Revisions of the Korean Labor Law in 2018

I. Minimum Wage and Obligations of the Employer

1. Minimum wage for 2018: The minimum wage, to be applied in 2018, is KRW 7,530 per hour, which is equivalent to KRW 1,573,770 per month for a 40-hour week. This is an increase of 16.4% over the previous year, and is twice the average increase rate in minimum wage.

2. Effective period: 2018.1.1 ~ 2018.12.31.

3. Application: The minimum wage shall apply to all businesses and workplaces.

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

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

(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;
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.

5. Employer Obligations

(1) Obligation to give notice: In case of violation, imprisonment for up to three years or a fine not exceeding KRW 20 million (Articles 11 and 31 of the Minimum Wage Act);
When the minimum wage is announced, the employer shall inform employees of 1) the 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 easily be seen by all employees, or through other appropriate methods.
(2) Penalty for not paying minimum wage: a fine not exceeding KRW 1 million (Articles 6 and 28 of the Minimum Wage Act).

II. Annual Paid Leave

1. Rescinding of annual leave deductions for those who have worked for less than one year (Deleted Article 60 (3) of the current Labor Standards Act)

Employees are guaranteed 15 days or more of annual paid leave as stipulated by the Labor Standards Act (LSA). However, it is regulated differently for those who have worked for less than one year. Under the current law, these people are granted one paid leave day for each month during which they have continuously worked (Article 60 (2) of the LSA), but used leaves during the first year are

deducted from the next year's number of days of annual leave (15 days). Therefore, for new employees, only 15 days of annual leave are provided in two years, which leads to the problem that this could threaten employees' right to sufficient rest.

In response to this criticism, on November 9th, the National Assembly passed a bill to revise paid annual leave. According to the amendment, even if employees who have worked for less than one year use their annual leave, such used leave will not be deducted from the number of annual leave days (15 days) in the following year (the current Article 60 (3) of the LSA has been deleted). New employees can now use up to 11 days of annual leave for the first year and 15 days for the following year, making a total of 26 days for two years. This amendment will be effective from May 29, 2018.

As an example: If an employee who joined a company on January 1, 2016 used 7 days of annual leave in the first year, how many days of paid leave would be available for him/her in 2017?

Under the current LSA, it is stipulated that the used leave days during the first year are deducted from the 15 days of annual leave that are granted only when the employee continues to work for one year. Therefore, the employee can use 8 days of paid leave in 2017, deducting 7 days from the 15 days of annual leave, which occurs on January 1, 2017.

Under the amendment, the employee will be paid for up to 11 days during the first year. Since those days are not deducted from the annual leave given in the following year, the employee can use another 15 days, which occurs on January 1, 2017.

2. The period of childcare leave shall be considered as a period of work attendance (Newly-established Article 60 (6) 3 of the LSA)

This amendment also introduces measures to ensure the annual leave of employees who come back to work after childcare leave. According to the current law, when calculating the number of annual leave days, while maternity leave is regarded as a period of attendance, the period of childcare leave is excluded and calculated as a proportion of the whole period. Because of this, there were cases where employees did not receive a single day of annual paid leave in the following year after returning from childcare leave.

In the future, the period of childcare leave shall be considered a period of work attendance when calculating the number of annual leave days, to encourage the balance of work and family and the use of childcare leave. Applicants who apply for childcare leave will be subject to this amendment after it is enacted.

This amendment is encouraging, given that the legislative purpose[1] of annual leave is to provide workers with adequate mental and physical free time to encourage greater productivity while enabling workers to balance work and family.

III. Extension of the Scope of "Industrial Accident" for an Accident while Commuting to and from Work

(Revision of the Industrial Accident Compensation Insurance Act)

[Before enactment]

ONLY an accident which happened while the worker was commuting to and from work under the control of the employer, such as by using transportation provided by the employer, or the equivalent thereof, could be recognized as a work-related accident.

[1] Supreme Court ruling on June 11, 1966, 95Nu6649

[After enactment]

A legal definition of "Commuting to and from work" was prepared. According to the revised law, "Commuting to and from work" means moving between residence and workplace or from one work place to another work place in connection with work (Article 5 (8)).

Even though an accident may not have happened while the worker was commuting to and from work under the control of the employer, if it happened while commuting in the ordinary course and methods of work, such accident is considered an industrial accident (Article 37 (1) 3).

However, an accident which happens while deviating from or stopping from the ordinary course of work, or an accident which happens thereafter shall not be recognized as an industrial accident. However, if such deviation and stop fall under any reason stated in the Presidential Decree as a necessary act for everyday life, it shall be deemed as an industrial accident (Article 37 (3)). However, if it falls under any occupation for which the commuting course and method are not consistent, as stated in the Presidential Decree, it shall not be recognized as an industrial accident (Article 37 (4)).

[Enforcement date]

The revised law shall take effect on January 1, 2018, and shall be applied to all accidents occurring while commuting after the enforcement date.

IV. Increase in the Amount of Child-care Leave Benefits, etc.

(Revision of the Presidential Decree of the Employment Insurance Act)

[Before enactment]

During childcare leave, 40/100 of ordinary wage in childcare leave benefits were provided (monthly maximum of KRW 1 million, monthly minimum of KRW 500,000).

In addition, 75/100 of child-care leave benefits were paid during the childcare leave and 25/100 of child-care leave benefits were paid if a worker returned to the workplace concerned after the end of childcare leave and continued to be employed for six (6) months or more. This meant that fixed-term workers whose employment period finished during childcare leave or within 6 months after childcare leave could not receive the remaining childcare leave benefits.

[After enactment]

<1> Increase in the Amount of Childcare Leave Benefits

For the first three (3) months of childcare leave, the childcare leave benefit has been increased to 80/100 of ordinary wage (monthly maximum of KRW 1.5 million, monthly minimum of KRW 700,000).

<2> Extension of Child-care Leave Benefits for Fixed-term workers

In cases where the employment period of a fixed-term worker expires so that childcare leave ends or the fixed-term employee finishes work at expiration of the employment term after return to the workplace, even though s/he/ did not work for six (6) months after returning to work, 25/100 of the remaining childcare leave benefits will be paid as a lump sum (Article 95(4)).

[Enforcement date]

Revised Article 95 (4) shall be enforced as of June 28, 2017 and shall apply to fixed-term workers whose employment period expires after the enforcement date.

The revised Article 95 (1) shall be enforced as of September 1, 2017; childcare leave benefits for the period of childcare leave before the enforcement date shall be subject to the previous Article.

V. Enhancement of the Employer's Responsibilities and Protective Measures for Victims of Sexual Harassment at Work, and Leave for Subfertility

(Act on Equal Employment and Support for Worker-Family Reconciliation)

[Before enactment]

Sexual harassment and sexual violence at work is on the rise, leading to demands for enhancement of employers' responsibilities and protective measures for victims.

Meanwhile, although the number of people treated for subfertility has been increasing, many have had to use their personal annual paid leave for treatment.

[After enactment]

<1> Enhancement of the employer's responsibilities and protective measures for victims of sexual harassment at work

○ Anyone is entitled to report sexual harassment at work to an employer (Article 14 (1)).

○ The employer's obligation to investigate the facts and to take countermeasures such as a change of workplace, reassignment, granting of paid leave to victims etc. has been newly established. (Article 14 (2), (3), (4) and (5), imposes a penalty of up to KRW 5 million for violation). When occurrence of sexual harassment is confirmed, the employer shall take countermeasures such as disciplinary action or change of workplace of a person who has committed sexual harassment, after listening to the victim's statement. (Article 14 (5), imposes a penalty of up to KRW 5 million for violation). Furthermore, confidential information obtained during an investigation of sexual harassment shall not be divulged to anyone. (Article 14 (7) provides a penalty of up to KRW 5 million for violation).

○ It is prohibited to administer disadvantageous treatment such as dismissal, discrimination, or bullying of victims. (Article 14 (6) increased the penalty for violation from KRW 20 million to KRW 30 million).

○ When sexual harassment occurs from a customer, the employer shall also rearrange a position or provide paid leave to victims, with a penalty of up to KRW 3 million imposed for violation. ○ Sexual harassment prevention education shall be conducted every year and the details of such shall be posted. (Article 13, (3) provides a penalty of up to KRW 5 million for violation).

<2> Establishment of 3 days annual leave for subfertility

○ An annual leave of 3 days for subfertility has been newly established, with the first day being paid, and the remaining 2 days not paid. However, the leave period concerned may be changed. in consultation with the concerned worker, in cases where granting the leave as requested might cause a serious impediment to the operation of the business; no employer shall dismiss or take any other disadvantageous measure against a worker for taking subfertility leave (Article 18.3).

[Enforcement date]

Enforcement shall be six (6) months after the date of promulgation (which is expected to be in May, 2018).

Explanation of Terms used in Korean Labor Law

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I. Introduction

I have been working as a Korean Certified Public Labor Attorney advising foreign companies and foreigners by using my second language of English. If I try to explain and educate foreigners about Korean Labor Law well, it is necessary that I understand Korean Labor Law first and then consider the labor law system of their countries at the same time. Also, it is natural that the expression of the labor law in English should be precise, but it is impossible to communicate correctly with foreigners if I use Korean Legal Definitions or Legal Definitions in general, simple words for complex ideas are the key to success. When I worked as a military liaison officer in the American army, I showed an American soldier a newspaper article that a Korean university professor had contributed to the Korea Herald. At this time, the Korean professor explained the subject by using technical definitions and intentionally wrote long complex sentences. The American soldier did not understand the English words as well as the sentence contents. He passed the newspaper article to his colleagues but doubted the article because he did not understand what the article was trying to communicate. This was a good lesson that I always remember whenever I speak English and I try to use terms and sentences that ordinary foreigners can understand. English is a means of communication and cannot be more than that. In other words, English is a means to communicate with foreigners. With this idea, I explain Korean Labor Law in English, and sometimes I can translate it.

I am always worried about appropriate terms to use when I select English terms related to labor law. I want to summarize some terms of expression in order to help my readers understand them.

II. Terms of Labor Law

1. 근로자 : Employee or Worker

In Korea, the term “근로자” in Labor Standards Act (LSA) means a person who offers work to a business or workplace to earn wages, regardless of kinds of job he/she is engaged (Article 2 (1) 1.). Meanwhile, the term “근로자” in Labor Union and Labor Relations Adjustment Act (LULRAA) means a person who lives on wages, salary, or other equivalent form of income earned in pursuit of any type of job；(Article 2 1.)

The most different thing between the two concepts is whether it requires “근로자” to be in a specific direct employment relationship with the Employer. Whereas “근로자” under LRC requires the specific direct employment relationship, “근로자” under LULRAA does not require a specific direct employment relationship and even includes a job seeker or temporary unemployed person according to court’s ruling. This is attributable to differences in the purposes of establishing each Act.

In English speaking countries, in general, the term “Employee” is a defined legal relationship between the Employer and the individual, whereas the term “Worker” is used as a person who does

a particular job to earn money not requiring working for certain Employer. "Worker" is a group noun and everyone who is employed is a worker, while "Employee" is a noun that only applies to workers employed by the certain Employer (company). There may be 100 "workers" at the factory but only 90 "employees" because the other 10 "workers" are "employees" of another company.

2. 근로계약 : Labor Contract, Employment Contract, Labor Agreement or Employment Agreement

In Korea, the term "근로계약" means a contract which is entered into in order for a worker to offer work and for an Employer to pay wages for that work (Article 2 (1) 4. of LSA).

In English speaking countries, the term "Contract" and "Agreement" are interchangeable because two parties must have an agreement on the terms of the contract. "Labor contract", "Employment contract" or "Employment agreement" tend to set forth individual legal relationship between an Employee and an Employer , whereas the term "Labor agreement" tends to be used when announcing collective barging outcomes or other contracts which involve groups.

3. 취업규칙: Rules of Employment or Company Handbook

In Korea "취업규칙"(Rules of Employment) refer to the company's regulations that an Employer stipulates unilaterally regarding working conditions and service rules. LSA stipulates the Employer's obligations for preparing and filing their rules (Article 93) and ways to compose and change the rules (Article 94). In particular, if an employment contract includes employment conditions which are below the standards stipulated in the Rules of Employment, the nonconforming part of the employment contract is null and void (Article 97).

In English speaking countries, usually, foreigners will understand the "Rules of Employment" as being a guideline or a Company Handbook for work place behavior and will not know that the Rules of Employment are an extension of the conditions of Employment which must abide by the LSA. Therefore, further explanation regarding legal effects of "Rules of Employment" under LSA should be provided.

4. 고용노동청 : Labor Office, Labor Board, Labor Administration Office

In Korea, according to LSA, the Ministry of Employment and Labor and its subordinate offices shall have a Labor Inspector to ensure the standards of the conditions of labor (Article 101 (1)). The Labor Inspector has the authority to inspect a workplace, dormitory and other annexed buildings, to request presentation of books and documents, and to question both an Employer and employees (Article 102 (1)) and the Labor Inspector shall have the authority to perform the official duties as the judicial police officer with regard to the crimes in violation of LSA or other laws or decrees pertaining to labor affairs (Article 102 (5)). "고용노동청" is the place where the Labor Inspector performs his duties.

In English speaking countries, there are not terms which correspond 100% to "고용노동청" because each country, understandably, has different legal systems and procedures. Foreigners will

often utilize the term “Labor Board”, the term is a historical term and most States/Provinces no longer utilize the term but the term is the most common. Foreigners will be familiar with the process of lodging complaint, having the “Labor Board”(노동청) review the complaint with the Labor Board issuing a decision.

5. 노동위원회 : Labor Relations Commission or Labor Court

“노동위원회” is a quasi-judicial government agency composed of three parties, each representing workers, Employers and public interests. The business of “노동위원회” includes work concerning adjudication (e.g. unfair disciplinary action case), decision, resolution, approval, recognition, redress for discrimination or the mediation and arbitration of labor disputes or support for the autonomous settlement of labor disputes by the parties concerned.

Foreigners will not likely to be familiar with the term “The Labor Relations Commission”(노동위원회) and will confuse it with the Labor Administration Bureau. Foreigners will have to be educated in the significant differences from what they know and understand and the Korean System.

6. 임금 : Salary or Wage

Under Korea Labor Standards Act, The term “임금” means wages, salaries and any other money and valuable goods an Employer pays to a worker for his/her work, regardless of how such payments are termed(Article 2 (1) 5.).

In English speaking countries, if someone is paid a “Salary”, they will not usually get overtime. Most Foreigners will understand the “Salary” to be the same as the Inclusive Wage system (Blanket wage system) in Korea. Foreigners should be made aware that the blanket wage system is the system to pay fixed amount of wages, including additional pay for overtime, night and holiday work. It doesn't have legal definition and also it doesn't have any ground rule under Labor Laws in Korea. However, its legal validity has been accepted exceptionally by a court or the Ministry of Employment and Labor in special circumstances, for example, when it's hard to calculate actual working hours for employees who work outside the office most of time. Whether and how to acknowledge its validity surrounding the blanket wage system is still hot potato in Korea.

Meanwhile, the term “Wage” is a very common payment system and is the equivalent of the Ordinary Hourly Wage under the Korean LSA.

7. 퇴직금 : Retirement Pay or Severance Pay

In Korea, under of Employee Retirement Benefit Security Act, an Employer shall set up at least one retirement payment system in order to pay benefits to workers who retire ： Provided that this shall not apply to workers whose consecutive service period is less than one year and workers whose average weekly working hours over a four-week period is less than 15 hours (Article 4 (1)). The Retirement payment system refers to a defined benefit retirement pension plan, a defined contribution retirement pension plan and severance payment system (Article 2 6.).

In English speaking countries, “Retirement Pay” is what occurs when a worker is too old to legally work and only on occasion will there be a “Retirement Payment” (as a “bonus”); and the severance pay system is not mandatory unlike Korea. The first time Foreign Workers encounter the term “Severance Pay” will be when they read an employment agreement from a Korean Company so they should be clearly understood that “Severance Pay” is paid according to Labor Laws. Many times foreign employees are told that “Severance Pay” is a “Bonus” that the Korean Employer will pay them after completion of their contract. It may lead significant miscommunication which has the Employee and the Employer embroiled in legal dispute regarding “퇴직금”.

8. 상여금 또는 성과급 : Bonus or Incentive

In Korea, “상여금” (Bonus) is remuneration, in practice despite its title, paid regularly (paid yearly, quarterly, or on Lunar New Years Day and Chuseok, etc.) with fixed amount in addition to monthly payment, whereas “성과급” (Incentive) is paid conditionally based on performance of individual or business, etc.

Most Foreigners will understand that a “Bonus” is an “Incentive” because there is no noticeable distinction between the two terms. Both are, in general, variable and conditional payment depending on successful performance, or etc.

9. 부당 해고 : Unfair Dismissal or Wrongful Dismissal

According to Article 23 (1) of LSA, no Employer shall dismiss, lay off, suspend, transfer a worker, reduce wages, or take other punitive measures (hereinafter referred to as 부당 해고, etc.”) against an Employee without justifiable reasons. In principal, dismissal is justifiable only when the Employee has committed such a serious violation that the company could not continue the employment relationship any longer and if the company has followed any statutory or contractual proper procedures. That is, “부당 해고” under LSA is very a inclusive term covering unfair reasons, unfair procedures and unfair severity punishment which is the act of dismissal.

In English speaking countries, there is no equivalent of “부당 해고” and the closest English term may be “Unfair Dismissal” or “Wrongful Dismissal”. Usually, “Wrongful Dismissal” is understood "...to terminate an Employee with less than the requirement minimum notice.." or to terminate due to discrimination, retaliation, or for not following an unfair order to commit an illegal act. Meanwhile, foreign employees will tend to understand the term “Unfair Dismissal” as dismissal for unfair reasons but they will not tend to think that it also includes dismissal without following proper or mandatory procedures.

Annual Paid Leave and Foreign Workers

I. Introduction

According to the report by the Ministry of Culture, Sports and Tourism (released on July 16, 2017), the number of days granted for salaried employees' annual paid leave was 15.1 on average, while the number of days actually used was just 7.9 (52.3%). This is low in comparison to the average vacation days of OECD countries (20.6), with a usage rate of 70%.

According to Annual Paid Leave (Article 60) of the Labor Standards Act (LSA), employees who work 80% or more a year will be given a 15-day paid leave. For employees who have worked for three years or more, one day's paid leave is added for every two years of employment, up to a total of 25 days. However, in instances where incurred annual leave is not completely used, the employer shall compensate for the unused portion by paying ordinary wages. In Korea, the use rate of paid annual leave is only 50%, and the unused leave is compensated for. This does not fit with the purpose of annual paid leave, which was designed to rehabilitate the exhausted minds and bodies of employees through paid vacation, enabling them to live comfortable lives.

Especially for the non-professional foreign worker, regulations on annual paid leave are not specified in the standard labor contract, and employers do not actually grant the annual paid leave, nor do they compensate for it. In this regard, I would like to carefully review the standard rules of annual paid leave and the issue of excluding their application of annual paid leave for foreign workers.

II. Purpose of Annual Paid Leave and Legal Standards

1. Purpose of annual paid leave

Annual paid leave is intended to provide paid leave (separately from paid weekly holidays) in order to allow workers to realize a healthy and relaxed lifestyle.[2] More specifically, the Constitutional Court stated the purpose of the annual leave: "Rest hours or weekly holidays are primarily for the physiological recovery of workers who have accumulated physical or mental fatigue due to daily or weekly work. Annual paid leave is designed to give workers freedom from work for a period of time and to have the opportunity to engage in social and cultural civic life by providing a voluntary leave period without a loss of wages.[3] As for this, the Supreme Court also explains, "It is the purpose of providing an opportunity for mental and physical recreation and improving cultural life by exempting workers from the obligation to work for a certain period of time."[4] Therefore, the objective of annual leave is to improve the quality of life of workers by adding aspects of cultural life in terms of relaxation from work.[5]

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[2] Jongryul Lim, 「Labor Law 」, Park Young Sa, 2016, page 454.

[3] Supreme Court ruling on May 28, 2015. 2013 hunma 619 (The purpose of annual paid leave)

[4] Supreme Court ruling on December 26, 2003. 2011 da 4629 (The purpose of annual paid leave)

[5] Hingyoung Kim, "System improvement for annual paid leave to secure rest", 「Study on Labor Laws」, 2016 Volume 40, Seoul University's Labor Law Society, page 165.

2. Comparison of international and national standards for annual paid leave

The international standard for annual paid leave and the Korean standard as per the Labor Standards Act can be compared by dividing them into ① the number of leave days and requirements for the occurrence, ② method of use, ③ the guarantee of annual paid leave, and ④ compensation for unused leave.

The International Labor Organization (ILO) has adopted the Convention concerning Annual Holidays with Pay, 1936 (No. 52) and the Convention concerning Annual Holidays with Pay (Revised), 1970 (No. 132). ① In relation to the number of leave days and the requirements for occurrence, "In any case, a minimum of three weeks must be given for a year (Article 3), and an employee who is less than one year shall be entitled to paid leave in proportion to the period of service for that year" (Article 4). ② Regarding the use of annual leave, "Annual leave shall consist of at least two weeks to be given without its division, even though it can be used in separate days (Article 8), and annual leave shall be granted within one year after the entitlement of annual paid leave" (Article 9). ③ Annual paid leave should be given as paid during the working day (Article 7). ④ For unused annual leave, "Workers who have worked for the minimum period of six months shall be entitled to paid leave or compensation equivalent to the period of unused annual leave" (Article 11).[6]

The annual paid leave (Article 60) in the Korean Labor Standards Act prescribes the use of leave in principle, but also specifies compensation for unused days.① As for the number of leave days and the requirements for the occurrence of annual paid leave, “An employer shall grant 15 days’ paid leave to a worker who has registered not less than 80 percent of attendance during one year (Article 1). After the first year of service, an employer shall grant one day’s paid leave for each two years of consecutive service in addition to the 15 days’ paid leave to a worker who has worked consecutively for 3 years or more. In this case, the total number of leave days including the additional leave shall not exceed 25 (Article 4). ② Regarding the use of annual leave, “An employer shall grant paid leave upon request by a worker. However, the leave period concerned may be changed, if granting the leave as requested by the worker might cause serious impediment to the operation of the business (Article 5). Paid leave can be used continuously over a certain day or several days. Here, if a worker requests a leave day by designating a desired date (a claim for a leave), the employer can adjust the date of the leave in consideration of the work. ③ In relation to the guarantee of annual paid leave, the annual paid leave shall be granted as paid off-days on the normal working days of the worker (Article 5). Therefore, annual paid leave shall not be granted on weekly holidays, unpaid holidays, or other paid holidays. ④ Regarding compensation for unused annual leave, "the annual paid leave will expire if not exercised for one year" (Article 7). This means that in the event that an employee fails to use the annual paid leave, the employer shall pay the employee for the unused paid leave.[7]

[6] Ilhoon Park, 「A Study on the Legal Issues of the Annual Paid Leave System」, MA degree thesis at Korea University Graduate School, December 2014, pp125-140.

[7] Supreme Court ruling on December 26, 2013. 2011 da 4629 (Unused annual leave allowance is regarded as wage.)

III. Labor Law Application to Foreign Workers and Annual Paid Leave

1. Expansion of Labor Law Application to Foreign Workers

The Act on Foreign Workers' Employment, etc. (hereafter the Foreign Workers' Employment Act) was designed to promote a smooth supply and demand of manpower and the balanced development of the national economy, through the systematic introduction and management of foreign workers (Article 1). The purpose of the law is to provide foreign workers with employment in the 3D industries of SMEs with insufficient manpower; not to protect the foreign workers with labor laws. However, as foreigners enter the country and live and work together, they become residents of our country, and residents must be protected with the human rights guaranteed by the Korean constitution. These constitutionally-guaranteed human rights include labor rights, protection of working standards, and prohibition of discrimination under Article 32 of the Constitution (three rights of labor under Article 33), and social insurance under Article 34. Foreign workers have recently been securing precedents in the obtaining of human rights after a long period of stay in Korea.

The Supreme Court ruled in a case in 1995 that an accident involving an illegal foreign worker who is a worker applicable to Korean labor law should be recognized as an industrial accident by the Industrial Accident Compensation Insurance Act. This was the first case to recognize an illegal foreigner as an employee, and an illegal foreigner's occupational accident was also recognized as an industrial accident for the first time.[8] Again, in 1997, the first case occurred in which the retirement allowance was paid to illegal aliens.[9] In 2011, the Constitutional Court made it clear that foreign workers employed under the Employment Permit System also have the freedom to choose their occupation as a basic human right.[10] In addition, in 2015, the Supreme Court recognized a labor union composed of illegal foreign workers as a labor union protected by the Trade Union and Labor Relations Adjustment Act.[11] Through these major cases, the labor rights of foreign workers have gradually been expanded.

2. Actual status of the use of annual paid leave for foreign workers

Annual paid leave should be applied to foreign workers as well. The "Standard Employment Contract" stipulated in the Foreign Workers' Employment Act (Annex 6) does not specify an annual paid leave requirement, which is mandatory in the Labor Standards Act. Article 11: "The matters not specified in this contract shall be as stipulated by the 「Labor Standard Act」". In reality, most employers do not grant annual paid leave for non-professional foreign workers. According to a report by Amnesty International in October 2014, [12] "None of the migrant workers interviewed by Amnesty International had received annual paid leave or unused annual leave compensation."

Non-professional foreign workers have not received any paid annual leave or compensation for related days at all. On the other hand, in the case of professional foreign workers, the annual paid leave regulations are applied in the same way as for Koreans. In 2011, the Supreme Court recognized

[8] Supreme Court ruling on September 15, 1995. 94 nu 12067 (Recognition of an illegal worker for the industrial accident)
[9] Supreme Court ruling on August 26, 1997. 97 da 18875 (Recognition of an illegal worker for the severance pay)
[10] Constitutional Court's ruling on September 29, 2011. 2007 hunma 1083 and 352 헌법재판소 (Foreign workers' freedom to choose their occupation.)
[11] Supreme Court ruling on June 25, 2015. 2007 doo 4995. (Recognition of illegal foreign workers' labor union)
[12] Amnesty International, "Exploitation and forced labor for Foreign Workers in the Korean agricultural industry", Document number ASA 25/004/2014, October 2014, page 30.

the worker status of native English instructors in worker status verification lawsuits filed by 24 native English instructors, and ruled that the employer would pay the weekly holiday allowance, compensation allowance for unused annual paid leave and severance pay for the duration of the work.[13] The unused annual paid leave allowance was included in the average wage for severance pay calculation. In other words, the Labor Standards Act was applied equally to professional foreign workers as to Koreans. Therefore, non-professional foreign workers must also be guaranteed an annual paid vacation, and when paid annual leave is not used, an allowance equivalent to the annual paid leave days must be paid. Once employment ends, the employer must add the unused annual paid leave allowance for the calculation of average wage related to severance pay. Any delayed loss of wages is to be calculated at the rate of 20% per annum, as stipulated in the Labor Standards Act, for the period from the day after 14 days from the date of leaving to the day when payment is made.

IV. Annual paid leave for foreign workers

1. Guaranteeing annual paid leave

The ILO and the EU's annual paid leave regulations, in principle, prohibit the substitution of unused annual leave for benefits and exempt monetary compensation only at the end of employment.[14] Korea still pays for unused annual paid leave because using annual paid leave is not widely accepted. In order to eliminate this monetary compensation, the principle of promoting the use of annual leave is stipulated in Article 61 of the Labor Standards Act. If a worker fails to use the annual leave despite the measures promoting the use of annual paid leave, the annual leave shall expire and the employer shall be exempted from liability for compensation. In addition, in order to encourage the use of leave, it is encouraged to collectively take paid annual leave through the substitution of paid leave on particular working days (Article 62 of the Labor Standards Act).

If foreign workers are allowed to use annual paid leave and visit their home countries for 15 working days (3 weeks) a year, it would allow them to relieve their individual stresses and become refreshed in their workplace, while the employer can reduce labor costs by avoiding the responsibility of compensation.

2. Compensation allowance for unused annual leave

If a worker's employment ends before his or her annual paid leave is used, the worker will be compensated for unused annual paid leave days.[15] Therefore, if he or she ceases employment without ever using annual paid leave, he/she can receive 15 days' additional ordinary wage for unused leave days for one year, 30 days for service of 2 years, and 45 days for 3 years of service.

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[13] Supreme Court ruling on June 11, 2015. 2014 da 88161 (Confirmation of employee status for native English teachers)

[14] ILO Convention (No. 132) – Article 5; EU Guide, Number 2003/88/EC – Article 7 (2)

[15] Supreme court ruling on May 27, 2005, 2003da 48549, 2003da 4855: The right to use Annual Leave as paid days off is acquired definitely as remuneration for labor when the employee has worked for a one-year period. As soon as the employee acquired the right of Annual Paid Leave, his employment was terminated due to retirement, etc. before using his Annual Paid Leave. In this case, while the right to use Annual Leave requires continuous labor service, this cannot be granted due to retirement. However, the right to request Annual Leave allowance does not require continuous labor service and so shall be compensated as a paid allowance. Accordingly, the employee can request the Annual Leave allowance equivalent to the whole number of Annual Leave days unused up to the employment termination date.

3. Concerning severance pay and compensation for delayed wages

When calculating the severance pay of an employee, the annual paid leave allowance that occurred before the cessation of employment, regardless of whether the employee received compensation for unused annual paid leave days or not, should be included for the amount equivalent to 3/12 based on the average wage calculation.[16] However, this is not the case if there is no unused annual paid leave. For unpaid annual paid leave allowance and benefits, an additional amount of severance pay, to be re-calculated after including compensation allowance for unused annual paid leave, shall be paid.

If a worker's employment ends, an employer shall pay the wages and other money or valuables within 14 days after the cause for such payment has occurred (Article 36 of the LSA). If an employer fails to pay wages and severance pay subject to be paid pursuant to Article 36, delay interest shall be payable within the range of the interest rate prescribed by the Presidential Decree within 40/100 of the number of days delayed from the next day to the payment date (Article 37 of the LSA). Here, the rate determined by the president is "20/100 per year" (Article 17 of the Enforcement Decree of the LSA).

V. Conclusion

It has been 25 years since the official introduction of foreign workers in 1993. As of December 31, 2016, there were about 530,000 foreign non-professional workers (E-9) and Korean descendants (H-2) among the various types of foreign workers[17], and there would be more than 700,000 million if we included approximately 2 million illegal foreign workers. Many of these do not receive paid leave or any unused annual leave allowance. They are an indispensable work force, usually staying in Korea from three to ten years in the 3D industries, where Korean people are reluctant to work for low wages. These workers' rights should be guaranteed to enable continuous working relationships and for the foreign workers to be utilized for a long time. It is my opinion that the treatment of foreign workers can be improved through the use of annual paid leave.

[16] Labor Ministry, "Guidelines for the right to ask for annual paid leave, and paid allowance for unused annual leave", Wage/working hours policy team-2820, September 21, 2006.

[17] Immigration Office statistics on December 31, 2016.
Non-professional workers (E-9) : 279,187; Korean descendant (H-2) : 254,950.

Japan's Foreign Employment System

I. Introduction

Japan's labor law system has had a great impact on the formation of labor laws in Korea. In 1953, when many of Korea's labor laws were enacted (the Labor Standards Act, the Labor Union Act, the Labor Relations Adjustment Act, and the Labor Relations Commission Act), Japan's labor laws were an important reference point. The Immigration Act of the Justice Ministry has also been influenced by Japan's Immigration Control and Refugee Recognition Act (hereinafter referred to as the "Immigration Control Act"), which is still influential in the management of foreigners in Korea.[18] Japan enacted its Immigration Act (which strictly controlled foreigners) in 1951, and has adhered to two principles when it accepts foreigners. First, acceptance is in principle limited to foreigners engaged in professional work, and not to those engaged in simple labor. Second, acceptance for immigration under the premise of permanent settlement and permanent residence in Japan is not permitted in principle.[19] While there is a gradual shift toward more accommodation for foreigners due to the recruitment of highly-talented individuals and a lack of manpower due to aging/low fertility, the basic principles are still observed.

II. Status of and Policy Direction for Foreign Workers in Japan

According to immigration statistics the Ministry of Justice, the total number of foreigners staying in Japan exceeded 1 million in 1989, 2 million in 2005, and was about 2.69 million at the end of 2015; a figure which accounts for 2.2% of the total population of 121.71 million, and which has been increasing by an average of 8.1% since 2011. As of the end of October 2015, there were about 908,000 foreign workers in Japan, including approximately ①168,000 persons for training purposes, ②367,000 persons with status as overseas Japanese, ③167,000 persons recognized as employed in the "professional and technical fields", ④192,000 other persons such as overseas students, and ⑤ those in "specific activities"[20] (nurses/caregivers, and highly-talented professionals who received preferential treatment through the point system). As of 2016, there were also about 6.2 million illegal immigrants, including those who were not employed.

Japan's policy of introducing foreign workers has consistently maintained a stance of attracting specialized foreign workers in the professional and technical fields, but of not importing unskilled foreign workers in principle.[21] In response to labor shortages caused by the aging and declining

[18] Yoongoo Jun, "Application of Japanese System for Foreign Employment Policy in Korea and Related Problems – Focusing on Introduction and Operation of the Industrial Trainee System –", 「Kangwon Law Study」, Volume 42, Comparative Law Research Center, June 2014, p. 76.

[19] Minkyung Choi, "Introduction and Development of Point System for Highly-talented HR", 「Asia Pacific Research」 23 (4), Kyunghee University's International Regional Research Center, December 2016, p. 76.

[20] An economic partnership agreement (EPA) is an agreement aimed at strengthening alliances in broad economic sectors across countries. In addition to cuts in tariffs, which are key elements of free trade agreements (FTAs), it facilitates the movement of services, investment and human resources. Japan signed its first EPA ever with Mexico in April 2005 (Source: KOTRA overseas market news).

[21] Kyuyoung Lee/Kisun Kim/Kisun Jung/Seolee Choi/Honghyup Choi, International Comparison of Immigration Policy, Korea Labor Institute, December *2015,* p. 276

population, the Japanese government now prioritizes the participation of Japanese nationals such as women and the elderly in the labor market. Among foreign workers, professionals and overseas Japanese descendants are actively accepted through institutional preferences, while unskilled foreign workers have been restrained by the Industrial Trainee System, which is based on the principle of "replacement circulation". Recently, however, the Abe government has been reviewing an expansion of the system which would introduce non-skilled foreign workers, focusing on industries with a shortage of manpower, "in order to expand the utilization of female workers and economic growth." It is now actively introducing unskilled personnel such as homeworkers in addition to the introduction of foreign professionals.[22]

III. Foreign Worker Employment System

1. Japan's unskilled foreign workers

The official position is that Japan does not introduce unskilled foreign workers. Currently, the Technical Intern Training Program is not designed to use foreigners as workers, but is rather a program that trains workers in developing countries in Asia and prepares them to work in industries in those countries. Although this intention was initially maintained to a certain extent, foreign workers are now being used by small and medium-sized enterprises (SMEs) because of the insufficient labor force in Japan, and the society's tendency to avoid what Korea calls "3D jobs" (dirty, difficult, dangerous) jobs. However, it is obvious that the worker still provides work in his/her trainee status, while yet maintaining the original intent.

The introduction of simple laborers in Japan can be divided into two stages, and can be explained according to each stage. The first stage was the Foreign Trainee Program (1993-2010); under this program, foreigners worked as trainees, not as workers. As a result, many human rights violations occurred due to the failure to apply labor laws, and so the Technical Intern Training Program (2010-present) was introduced to improve the situation. However, even in this second stage, the exploitation of foreign workers was severe and violation of the labor law did occur, which led to the Foreigners' Technical Intern Training Act (2016), which was introduced to strengthen labor law protections.

In 1990, SMEs accepted foreign trainees for the purpose of cultivating manpower for developing countries. In 1993, the Trainee Program was implemented so that foreigners who had completed one year of training could work in Japan for a maximum of two years. 'Training' referred to not only lectures, but also to training in the field. Because trainees were not workers, a 'training allowance' was paid in place of a wage. In actual fact, companies paid foreign trainees low wages, and even the training allowance was less than the minimum wage. There were many cases where Japanese SMEs exploited the Foreign Trainee Program by using young workers from developing countries as a low-cost labor force without the protection of the Labor Standards Act or the right to the minimum wage. Such violations of human rights and the poor treatment of trainees soon became social problems.[23]

In order to address the human rights violations, Japan abolished the existing Foreign Trainee Program in July 2010 and replaced it with the Technical Intern Training Program, and from the

[22] Kilsang Yu/Youngbum Park/Haechoon Lee/Donghoon Sul, The Employment Permit System Evaluation and System Improvement Plan, Labor Ministry, 2011, p. 61

[23] Skeno Kazo (translated by Jung Lee), 「Japanese Labor Law」, Bupmoonsa, 2015, p. 123.

beginning introduced low-skilled foreign manpower as having employee status.[24] Technical trainees were allowed to stay in Japan for a maximum of three years, less the two-month training period. Permission for the entry of technical trainees was structured so that the accepting company or the supervising organization applied to the local immigration office.[25] By the end of June 2016, there were about 210,000 technical trainees nationwide, composed of Chinese (85,000), Vietnamese (72,000), Filipinos (21,000), Indonesians (17,000), and others.[26]

The Technical Intern Training Act of November 2016 classifies trainee status as "Technical Intern Training No. 1" for the first year of entry, "Technical Intern Training No. 2" for the second and third years, and "Technical Intern Training No. 3"[27] for the fourth and fifth years. The target jobs are relative to the needs of the sending countries, and job descriptions established by the Technical Skill Evaluation System, in accordance with the notification from the Minister of Health and Labor. (As of March 31, 2017, these comprised 74 jobs and 133 jobs respectively).

The following features are understood as relates to the Technical Intern Training Program:[28]

First, the period of stay for technical trainees is limited to three years. Since foreigners work for three years and then must return to their home country, employers do not give them an opportunity to acquire important skills, but provide only simple repetitive work, and so foreign workers are unable to get any further technical education. Companies regard foreign workers as those who need to be replaced after a certain period of stay, similar to a dispatch worker.

Second, re-entry is prohibited. The Technical Intern Training Program does not give the skilled foreign workers the opportunity to re-enter after their stay of three years, and companies do not recognize the skilled or semi-skilled abilities of such workers. Industry is constantly demanding an extension of stay in order to utilize skilled foreign workers.

Third, the program strictly observes a restriction ban against foreign families living in Japan. Although it is natural for families to reunite, the program prohibits family members from coming with the trainees, and restricts temporary family invitations for simple-functioning foreign workers, similar to Korea.

Fourth, there are a limited number of jobs available for foreign workers. Since the purpose of the Technical Intern Training Program began with industrial trainees, it limits the scope of industries that can retain trainees. Foreign workers can continue to work for three years if their employers do not have any business problems, but if their company closes, re-employment is difficult. It is also difficult to transfer to another job in the same industry, and changes of workplace are prohibited.

Fifth, foreign workers are subject to social insurance. These mandatory social insurances are employment insurance, industrial accident compensation insurance, national health insurance, and employee pensions.

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[24] Gilsang Yu/Youngbum Park/Haechoon Park/Donghoon Sul, Implementation Evaluation and System Improvement of Employment Permit System, Ministry of Employment and Labor, 2011, p. 66.

[25] Supervising Association (engaged in training for foreign workers) shall get permission for their business or submit an entity report of their recruiting on the basis of the Employment Security Law.

[26] Ministry of Justice statistics for resident foreigners, June 2016

[27] Technical training No. 3: persons who have acquired the prescribed technical training No. 2 must pass a technical skill acquisition test and be recommended by the supervising organization. In this case, such foreign workers can stay up to an additional two years, after taking leave of more than one month to return to their home country and then coming back to their workplace in Japan.

[28] Kawakami Kamikawa, 「Acceptance of foreign workers and Japanese society 」, Dongkyung University, 2016, p 196-210.

2. Japanese foreign descendants (Nikkeijin)

As descendants of Japanese, Nikkeijin have been institutionally recognized for their special relationship with Japan, and can stay with a "resident" visa (a newly-introduced residence qualification according to the revised Immigration Act of 1989).[29] The Nikkeijin are estimated to comprise more than 3 million people. Since the mid-1980s, entries into Japan by Nikkeijin have begun to increase, mostly coming from South American countries such as Brazil and Peru. Their initial entries were in the form of visits to relatives, after which they gradually entered the labor market. As foreign nationals, they have permanent residence status, so there are no restrictions on their activities or employment.[30]

Most Nikkeijin do not speak Japanese well and are engaged in simple labor. In the 1980s and 1990s, during labor force shortages even among Nikkeijin residents, there were cases where they became mid-level employees of small and medium-sized companies, but the majority of them had irregular employment contracts as dispatched workers or subcontractors. As a result, Nikkeijin began to search for more advantageous working conditions. This led to a gap between the alien registration system and the residence status of foreigners in their self-governing regional provinces, which made it difficult to determine their status, and caused social problems such as not registering for social insurance, not sending their children to school, etc.[31]

Japan has activated the employment of Nikkeijin in order to decrease the employment demand for unskilled foreign workers. The number of employed Nikkeijin is more than twice that of unskilled foreign workers, which helps to prevent the social burdens caused by the hiring of foreign workers receiving relatively low wages.[32]

3. Professional Foreign Workers in Japan

The number of foreign persons in Japan's professional and technical field increased from 129,414 in 2003 to 167,301 in 2015 (Ministry of Justice Statistics on Foreign Residents). Persons are regularly placed in technology development in the fields of information processing (27.6%), translation/interpretation (12.0%), sales/marketing (9.9%), education (9.8%), technology development in other fields of information processing (7.9%), design (7.5%), overseas work (5.5%) and trade work (2.1%). Of these numbers, 47.1% received a monthly remuneration of between JPY 200,000 and 300,000 for the period. Of employing companies, 25.9% had annual sales between JPY 100 million and 1 billion, while 9.7% had annual sales exceeding JPY 100 billion. By business size, 65% of foreigners work in establishments with less than 300 employees.[33]

Regarding foreigners with a high level of specialized knowledge and skills (so-called high-ranking foreign workers), there was no limit to the number of labor market tests available, or to the number of people who could be accommodated in the market, where they were allowed to work freely. As

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[29] Kyuyoung Lee/Kisun Kim/Kisun Jung/Seolee Choi/Honghyup Choi, 「International Comparison of Immigration Policy」, Korea Labor Institute, December 2015, pp. 299-300.

[30] Myungjoong Kim, "The status of foreign workers and acceptance policy in Japan", International Labor Brief Vol. 13 (No. 11), Korean Labor Institute, 2015, p. 104.

[31] Myungjoong Kim, ibid, p. 105.

[32] Kyuyoung Lee and others, 「International Comparison of Immigration Policy」, p. 302.

[33] Immigration office of the Justice Ministry, "Regarding the status of issuance of a certificate of status of residence concerning "technology, humanities and international affairs" for the purpose of employment in Japanese companies in 2015 (October 2016)

globalization and industrial activities continued to progress, promotion of the employment of foreign talent at such a high level was regarded as one of the measures that the government should take in the Employment Measures Act, which was revised in 2007. In June 2010, the "New Growth Strategy" announced the introduction of a point system, which would grant preferential treatment to highly-skilled foreign laborers on the basis of immigration laws, and a notification was issued in March 2012 and enforced in May of that year. This high-level talent point system was revised in December 2013 to review the preferential measures, and in June 2014 the Immigration Act was revised (Act 74 of 2014).[34]

The point system is the method whereby the immigration office allocates points for items such as academic achievement, proficiency, and annual income, according to their guidelines, in three areas (advanced academic research activities, advanced professional and technical activities, and advanced management and management activities). This is a system to entice highly-qualified foreign talent to Japan by giving preferential immigration treatment when a specific score is reached. Preferential measures include the granting of multiple statuses of residence, the granting of five years of stay, alleviation of permanent residence permit requirements relating to residence history, priority handling of immigration and stay procedures, employment of spouses, family employment of a foreign housekeeper, etc.[35]

IV. Conclusion

The introduction of foreign workers in Korea has been made with reference to the industrial trainee system in Japan, but has evolved with very significant differences in direction and scale. In view of the foreign employment system in Japan, Korea should benchmark the following points regarding Japan's policy:

First, it should minimize the incidence of human rights violations or social problems due to the long-term stays by minimizing the importation of unskilled foreign workers or observing the principle of short-term circulation.

Second, in the policy of accepting Korean foreign descendants, it is necessary to actively benefit from their employment.

Third, the Japanese government is actively attracting foreign professional workers through consistent policy support and improved immigration control laws. In Korea, it is essential to attract foreign professional manpower in order to develop high-tech industries and maintain industrial competitiveness. In the future, it will be necessary to improve the immigration system and for industry to cooperate with the government to attract professional foreign workers.

[34] Skeno Kazo (translated by Jung Lee), 「Japanese Labor Law」(translation of recent version),

[35] Myungjoong Kim, "The status of foreign workers and acceptance policy in Japan", 「International Labor Brief」 Vol. 13 (No. 11), Korean Labor Institute, 2015, p. 105.

The Judgment Function of the Labor Relations Commission

1. Introduction

If an employer dismisses, lays off, suspends, or transfers a worker, or reduces wages, or takes other punitive actions against a worker without justifiable reason, the worker may apply to the Labor Relations Commission for remedy. In addition, any labor union whose rights have been infringed by unfair labor practices may also do so (Article 28 of the LSA, Article 28 of the Union Act).

As these labor disputes are dynamic, continuous, and collective, administrative agencies or courts cannot always be expected to handle them fairly, promptly, and reasonably, due to the inflexibility of bureaucracy and lack of experience of some agencies. The Labor Relations Commission is an independent administrative agency that has the authority and the ability to resolve labor disputes fairly, promptly, and in a way that is appropriate to the professional situation at hand.

2. Organizational structure of the Labor Relations Commission and composition of its judgment function

The Labor Relations Commission has an organizational structure in response to local administration. The National Labor Relations Commission covers the entire country, while 13 district Labor Relations Commissions cover the capital, the metropolitan cities and the provinces. The National Labor Relations Commission can approve, cancel, or change the decisions of the district Labor Relations Commissions. The judicial arm of the Labor Relations Commission is composed of three public interest committee members (including a chairperson or one standing commissioner) and one worker and one employer committee member.

3. Procedures of the judgment function

The Labor Relations Commission reviews applications and admits, rejects or cancels labor cases, determines the eligibility of the parties involved, investigates, conducts interviews and holds judgment hearings within 60 days after the initial application date.

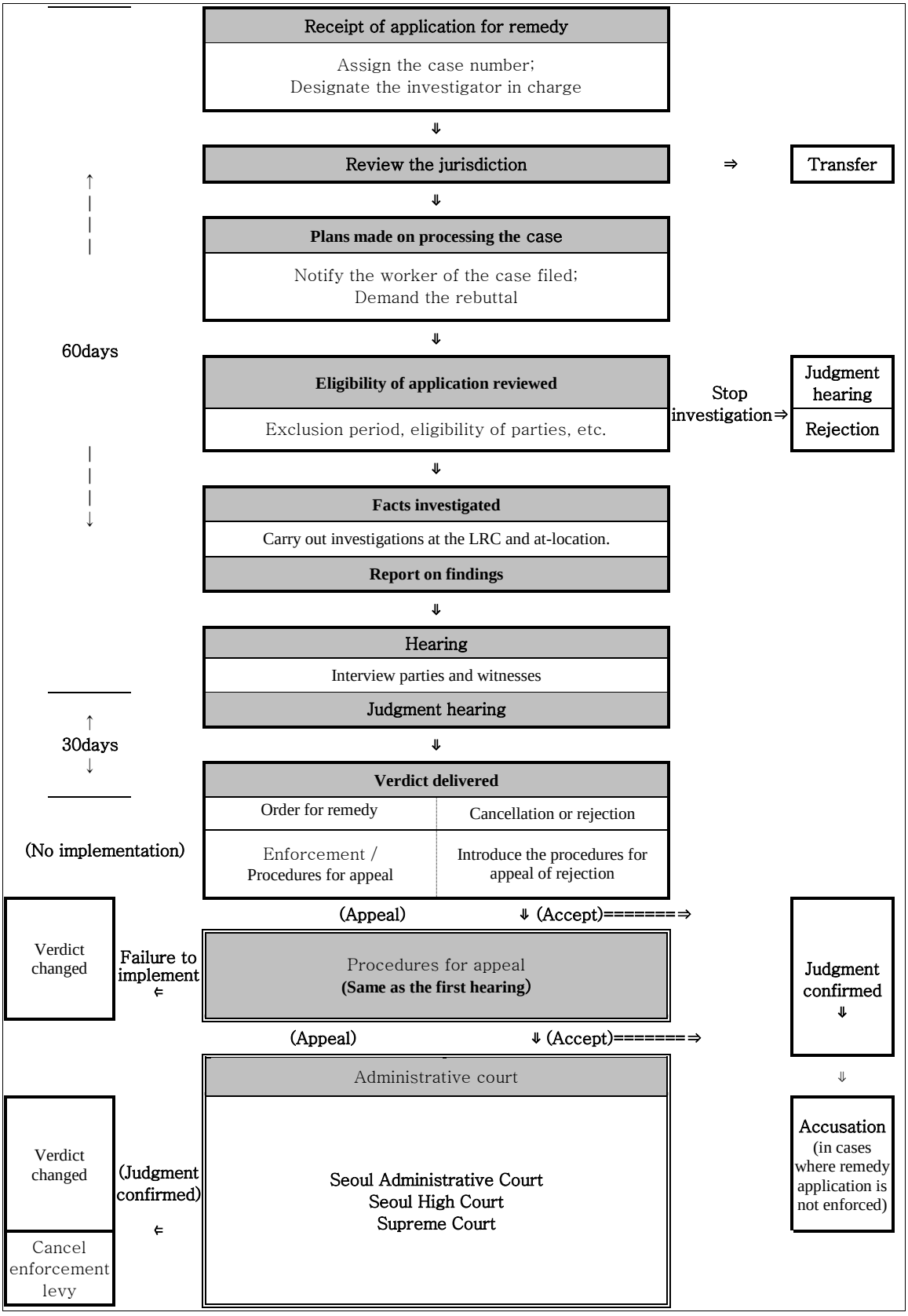
(1) Application for Remedy

If an employer dismisses or treats a worker unfairly, the worker may apply to the Labor Relations Commission for remedy. This application for remedy shall be made within three months from the date on which the unfair dismissal and/or related actions took place (or from the date of termination in cases where such activities continue). The worker must apply for remedy with the Labor Relations Commission nearest his/her workplace regarding unfair dismissal or unfair labor practice.

(2) Investigation

The Labor Relations Commission shall, without delay, conduct necessary investigations and inquiry of the parties concerned, upon receipt of an application for remedy. The Labor Relations Commission shall ① designate an investigator responsible for the process of investigation, ② demand the applicant submit evidence of the reason(s) for the application, ③ deliver a copy of the application for remedy or statement of reasons to the employer, and give opportunity for rebuttal and associated evidence to explain the employer's actions, and, ④ if necessary, order the parties, witnesses or other related persons to attend a hearing and give their testimonies. Further investigation will then be carried out as deemed necessary (Article 45 and 46 of the Implementation Rules of the LRC Act).

《Process for Applications for Remedy with the Labor Relations Commission》



(3)Hearing

The Labor Relations Commission shall hold a hearing within 60 days from the date the application was received. This hearing is to review documented evidence both parties have submitted, and information gathered during investigation, and then decide whether unfair dismissal or unfair labor practice actually took place. The committee members (public-interest, worker and employer representative members) assigned to the case shall attend the hearing, have both parties verify their claims, and interview witnesses and other related persons. At the judgment hearing right after the hearing, the public interest committee members shall decide whether unfair dismissal or unfair labor practice took place. The worker and employer committee members may also interview the parties to the case and witnesses, and give their opinions before the public interest committee members give their decision during the judgment hearing.

<Burden of Proof>

1) Regarding decisions disadvantageous to certain personnel such as dismissal, the first burden of proof is on the employer to verify whether the worker committed a particular action, whether such action violated the Rules of Employment, and whether the disciplinary action, severity and suitability of punishment is justified. Regarding unfair labor practice, the first burden of proof is on the worker and the labor union to verify the employer's intention to commit the unfair labor practice, unfair treatment, and/or the existence of domination and interference.
(Supreme Court ruling on Aug 14, 1992, 91da29811)

2) However, regarding an employer's statements of reasons for decisions disadvantageous to certain personnel such as dismissal, the burden of proof then falls on the worker to verify that he/she did not commit a particular action, that he/she did not violate the Rules of Employment, and/or that the punishment was too severe or unsuitable to the violation. Regarding unfair labor practices, the employer also has a burden of proof to verify that he/she did not intend to commit an unfair labor practice, or give disadvantageous treatment to the company personnel due to their union activities, or obstruct those union activities, or cause deterioration to the union organization. (Supreme Court ruling on Sep 10, 1996, 95nu16738)

(4) Settlement

Labor cases filed for remedy at the Labor Relations Commission are often resolved between the two parties peacefully before going to the judgment stage of the Commission’s activities. Such settlement not only helps to restore labor-management stability, but also aids implementation of the employer’s agreement more effectively than a remedy order from the Labor Relations Commission. The Labor Relations Commission can always recommend or arrange a draft of settlement for both parties in the process of investigation and interview. Once settlement is established, the statement of settlement is composed, which has the same effect as settlement decided by a court (Article 16-3 of the Labor Relations Commission Act).

(5) Judgment

The judgment hearing is for the purpose of determining whether unfair dismissal or unfair labor practice has occurred, and takes place after the hearing. The judgment hearing is held with all three public interest committee members, and resolutions pass with approval from at least two of the three committee members. The Labor Relations Commission issues an order for remedy to the employer when it is deemed that unfair dismissal or unfair labor practice has occurred, or cancels the application for remedy if it is deemed that they have not. The Labor Relations Commission shall deliver a letter of the verdict to the employer and workers concerned within 30 days of the date of judgment.

<Example judgment statements>

#1: Application for remedy regarding unfair dismissal (Order for Remedy)

1. The employer in this case shall agree that dismissal of the applicant on Month/Day/Year was an "unfair dismissal".

2.The employer in this case shall reinstate the employee within 30 days from the day this adjudication statement is received and shall pay an amount not less than the amount of wages he/she would have received if he/she had worked during the period after he/she was dismissed.

#2: Application for remedy regarding unfair dismissal (Dismissal / Rejection)

The application by the worker has been dismissed or rejected.

#3: Application for remedy regarding unfair dismissal (Order for monetary compensation)

1. The employer in this case shall agree that dismissal of the applicant on Month/Day /Year was an "unfair dismissal".

2. The employer in this case shall pay an amount not less than the wages the applicant would have received if he/she had worked during the period after he/she was dismissed, in lieu of ordering his/her reinstatement within 00 days from the date this remedy order is received.

#4: Application for remedy regarding unfair labor practice (Order for Remedy)

1. The employer removing labor union notices on the bulletin board of the labor union office on Month/Day/Year is determined as an unfair labor practice: domination of or interference with labor union activities.

2. The employer in this case shall post a notice apologizing for the removal of the union notices without permission and shall post a notice on company bulletin boards that such actions will not be repeated.

#5: Application for remedy regarding unfair dismissal & unfair labor practice (Orders for Remedy)

1. The worker's dismissal by the employer in this case on Month/Day/Year is determined as an "unfair dismissal" and the related discrimination as an "unfair labor practice".

2. The employer in this case shall reinstate the employee immediately and shall pay an amount not less than the wages he/she would have received if he/she had worked during the period after he/she was dismissed.

3. The employer shall post a notice on company bulletin boards declaring that such dismissals will not happen again.

#6: Application for remedy regarding unfair dismissal & unfair labor practice (Orders for Remedy for Dismissal, but Rejection of Unfair Labor Practice application)

1. The worker's dismissal by the employer in this case decided on Month/Day/Year is determined as an "unfair dismissal."

2. The employer in this case shall reinstate the employee immediately and shall pay an amount not less than the wages he/she would have received if he/she had worked during the period after he/she was dismissed.

3. Other applications have been rejected.

#7: Application for remedy regarding unfair dismissal & unfair labor practice (All applications rejected)

All applications that the worker and labor union submitted have been rejected.

(6) Monetary compensation system

The monetary compensation system was introduced so that workers not wishing to be reinstated can still receive remedy. Under the monetary compensation system, the Labor Relations Commission may order the employer to pay the worker an amount not less than the wages he/she would have received if he/she had worked during the period after he/she was dismissed, in lieu of ordering that the worker be reinstated. The amount equivalent to wages (or more) includes some additional compensation as well, which shall be determined by the Labor Relations Commission after considering such things as any worker fault, and degree of unfairness of the dismissal, etc. This monetary compensation system has contributed to worker rights by providing alternative methods for receiving remedy for unfair dismissals. However, in actual practice this monetary compensation system has been used on a limited basis because this system permits the minimum compensation equal only to the wages the worker would have received during the period after dismissal. Accordingly, in order to promote the monetary compensation system, it would be reasonable to require compensation equal to the total salary during the period after dismissal, a certain amount of compensation for the trouble and inconvenience of taking action, and the costs related to the application for remedy.

4. Failure to comply with orders for remedy and procedures for appeal

(1) Failure to comply with an order for remedy (Enforcement levy)

Employers are required to obey orders for remedy, and penalties are applied if they fail to do so (Article 111 of the LSA, Article 89 of the Labor Union Act). **However, this criminal punishment is valid after the remedy order is confirmed finally.** If an employer, after receiving the remedy order from the Labor Relations Commission and a decision on reexamination concerning a remedy order from the National Labor Relations Commission, fails to comply with a remedy order by the compliance deadline, an enforcement levy in the amount not exceeding 20 million won shall be imposed on the employer. The Labor Relations Commission may impose an enforcement levy twice a year for two years from the date the initial order for remedy was issued, or until the order is complied with. If an order for remedy issued by the Labor Relations Commission is canceled in accordance with a decision rendered by the National Labor Relations Commission after reexamination or a confirmed court ruling, the Labor Relations Commission shall immediately stop imposing the enforcement levy and return any monies already paid, by virtue of its authority or at the request of the employer. Controversy may arise when deciding "fulfillment" of the employer's remedy order if there are no criteria to determine "fulfillment" of the orders from the Labor Relations Commission. There will be disputes among parties and the Labor Relations Commission in understanding the conditions related to complete fulfillment. So, the purpose of pursuing complete fulfillment is to prevent these disputes, ensure the effectiveness of an order for remedy, and resolve labor disputes in the early stages (Article 79 of the Rules on the LRC).

1. Fulfillment of an order to reinstate the worker to his/her previous job is when the employee has been assigned the same position the employee had when he/she was dismissed, with the same kind of work duties, or when the employee has been assigned other work duties with his/her prior consent. However, if the same position or work is no longer available for unavoidable reasons, assigning a similar position or work duties to the employee can be regarded as fulfillment of the order for remedy.
2. Fulfillment of the duty to pay the amount equivalent to wages is when the total amount of wages that the worker would have received, up to the time of complete payment, is paid to the worker.
3. Fulfillment of an order for monetary compensation is when the amount stipulated in the written judgment is paid.
4. Fulfillment of other orders for remedy occurs when the items stated in the written judgment are implemented.
5. In cases where the parties agree to a settlement other than an order for remedy for unfair dismissal, fulfillment occurs when that settlement is implemented.

(2) Procedures for appeal

If an employer or worker is aggrieved by an order for remedy or decision to dismiss rendered by a Regional Labor Relations Commission, he/she may apply to the National Labor Relations Commission for reexamination within ten days of the date on which he/she received the notice of the order for remedy or decision to dismiss the application. The procedures for application to the National Labor Relations Commission are the same as the procedures for application to the Labor Relations Commission. An employer or worker may file a lawsuit in accordance with the Administrative Litigation Act against the decision made by the National Labor Relations Commission after the reexamination within fifteen days from the date on which he/she received the notice of decision on the reexamination. If an employer or worker is aggrieved by the decision of the National Labor Relations Commission and appeals to the Administrative Court, the National Labor Relations Commission becomes a defendant and the worker (the employer) becomes a defendant assistant participant. If no application for reexamination is made and no administrative lawsuit is filed within the periods listed above, the order for remedy, decision to dismiss or decision on reexamination shall be considered confirmed.

Comparison between the Labor Relations Commission and the Teachers' Appeals Commission

I. Introduction

A foreign professor of a private university visited this Labor Law Firm for a consultation regarding his unfortunate employment case. This professor had had his employment contract renewed every year for the past 5 years, but this had not been done this past February. The university stated that his employment contract had expired, as he was a fixed-term employee. The professor thought that his employment contract would be renewed according to the university regulations, as he had better-than-average scores in the teacher evaluation. He took legal action by submitting to the Labor Relations Commission an application for remedy for unfair dismissal, but his claim was rejected. He visited me to apply for an appeal.

Reviewing the details of his case, it was determined that, as he had been an assistant professor, he should have taken his original application for remedy to the Teachers' Appeals Commission instead of the Labor Relations Commission. This individual could have been protected from the unfair rejection if he had known of the procedures of the Teachers' Appeals Commission. This was a very unfortunate situation. [36]

In cases where an employee receives an unfair personnel disposition, he or she can find resolution by applying for remedy with the Labor Relations Commission. In 2015, the Labor Relations Commission handled 13,000 unfair dismissal cases, whereas in comparison, the Teachers' Appeals Commission only disposed of 588, a relatively small number of cases, although the number is gradually increasing.[37] Foreign professors, in particular, can be confused as to whether a claim should be made with the Teachers' Appeals Commission, as they are fixed-term employees, but at the same time have the status of a teacher. The information below will enable the reader to understand the procedures of the Teachers' Appeal Commission as they compare to the procedures for remedy with the Labor Relations Commission.

II. Comparison of Functions between the Labor Relations Commission & the Teachers' Appeals Commission

1. Division of Scope

Individuals subject to applications for remedy with the Labor Relations Commission are employees working for a company that employs five or more employees. Provided, that government servants working for state or local governments, and teachers, are excluded. Those government servants and teachers to whom Korean labor laws do not apply can submit applications for remedy through the Appeals Commission. The State Administration has an Appeals Commission for public servants and the Teachers' Appeals Commission for teachers, while local administrations have an Appeals Commission for local public servants. The legislative branch and judicial branch of the national government, the Constitutional Court, and the Central Election Management Commission all have

[36] Similar case: NLRC 99 Buno 165, Buhae 610, Jan 31, 2000. Railroad employees, to whom the Government Servant Law applies, submitted a claim of unfair dismissal to the Labor Relations Commission, rather than to the Appeals Commission. Due to this, the case was rejected.

[37] Teachers' Appeal Commission, "Collection of Decision Cases", 2014

their respective appeals commissions.

Teachers have rights of education, guarantee of status, and guarantee of freedom of speech, while at the same time they often have the duties of educating and conducting research and maintaining their professionalism as teachers, but are banned from political activities. Of particular interest, the system related to the guarantee of status is with the Teachers' Appeals Commission, which deals with teachers' disciplinary dispositions (such as expulsions, dismissals, suspensions from office, wage reductions, and written warnings), and disadvantageous dispositions (such as forced leaves, dismissals, and removal from one's position), and this system can involve a kind of administrative trial.[38]

Specifically, teachers are classified as kindergarten "directors and assistant directors" (Article 20 of the Early Childhood Education Act), teachers at elementary schools, middle schools, high schools, advanced technical high schools, and "principals and vice-principals" at special schools (Article 19 of the Elementary and Secondary Education Act), as well as those at universities, colleges, colleges of education, and "presidents, deans, professors, vice-professors, associate professors, assistant professors, and full-time instructors" at open schools (Article 14 of the Higher Education Act). Accordingly, employees engaged in a private school's administrative work, and fixed-term employees, (Article 32 of the Public Educational Officials Act, Article 54-4) do not fall within the scope of the Teachers' Appeals Act. Instead, they may apply for remedy with the Labor Relations Commission.

2. Legal Procedures of the Labor Relations Commission & the Teachers' Appeals Commission

Item	**Labor Relations Commission**	**Teachers' Appeals Commission**[39]
Composition	ㅇ Related law: Labor Relations Commission Act. ㅇ Organization: Under the Ministry of Employment & Labor, National Labor Relations Commission (1) and regional Labor Relations Commissions (12). The National Labor Relations Commission (NLRC) is located in Sejong City, while regional Labor Relations Commissions (LRC) are located in their respective regions. ㅇ Purpose: To provide judgments for rapid and equitable resolution of unfair dismissal claims, unfair labor practices, etc. ㅇ Applicable to: All employees to whom the Labor Standards Act (LSA) applies. ㅇ Composition of judgment panel: 3 members representing the public interest, 1 member representing employee interests, and 1 member representing government interests. ㅇ Target: Claims of unfair dismissal under Article 23 of the LSA; Claims of unfair labor practice: Article 81 of the Trade Union & Labor Relations Adjustment Act. Correction of discriminative treatment: Article 9 of the Fixed-term Employee Act.	ㅇ Related law: Special Act on the Improvement of Teachers' Status. (Related Enforcement Decree: Regulation Regarding the Teachers' Appeals Commission). ㅇ Organization: Under the Ministry of Education. There is one Teachers' Appeals Commission in Seiong City. ㅇ Purpose: As a collegiate administrative agency, to provide a review and judgment equitably based upon related laws and judicial rulings for disciplinary actions and disadvantageous dispositions related to teachers. ㅇ Applicable to: Teachers working in national, public and private kindergartens, elementary schools, and universities. ㅇ Composition of judgment panel: 8 committee members, with a majority attending. ㅇ Target: -Disciplinary actions handled: expulsion, dismissal, suspension from office, and warning letters. -Other disadvantageous actions handled: rejection

[38] Dongchan Lee, "A Study on the Teachers' Appeals Commissions", Hanyang Law Study, 22, February 2008, p. 370.

[39] Teachers' Appeals Commission in the Ministry of Education,「Renewal of Teachers' Employment Contracts」, Publishing Company, Intelligence Space, 2016

		of contract renewal, dismissal, removal of job title, and forced leave.
Application for remedy	-The employee shall apply for remedy for unfair dismissal or unfair labor practices, etc. within three months from the date on which such action took place (Article 28 of the LSA, Article 82 of the Trade Union and Labor Relations Adjustment Act). -Jurisdiction: The Labor Relations Commission that is located in the district where such actions have occurred (Article 29 of the LRC Regulation).	The employee shall apply for remedy within 30 days from the date on which the action took place. -If the employee has applied for remedy to the Teachers' Appeals Commission regarding expulsion or dismissal, the school shall not appoint a successor until the Commission makes its final decision. Provided, appointment of a successor can be done after the applicable period for remedy claims has expired.
Receipt of applications	The adjudication committee is assembled when a remedy application is received. -Composed of three representatives of the public interest to be in charge of adjudication. -Appointment of an investigator. -Request correction of any missing required items for remedy application. -Add or change the purpose for applying.	When a remedy claim is received, the Commission official shall immediately appoint an investigator to be in charge. -When it is determined that the remedy application is missing required information, a request for correction should be made within 7 days from the date on which the case was filed. If such required correction is minor, the Commission will correct it directly.
Providing and demanding written responses.	-The Commission sends the parties in charge of the presentation information to advise on preparing a statement of reason, response documents, and the judging procedures. -The Commission will forward a copy of the remedy application and statement of reason, and request submission of response documents.	The Commission will, within 3 days, send a copy of the remedy application and request the written responses. -The Commission will forward a copy of the remedy application and may request the submission of written responses.
Investigation & submission of evidence	The Commission requests the documents needed for the case, and if necessary, may request attendance of the parties concerned or witnesses. If necessary, the investigator may visit the workplace for investigation purposes.	Receives the statement of reasons and forwards copies of such documents within 20 days. -Upon receipt of the written response from the school, one copy will be sent to the applicant. If necessary, the investigator may visit the workplace for investigation purposes.
Providing information on hearing dates	A hearing date is announced 7 days in advance. -The hearing may be delayed for justifiable reason.	A hearing date is announced 7 days in advance. -The hearing may be delayed for justifiable reason.
Hearings	The hearing panel will consist of three representatives of the public interest, one member representing the employee, and one member representing the employer. -Meeting procedure: Confirm the case → Confirm the parties → Questions and statements → Decision. -Persons wishing to attend the meeting must receive permission in advance. -The chairperson can designate a witness and question him or her. In such cases, both parties will	○ Hearing of the appeal. -Participants: the chairperson, commission members, commission official, investigator in charge, both parties and witnesses. -Meeting procedure: Confirm the case → Confirm the parties → Questions and statements → Decision. -Range of review: The commission cannot explore issues other than the remedy claim.

	have equal opportunity to ask questions.	
Decisions	A judgment hearing is held. Presentations are made to the three representatives of the public interest, who make decisions by majority vote. -Results: Admission, rejection, cancellation, or settlement. -Monetary compensation: Admission of unfair dismissal, and monetary compensation instead of reinstatement	-Method: The hearing requires attendance of two-thirds of the registered members, and is decided by the majority vote of the registered members in attendance. -Deadline: The decision should be made within 60 days, with an additional 30 days allowed when necessary. -Decisions: cancellation, dismissal, reduction of disciplinary action, Order of implementation, etc.
Sending of decisions	Sending the decision: For remedy applications, the verdict shall require implementation of the order within 30 days.	The decision will be sent within 15 days. -When the decision document is complete, it is sent to both parties.
Follow-up measures and appeals	-Enforcement levy: If the employer has not complied with the decision of the Commission, an enforcement levy of up to 20 million won per person will be charged. Such levy may be charged twice per year, for up to two years. If the employer wins the case in the appeal commission or court, all levies previously paid will be refunded. -An appeal may be entered within 10 days from the date on which the party received the decision.	-If the Commission's decision cannot be admitted, the teacher or the private school can file an administrative litigation. -Teachers working for a public school may file administrative litigation against the public school concerned. However, the public school cannot file a lawsuit but must comply with the decision. -Administrative litigation should be filed within 90 days from the date of the decision.

3. Characteristics of the Teachers' Appeals Commission

The Teachers' Appeals Commission has many positive characteristics, as the system was designed to fit the needs of teachers as follows: ① The Commission cannot implement the worst of the original dispositions on the applicant (Article 16 of the Teachers' Appeals Regulation). ② When the applicant receives a disposition of expulsion or dismissal, the school cannot assign a replacement until a decision is made (Article 9 of the Special Law for Teachers' Status). ③ There is no fee for filing an appeal, and the decision on an appeal can be made much quicker than in civil litigation: within 60 days with a possible additional 30 days (Article 10 of the Special Act on Enhancement of Teachers' Status). Accordingly, the Teachers' Appeals Commission is the best system for practical remedies by considering the teachers' guarantee of status, as in the aforementioned items.

III. Conclusion

The foreign professor recognized that the rejection by the Labor Relations Commission was not due to the particulars of his case, but due to the wrong commission being asked to handle the case. He also understood that any appeal to the National Labor Relations Commission would not be valid due to the different legal procedure. In his case, there were two options that he could pursue: file a civil litigation, or look for a new job after acquiring a D-10 (job-seeking) visa. In this instance, I suggested that he look for another job instead of filing a civil litigation due to the fact that it could be almost impossible for a foreigner to pursue such civil action due to the expenses and time required. It was disappointing to realize that this was the result simply because he did not know the proper legal protection procedures. Obviously, employees need to become familiar with their applicable legal protection in order to avoid losing their legal rights.

Criteria for Evaluating Sexual Harassment and the Employer's Duties

I. Concept of sexual harassment

EQUAL EMPLOYMENT ACT, Article 2 (Definition)

(2) "Sexual harassment at work" in this Act refers to a situation where an employer, a senior, or an employee makes another employee feel sexually humiliated or offended by using sexually charged behavior or language using their high status at work or in relation to work, or provides a disadvantage in employment on account of a rejection of the sexual gesture or other requests.

1. Using their high status at work or in relation to work
   (1) It means, no matter whether the situation takes place inside the workplace or in a public area, employer or employee use their status at work or in connection to work.
   (2) Although it occurs beyond working hours and outside the workplace, it is sexual harassment if it is connected to work performance.
   (3) The concept of workplace includes the customer' office, dinner with a business partner, business partner's or customer's etc., if there is a connection to work.
   (4) Although there is no connection in regards to rank in the workplace, its a connection with the counterpart of a customer company that the employee has to contact in connection with work.

2. Environmental and conditional sexual harassment
   (1) Environmental sexual harassment
   Environmental sexual harassment is where an employer, a senior, or an employee sexually humiliates or offends another employee with sexually charged behavior or language using a higher status at work or in connection to work, or creates a disadvantage in their employment.
   (2) Conditional sexual harassment
   Conditional sexual harassment is where an employer, a senior, or an employee disadvantages another employee by using their higher status at work or in connection to work on account of rejection to sexual advances or demands.

II. Types and criteria of evaluating sexual harassment

1. Types of sexual harassment

[Implementation rule of the EEA (Attachment) - related to the Article 2 of the ACT]

A. Physical behaviors

(1) Behaviors such as physical contact like kissing, hugging, or hugging behind
(2) Behaviors such as touching the physical parts like breast, hip, etc.
(3) Behaviors such as forcing massage and caressing

B. Linguistic behaviors

(1) Behaviors such as saying a filthy joke or telling lustful and indecent words, including in telephone conversations)

(2) Behaviors such as likening appearance to sexual things or evaluating

(3) Behaviors such as asking about sexual relationships or facts, or intentionally distributing information of a sexual nature

(4) Behaviors such as forcing sexual relations or requesting sexual relations

(5) Behaviors such as forcing a female to sit close and fill glasses at a dinner meeting, etc.

C. Visual behaviors

(1) Behaviors such as putting up or showing lustful photos, pictures, drawings, etc., including distribution by email or fax

(2) Behaviors such as intentionally exposing or touching one's own physical parts in a sexual manner

D. Other language or behavior which makes other workers feel sexually humiliated or offended as a socially accepted notion

2. Criteria of evaluating sexual harassment

(1) Concept of criteria for evaluating sexual harassment

[Implementation rules of the EEA (Attachment)]

Whether or not evaluating sexual harassment, you should consider the victim's subjective conditions. As a socially accepted idea, you should also consider together how a reasonable person evaluates or copes with the situation against the particular controversial behaviors involved in the victim's case. Accordingly, you should review whether the situation created a threatening and hostile employment environment as a result and hindered work efficiency.

(2) Concrete contents of evaluating sexual harassment

A. Undesired behaviors

Whether a certain behavior belongs to sexual harassment shall be determined for each case after totally considering all situations and a record of the characteristics of the sexual language or behavior involved and the incident-occurring background. Of course, it is not sexual harassment when two parties want or agree to have a sexual relationship. However, it is sexual harassment when one party does not want such behavior. An undesired act shall not require repeating or recurring. A one time sexual act can be regarded as a sexual harassment.

B. Victim's perspective

Criteria of evaluating sexual harassment at work are situations where the victim felt sexually humiliated or offended. It can be sexual harassment if the victim felt sexually humiliated or offended. In this case, whether or not the offender intended to sexually harass cannot affect the evaluation criteria. That is, sexual harassment at work provides important criteria, which is how the victim was affected by the sexual language or behavior.

C. No clear expression of intention required

Recognition of sexual harassment does not require that the victim prove that the offender intented to sexually harass. The undesired behavior in practice shall be estimated objectively in consideration of the victim's language and behavior or surrounding circumstances.

D. Whole circumstances considered during the incident

Whether sexual harassment was or was not committed shall be reviewed by considering totally the record events and all surrounding circumstances. All facts and circumstances related to the work environment causing sexual harassment shall be organized and recorded totally and synthetically. Also, the review of the records shall be implemented from all points of view and considering all circumstances.

III. Employer's duties to prevent sexual harassment

Article 12 (Prohibition of Sexual Harassment at Work)

Employers, senior workers or workers shall not engage in sexual harassment at work.

[Article 39 (Fine for Negligence)]

(1)An employer who commits an action in violation of Article 12 shall be punished by a fine for negligence of ten million won or less.

Article 13 (Education To Prevent Sexual Harassment at Work)

(1) An employer shall implement an educational program to prevent sexual harassment at work and create a safe work environment for workers. The methods, content, and frequency of the program and other necessary requirements shall be determined by Presidential Decree.

[Article 39 (Fine for Negligence)]

(3) One who falls under any of the following subparagraphs shall be punished by a fine for negligence of 5 million won or less. 1. One who fails to implement the measures prescribed in Article 13(1).

*** Implementation Decree, Article 4 of the EEA

(1) The employer shall implement an educational program to prevent sexual harassment at work once or more per year.

(2) The preventive program shall include the following items.

1) Laws concerning sexual harassment
2) Procedures or criteria for remedy in the event of sexual harassment at work
3) Consultation for grievance and procedure for remedy to the victim of sexual harassment at work
4) Other necessary items to prevent sexual harassment at work

(3)A preventive program can be implemented through employee seminars, morning meetings, conferences in consideration of the size of the business and the situation. Provided, that simply distributing or putting up educational materials cannot be deemed as the implementing preventive training.

Article 14 (Measures to be taken in case of Sexual Harassment at Work)

(1) An employer shall take disciplinary actions and other equivalent measures without delay upon the finding of sexual harassment at work.

[Article 39 (Fine for Negligence)]

(2) An employer who commits an action in violation of Article 14(1) shall be punished by a fine for negligence of five million won or less.

(3) An employer shall not take unfavorable measures such as dismissal, or other disadvantageous measures against a worker who was sexually harassed at work.

Article 37 (Penal Provisions) (2) An employer who commits an act in violation of Article 14(3)shall be punished by imprisonment of three years or less or a penalty of 30 million won or less.

Article 34 (Application to Dispatched Workers)

When the provision of Article 13(1) is applied to the workplace where dispatched workers are used pursuant to the Act relating to Protection, etc. for Dispatched Workers, the using employer prescribed in Article 2(4) of the Act relating to Protection, etc. for Dispatched Workers shall be regarded as the employer prescribed in this Act.

Procedures for Employers Handling Instances of Sexual Harassment[40]

I. Summary (Introduction)

Incidents of sexual harassment occurred in a Korean branch office (hereinafter referred to as "the Company") of a foreign company. The female employee victimized by the sexual harassment (hereinafter, "the victim-employee") submitted a petition to the National Human Rights Commission over the incidents. The victim-employee then informed the company of the petition she had submitted, and details within her statement to the Human Rights Commission. From this, the Company investigated the senior sales manager concerned (hereinafter, "Offender A"), estimated that his actions were sexual harassment, and then took appropriate disciplinary action against him. Shortly after, the Human Rights Commission transferred this case to the Gangnam Labor Office of the Ministry of Employment and Labor. On June 16, 2011, the Company received a written notice from the Labor Inspector in charge of sexual harassment cases, that there would be an investigative hearing. The Labor Inspector also informed the Company that there were two more alleged offenders that the victim-employee had not mentioned to the Company. After being informed of the additional alleged sexual harassment, the Company investigated the sales director (hereinafter, "Offender B") and the country manager (hereinafter, "Offender C"), and after evaluation, determined their behaviors were also sexual harassment, based upon their statements and the victim's, and took appropriate disciplinary actions against Offenders B and C. On June 28, 2011, the Company attended the investigative hearing at the Labor Office and explained the measures that it had taken appropriately according to related law. The Labor Inspector in charge agreed that the Company had taken the proper actions and closed the petition. However, the Labor Inspector discovered that the Company had not given any education to its employees to prevent sexual harassment at work in 2008 and 2009, but had started only in 2010. For this non-fulfillment of the Company's legal duty to provide education on sexual harassment prevention, the Company was fined 2 million won.

According to the 'Equal Employment and Work-Home Balance Assistance Act,' sexual harassment at work refers to "a situation where a person's superior or colleague harasses him/her with sexually-charged behavior or language," and it is the employer who is responsible to prevent sexual harassment at work and take appropriate measures if such harassment occurs. I would like to review the appropriate measures taken by the Company.

II. Details of the Sexual Harassment Case at Work

1. Sexual Harassment by Offender A

On April 27, 2011, during a team-building event at a company workshop with all employees (about 30), the victim-employee had to do something as a penalty in a game. The penalty was that she had to write her name with her backside. Before doing so, she told everybody that they couldn't take any video with their cameras or cell phones. The sales manager (Offender A) took a video of her with his

[40] A sexual harassment petition case at GangNam Labor Office from Apr to Jun 2011

cell phone secretly, saved it and forgot about it. On May 19, 2011, at a company dinner, Offender A remembered the video he had secretly recorded, and showed the video to his colleagues in turn. The conversation among those employees was sexually humiliating for the victim-employee, and included such expressions as “It would be fun to show this as a highlight at a Sales Kick-Off event,” and “Since we can’t see her face, send her ID picture to me with the video.” The victim-employee demanded Offender A to delete the video, but Offender A did not do so. At this, the victim-employee informed the personnel team of her displeasure and requested a formal apology from him. Offender A would not offer a formal apology, and simply showed his displeasure at her informing the personnel team.

2. Sexual Harassment by Offender B

On May 19, 2011, at the same company dinner, Offender B wandered around, pouring traditional wine for his colleagues. When he came to the victim-employee’s seat, he said to her, “Ms. Lee, you sat in my seat. You must like me” and sat beside her. He then said, “Shall we have a love shot?” The victim-employee was humiliated as he was suggesting that she was a “bar hostess” (a position which sometimes involves sexual behavior). The victim-employee very obviously did not like his suggestion, saying “That is a very dangerous thing to say.” To which Offender B replied, “I’m not dangerous.”

On March 29, 2011, at a company dinner, all the employees went to a Singing Room after dinner. There, while the victim-employee was singing a song by Sym Subong at someone’s request, Offender B approached the victim-employee with a gesture in blue dancing, but the victim-employee avoided looking at him. After the song was finished, she sang another song by Ju Hyunme, which talked about a ‘confession of love’ many times. When she returned to her seat, Offender B said to her, “You were talking to me. That story was about me, right?”

On February 11, 2011, at a company dinner, Offender B approached the victim-employee and said, “Let’s hug each other!” It was hard for the victim-employee to refuse in front of all her colleagues, so she patted his shoulder from a distance. The victim-employee began to wonder seriously how she could continue working with her manager (Offender B) who, without hesitation, had shown sexually-charged behavior and caused this humiliation to a married employee at a company dinner with their colleagues.

3. Sexual Harassment by Offender C

On March 29, 2011, the victim-employee was trying to get out of the company dinner because she was humiliated by Offender B’s sexual behavior, but after giving it more thought, she went to the country manager (Offender C) to say ‘good-bye’. When she said to him, “I have to go home early,” Offender C offered his hand to shake hers. Shortly after they shook, Offender C said goodbye again, wanted to shake hands again, and attempted to kiss her hand. Surprised, the victim-employee took her hand back quickly, but some of her fingers touched Offender C’s lips. The victim-employee was very embarrassed, shocked, and humiliated.

III. Company Recognition of Sexual Harassment and Handling Procedures

1. Employer procedures in dealing with sexual harassment complaints

Upon receiving a complaint of sexual harassment, the employer will conduct interviews, investigate the facts, implement appropriate measures such as disciplinary punishment, etc. and then inform the victim-employee.

-1st Stage: Receipt of the sexual harassment complaint (HR or Labor Department)

-2nd Stage: Interview and investigation
Upon receiving the complaint, the person-in-charge is to quickly set up an interview and begin a thorough
investigation. If necessary, the investigator can hear the defendant's testimony instead by organizing a
face-to-face meeting between him/her and the victim.
The person-in-charge shall weigh the collected information obtained during the investigation. As soon as
the person-in-charge reaches a final conclusion, it shall be reported to the employer.

-3rd Stage: Confirmation and disciplinary measures
If it is confirmed that sexual harassment has occurred, the employer shall take appropriate action against
the offender, such as a transfer to another department or position, warning, reprimand, work suspension,
or dismissal, etc.

-4th Stage: Report of the results
Upon closing the investigation, the company shall notify the victim and the offender of the results.

-5th Stage: Preventative action
The employer shall pay special attention to the victim-employee after the closure of the sexual harassment case to prevent further sexual harassment of that employee.

2. The Company's handling of the above cases of sexual harassment

When it recognized the victim-employee's accusations regarding sexual harassment, the Company immediately requested statements from the victim-employee and the alleged offenders. As the country manager (Offender C) was involved in this case, the Company used a labor attorney to interview the victim-employee and the alleged offenders and receive their statements, to ensure fair conclusions. After receiving their statements and witness accounts, the Company determined the related behaviors were sexual harassment according to the criteria for evaluating whether certain behavior is sexual harassment at work. In this process, the Company handled the investigations quickly and confidentially, in order to protect the alleged offenders and the victim-employee at the same time. The alleged offenders resisted this investigation, saying they did not intend to harass her sexually. However, the Company explained to them seriously of the criteria for determining the existence of sexual harassment, "In evaluating whether certain behavior is sexual harassment or not, the victim's subjective conditions must be considered. As a socially accepted idea, how a reasonable

person evaluates or copes with a situation against the particular controversial behaviors involved must also be considered in the victim's case." The Company concluded that the three men's behaviors were sexual harassment and they were disciplined in accordance with the level of their violations. After this, the Company invited an external expert, (a labor attorney), and implemented training for all employees towards preventing sexual harassment at work. The Company also strove to prevent the reoccurrence of any sexual harassment by posting a notification on the bulletin board, detailing ways to prevent any further sexual harassment in the work environment.

The Company held a Disciplinary Action Committee composed of three members designated by the Company in accordance with the disciplinary regulations in the Rules of Employment, and took disciplinary action after reviewing the disciplinary details. There are five types of discipline: 1) written warning, 2) wage reduction, 3) suspension from work, 4) recommended resignation, and 5) dismissal. The Company decided the level of discipline according to the level of violation as follows.

A. Offender A: ① 10% wage reduction from one month's salary;
② Suspension of promotion for six months;
③ Official apology to the victim in front of company directors
B. Offender B: ① Written warning;
② 2.5% wage reduction from one month's salary (July)
C. Offender C: Written warning

IV. Conclusion

These cases of sexual harassment at work were related to environmental sexual harassment, and the employees recognized that their behavior at company dinners could be interpreted as sexual harassment even if they didn't think much about it. These cases brought some educational benefit to the Company as well as the employees realized that their unintentional behavior could be interpreted as sexual harassment because the criteria for determining sexual harassment is partly judged from the victim's perspective, rather than the offender's intention. In addition, this case contributes to the building of healthy relationships between employees. The Company was able to protect the victim from being further humiliated, through appropriate measures against sexual harassment. The Company also took appropriate action to prevent a repeat of sexual harassment by determining acceptable discipline for the offenders, carrying that discipline out, and providing education to prevent sexual harassment of other employees.

Due to the victim-employee's complaint of sexual harassment to the Labor Office, the Company was investigated to determine whether or not it had followed the employer procedures for handling sexual harassment complaints. The Labor Office found that the Company had carried out its duties as employer very well according to the Equal Employment Act, except for one, which was skipping its obligation for two years before setting up sexual harassment education last year. As already mentioned, the Company was fined 2 million won for two occurrences of failing to provide education to prevent sexual harassment. Beyond this, the victim-employee's petition to the Labor Office was concluded without any further penalty or demand.

A Case of Sexual Harassment in the Workplace & Lessons Learned

I. Introduction

The most important step to handling workplace sexual harassment is to prevent it in advance. When it happens in reality, it is also important to deal with it appropriately in accordance with on-the-spot situations. There is a legal procedure for handling sexual harassment cases, but the particular case in this article was greatly influenced by the emotional state of the victim and the offending employee. Accordingly, it is necessary to seek a reasonable solution through appropriate actions, rather than only following the legal procedures by the letter.

The case discussed herein was not well handled and resulted in resignation of both the victim and the offending employee, causing direct loss to the related parties through the loss of their jobs, and to the company through the loss of the personnel in question. In the interest of preventing this kind of disruptive outcome, we will look at the problem-solving procedures in the case, review the lessons learned and consider methods of improvement.

II. Sexual Harassment Case

1. Summary of the case

On August 5, 2014, a woman who had been employed by the company in April 2012 and had worked at the company's Suwon site since then submitted a written complaint of sexual harassment by her supervisor. The Personnel Manager asked for legal opinion from a labor attorney, who read the female employee's statement and advised problem-solving procedures for the company to follow.

The labor attorney did not recognize the seriousness of the case, and focused upon prevention of recurrence through protection of both the offender and the victim. In the meantime, the female employee and her colleague submitted their resignations as they were afraid of revenge from the offending supervisor (the site manager). Then, because of their resignations, the offending supervisor was also forced to resign. As a result, the company lost significant resources: two female staff employees and one site manager.

2. Details of sexual harassment

The sexual harassment consisted of physical and verbal harassment, as detailed in the female employee's statement as follows.

(1) Physical sexual harassment

At the end of 2013, my hair was down and hanging to my shoulders, and the site manager, saying my hair needed trimming, touched my neck with his fingers and combed them through my hair. It felt instantly creepy and I felt sexually humiliated.

(2) Verbal sexual harassment

- Not long time after being hired by the company, a male colleague and I were sweeping the building in preparations for auditing, when the site manager came over to us, looked at me and said to my colleague, “You guys are sweeping like feeling a virgin’s breast.” His remark really shocked me.
- The site manager often commented about my make-up “You need to put on more make-up and wear more lipstick.” Recently he said to me in front of some other colleagues, “You seem to have let everything go. I mean since you got married, you really don’t put on make-up nor dress well at all. Put on some make-up before you come to work.” He even said to other female colleagues with a laugh, “Please teach her how to put on make-up properly.” I felt very displeased and angry.
- Two months ago, while a female worker in the same office was listening, the site manager said smilingly to a male worker, “Women in the US air force do everything by themselves. In the hot summer some women only wear undershirts, moving oil drums and swinging their full breasts.”
- On August 5, 2014, while the female employees were talking to each other, the female victim of the harassment said to her supervisor, “I have a headache and feel sick.” The site manager responded, “You must feel sick because you’re having your period.” Both my colleague and I were shocked at his statement.

III. Handling of the Case by the Company

1. Questions and answers regarding the issue

The company asked three questions of the advising labor attorney regarding this sexual harassment on August 6, 2014.

<u><Question 1> Can sexual language or unnecessary physical contact used by this site manager be considered workplace sexual harassment?</u>

<Response> Judgment of sexual harassment (Supreme Court ruling on June 14, 2007, 2005 du 6461): ‘Sexual language and behaviors in becoming ‘workplace sexual harassment’ in accordance with Article 2(2) of the Equal Employment Act refer to physical relations between a man and a woman or physical, linguistic and visual behaviors in relation to the male or female physical appearance. These behaviors mean that a normal and average person would feel sexually humiliated or offended if that person were in the victim employee’s situation in view of the social community’s healthy common sense and socially accepted notions. The condition in which these behaviors are considered sexual harassment does not require the offender’s sexual motivation or intention, but shall consider the relation with the victim employee, place and situation where such behaviors happened, the counterpart’s explicit and presumptive reactions and details of such behaviors, characteristics and degree of the behavior, whether such behavior was one time only or repeated, and other concrete situations. So, such behaviors should be ones which a normal and average person in the same situation would also feel sexually humiliated or offended objectively. In such cases, these behaviors should be admitted as sexual harassment that resulted in the counterparty feeling sexually humiliated and offended.

In this sexual harassment case, the victim employee felt humiliated by her supervisor’s sexual language and behavior, which furthermore caused a feeling of inferiority and disgust by the victim. In considering a normal person’s reaction, such language and physical behavior would cause similar

feelings. Therefore, the sexual language and other details mentioned by the female employee would be considered workplace sexual harassment.

<Question 2> How can the company deal with a reported case of workplace sexual harassment?

<Response> According to the Equal Employment Act, "1) An employer shall take without delay disciplinary measures or other equivalent actions against the sexual harasser if an occurrence of sexual harassment at work has been verified. 2) No employer shall dismiss or take any other disadvantageous measures against a worker who has been the victim of sexual harassment at work or has claimed to have been sexually harassed (Article 14). If the Company violates the aforementioned items, the employer shall be punished by a fine for negligence not exceeding 5 million won (Article 39)." Accordingly, when receiving information on sexual harassment at work, the employer shall interview the parties concerned, investigate the case, confirm the actual facts, and then take appropriate measures such as disciplinary action and report the outcome to the employee who was sexually harassed.

<**Question 3> How can the company deal with this case in a reasonable manner?**

<Response> The company shall take appropriate action for cases of sexual harassment in which the victim employee shall be protected from any further damage and the offender punished through acceptable disciplinary action. The company shall also work to prevent recurrence through employee education on sexual harassment.

I would like to suggest a level of disciplinary action for this case as salary reduction (10% of one month's salary) and a written warning letter stipulating that any repeat will result in serious disciplinary action like dismissal. It is also advisable to have the labor attorney who is handling this case to give a presentation on prevention of sexual harassment at your Suwon site.

2. Email conversations between the victim employee and the Labor Attorney

From: Victim employee; To: Labor Attorney; Sent: August 20, 2014 (Wednesday)

On August 12 I submitted my resignation, and on Thursday, August 14, the site manager held a general meeting in an attempt to excuse his behaviors and said to all attending employees that he did not have any intention to harass the female employees. At that meeting, he outlined point by point what I explained in my statement, explaining that he did not mean to harass me.

What angered me is that the site manager apologized to me and even sent a message that he was a stupid man and he was so sorry for his behaviors, but in front of other employees, he excused himself by skipping over the worst incidents and telling people that I was hypersensitive about nothing out of the ordinary.

From: Labor Attorney; To: Victim employee; Sent: August 20, 2014 (Wednesday)

I apologize that I have been unable to protect you better. I think the company made mistakes in handling this case. First of all, the most important thing is to protect the victim employee…. I wish you had contacted me before submitting your resignation.

From: Victim employee; To: Labor Attorney; Sent: August 20, 2014 (Wednesday)

The Personnel Team continuously recommended that I not submit my resignation. However, frankly speaking, I was disappointed to hear that the level of punishment would only be salary reduction (10% of one month's pay). I was not sure whether I could continue to work with the site

manager, so, after discussing it with my family, I decided to resign.
From: Labor Attorney; To: Victim employee; August 20, 2014 (Wednesday) It is very sad. Now, the site manager has resigned and you also quit. So, everyone related to this has become a victim. My expectations were that I could protect both him and you, but I was unable to protect anyone at all. I think that I should take more preventive action to avoid a repeat of this case. As time passes, it will be difficult for people to adjust to the changed environment. I would like to recommend that you reconsider your decision to quit.
From: Victim employee; To: Labor Attorney; Sent: August 26, 2014 (Tuesday) The reason why I quit was not because the Labor Attorney could not protect me. When I officially submitted my statement to the Personnel Team, the other female employee was also planning to submit her statement, but the Head Office persuaded me not to make this case public until obtaining more tangible evidence, because the company needed the site manager during contract-renewal with the client company. As I understood the company's situation, I felt it would be hard to continue to work for this company.
From: Labor Attorney; To: Victim employee; Sent: August 26, 2014 (Tuesday) I feel very unhappy to see the tragic results of this sexual harassment case. I have always thought that the offender should be given a chance and punished lightly, but now I think this is not always best. Because of this case, I realize I need to consider the victim employee's situation and try to help the victim employee more.

IV. Lessons Learned & Opportunities for Improvement

Sexual harassment cases cause considerable damage not only to the individual employees concerned, but also the company. This company has also turned to annual education to prevent sexual harassment, but this has not prevented it effectively. Rather, this company spent energy on covering up the case more than on dealing with it appropriately.

The labor attorney in charge could not give sufficient advice as he did not fully understand the situation. His advice was designed to protect both the victim and the offender together, but could not protect anyone as three persons related to this case resigned. As the company failed to adequately consider the victim's position and requests, two victim employees resigned. The offender too was forced to resign due to his moral responsibility. As can be seen by reviewing the email conversations between the victim employee and the labor attorney handling the case, it is regrettable that the company failed to handle things effectively, and that the labor attorney did not fully appreciate the victim employee's situation.

On August 27, 2014, the labor attorney in the case above gave a presentation on prevention of workplace sexual harassment at the Suwon site where the sexual harassment occurred. He explained the definition, the types, the judgment criteria for determining sexual harassment, and the employer's legal obligations, all of which was taken very seriously in light of the case the participants all knew about. As the outcome of this case reveals, preventive action through education on sexual harassment is the best policy, while knowing how to appropriately handle any cases that do occur will do much to realize as little disruption as possible to both the company and the victim employees.

Sexual Harassment at Work and its related cases

(Administrative Interpretations and Judicial Rulings)

I. Questions and Answers concerning Sexual Harassment at Work

→ reference: Publication of the Ministry of Labor 『Sexual Harassment at Work, from its preventions to countermeasures』(March 2001)

1. Q&A designed to understand the concept of sexual harassment at work

Q) Does sexual behaviors of the customer's agents or employees from the affiliate company constitute sexual harassment at work?

A) It is difficult to define sexual harassment by people, that is, by those related to customer's companies or by those within the company in which one works in. However, if an employer, a senior, or an employee makes the environment conducive for sexual harassment or demands the victimized employee to tolerate sexual harassment, it can constitute sexual harassment at work and the employer may be held liable.

Q) Is it possible for sexual harassment to occur in the process of job interview before an employee is formally hired?

A) Yes, it is possible. An interviewee in the process of job interview for employment is a potential employee. It can thus constitute sexual harassment when the interviewer causes the interviewee to feel sexually humiliated, when the interviewer make any verbal or physical conduct of a sexual nature to the interviewee or makes sexual approaches/requests to interviewee.

Q) Is it possible for a female to be a sexual harasser?

A) Generally sexual harassment at work is committed by male rather than female but it may also be possible at times for such offences to be committed by a female to a male, a female to a female and a male to a male. For example, it can constitute sexual harassment when a female superior sexually harasses a male subordinator against his wishes.

Q) Can an hourly or daily rated employee be protected against sexual harassment at work?

A) The Equal Employment Act is applicable to all employees, including hourly and daily rated employees, working at a business or workplace with five or more employees. As such, hourly or daily rated employees working in a workplace with five or more employees can be protected against sexual harassment at work. For hourly or daily rated employees working in a workplace with four or less employees, the 'Gender Discrimination Prohibition and Remedy Act' which applies to workplace with four or less employees provides them with such protection.

Q) If the victimized employee reacts to verbal or physical conducts of sexual nature passively / silently, can it still be regarded as sexual harassment?

A) Yes, it can. For an example, due to lack of social experience, a victimized employee may be under the impression that sexual harassment is generally acceptable and thus tolerated passively without apparent sign of rejection. But as he/she gradually felt sexually humiliated and raised contention against such acts, it can still be regarded as sexual harassment. However it may not be regarded as sexual harassment if the victimized employee explicitly permits the continuance of such verbal or physical conducts of a sexual nature.

Q) If a senior employee displays pictures of overly exposed women on his desktop computer screen, is it regarded as sexual harassment?

A) Except for special circumstances, visual conduct of sexual nature is also regarded as sexual harassment so long as there is a victim resulting from such conducts. Having obscene pictures on one's own desktop computer screen placed on one's own table is a personal inclination. Although such a personal lifestyle shows inconsideration to others and hence immaturity, it does not suffice for relation to sexual harassment. However, when such behaviors cause others to feel uneasy and when the harasser pays no heed to victim's explicit expression of such uneasiness but continues with such behavior, it can be regarded as sexual harassment at work. In that respect, hanging of obscene calendar at a location meant to be seen by women is definitely regarded as sexual harassment.

Q) Does sexual harassment exists only when the harasser carries intention of causing sexual harassment?

A) No, even though the sexual harasser may not be conscious of his sexual harassment act, the victim may feel sexually harassed. Hence, whether sexual harassment exists or not should not be judged based on the harasser's intention but from the point of view of the victim. However, since victim's response differs from person to person, the standard of judgment should therefore be based on socially accepted norm of how a reasonable person would react towards such verbal and physical conduct of sexual nature if he/she is in the victim's situation.

Q) If there is no specifically targeted person for sexual jokes, does it still constitute sexual harassment?

A) Yes, it does. Even though verbal and physical conduct of sexual nature may not be targeted at specific person, it still constitutes sexual harassment if it invokes sexual humiliation or contributes to hostile environment.

Q) Does demand for errands such as delivery of beverages and photocopying of document targeted restrictively at female employees constitute sexual harassment?

A) Sexual discrimination acts, as below, may be regarded as sexual harassment ① Degrading female employees by addressing them as 'Halmony(grand mother)', 'Ajumma', 'Yah', etc. ② Discrimination of roles between the genders such as degrading females' roles to homemaking, husband-supporting or child-raising whilst glorifying males' roles as master and authority of home ③ Restricting certain task to be performed by a certain sex, for instance, only female employees are demanded to perform errands such as delivery of tea and photocopying of document.

Notwithstanding the type of job the victimized employee is engaged in, 'sexual discrimination type of sexual harassment' basically affects the victim's will to work and her work efficiency by degrading female employees to roles of home-making and child-raising whilst glorifying male employees to more superior status as home master.

Whether such acts constitute sexual harassment or not very much depends subjectively on the victim's individual feeling in addition to a standard of judgment based on socially accepted norm of how a reasonable person would react towards such sexual discrimination if he/she is in the victim's situation. With such a perspective, it remains difficult for Koreans to perceive sex discrimination as a form of sex harassment because until now sex discrimination has been our nation's socially accepted norm.

Q) Does a one-time verbal abuse of sexual nature constitute sexual harassment?
A) Yes, it does. Under conditional sexual harassment, when such one-time verbal abuse of sexual nature resulted in the victimized employee showing rejection or expressing feeling of displeasure or suffering disadvantages in personnel-related matters, it undoubtedly constitutes sexual harassment. Also, even if the verbal abuse is trivial but if such unwanted behavior is repeated to the extent of causing sexual humiliation or affecting work efficiency, it can constitute sexual harassment.

2. Q&A concerning employer's duties in relation to sexual harassment at work

Q) Does distribution of company's papers or brochures suffice as training on preventing sexual harassment?
A) In implementing training on preventing sexual harassment, it is a good method to create awareness about sexual harassment to company's managers or employees by distributing company's papers or brochures. However, such method should be used as a supplementary measure. At the very least, there should be various forms of trainings such as employee seminars, regular meetings, department-level trainings and audiovisual educational trainings. If possible, it is also important to have many dialogue and discussion sessions for sharing and exchange of opinions with one another.

Q) As trivial sexual jokes may also be regarded as sexual harassment at work, should employer adopt personnel measures such as department transfer and disciplinary punishment when such harassment occurs?
A) There should at least be measures such as light warnings. Even if a verbal or physical conduct of sexual nature appears trivial from a third party's objective point of view but from the point of view of the victim, it may be felt as a severe sexual humiliation. As such, so long as the employer agrees that the offence constitutes sexual harassment, the employer should pursue it and serve disciplinary warnings to the harasser in order to prevent the recurrence of such harassment. Accordingly, the employer should, through the use of punishments such as warnings, try to ensure that harassments akin do not recur.

Q) Can an employer impose heavy disciplinary punishment such as dismissal for trivial sexual harassment offence?
A) If a light disciplinary punishment such as warning fails to stop sexual harassment behaviors, the employer may impose heavier disciplinary punishment. However, if heavy disciplinary punishment is resorted without attempting light disciplinary punishment for even once or if heavy disciplinary punishment is resorted after the harasser has already stopped its sexual harassment behaviors after a light disciplinary warning, it would then have to be deemed as not acting in line with socially accepted norm.

Q) In the event there are harasser and victim parties to a case of sexual harassment, is it regarded as unfair to transfer only the victimized employee?
A) In general, workplace transfer can be used as a disciplinary punishment against the sexual harasser. However, if the victimized employee voluntarily requests for or agrees to the transfer and there is no problem arising from doing so, transfer of victimized employee may also be the case. However, if there is no business necessity in making such transfer or if there is no consideration to the victimized employee's opinion, or if it is done against the victim's will, such transfer would be treated as transfer without appropriate reason according to Article 30 of the Labor Standards Act.

Q) When a dispatched employee committed sexual harassment at work, does the employer who uses his/her services have to impose disciplinary punishment?

A) In the event a dispatched employee initiates sexual harassment at work, the employer who uses his/her services will have to take the responsibility to conduct fact-finding and organize the formation of dispute dissolution committee. However, as such employer does not have the authority to discipline the dispatched employee, direct disciplining would be impossible. Nevertheless if the dispatched staff's sexual harassment act is confirmed to be true, the employer who uses his/her services may recommend to the employer who dispatched him/her to take disciplinary punishment against him/her. If the dispatched employer does not respond, the using employer can request for termination of seconding contract.

3. Q&A concerning the rights of the victimized employee to seek help

Q) Is it possible to punish sexual harasser by the Equal Employment Act?

A) It is not possible to directly punish sexual harassers by the Equal Employment Act. This is because in order to punish the sexual harasser by an act that does not differentiates between his/her acts inside and outside of the company, it would have to be regulated by a general law that apply to all nationals instead of a law such as the Equal Employment Act which is specific to employment. As the Equal Employment Act entrusts employers with the responsibility of prohibiting and preventing discrimination, there is no provision stipulated in the administrative legal structure to punish the sexual harasser. However, as there are provisions for employer to implement measures such as department transfer, disciplinary punishment, etc. against sexual harassers, the victimized employee may therefore request to a grievance handling committee for help to resolve problems of sexual harassment and may also request for disciplinary punishments to be imposed on the sexual harasser. If such requests are not accepted by the employer, the employee may lodge with the Labor Office for remedial action against the employer. In addition, the victimized employee may also bring a civil suit against the sexual harasser so as to claim for compensation.

Q) For sexual harassment case happened 2 years ago, is it still possible to appeal for an internal solution by the company or to lodge complaint with the Labor Office?

A) Yes, it is possible. Extinctive prescription of labor laws generally allows for three years and extinctive prescription of general rights in the Equal Employment Act also allows for three years. As such, for sexual harassment occurring within 3 years the Equal Employment Act is absolutely applicable and the victimized employee may lodge such complaint with the Labor Office.

Q) When there is sexual harassment, must the victimized employee personally lodge her appeal or complain in order for her right to seek help to be effective?

A) No. In the event an employer disadvantages an employee in her employment or did not take appropriate measures against the sexual harasser, it is also possible for a third party such as a consulting body to seek redress or to complain to the Labor Office. However, as sexual issues are likely to infringe on characters and rights of both the victimized employee and the sexual harasser, the representing third party will have to sufficiently consider the victimized employee's opinion before appealing or complaining to the labor office

II. Cases of Sexual Harassment at Work

[Case 1] This was a case affirmed as sexual harassment at work as the assistant manager demanded his subordinate to fill the glass of the managers with liqueur.

Details of the case

- The victimized employee (A), a nurse of a hospital supervised by a Manager of Nurse of the same hospital, attended a company's dinner on March 26 1999 and was told by an Assistant Manager of the General Affairs team (B) at the company's dinner to fill the glass of the Director of General Affairs and that of the General Manager of Treatment team with liqueur. When (A) rejected that suggestion, (B) grasped her arm and took her to the table of the director and the general manager, and forced her to fill the glass with liqueur. Because of this incident, the victimized employee (A) felt severely humiliated.

Judgment

- Sexual harassment at work can occur in a company's dinner related to work. This case was in relation to work as the company's dinner was held under the supervision of the Manager of Nurse.
- The Assistant Manager of General Affairs team (B) took advantage of his position as a superior in the company to verbally compel the victimized employee (A) to fill the glass regardless of her dislike. From the perspective that the employee felt sexually humiliated, such an act therefore constitutes sexual harassment at work.

[Case 2] Disciplinary dismissal due to sexual harassment behavior at work is an exercise of justifiable rights of personnel, but disciplinary dismissal out of sympathy for the offender is unfair dismissal.

Details of the case

- Applicant A and B worked as Manager and Assistant manager of the Planning team in a hospital respectively and attended the department's dinner at a restaurant near the hospital. At the dinner, applicant A went to the extent of making physical abuse of a sexual nature by fumbling the thigh of a female employee and touching her breast, but applicant B just looked on such sexual harassment behaviors and somewhat expressed sympathy.
- After this incident, the employer dismissed applicant A on grounds of sexual harassment and also dismissed applicant B for not upholding morals at work. Both applicants A and B sought remedial help to the Labor Relations Commissions against unfair dismissal by the employer.

Judgment

- Depending on the severity of the sexual harassment and the continuity of such acts, the employer would have to take reasonable disciplinary measures such as department transfer, warning, reprimand, salary reduction, job transfer, suspension from work, being placed on the waiting list, suspension from office, etc.,
- Article 10 of enforcement decree of the Equal Employment Act regulates that 'in cases where the employer takes disciplinary measures such as department transfer, disciplinary punishment, etc., he shall consider the severity of sexual harassment and its continuity. Accordingly, the employer shall determine a reasonable level of disciplinary punishment, considering ① whether the sexual harasser is aware of the fact that the victim employee did not want the behavior? ② were the behaviors repeated somehow? (for example, the level of sexual harassment, its continuity, etc.)

③ Is there any difference in power (authority) between the sexual harasser and the victimized employee? and ④ the legal ambit which the victimized employee comes under.

- In this respect, as dismissal is the heaviest disciplinary punishment causing severe threat of the employee's survival right, Article 30 (1) of the Labor Standards Act regulates that it shall be implemented only in the case where there is a reasonable grounds. In this case, reasonable grounds imply that the employee's violation was so severe that it would be difficult to continue his employment with the company. And the employer will have to consider the gravity of the employee's violations and equality compared with other employees, and shall not abuse the rights of employer in imposing punishment.
- It follows that the disciplinary dismissal imposed on A, who had at the dinner gone to the extent of physical sexual abuse by fumbling the thigh of the female employee and touching on her breast, was an appropriate exercise of personnel management's rights as it had considered the severity of applicant A's sexual harassment conducts. However, for applicant B who had just looked on such sexual harassment behaviors and who somewhat showed sympathy, the imposing of disciplinary dismissal similar to the punishment received by applicant A would be deemed as an abuse of the employer's right in considering the severity of the employee's violations and in maintaining equality amongst employees.

[Case 3] A case difficult to be affirmed as sexual harassment based on the harasser's verbal and physical conduct.

Details of the case

- Applicant and defendant were both hospital employees. The applicant worked as a Service Manager in charge of receiving patients, while the defendant worked as a Planning Director in charge of personnel management of all employees and was a senior manager to the applicant.
- On August 16 2000, the applicant was waiting for an elevator together with her superior, a Nursing Manager, on their way to work. The defendant got on the elevator at the underground first floor, and the applicant and her superior joined in from the first floor to the fifth floor. On the way to the fifth floor, the defendant said to the applicant "Ms. Kim, you should try to greet" and he tapped the hip of the applicant twice with a folded newspaper. The Nursing Manager got himself involved at this juncture, but the defendant said, "I wonder whether people still know their workplace manners after marriage." The applicant felt embarrassed and sexually humiliated to have her hip tapped in the presence of many employees working together in the same building and therefore claimed this incident to be a case of sexual harassment rather than a case of plain assault.

Judgment

- In judging sexual harassment, the victim's subjectivity should be considered. At the same time, socially accepted norms on how a reasonable person, in the victim's circumstances, would evaluate or react to such a controversial situation should also be considered.
- The applicant claimed that she felt embarrassed and sexually humiliated when the right-hand side of her hip was hit by the defendant's newspaper.
- Even though she was tapped on the hip, it was only an indirect contact with the newspaper held by the defendant. There was no verbal abuse of a sexual nature except for an advisory remark," Ms. Kim, you should try to greet" and there was also no disadvantage in employment to the applicant. The main fault lies with the defendant's behavior in using an advisory method in front of other people. As it was hard to find sexual factors in the incident, what the applicant felt was judged as

plain humiliation rather than sexual humiliation. As such, it could not constitute sexual harassment.

Adjudicated to compensate 30 million won for compelling a subordinate to drink (May 5, 2007, Seoul Appellate Court 2006 na 109669)

A married male manager at an internet game development company had very often organized drinking sessions after work on the reason of promoting teamwork, and he also included the female unmarried employees. At such drinking sessions, he would compel female employees who could not drink alcoholic liqueur for physical and health reasons to drink. Such drinking events often went on till dawn disabling the female employees from returning home early. He had also often used sexual remarks of sexual harassment nature to the female employees at the drinking place or office. The manager's aforementioned behaviors which are infringement of the autonomous expression of opinion and behavior of his younger employees and violations of their personality freedom are damage to others' humane dignity. And if confirm to have caused others severe sufferings in their state of mind, it can also constitute illegal behavior.

Vice-Principal's verbal and physical conduct at official dinner meeting of expecting female teachers to fill the glass of the male principal did not constitute sexual harassment. (Feb. 11, 2004, Seoul Administrative Court 2003 guhap 23387)

The dinner meeting was arranged by the 3rd grade elementary school teachers to welcome a newly appointed vice-principal (plaintiff) and they invited the principal and vice-principal. So, it was a place where the plaintiff and the teachers met for the first time. At the dinner meeting, participants were mainly discussing about teachings when some female teachers were given liqueur-filled glass by the principal and were suggested to toast. However, neither did they empty their glass nor did they reciprocate by filling the glass of the principal. The plaintiff, on seeing this situation, suggested that the female teachers should fill the glass of the principal. The plaintiff claimed that it would be more correct to view his verbal and physical conduct in this case as a recommendation for subordinates to reciprocate their superior's toasting rather than an intention to discriminate against the female and asking them to pour liqueur for the principal just because they are females. Other female teachers who heard the plaintiff's suggestion to those female teachers about pouring the liqueur for the principal felt unpleasantness but did not feel a sense of sexual humiliation or dislike. Integrating all the points in this testimony about the characteristics of the dinner meeting, relationships of the participants, place, the situation under which the plaintiff's remarks were made, and whether there had been any sexual motives or intention etc., the verbal and physical conduct of the plaintiff in this case, strictly speaking, is in line with our nation's common sound knowledge and customary practices, and hence it is difficult to conclude his remarks and behaviors as intolerable or are violations of kind mannerism or social order.