) Even though the "meal charge (food expenses)" is paid regularly and uniformly to all employees on a monthly basis in accordance with the collective agreement and the rules of employment, and so it is decided to include these in the ordinary wages in the Rules of Employment, they cannot be included as wages for the application of the minimum wage, as such allowance is paid as a welfare benefit for the purpose of supporting the employees' livelihood. However, a "vehicle management fee" is paid to the driving worker at least once a month in accordance with predetermined payment conditions, and is understood as a duty or service allowance for the specific worker, and can therefore be included as wages for the application of the minimum wage.[6]

2. Bonuses and sales bonuses

(1) Bonuses calculated on a yearly basis and regular bonuses

In cases where a bonus is paid equally each month, after it is calculated and fixed for the yearly period, this monthly bonus is not included in the minimum wage, but in cases where a bonus is calculated based on a monthly period, it is included in the minimum wage. Bonuses that are calculated on a yearly basis based on a collective agreement and paid regularly and uniformly to all employees on a monthly basis are included in wages but not included in the minimum wage under Article 6 of the Minimum Wage Act. By stipulating that a "bonus calculated according to reason for a period of more than one month" is not included in the minimum wage, the "calculation period" of the bonus, not the "payment cycle" of the bonus,

[4] MOEL guideline on August 21, 2004, Wage Policy-3074; December 21, 2009, Labor Standards-5970
[5] MOEL guideline on October 16, 2003 Wage-68200-828; September 27, 2003 Wage-68200-764; September 22, 2004 Wage Policy-3545.
[6] MOEL guideline on December 15, 2010 Wage welfare-2356

becomes the standard as to whether it is included in the minimum wage. In other words, even if the bonus is paid uniformly every month, if the bonus calculation period is longer than one month (i.e. the bonus is calculated on a yearly basis), the bonus is not added to the minimum wage prescribed in Table 1 of the Enforcement Ordinance of the same Act.[7]

If the bonus is determined for a period exceeding one month, such as 800% per annum), and it is paid equally each month, this bonus is not included in the minimum wage calculation.[8]

(2) Sales bonus (based on results)

The sales bonus, for which the monthly amount varies according to the sales results of the individual salesperson, is equivalent to a wage, in accordance with the sales incentive bonus set forth in Article 5 (2) of the Enforcement Decree of the Minimum Wage Act. Therefore, Article 5-2 of the Minimum Wage Act stipulates that the sum of the monthly sales bonus divided by the total number of working hours per month and the monthly salary divided by the number of working hours per month shall be included in the minimum wage.[9]

In cases where a health trainer carries out individual fitness training work for a member, if the trainer receives an additional tuition fee according to a predetermined payment condition and payment rate, such fee can be considered to be equivalent to a sales bonus and included in the minimum wage. Such sales bonus is calculated into hourly wage after it is divided by monthly contractual working hours; the wage determined in monthly units, such as the basic wage, is also divided by monthly contractual working hours. The sum of both wages should be evaluated to determine whether it exceeds the minimum wage.[10]

3. Welfare benefits

(1) It is reasonable that a treatment improvement fee corresponding to money for welfare, such as an allowance which helps to improve the life of an employee is money which does not count in the minimum wage.[11]

(2) Even if a "welfare allowance" is included in regular wages, if it is explicitly stated in the collective agreement that it is a subsidy for living expenses or a benefit for welfare, according to Table 1 of Article 2 of the Enforcement Rule of the Minimum Wage Act, it shall be seen as a wage not included in the wage for the application of the minimum wage in terms of welfare benefits.[12]

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[7] MOEL guideline on September 30, 2015 Law department 15-0501

[8] MOEL guideline on December 14, 2015 Labor Standards-6817; June 4, 2012 Labor Improvement 2901

[9] MOEL guideline on February 14, 2004 Wage Policy-501; April 3, 1990 Wage 32240-4770; October 2, 2005 Wage Policy-801; June 20, 2003 Wage 68200-471

[10] MOEL guideline on October 2, 2015 Labor Standards-4782

[11] MOEL guideline on February 7, 2014 Labor Improvement-659

[12] MOEL guideline on May 17, 1989 Wage 32240-7146

4. Differences from ordinary wages [13]

Item	Ordinary wage	Minimum wage
Definition/ Purpose	Ordinary wages means hourly wages, daily wages, weekly wages, monthly wages, or contract wages which are determined to be paid periodically or in lump sum to a worker for his/her prescribed work or whole work (Article 6 of the Enforcement Decree of the Labor Standards Act Enforcement Decree).	The purpose of this Act is to stabilize workers' lives and improve the quality of the labor force by guaranteeing a minimum level of wages (Article 1 of the Minimum Wage Act).
Calculation Method	Calculated into hourly wage rate (Monthly ordinary wage ÷ monthly contractual working hours).	Calculated into hourly wage rate (Monthly minimum wage ÷ monthly contractual working hours).
Legal enforcement	No legal enforcement.	Legal enforcement, with cases of violation being invalid.
Usage	Wages determined to be paid in advance; used for paid leave allowance	Wages actually paid; used for guaranteeing employees' livelihood
(i) Regular meal charge	Included in ordinary wage	Not included in the minimum wage
(ii) Performance bonus	1) Fixed bonuses are included in ordinary wages. 2) Performance bonuses are recognized as ordinary wages to the extent that they are guaranteed to a minimum. 3) Sales bonuses are excluded.	1) Annual bonus payments are excluded. 2) Monthly bonuses are included in the minimum wage. 3) Monthly performance bonuses are included in the minimum wage. 4) Sales bonuses are included in the minimum wage.
(iii) Welfare allowance	Regular, uniform, and fixed welfare allowances are included.	Welfare allowances are excluded.

[13] Supreme Court ruling on January 11, 2007 2006 da 64245; MOEL guideline on June 29, 2006 Wage and working hours 1539; MOEL guideline on December 20, 2006 Wage and working hours 3848

VI. Conclusion

The 2018 minimum wage increase, in addition to the court ruling in December 2013[14] concerning the enlarged ordinary wage, has had a considerable impact on the wage structure of companies. In particular, production workers in the automobile industry have fixed working hours of 243 per month, which was designed to lower the ordinary wage through the bonus system. Such companies have maintained long working hours by lowering the overtime, nighttime and holiday work allowances. However, it would not be possible to maintain this trend with the increased minimum wage.

Three things are expected through the increase of the minimum wage. First, it will be an opportunity to simplify the current wage structure. There is a high possibility that the wage structure will be restructured with a base salary added to the minimum wage range, performance bonuses, and statutory allowances. Second, the steep increase in wages may lead to a reduction in hours of work and the creation of new employment. Third, it will be an opportunity to overcome polarization in the working conditions for regular and irregular workers. I expect the increase in minimum wage to have a positive effect on SMEs while it may be a burden to management.

[14] Supreme Court ruling on December 18, 2013 da 89399

Foreign Workers: the EPS and Human Rights

I. Introduction

As of December 2016, there were about 2.04 million foreigners staying in Korea, with about 1.32 million having an employment status. There were 48,000 (3.7% of the total) professional personnel, 294,000 (22.2%) non-professional, and 775,000 (58.5%) overseas Koreans. There were also 208,000 (15.8%) illegal workers.[15]

Professional foreign personnel (E-1 ~ E-7) are managed under the Employment Permit System (EPS) according to the Immigration Control Act, but they can stay for a long time through a job-seeking visa (D-10). Non-professional foreign workers (E-9) are strictly controlled according to the short-term circulation system and are prohibited, on principle, from becoming residents under the EPS, which has resulted in many human rights violations. In the case of overseas Koreans, there are two types of visas: Working visit visas (H-2) for those from China and the former Soviet Union and Korean descendant visas (F-4) for those from advanced nations. Working visit Korean descendants (H-2) are allowed to work under the Work Permit System (WPS) for a period of 5 years and can choose their workplace freely, while F-4 visa holders can continue to stay on in Korea without restrictions for an unlimited period of time.

Both non-professional and professional foreign personnel are managed under the EPS, while Korean descendant workers are managed by the WPS. As visa status under the EPS can only be maintained with a valid employment contract, the status of foreign workers is unstable and easily subject to human rights violations. On the other hand, under the work permit system, foreigners can be freely employed and move elsewhere to work during the period of the work permit. Since August 2004, we have been dealing with non-professional foreign workers (hereinafter referred to as "foreign workers") under the EPS, to offset the labor shortages in small- and medium-sized companies involved in industries such as production, agriculture, livestock, fishery, construction, etc. This EPS has brought out positive results, by meeting this shortage with foreign workers. However, as the EPS has been used for the benefit of employers, foreign workers' human rights have not been sufficiently protected, therefore necessitating that the current EPS be supplemented.

[15] Ministry of Justice, "A Monthly Report on Immigration Statistics of Foreigners", December 2016, pg. 3.

Personnel	(i) Non-professional		(ii) Overseas Koreans				(iii)Professional	(iv) Illegal
	Non-professional (E-9)	Ship crew (E-10)	Working visit (H-2)	Overseas Korean (F-4)	Permanent resident (F-5)	Family visitation (F-1,2)	Professor, etc. (E-1～E-7)	
	279,187	15,312	254,950	372,533	86,549	61,683		
1,327,519	294,499 (22%)		775,715 (59%)				48,334(4%)	208,971(16%)

II. The Employment Permit System (EPS)

The introduction of foreign workers in Korea began in November 1993 when the industrial trainee system was introduced. Under this system, the government recognized foreign workers as trainees rather than workers, and to whom only some provisions of the Labor Standards Act applied. As a result, there was constant corruption in importing foreign workers due to the fact that they were managed by private companies rather than government agencies. Specifically, 80% of the trainees stayed on illegally beyond expiration of their effective stay, resulting in serious social problems such as forced labor and human rights violations. The EPS was introduced to address these serious problems.

The EPS, in accordance with the Act on the Employment, etc. of Foreign Workers (the Foreigners Employment Act) was enacted on August 16, 2003, and implemented on August 17, 2004, while the Industrial Trainee System ran concurrently with the EPS until the former's abolishment on January 1, 2007. Through adoption of the EPS, a large number of illegal foreign workers were legalized and brought into the system, while the government itself managed the employment process for foreigners to preclude corruption and succeeded in significantly reducing illegal stays. Above all, working conditions for these workers improved by means of managing them according to labor law. Nevertheless, since the purpose for legislation of the Foreigners Employment Act was to contribute to balancing the supply of and demand for human resources and the balanced development of the national economy through systematic introduction and management, human rights were not specifically protected. Foreign workers who live in Korea for a long time should be guaranteed dignity and value as residents and human beings. However, the EPS has limited the legal rights of foreign workers for the purpose of enhancing the convenience and benefit of the employer. In reality, even though foreign workers are long-term residents, their rights such as freedom of occupation, freedom to have their families with them, equal treatment, applications for remedy under labor law, and social insurances, etc., have been restricted and their human rights at times seriously infringed.

III. System Changes for Employers

1. Employment contract terms have been extended.

Article 9 (3) of the Foreigner Employment Act, at the time of enactment, stipulated that "the term of employment contracts shall not exceed one year." However, as the law was revised on October 9, 2009, this term was extended to three years. This means that when an employer sets a contract period of three years, the foreign worker is restricted to a specific workplace for three years.

2. There is no freedom of movement.

The foreign worker cannot move to other workplaces unless the contract has expired or is terminated due to a reason not attributable to the foreigner. The direct reasons to restraint their transfer to other workplace are ① restrictions for change of workplace, ② frequency, ③ type of industry and ④ permitted period of transferring to other workplace. The indirect reason to restrict their ability to work at another workplace is to give long-term stay benefits if they have not changed jobs. If a foreign worker continues to work at the same workplace for five years, he/she will be given a chance to renew his/her employment contract and be able to work for an additional maximum of 4 years and 10 months.

① Valid reasons to work for a different employer: In Article 25 (1) of the Foreigners Employment Act,
a) If his/her employer intends to terminate his/her employment contract during the contract period, or intends to refuse to renew his/her employment contract after its expiration, on unjustifiable grounds;
b) Where the Minister of Employment and Labor gives public notice, as he/she deems, under social norms, that the foreign worker is unable to continue to work in the company or workplace for reasons not attributable to him/her, such as temporary shutdown, closure of business, cancellation of the employment permit, limitations on employment, or violation by his/her employer of the terms and conditions of employment, or unfair treatment.

② Frequency limitations on changing jobs: According to Article 25 (4), workers to whom the Foreigners Employment Act applies cannot change jobs more than three times in three years, or two times in the extended two year period.

③ Restrictions against moving to another industry: As a general rule, the movement of foreign workers into other industries is limited under the current EPS for foreigners. However, it is possible for those originally employed in the manufacturing industry to move into agriculture, livestock, fisheries, and construction, as labor is needed in those industries.

④ Limited period for approval to change jobs: Article 25 (3) of the Foreigners Employment Act stipulates that "within three months from the date of application for change of workplace, or within one month from the date of termination of the employment contract with the employer, foreign workers who have not applied to change jobs at a Job Center must leave the country."

3. Choice of workplace is restricted.

At the time of enactment of the Foreigners Employment Act, when a foreign worker moved to a new workplace, he/she was provided a list of prospective employers from the employment center. However, in August 2012, the government issued a guide to improve the process. As

only two designated workplaces were given as options, there was essentially no choice for foreign workers. If one applied for a job and did not get hired by one of the places of employment provided by the employment center, he/she would have to leave the country three months beyond termination/expiry of the original employment contract. This would seriously hamper a worker's efforts to learn more about a potential employer (Article 25 (3).

4. The retirement allowance is replaced with the Insurance for Departure Guarantee.

In order to prevent foreign workers from staying illegally, the employer shall replace the retirement allowance with an 8.3% deposit of regular wages each month into the Insurance for Departure Guarantee program. The employee will receive this money (his or her retirement allowance) only upon departure at the airport (Article 13 of the Foreigners Employment Act). This is a special provision in the Act, creating an exception to Article 36 of the Labor Standards Act, which requires payment within 14 days from the date employment ends. The Constitutional Court has ruled in favor of its constitutionality as reasonable measures to prevent illegal stays. [16]

III. Demands for Improvement of Human Rights

1. Freedom to choose a workplace

The EPS is a foreign worker employment system designed to supplement the scarce labor force at SMEs with foreign workers. The rights of foreign workers are limited because the EPS is designed strictly to make use of them. However, it is a violation of human rights that foreign workers are deprived of the choice of workplace despite their long stay. Some foreign workers submitted a petition to the Constitutional Court that Article 25 (4) of the Foreigners Employment Act violated the right to work, the freedom to choose a job, and the right to pursue happiness by restricting movement of workplaces to three times in a three-year period. In the decision, the Constitutional Court ruled that Article 25 (4) was not unconstitutional because foreign workers were not entirely restricted in consideration of the legislative purpose of the law.[17] The dissenting opinion in this decision was that, "Even if you are a foreigner, if you were granted permission to work under the procedures set by the Republic of Korea, legally entered the country, have lived in Korea for a considerable period of time, acquiring and maintaining a certain type of living relationship, as a foreigner you must still be granted human dignity and value during the period of your legal stay, and the freedom to choose the means to maintain a living, including the freedom to choose a job. The provisions violate the principle against restricting basic rights, and the principle against excessive restriction of the freedom to

[16] The Constitutional Court ruled on March 31, 2016, 2014 hunma 367 (Insurance for Departure Guarantee)

[17] The Constitutional Court decision on September 29, 2011, 2007hunma1083, 2009hunma230, 352 (combined), (Freedom to Choose an Occupation)

choose a job." According to Article 52 (3) of the UN Convention on Foreign Workers' Rights, foreign workers should be entitled to the freedom to choose a job after two years of their first employment.

2. Legalization of undocumented foreign workers

Currently, there are more than 200,000 undocumented foreign workers in Korea, with most non-professional foreign workers who did not leave the country even though their period of stay expired. Undocumented foreign workers are subject to human rights violations such as delayed payment of wages, industrial accidents, and the denial of social insurance. Due to market demand, it is possible for such workers to stay for a lengthy time. Undocumented foreign workers suffer from human rights violations, vulnerable while providing work at SME workplaces, construction projects and farming and fishing villages, living on illegal income for five to as many as 20 years. It is necessary now to protect their human rights by legalizing their status.

3. Application of labor laws and social insurance laws

In cases where a non-professional foreign worker is dismissed, it may be possible to apply for a job at another workplace. If a foreign worker is dismissed and does not apply for another job with the Job Center, he/she should leave Korea within one month. Also, if the employer unilaterally submits an employment termination report to the Job Center, it is difficult for foreign workers to receive relief from unfair dismissal as the Center often does not accept the termination report as a dismissal, but simply the employer's administrative duty to report. [18]

Since it is not mandatory for foreign workers to subscribe to employment insurance, they are virtually excluded. As a result, foreign workers cannot receive unemployment benefits while looking for a new job. Regarding industrial accident insurance, workplaces with fewer than 5 workers in farming and fishing workplaces are not covered.

4. The effective prohibition of discrimination

Discrimination based on nationality and race is prohibited in accordance with Article 6 (Equal Treatment) of the Labor Standards Act, Article 9 (Prohibition of Discrimination) of the Labor Union and Labor Relations Adjustment Act, and Article 22 (Prohibition against Discrimination) of the Foreigners Employment Act. However, in reality, it is not easy for foreign workers to be protected from discrimination as that based on the Immigration Control Act, that based on the characteristics of fixed-term workers' employment, and that based on the degree of Korean language skills, are all recognized as legitimate forms. [19] In order to eradicate such

[18] Hongeup Choi, "Case Studies for the Report on Employment Changes", 「Labor Law Periodical」, 25th edition, Comparative Labor Law Society of Korea, Volume 35, 2015, pg. 172.
[19] Hyungbae Kim, 「Labor Law」 24th edition, Parkyoung-Sa, 2015, pg. 239.

discrimination, it is necessary to apply the principle of equal pay for the same work without distinguishing between foreigners and locals.

5. Living together with family members

Foreign workers are not allowed to be accompanied by a family member even after they continue to work for a period of five years or even longer period due to an extension program of the "Reinstatement of Sincere Workers". Foreigners are entitled to human rights guaranteed by the Constitution, and should be guaranteed the right to have their family with them if they stay for five years or longer.

IV. Conclusion

In order to use foreign workers continually, they need to be treated the same as domestic workers. Although this is the basic principle of labor law, it is not reality in terms of wages and working conditions. I would like to recognize the necessity of treatment for these workers based on human rights, by quoting Choi Eulpal, head of the Seoul Foreign Workers Center:

"We should not forget our experience of sending miners and nurses to Germany in the 1970s. At that time, Korea and Germany had a huge wage gap. Nevertheless, in Germany, according to the state-to-state bilateral agreement, Korean workers were introduced as equivalent workers without any difference in working conditions with their German counterparts. Of course there were differences in productivity, but in order to overcome this, the German government enrolled the Korean workers into two-month language training programs paid for with German government funds." [20]

[20] Eulpal Choi (Chief of Seoul Foreign Workers Center), "An Employment Permit System that Cannot Reflect Reality",「Monthly Welfare Trends」(56), June 2003, pg. 22.

Foreign Workers: Labor Rights & Limitations

I. Introduction

Since the late 1980s, Korea has suffered a rapid increase in labor costs, coupled with a labor shortage in the 3D jobs of small- and medium-sized companies (SMEs), and since 1993, has introduced foreign workers through the Industrial Trainee System. An Industrial Trainee does not have the legal status of a worker, but rather, has a trainee status with limited protection under labor law. Many social problems such as human rights abuses, corruption in introducing foreign workers, and illegal stays occurred under the Industrial Trainee System because these had been left to the civilian institutions rather than the government. To resolve these problems, in August 2003, the Act on the Employment, etc. of Foreign Workers (hereinafter referred to as the "Foreign Worker Employment Act") was enacted to introduce an Employment Permit System. The Employment Permit System is for non-professional foreign workers (E-9 visa) and visiting workers (H-2 visa).

The Foreign Worker Employment Act aims at promoting a smooth supply of manpower and the balanced development of the national economy by introducing and managing foreign workers systematically (Article 1). In other words, the purpose of the Act is to supply foreign workers to fulfill the labor shortage in the 3D jobs of SMEs, but not to provide labor law protection for foreign workers. However, when foreigners enter the country and work, they become residents of our country, and should be protected as human beings under the Constitution. The constitutionally-guaranteed human rights include the Labor Standards Act (Article 32) the three rights of labor (Article 33), and the four social insurances (Article 34). This means that there has been a conflict between the purpose for introducing foreign workers and the rights of those workers. In the paragraphs following, I will look at the content of this conflict and system improvement.

II. Recognition of Worker's Status for Foreign Workers (1991 - 2003)

Until introduction of the Foreign Worker Employment Act in 2004, Korean labor law did not apply to foreign workers, and they were not treated as workers, but as trainees. A Thai worker who entered the country with the status of an industrial trainee and became an illegal foreign worker due to overstaying his contract period, had a work-related accident on December 10, 1992. The "trainee" applied for medical treatment under the Industrial Accident Compensation Act, and the Supreme Court concluded that an injured foreign worker would be entitled to Industrial Accident Compensation Insurance coverage as long as he or she was providing labor service to earn money.[21] This was the first court case to be accepted as an occupational

[21] Supreme Court ruling on September 15, 1995, 94nu12067: Recognizing work-related accidents for illegal foreign

accident for illegal foreign workers, and has since become the precedent in instances of similar incidents. This court ruling confirmed two significant facts. First, it stipulated that "the purpose of the Immigration Control Act is to monitor the illegal stay of foreigners to protect domestic workers, and to regulate the employment eligibility of foreign workers in order to prohibit those not qualified for employment." Therefore, the Immigration Control Act is a law for punishing those who violate the immigration laws, but cannot deny the legal rights achieved after delivering such work, and cannot deny a worker's status accumulated over a long period of time. Second, when evaluating the worker status of the foreign worker, the court recognized the illegal foreign worker's status through a practical standard rather than simply formal content.

After this Supreme Court ruling, work-related accident and severance pay cases for illegal foreign workers have been positively recognized.[22]

III. Recognition and Limitations of the Fundamental Rights of Foreign Workers (2004-2014)

There were two important Constitutional Court decisions during this period. In 2011, there was a violation of the constitution regarding the Labor Ministry Guidelines called, "A Guide to the Protection and Management of Foreign Workers." There was also a case which was rejected when foreign workers claimed the Industrial Trainee System was unconstitutional due to the lack of freedom to choose an occupation.

1. Decision on claims that the Industrial Trainee System was unconstitutional

The Industrial Trainee System was introduced November 1993 by the Ministry of Justice, but there were a lot of human rights violations due to the lack of labor law protection for foreign workers. To resolve this issue, on February 14, 1995, the Ministry of Labor introduced some provisions to the Labor Law for industrial trainees through the Ministry of Labor's operating procedures, "Guidelines on the Protection and Management of Foreign Workers as Industrial Trainees."[23] The foreign workers demanded judgment by the Constitutional Court, which ruled that the System violated the equal rights guarantee in Article 11 of the Constitution.[24]

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workers

[22] Supreme Court ruling on August 26, 1997, 97da18875: Severance pay for illegal foreign workers
Supreme Court ruling on October 10, 1997, 97nu10352: Recognition of IAC Insurance for industrial trainees

[23] Applicable labor law: Labor Ministry Guidelines (Article 8: Protection of Trainees) ① Prohibition of violence and forced labor, ② Regular, direct, and cash payment for trainee wages, and settlement of payments, ③ Training periods, recesses and holidays, overtime work, night and holiday work, ④ Paying more than minimum wage and its payment, ⑤ Confirmation of industrial safety and health, and ⑥ Coverage of Industrial Accident Compensation Insurance

[24] The Constitutional Court decision on August 30, 2004 hunma670: Unconstitutionality of the Industrial Trainee System

In this decision, the Constitutional Court "recognized the basic constitutional rights of foreign workers. Foreign workers do not have all basic rights indefinitely but in principle do have basic rights only within the scope of 'human rights', not 'Korean people's rights' ··· Work-related rights include not only the 'right to demand a position to work at', but also the 'right to demand a healthy working environment.' Foreign workers only have the right to demand a healthy working environment, and this right includes the fundamental rights which prevent the violation of human dignity, such as the right to make demands for things such as a healthy working environment, fair compensation for work, and the guarantee of reasonable working conditions."

The Constitutional Court stipulates, "Even if an industrial trainee is under the Industrial Trainee System, if the trainee provides labor service to an employer under the supervision of that employer, he or she is actually in a labor relationship, providing labor and receiving money in the name of a beneficiary. In this case, if the trainee receives different working conditions compared to other workers, it is arbitrary discrimination."

2. Freedom to choose a workplace

Five foreign workers submitted a petition to the Constitutional Court that Article 25 (4) of the Foreigners Employment Act violated the right to work, the freedom to choose a job, and the right to pursue happiness by restricting the foreign workers' movement of workplaces to three times in a three-year period. In the decision, the Constitutional Court ruled that this Article 25 (4) was not unconstitutional because foreign workers were not entirely restricted in consideration of the legislative purpose of this law.[25]

First of all, the Constitutional Court stated that foreign workers have the freedom to choose a job as the fundamental right of a human being. In other words, the freedom of job choice, which is a problem in this case, is closely related to human dignity, value, and pursuit of happiness, and is the right of all humans, not of just the Korean people.

The Constitutional Court stated, "The legal provisions of this case (Article 25 (4)) were introduced to protect the employment opportunities of domestic workers by restricting the uncontrolled transfer of jobs to foreign workers, and to facilitate the efficient supply of foreign workers to SMEs through efficient employment management of those foreign workers, and to ensure a balanced development of the economy. The provisions of this case allow foreign workers to change workplaces up to three times during their stay of three years and to change workplaces additionally if there are unavoidable reasons as prescribed by Presidential Decree, and so do not infringe on the freedom to choose a job."

The dissenting opinion in this decision was that, "Even if you are a foreigner, if you were granted permission to work under the procedures set by the Republic of Korea, legally entered the country, have lived in Korea for a considerable period of time, acquiring and maintaining a

[25] The Constitutional Court decision on September 29, 2011, 2007hunma1083, 2009hunma230, 352(combined), (Freedom to choose an occupation)

certain type of living relationship, as a foreigner you must still be granted human dignity and value during the period of your legal stay, and the freedom to choose the means to maintain a living, including the freedom to choose a job. The provisions violate the principle against restricting basic rights, and the principle against excessive restriction of the freedom to choose a job." Foreign workers are not allowed to change their jobs at will during the first three years, due to their three years' employment contract, and after expiration of that 3-year contract, they do not have the option of selecting a place of work. Considering that employers can choose foreign workers unilaterally, it can be seen that foreign workers are not free to change jobs. According to Article 52 (3) of the UN Convention on Foreign Workers' Rights, foreign workers should be entitled to the freedom to choose a job after two years of their first employment.

VI. Extended Application of Labor Law and Limitations (2015-2016)

At this time, there was a ruling by the Supreme Court and a decision by the Constitutional Court regarding foreign workers. In 2015, the Supreme Court recognized illegal foreign workers' right to organize a labor union. In 2016, the Constitutional Court decided to impose a mandatory exemption on foreign workers' retirement allowances as constitutional.

1. Labor union for illegal foreign workers

On April 24, 2005, 91 foreign workers residing in the Seoul, Gyeonggi and Incheon regions established the 'Seoul Gyeonggi Incheon Migrant Workers' Labor Union' (hereinafter called the 'Migrant Workers' Union'), and submitted the establishment report to the Seoul Regional Labor Office. The Ministry of Labor requested supplementary information on the list of union members when it was determined that illegal foreign workers composed the majority of its membership. When the union did not submit the supplementary documents, the Ministry refused to recognize the union. The Migrant Workers' Union filed a lawsuit that the dismissal of the establishment report was against the law. The Seoul Administrative Court ruled that it was reasonable to refuse to confirm the establishment of the Migrant Workers' Labor Union. The first trial stated, "Foreigners who stay illegally in contravention of the Immigration Control Act are strictly forbidden to work, so they are not workers under the labor law because they are not in a legal position to maintain and promote their working conditions and enhance their status."[26] However, the Seoul High Court ruled that it was illegal to refuse to recognize establishment of the Migrant Workers' Labor Union and overruled the first judgment. The second trial stated, "It is a worker who is able to establish a labor union that realistically provides labor in Korea, while living by wages, salary and other similar income."[27]

The Supreme Court ruled in line with the 2nd trial that, "Under the Labor Union Act, a worker

[26] Seoul Administrative Court ruling on February 7, 2006, 2005goohap18266: Refusal to recognize the Migrant Workers' Labor Union.

[27] Seoul High Court ruling on February 1, 2007: Recognition of the illegal Migrant Workers' Labor Union.

is a person who provides work under the supervision of an employer and lives in exchange for wages, including those who are temporarily unemployed or who are seeking jobs, as well as those who are engaged in a particular employment. A person who provides work under a subordinate relationship with others and earns wages in exchange for work provision is a worker under the Labor Union Act as long as the worker's status under the Labor Union Act is recognized, whether or not such worker is a foreigner, or whether or not it is included in the scope of workers under the Labor Union Act without discrimination."[28]

The dissenting opinion in the Supreme Court states, "Unlike the Labor Union Act, the Immigration Control Act prohibits the employment of foreigners who are not entitled to employment, through the provision of employment restrictions. Foreigners who are employed without a working visa are subject to forced eviction and punishment. As a result, the employment of foreigners becomes legally possible by acquiring the qualification for a working visa, as does the suspension of a working relationship with foreigners without a working visa; the employer may terminate the employment contract of a worker on the grounds that he/she is not eligible for employment at any time. Foreigners who are not entitled to employment cannot be regarded as 'workers who normally want to work' to start with, and even those who have already been employed are not guaranteed the survival of their labor agreement. Even though they are automatically included in the concept of workers, it is also not legal for them to stay in Korea. It is doubtful whether it is possible to maintain or improve their working conditions through collective bargaining with an employer or concluding collective agreements on the assumption that a working relationship will be established or continued."[29]

2. Departure Guarantee Insurance

The Departure Guarantee Insurance will be paid within 14 days of when a foreign worker departs Korea, from the deposit that the employer has saved (in an amount equivalent to 8.3% of his/her monthly wages at a designated financial institution) in exchange for severance pay. On January 28, 2014, the National Assembly revised the Foreign Worker Employment Act regarding the period of payment of the Departure Guarantee Insurance because of the increase in the number of illegal foreign workers, stating that it was to be paid 'within 14 days from the time when the insured left Korea'. In response, the claimants (foreign workers) demanded a judgment by the Constitutional Court that Article 13 (3) of the Foreign Worker Employment Act, which limits the payment period of the Departure Guarantee Insurance to within 14 days after departure, violates the basic rights of the applicants.

The Constitutional Court stipulated, "Illegal foreign workers are at risk of being exposed to various crimes such as wage delays and assault, and because of this vulnerability, there is a high possibility of human rights violations such as forced labor. There is always a possibility of

[28] Supreme Court ruling on June 25, 2015, 2007doo4995 (Recognition of Illegal Migrant Workers' Labor Union)

[29] Professor Jonghee Park stated the same opinion in his thesis paper: "Studies on Judicial Rulings Regarding the Rejection of Labor Union Registration of Illegal Foreign Workers," 「Labor Studies」, Volume 20, Korea University Labor Research Center, 2010, p. 23.

various social problems such as accidents, without expectation of support from labor inspectors. In addition, the domestic effect of the illegal stay of simple functional foreign workers generally increases social integration costs and may have a negative impact on the domestic employment situation. Therefore, even if the Departure Guarantee Insurance in this case has the nature of a retirement allowance for a worker, it is inevitable that a link is made between the time of payment after departure (for the purpose of preventing illegal stays) and the various problems caused by an illegal stay. The provisions of the Act do not infringe on the labor rights of the applicants."[30]

In contrast, the dissenting opinion in the Constitutional Court states, “the objection clause stipulates, ‘The purpose of the judgment is to prevent the illegal stay of foreign workers, and set the deadline for payment of the Departure Guarantee Insurance benefit, which is in the nature of severance pay, within 14 days of departure.’ It does not take into account the nature of severance pay and it is difficult to recognize its legitimacy. If severance pay is not paid quickly after the termination of employment, the lives of the relevant worker and his/her family will be negatively affected. The linking of timing to the payment of the Departure Guarantee Insurance benefit violates the basic character of severance pay, and so the judgment clause infringes the rights of foreign workers."

V. Conclusion

Foreign workers should be treated the same as domestic workers if they are regular workers providing work. In reality, however, Korea discriminates against foreign workers on the basis that it is faithful to the legislative purpose of the Foreign Workers Employment Act. Looking at the decisions of the Constitutional Court and Supreme Court precedents, the labor rights of foreign workers have improved greatly, but there are still many areas of institutional discrimination. In order to accept foreign workers as a permanent part of the labor force in the future, foreigners should be recognized as workers and residents as is the case for domestic Koreans.

[30] The Constitutional Court ruled on March 31, 2016, 2014 hunma 367 (Departure Guarantee Insurance)

Supreme Court Decision on Ordinary Wage

I. Rulings (Two Cases Related to Ordinary Wage)

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

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

(2) Controversial points related to this case:

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

(3) Court ruling:

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

admit that payment as ordinary wage. Accordingly, the regular bonus in this case shall be included in ordinary wage.

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

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

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

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

II. Judgment Criteria for Ordinary Wages

1. The concept of “ordinary wage”

“Ordinary wage” is the wage determined to be paid uniformly when contractual labor service is provided. All allowances which legally qualify as ordinary wage shall be included in ordinary wage regardless of the title of the allowance. It is recognized as the basic wage when calculating additional wages for extended work, night-time and holiday work, allowance replacing advance notice of dismissal, and the unused annual leave allowance. Additional wages under the Labor Standards Act shall be 150%, calculated by adding 50% of ordinary wage.

2. Criteria for inclusion in "ordinary wage"

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

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

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

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

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

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

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

III. Substantial Applications

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

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

2. Wage variance based on the number of working days

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

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

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

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

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

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

5. Wages depending on performance results

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

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

6. Amount of Kimchi bonus not confirmed

The collective agreement stipulates that 'a Kimchi bonus is paid during Kimjang (the Kimchi-making period), with the amount determined through labor-management consultation.' The amount was determined in this way just prior to the payment date. In this case, the amount to be paid cannot be confirmed at the time of overtime work performance, and therefore cannot be regarded as a fixed payment or included in ordinary wage.

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

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

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

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

Ordinary Wage

I. Introduction

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

II. Legal criteria for determining ordinary wages

(1) Ordinary wages means wages that an employer pays to an employee as remuneration for his/her prescribed work or whole work, and those which are paid regularly and uniformly are considered ordinary wages in principle. In consideration of the purpose for legislating the Labor Standards Act and the function and necessity of ordinary wages, what should be included as ordinary wages shall be fixed wages paid regularly and uniformly, meaning non-fixed wages are not ordinary wages, as they are not paid regularly and uniformly and may or may not be paid, or the amount paid is according to actual work performance. Here, being paid 'uniformly' not only means payment is made to all employees, but also to all employees qualified according to certain conditions or criteria. Here, 'certain criteria' means 'fixed conditions' in considering the concept of ordinary wage that is designed to calculate 'fixed and generally accepted regular wage.' [31];

(2) Even though a particular allowance or bonus, etc., may be paid for a period exceeding one month, if these are paid regularly and uniformly, these components can be included in ordinary wages. [32]

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[31] Supreme Court ruling on Jan 29, 2010:2009da74144

[32] Supreme Court ruling on Feb 1996: 94da19501; SC ruling on Jun 13, 2003: 2002da74282

(3) Mutual agreements between employer and employees that exclude a particular allowance considered ordinary wages according to the Labor Standards Act are null and void because such an agreement sets conditions lower than that of the Labor Standards Act. [33]

III. Application of Ordinary Wage

1. Bonuses

Bonuses are included into the realm of ordinary wages even if they are not paid regularly every month. “Rules for calculating ordinary wages” explains the bonus as follows[34] (Revised after the Supreme Court ruling on December 18, 2013):

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

(1) “As the regular bonus is paid regularly and uniformly (100% paid every even month) as fixed wages for labor service, it shall be considered ordinary wages stipulated in the Labor Standards Act.” [35]

(2) The bonus in this case is only applicable to employees working for six months or more with a certain amount paid quarterly, and calculated according to the number of years of service. This bonus is paid every quarter, distinguishing it from annual salary divided into monthly payments, but this difference in payment time does not preclude it from being considered as ordinary wage. As the bonus in this case has been previously fixed, it shall be considered ordinary wage as it is a fixed wage paid regularly and uniformly.[36]

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[33] Supreme Court ruling on Nov 29, 2007: 2006da 81523

[34] Regulation of the MoEL-476, Jan 22, 2002 plus Supreme Court ruling

[35] Inchon district court ruling on Feb 23, 2012: 2011gahap6096; Seoul Appellate Court ruling on Oct1,2010: 2010na34618

[36] Supreme Court ruling on Mar 29, 2012: 2010da91046

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

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

(1) "If a welfare allowance has been paid uniformly, regularly, and at a fixed rate to all employees of the same business according to the collective wage agreement, this is not money paid temporarily and according to favor for welfare, but wages paid as reward for labor service according to employment relations. In addition, this is not wages paid individually or at a variable rate, but fixed wages for ordinary working days and working hours, so shall be considered ordinary wage." [37]

(2) "Even though some employees with lower work attendance rates have been paid transportation and meal allowances differently than other workers, these allowances have been paid to all employees and shall be considered ordinary wages." [38]

(3) "Even though a company enters into an agreement with employees that it will not calculate into ordinary wage the meal allowances that have been paid at a fixed rate to all employees, this shall be considered an illegal employment contract." [39]

(4) "Service allowances have accumulated according to the length of service for all cleaning workers employed for at least one year; meal, transportation, sanitation, and hazard allowances have been paid at a fixed rate every month to all cleaning workers. Quarterly, attendance, exercise, and traditional holiday allowances have been paid to all cleaning workers regularly and at a fixed rate if they meet certain criteria. As these allowances are fixed wages paid regularly and uniformly as reward for labor service, they shall be considered ordinary wages." [40]

[37] Busan Appellate Court ruling on Sep 25, 1996: 96gu2583
[38] Seoul district court ruling on May 18, 2006: 2005gahap57290
[39] Supreme Court ruling on Feb 22, 1994: 93da9620
[40] Supreme Court ruling on Sep 8, 2011: 2011da22061

Petition for Unpaid Weekly Holiday Allowance

1. Summary

On Sep 21, 2009, a Korean cook (hereinafter referred to as “the employee”) who worked at a US Army restaurant based in Korea applied to the Seoul Regional Labor Office for his unpaid weekly holiday allowance. The employee claimed that his monthly salary was calculated by multiplying his actual working hours by an hourly wage rate and then allowances, like bonuses, were included, but he did not receive anything called a weekly holiday allowance. He therefore asked that the company pay him the unpaid weekly holiday allowance from the previous three years until the present time. The Labor Inspector investigated the claims of both parties related to the case and concluded on Jan 12, 2010, that the company did not violate any related laws.

2. The Employee’s Claim

According to his employment contract, the restaurant employee received an hourly wage, paid every month, in the amount calculated by multiplying the actual working hours by the hourly wage rate, plus an amount reflecting the Welfare Benefit allowance & PIK allowance, as well as a monthly bonus calculated by dividing 700% of the annual bonus by 12. The employee has not received anything called a weekly holiday allowance in his salary. Monthly wages have been always variable according to the hours worked each month because the wage structure was not a monthly wage system but an hourly wage system. Accordingly, as the company has not paid a fixed monthly wage, but paid different wages every month according to the number of hours worked, the company should also pay a weekly holiday allowance.

3. The Employer’s Claim

When paying wages in an hourly wage system, the company calculated the wages as (working hours × hourly wage rate) and, instead of adding a weekly holiday allowance, included a fixed monthly ‘benefit allowance’ and ‘PIK’ allowance, which was an amount exceeding the weekly holiday allowance. Given that this is the case, how would it be possible for the company to pay 700% of the annual bonus (divided into 12 months), as well as subsidize middle and high school students’ tuition while neglecting to pay the statutory weekly holiday allowance? As the company has paid an amount equivalent to the weekly holiday allowance each month, even

though the company did not call it a weekly holiday allowance, this amount can replace the weekly holiday allowance.

4. Related Administrative Guidelines

(1) Inclusion or non-inclusion of paid weekly holiday (Jul 8, 2008; kunrokijun-2455)

If an employer pays employees according to a monthly wage system, the monthly wage shall be considered to include a paid weekly allowance, if there are no exceptional situations (Supreme Court ruling 93 da 32514). If the employee receives fixed allowances along with basic hourly wages every month in a monthly wage system, such fixed allowances shall be interpreted to have similar characteristics as wages for paid weekly holiday allowance (Supreme Court ruling 97 da 28421).

(2) The weekly holiday does not normally apply to daily workers, but if a daily worker works for six consecutive days, a paid weekly holiday shall be provided. (Apr 2, 1997, Gungi 68207-424)

Weekly holiday allowance under the Labor Standards Act shall be given to a worker who fulfills his/her weekly contractual working hours. However, in principle, the weekly holiday shall not be given to daily workers because it is not possible to calculate weekly contractual working hours for daily workers, as they engage in daily employment contracts.

The purpose for providing a weekly holiday is to reduce the accumulated fatigue on workers after one week's work, thereby helping to protect their health, and to provide time to participate in social and cultural activities. If a daily worker works for 6 consecutive days per week without absence, actual working days, and not contractual working days, shall be applied and weekly holiday shall be granted. The employer shall pay weekly holiday allowance separately from wages for daily workers, unless the affected worker agrees to receive the weekly holiday allowance in advance, with their daily wages.

5. Judgment on the Case

The labor inspector in charge of this case concluded that the company has paid weekly holiday allowance to the employee as the company paid monthly wages based on the hourly wage system and added a regular allowance for each month, which was an equivalent amount to the weekly holiday allowance. If, in this case, the company had paid wages by multiplying the actual working hours by the hourly wage rate without a monthly regular allowance, only adding a monthly bonus calculated for the annual 700% bonus, the company would have to pay all employees, including the employee in this case, all unpaid weekly holiday allowances for the past three years.

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[41]

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

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

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 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.[42]

[42] Wage Team - 2534, Sep 1, 2006

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.[43]

(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 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. [44]

(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. [45]

[43] Supreme Court ruling on June 14, 2002, 2002Da16958
[44] Seoul Appellate Court ruling on July 23, 2004, 2004Na2740
[45] Supreme Court ruling on April 28, 2006, 2004Da66995

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 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.[46]

(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. [47]

(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. [48]

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[46] Suwon Court ruling on Jan 11, 2008, 2007Na17199
[47] Labor Standards - 7485, Oct 19, 2004
[48] Kwangju Court ruling on Jun 30, 2010, 2009Na4816

(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. [49]

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.

[49] Supreme Court ruling on May 13, 2010, 2008Da6052

The Principle of Complete Payment of Wages & Exceptions

I. Introduction

Company A gives a 20 percent discount to its employees when they buy company products, up to a maximum of KRW 2 million per year. Only employees and their direct family members living together may receive this discount when they purchase products. However, it was confirmed that one employee violated this company regulation, so the company issued a written warning and deducted, with the employee's agreement, KRW 500,000 from his salary: the amount involved in the violation. This type of situation has occurred frequently in business, and deals directly with whether a company can recover claimed damages by deducting employee wages.

As the wages paid in return for work provided directly support the employee's ability to sustain him or herself, deducting wages to pay for claims is strictly regulated. Article 43 (Payment of Wages) of the Labor Standards Act stipulates, "(1) Payment of wages shall be made in full to workers; however, if otherwise stipulated by special provisions of laws or decrees or a collective agreement, wages may be partially deducted or may be paid by other means than cash." Other provisions that deal with this subject include Article 20 (Prohibition of Predetermination of Nonobservance) [50], Article 21 (Prohibition of Offsetting Wages against Advances) [51], Article 22 (Prohibition of Compulsory Saving) [52], and Article 95 (Limitation on Punitive Provisions) [53]. Despite the principle of complete payment, there are a few exceptions. Some legitimate reasons for deductions include: ① deductions allowed by law or decrees (court rulings); ② deductions allowed by the collective agreement; ③ deductions made to correct miscalculation of wages. [54] Also, even though an exception for wage claims has the employee's consent, this needs to be handled in a strictly regulated manner. Here I would like to take a substantial look into exceptions to complete payment of wages.

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[50] Article 20 (Prohibition of Predetermination of Nonobservance): No employer shall enter into a contract by which a penalty or indemnity for possible damages incurred from breach of a labor contract is predetermined.

[51] Article 21 (Prohibition of Offsetting Wages against Advances): No employer shall offset wages against an advance or other credits given in advance on the condition of worker's labor.

[52] Article 22 (Prohibition of Compulsory Saving): (1) No employer shall enter into a contract with a worker, in addition to a labor contract, which stipulates compulsory savings or the management of savings.

[53] Article 95 (Limitation on Punitive Provisions): If a punitive reduction in wages for a worker is stipulated in the rules of employment, the amount of reduction for each infraction shall not exceed half of one day's average wages, and the total amount of reduction shall not exceed one-tenth of the total amount of wages during each period of wage payment.

[54] Jongyul Lim, 『Labor Law』, 14th Edition, 2016, Parkyoungsa, pg. 417.

II. The Principle of Complete Payment & Exceptions

1. The principle of complete payment

The purpose of complete payment of wages is designed to protect employees and provide stability in their earning of a living by means of prohibiting employers from unilaterally deducting wages and requiring the complete payment of wages. Some exceptions exist, but these are strictly regulated in special provisions of laws or decrees or in collective agreements. [55] The courts have ruled, "In cases where an employer reduces personnel and at the same time unilaterally cuts bonuses, if the employees continue to work without any particular claims, this deduction of wages still amounts to a unilateral decision by the employer and the employees' rights to claim these unilaterally-reduced bonuses shall not be considered waived." [56]

2. Exceptions

(1) Deductions allowed by law and decree

Laws and decrees which allow deductions are limited to income tax law, social security insurance laws, and other stipulated laws. In addition, a court decision to allow seizure of wages can be implemented by seizing one-half of wages exceeding the minimum cost of living (KRW 1.5 million) [57]

A particularly remarkable judicial ruling was recently made which ruled that deductions can be made from monthly wages, but not from severance pay or retirement pension. "Since Article 7 (Protection of Right to Receive Benefits) of the Employee Retirement Benefit Security Act (ERBSA) stipulates that the right to receive benefits under a retirement pension plan shall neither be transferred to others nor offered as collateral, such provision prohibiting transferring the retirement benefits as collateral is part of statutory law. Accordingly, a court ruling to allow seizure of benefits under a retirement pension plan is null and void, and a third-party debtor can refuse the payment, by quoting the above, from an employee's benefits, even if ordered by a court. On the other hand, Article 246 (Claims Subject to Prohibition of Seizure) of the Civil Execution Act (CEA) regulates that an amount equivalent to a maximum of 1/2 of wages, retirement pension or other wage claims of similar nature can be deducted. Since Article 7 (Protection of Right to

[55] Article 109 (Penal Provisions): (1) Persons who violate the provisions of Article 43 shall be punished by imprisonment of up to three years or by a fine not exceeding twenty million won.

[56] Supreme Court on June 11, 1999, 98 Da 22185

[57] Supreme Court on March 16, 1994, 94 Ma 1882; **Civil Execution Act: Article 246 (Claims Subject to Prohibition of Seizure)** (1) None of the following claims shall be seized: 4. Amount equivalent to 1/2 of wages, pension, salary, bonus, retirement pension, or other wage claims of similar nature: Provided, that where the amount falls short of the amount prescribed by Presidential Decree in consideration of the minimum cost of living under the National Basic Living Security Act or exceeds the amount prescribed by Presidential Decree in consideration of the cost of living for a standard family, such amount (1.5 million won) prescribed by Presidential Decree shall apply respectively;

Receive Benefits) of the ERBSA and Article 246 (Claims Subject to Prohibition of Seizure) of the CEA are affected by the relationship between general law and special law, it is translated that all benefits under retirement pensions shall not be transferred as collateral."[58] This means that because the ERBSA is a special law, it takes precedence over the CEA, which is a general law.

(2) Deductions allowed by a collective agreement

Deductions of union dues (or dues checkoff) are typical deductions allowed by a collective agreement. In cases where the labor union requests that the company deduct 10 times the usual monthly union dues (such as KRW 500,000 from each union member towards preparations for a strike), the company will need to decide whether to cooperate or not. For its part, the Ministry of Employment and Labor (MOEL) expressed its official opinion that if the labor union decides to raise funds to prepare for a strike by means of a legitimate decision-making process such as by resolution at a general meeting of all union members (or union representatives), the company shall cooperate by deducting the special union fees from employee monthly wages even though there is no individual consent to do so. [59] This means that, according to MOEL, it would be considered unfair labor practice for an employer to refuse to deduct the amount requested by the labor union to prepare for a strike.

(3) Deductions to correct miscalculation of wages

In cases where an employer overpaid an employee by mistake, equivalent deductions from wages would be to correct the miscalculation, making it possible to adjust wages or severance pay, regardless of the principle of complete payment of wages. Provided, even in this case, the courts have ruled that the amount of retirement benefits deducted to retrieve overpaid wages shall be a maximum of 1/2 of the retirement benefits. [60]

III. Criteria for Judgment & Related Cases Regarding Other Deductions

1. Criteria for judgment

The principle of complete payment of wages strictly regulates, in accordance with Article 43 of the Labor Standards Act, related judicial rulings and MOEL Guidelines an employer from deducting an employee's wages to cover damage claims against the employee. [61] This is because such a deduction is determined unilaterally by the employer.

Regarding the justification for this, judicial ruling has stipulated the following criteria for judgment: "It is prohibited for an employer to unilaterally deduct an employee's wages to cover claims against the employee by the employer, but in cases where the employer deducts

[58] Supreme Court on January 23, 2014, 2013 Da 71180
[59] Labor Ministry Guideline: June 6, 2004, Labor Union – 1501
[60] Supreme Court on May 20, 2010, 2007 Da 90760
[61] Supreme Court on September 28, 1976, 73 Da 1768

or replaces the employee's wages after obtaining the employee's consent, as this consent can be regarded as the employee voluntarily agreeing to this deduction, this would not be a violation of Article 43 of the Labor Standards Act. Provided, in view of considering the purpose of the principle of complete payment of wages, determination of whether the employee actually voluntarily agreed to this deduction shall be strictly and carefully made." [62]

2. Related cases

(1) Reimbursement of training expenses

In cases where an employer assigns an employee overseas and subsidizes all training expenses for the employee to attend a training program, and that employee does not serve the compulsory employment period after completing the training, the employer can legitimately require the employee to reimburse part or all of the training expenses covered by the company. Accordingly, a training regulation that exempts an employee from the duty of reimbursement if that employee serves the compulsory employment period after completing the commissioned overseas training is not equivalent to a contract by which a penalty or indemnity is predetermined for damages incurred from a breach of the labor contract. Neither does such a training regulation violate Article 7 of the LSA (Prohibition of Forced Labor: No employer shall force a worker to work against his own free will through any means which unlawfully restrict mental or physical freedom) nor Article 21 (Prohibition of Offsetting Wages against Advances: No employer shall offset wages against an advance or other credits given in advance on the condition of a worker's labor). [63]

(2) Deductions from bonuses

Sometimes an employer reduces or does not pay bonuses, with labor union consent, in the process of coping with the company's business difficulties. The MOEL has released guidelines for two different cases: bonuses already incurred and bonuses expected to be incurred. In cases where the employer intends to deduct from bonuses already incurred, which were paid in return for employee labor service, this is null and void even with labor union agreement or revision of company rules. In such cases, individual employee consent must be received. However, the employer reducing or deducting from bonuses expected in the near future is possible through revision of the collective agreement with labor union consent, or revision of the company rules after obtaining the consent from the labor union or the majority of employees. In such cases, receiving individual employee consent is not necessary. [64]

The courts have made rulings that align with this guideline. The wages (including bonuses) or severance benefits already incurred are considered the employee's private property, so

[62] Supreme Court on October 23, 2001, 2001 Da 25184
[63] Supreme Court on February 25, 1992, 91 Da 26232 (Korean Air)
[64] Ministry of Employment & Labor Guidelines: April 15, 1999, LSA 68207-587

unless the labor union receives individual employee agreement, it is not possible to deduct or delay those payments through a collective agreement. Accordingly, a collective agreement cannot require employees to reimburse payments already received, unless there is agreement from each individual employee.[65]

(3) Housing loans from the company

In cases where an employee resigns before he/she has reimbursed the company for a housing loan received from the company, if the employer deducts all unpaid debt in a lump sum from the severance benefits, this may be considered a violation of the principle of complete payment of wages. However, the courts have ruled in favor of lump sum deductions from severance benefits for the following reason: "Since the collective agreement is the agreement to determine items occurring in labor and management relations, it can be a real expression of the intentions of both parties. It can also be admitted that the individual employee's voluntary decision and agreement make it possible to deduct wages instead of entering a formal claim for repayment of debts owed to the company by that employee. In view of these points, if the collective agreement was made justifiably and contains items permitting the requirement to reimburse unpaid loans, such a collective agreement does not violate the principle of complete payment of wages."[66]

IV. Conclusion

As in the cases given above, companies frequently deduct or require reimbursement for claims of illegal acts or other damages. Strictly speaking, this is a violation of the principle of complete payment of wages, which by law prevents the reduction of wages for general claims (debts) that an employee owes to his or her employer. Accordingly, if an employer deducts wages unilaterally to cover these claims, this deduction is invalid and makes the employer subject to punishment for violating the Labor Standards Act.

[65] Supreme Court on January 28, 2010, 2009 Da 76317
[66] Supreme Court on June 27, 2003, 2003 Da 7623

Whether incentive bonus belongs to wages or not

Premiums for Industrial Accident Compensation Insurance and Employment Insurance are calculated based upon the total amount of wages. Many companies incorrectly still include incentive bonuses in calculating the total amount of wages. Therefore, I would like to analyze whether incentive bonuses should be included when calculating wages under administrative guidelines, administrative interpretations and/or judicial rulings.

I. Characteristics of Bonuses in the Wage System

Calculation Rules for Wages: Whether bonuses are included when calculating wages (Article 476 of Regulations of the Ministry of Labor, January 22, 2002)

<In cases where bonuses are included as wages>

In cases where payment conditions, amounts, and payment rates are regulated in the Rules of Employment, or where employees are paid habitually and expected to get paid naturally: regular bonuses, exercise support fee, etc.

<In cases where bonuses are not included as wages>

In cases where payments are not paid habitually, but paid temporarily or definitely based on company profits in accordance with employer discretion: incentive bonuses, incentive pay, production bonuses, rewards bonuses, incentive allowance, etc.

Bonuses/benefits paid temporarily or indefinitely are excluded when calculating the total amount of wages (June 9, 1994, Jingsu 68607-285)

Among incentives based on business performance, bonuses/benefits which have never been paid customarily, but paid temporarily based on corporate profits (or where the purpose is not specific) shall be excluded when calculating total wages for determining the Industrial Accident Compensation Insurance premium.

II. In cases where incentive bonuses are included when calculating wages

If incentive bonuses and production promotion bonuses of the same amount are paid periodically and given to all employees pursuant to the collective bargaining agreement, they are characterized as wages.(September 18, 2003, Seoul Appellate Court ruling 2002 Na 18697)

The company claims that incentive bonuses and production promotion bonuses are not calculated as wages because they have been an indefinite valuable paid at the discretion of the employer for the purpose of preventing a labor dispute or implementing the early termination of wage negotiations by employees.

However, although there have been slight changes in bonuses since 1996, the above bonuses/benefits have been paid uniformly in regards to payment amount, payment period, etc. It has been a burden for the employer to pay incentive bonuses and production promotion bonuses to all employees uniformly according to the Wage CBA. In terms of formal items such as payment rules, purpose, etc., the payment was also definite and scheduled. So, those bonuses were not paid customarily and temporarily. When the above incentive and promotion bonuses are analyzed totally and substantially, they are wages to be regarded as remuneration for work.

III. In cases where incentive bonuses are not calculated as wages

Whether profit sharing bonuses paid on the basis of business performance are considered wages. (February 28, 2002, Wages 68207-134)

According to Article 18 of the Labor Standards Act, the term "wages" means wages, salary and any other kind of money or valuables (regardless of title), which the employer pays to a worker as remuneration for work. In cases where incentive bonuses were determined previously in regards to the method of payment, amount and payment period in the Rules of Employment, the incentive bonuses were paid customarily to all employees. This repeated payment has made employees expecting to receive a bonus. Accordingly, these bonuses shall be regarded as a part of wages.

However, without regulating this working condition, which was previously provided in the Rules of Employment, the company management and labor determined the business target. In the event that the employer makes a decision to pay a fixed amount (e.g., a certain incentive bonus rate or a one-time bonus), then if the target is achieved, such bonuses will not be treated as wages, because what they received is dependent upon the result of business performance. Whether a payment condition is achieved or not determines the actual payment – the amount being disbursed based on an evaluation of the company's performance. Therefore, since the reason for the payment is indefinite, temporary and based on the company's performance, this payment cannot be regarded as part of wages.

The Rules of Employment stipulates, "the bonus can be paid in consideration of yearly corporate performance. In the case of a good business performance, like a successful business surplus, the company may through internal decision-making determine whether to pay special bonuses, including the amounts and payment conditions, per each department. Accordingly, this type of profit sharing bonus is paid amount according to whether the business surplus is achieved or not. Therefore, in consideration of the payment conditions and purpose, it is hard to deem this payment as wages according to Article 18 of the Labor Standards Act – Wages are determined to be paid for the subject of prior work.

The incentive bonuses determined according to the individual employee's performance cannot be included as wages even though payment conditions and period of payment were already stipulated in the Collective Bargaining Agreement. (Supreme Court ruling on May 14, 2004, 2001 Da 76328).

The incentive bonuses that the company pays to sales employees are paid based on the employees' performance. Whether payment conditions are achieved or not is variable according to the individual employee's performance. Even though the bonus payments, payment conditions and periods are stipulated in the Collective Bargaining Agreement, incentive bonuses determined according to the individual employee's performance cannot be included as wages paid for the employee's work.

Whether incentive bonuses are included as wages.

(Seoul Administrative Court on March 13, 2003, 2002 Kuhap 29678).

- The characteristics of valuables that the company pays to the employees: "The Labor Union requested the company to pay the incentive bonuses and the company discussed this issue with the Labor Union, but actual payment and method of payment of the incentive bonuses could not be decided. The company decided to pay the incentive bonuses on the basis of its business performance and actually paid in the name of incentive bonus on March 4, '1999, December 23, 1999 and December 29, 2000, to only incumbent employees with a different payment criteria and payment rate per employee".

- Ruling: The company regulated incentive bonuses and their general payment criteria in the Internal Wage Rules, but there were no other rules related to payment, period, and concrete rate for incentive bonuses in the Rules of Employment and Collective Bargaining Agreement. Incentive bonuses were paid irregularly, with no fixed rate and at different amounts per employee. The company determined payment and its method according to the company's business performance. In consideration of this situation, it is hard to deem that incentive bonuses were paid continuously and periodically as remuneration for work or that such customary practice was established. As the employer has no obligation to pay incentive bonuses in the Rules of Employment, Collective Bargaining, and Wage Regulation, incentive bonuses shall not be interpreted as wages.

Whether profit sharing bonuses are included as wages.

(Changwon Regional Court on May 17, 2001, 2000 Gu 3242).

- The characteristics of valuables that the company pays to the employees: "There were no regulations for profit sharing bonuses in the Collective Bargaining Agreement. Since the company exceeded its production target by more than 100% from December 1996 to 2000, it paid 100% profit sharing bonuses on average."

- Ruling: The wages regulated in the company's Collective Bargaining Agreement consist of base pay, bonus and allowance, but there is no regulation for incentive bonuses. According to the Wage CBA concluded every year, profit sharing bonuses are determined to be paid according to whether a production target scheduled in a given year was achieved. Therefore,

the payment method and amount of profit sharing bonuses have not been same every year and these bonuses were paid irregularly. Accordingly, the company does not have a legal duty to pay profit sharing bonuses. This means that these bonuses are not considered as wages.

Whether performance bonuses per each business section are included as wages.
(Administrative Judgment on December 14, 2002, 02-03886).

- The characteristics of valuables that the company paid to the employees: "the company stipulates in the Rules of Employment that the company can pay incentive bonuses once a year in consideration of business performance per business section; provided, that payment, method, criteria and amount of incentive bonuses shall be determined by the business performance every year." Since the establishment of the incentive bonus regulation in 1995, it has been applied differently for payment rates and payment subjects in the second half of 1995, in the first half and second half of 1996, in the first half and second half of 1999, and in the first half and second half of 2000. Bonuses were not paid in 1997 and 1998.

Judgment: Incentive bonuses were not fixed amount each time and the Rules of Employment stipulates that "the company can pay incentive bonuses once a year in consideration of business performance per business section; provided, that the method, criteria and amount of incentive bonuses shall be determined based on the annual business performance." Since the reason for the bonus, the concrete payment criteria, amount and time are indefinite, it is hard for incentive bonuses to be definitely determined and paid. In consideration of the fact that incentive bonuses in 1997 and in 1998 were not paid, the incentive bonuses shall be included as valuables granted temporarily and indefinitely according the company's business result.

Whether variable incentive bonuses are included as wages.
(Administrative Judgment on November 18, 2002, 02-03729).

- The company paid variable incentive bonuses in appreciation of employee efforts in smoothly implementing the core business. There is no regulation for variable incentive bonuses in the Rules of Employment. Even though they have been paid a few times temporarily in 1999 and 2000, these bonuses were not paid uniformly and very in total sum per individual payment.
- Judgment: "There are no regulations concretely stipulated in the Rules of Employment related to variable incentive bonuses or other incentive bonuses. And, there is also no agreement for variable incentive bonuses in the Collective Bargaining Agreement. These bonuses were only paid one time in 1999 and 2000 respectively, and so it is hard to regard the variable incentive bonuses as a repeated practice to be paid to all employees uniformly and regularly. In consideration of these facts, variable incentive bonuses cannot be regarded as wages, but valuables to be paid to employees under friendly and favorable terms according to the employer's business performance.

Administrative Interpretation concerning Average Wages

I. Average wage

1. Concept

Average wages mean the actual wages paid for the actual work served and calculated into the daily wage rate. Average wages are the amount calculated by dividing the total amount of wages paid to the relevant worker during three calender months prior to the date of calculation by the total number of calender days during those three calender months.

2. Administrative interpretations related

● As incentive bonus, special bonus or production incentive has been determined at the discretion of the employer for its payment, payment rate, and payment period, it is not designated as average wages. (Mar. 25, '05, Labor Standard 1758)

In cases where even incentive bonus satisfies some specific conditions, it can be admitted as wages and it shall also be included into calculation of average wages. Otherwise, it shall be considered as the employer's praise or favorable reward, which then denies it the character of wages and it is excluded in the calculation of average wages.

Your company did not regulate in the CBA or the Rules of Employment any payment of incentive bonus, special bonus or production incentive, but determined them at the employer's discretion according to the business performance. Unless the habitual practice for payment was settled down, such valuables shall be denied as a character of wages.

However, if you regulated in the CBA or the Rules of Employment that the incentive bonus to be included in the average wages in cases where you calculate average wages for severance pay and an unused annual leave allowance, or, despite no specific regulation, if you have repeatedly included incentive bonus in the calculation of average wages for severance pay for a long time, this habitual practice may be deemed as decided working conditions. In cases where you want to change unfavorably the working conditions admitted as habitual practice, you should go through the proper procedure required to revise the Rules of Employment unfavorably.

● If the personnel order of suspension from office is justifiable, the period of suspension from office shall be included in the period of calculation for average wages.

(July 16, '03, wage 68207-562)

In this case, the criteria for calculating average wages shall be decided upon whether the suspension from office is justifiable or not. If the suspension from office is justifiable, the suspension period and the wages paid during the suspension period shall be included to the period and the total amount of wage respectively and calculated as average wages. Provided, that when the amount calculated for average wages is lower than that of the ordinary wages of the employee concerned, the amount of the ordinary wages shall be deemed his average wages.

If the suspension from office is taken unjustifiably, it is legitimate that the suspension period and the wages paid for the suspension period shall be deducted respectively from a basis period for the calculation of average wages and the total amount of average wages according to Article 2 (8) of Enforcement Decree of the LSA.

● In cases where leave of absence is due to the employee's choice or cause, this period shall be included to the standard period in calculating average wages. (Feb. 27, '02, wage 68207-132)

In cases where the reason that an employee could not provide labor service during the period required for calculating is due to the employee's choice or cause, this period shall be included to the standard period in calculating average wages.

On the other hand, in cases where an employee took a leave of absence with the approval from the employer, caused by non-occupational injury, disease or other reasons according to Article 2 (8) of Enforcement Decree of the LSA, the remaining period and wages excluding the period mentioned above shall be used for the calculation of average wages. If the leave of absence exceeded the three months, the first day of taking a leave of absence shall be the date on which a cause for calculating average wages occurred and calculated for the average wages based on the past three months.

In any case, if the amount calculated above is lower than the ordinary wages of the employee concerned, the amount of the ordinary wages shall be deemed as average wages.

● Calculation of average wages for a full-time officer of the Labor Union

(May 3, '01, wage 68207-317)

In cases where a full-time officer of the Labor Union, who is engaged exclusively in affairs of the Labor Union without providing labor service, resigns from the company at the same time as the expiration of his union service period, the initial day (last day of wage payment) of the Labor Union's full-time officer for calculating average wages shall be considered the "date on which a cause for calculating his average wage occurred", unless there is a special agreement to the contrary.