Work-from-Home Systems

I. Introduction

As of June 8, 2020, the number of persons confirmed to have been infected by the coronavirus in Korea was approaching 12,000, with over 270 dead. COVID-19 is spreading worldwide and showing signs of prolongation. In this emergency situation, many companies are putting work-from-home procedures in place to protect workers while continuing business. However, these procedures have been introduced without preparation, lowering work efficiency and causing many negative side-effects.

To maintain efficiency while a work-from-home system is in place, the following three criteria must be met in the introduction process: (i) the jobs must be suitable for working from home; (ii) the employee(s) must have the necessary work environment to work from home; and (iii) there must be continuous management supervision of those working from home. First, a work-from-home system should be introduced only for jobs in suitable fields. Second, an IT work environment must be in place for the employee(s). Only then will it be possible to manage and supervise the work and address the security concerns related to working from home. Third, application of the Labor Standards Act to maintain and manage the working conditions of those working from home must be made clear. From this point of view, I would like to review the concept of working from home and suggest concrete methods to make a work-from-home system sustainable.[1)]

II. Jobs Suitable for Working from Home and Required Equipment

1. The concept of working from home

Working from home provides flexibility when a work space is provided in a "home" and utilizes information & communication technology and the facilities & equipment necessary for the work. Regular working from home involves most of the work being done from home, while occasional working from home involves only part of the week spent working from home and the other part at the office. This would include, for example, Mondays and Tuesdays at home working and the rest of a 5-day work week in the office.

2. Jobs suitable for working from home

Jobs that allow workers to work independently and involve the performance of individual tasks, jobs that have little or no face-to-face contact with customers, and jobs that do not need to be performed at a specific location are all suitable for a work-from-home system. Such a system is particularly easy to introduce into fields such as program and game development, web design, book publication, distance education, financial and insurance marketing, civil complaint consulting, planning and administrative processing, and computational work.

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1) Reference: Ministry of Employment and Labor, "Manual for the Introduction and Operation of a Systematic Flexible Working System", December 2017; Ministry of Employment and Labor, "How Korean Companies Will Put Flexible Work into Action", November 2016; Labor Ministry Guidelines (kungi 68201-4085, December 29, 2000): "Standards for Application of the Labor Standards Act with Those Working from Home"; Ministry of Employment and Labor, "Flexible Working Hours Guide", August 2019; Seung-Gil Lee, "Status of Those Working from Home in Terms of Labor Law", Labor Law, August 2001, vol. 123.

(1) Suitable tasks:

1) Work with little or no face-to-face contact with customers;
2) Work allowing a high degree of independence and little need for approval or reporting, or organizational management that allows a high degree of independence due to little need for cooperation between organizations;
3) Work easy to quantify in work performance evaluations; and
4) Jobs determined by managers with approval authority after considering business characteristics and working conditions of the department.

(2) Unsuitable tasks:

1) Jobs where there is significant security risk due to insufficient security measures in the relevant business;
2) Jobs involving safety inspections, equipment inspections, and accident handling measures, etc., where the person responsible should be there to do such jobs, or the risk will inevitably and significantly increase if the work were to be done from home;
3) Jobs where the work must always be carried out in a specific place for the purpose of receiving and processing civil complaints;
4) Jobs where other serious obstacles are expected before business (administrative) objectives can be achieved.

3. Equipment needed when working from home

A certain level of working environment and work facilities (seats, PCs, etc.) are needed at home so that the work can be performed in an identical or very similar environment to the regular office.

(1) Preparing work space

As contact with family members can disrupt work performance, employers need to ensure that those working from home have an independent space dedicated to work.

(2) Construction of an IT infrastructure

The company will need to provide the basic IT devices and networks needed to do business at home. These would include computers and accessories, printers, communication equipment, and personal web cameras for video conferencing. The company will also need to provide the necessary solutions (electronic payment, messenger, file sharing, project management, etc.) when accessing office systems or performing company work.

(3) Cost burden

It is common for the employer to bear the communication expenses related to working from home, the cost of information and communication equipment, and work-related consumable items.

(4) Security measures

Working from home requires measures to protect information security. Such measures may include (i) providing a solution to security threats that may occur when accessing an office system from home, and to support with related technologies, (ii) introduction of a computer that leaves all work and records on the cloud rather than individual computers, (iii) actions to prevent family members of the employee working from home from accessing any company data, (iv) safe disposal of document waste, and (v) preparation of measures to ensure security of the home office space and computers (such as shutting them down automatically) when the employee is not at the work-from-home location.

III. Introducing a Work-from-Home System

Introduction of a work-from-home system requires (i) a written agreement with the workers' representative, (ii) changes in the labor contract with individual workers, and (iii) changes in the rules of employment. Even when a work-from-home system needs to be revised, the employer must follow the above 3 steps again. However, when the work-from-home system will apply only to a particular worker, only that worker's consent is needed.

1. Written agreement with the workers' representative

The Labor Standards Act (Article 58 (2)) provides for the provision of a written agreement with the employees' representative when working outside the workplace, such as working from home. The time required for the performance of work is usually determined through a written agreement, but the content of the rest of the written agreement is not otherwise specified. Eventually, if the working hours for a work-from-home system are determined in a written agreement, the details of place of work and those to whom the agreement applies should be included.

2. Changes to the employment contract

(1) Since the details of workplace and working hours are legally required to be specified in the employment contract, the working contract must reflect the changed workplace and working hours under the work-from-home system (regular work from home).

(2) For occasional work from home at a certain frequency and time while the company workplace remains the main workplace, it is necessary to state in the employment contract that work at a certain frequency and time outside the workplace is possible. However, as is the case for remote work, it is common for employment contracts to stipulate that uniform working conditions such as working place, working hours, and holidays are subject to employment rules or collective agreements. In this case, even if it is not specified in the employment contract, it is recognized in the employment rules that the company fulfilled its obligation to notify workers of compulsory working conditions.[2)]

3. Changes to rules of employment

When introducing a work-from-home system, whether there is a need to change the existing rules of employment needs to be confirmed. Any changes shall be reflected in the existing rules of employment.

(1) If there is no change to the rules of employment: When comparing the working conditions of working from home with those of ordinary workers at the workplace, if there are no changes in working conditions besides workplace, individual consent of the worker who wants to work from home is all that is needed. There is no need to change the rules of employment.

(2) When the rules of employment need to be changed: If the employer requires all workers in the business or workplace to work from home.

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2) Labor Ministry Guideline: Labor Standards Team-5809, August 7, 2007.

Example rules of employment: Article 00 (Working from home)

① The company may introduce a work-from-home system for workers desiring to work part or all of their working hours at home.

② The working hours of workers to work from home are considered to be 8 hours a day. However, working hours may be determined separately according to the work performed. When the working hours are determined by written agreement with the workers' representative, the hours in the agreement shall be considered working hours that have been worked.

③ If those working from home want to work overtime, at night or during holidays, the approval of the head of the department must be obtained in advance. In this case, 50% of the normal wage is added and paid.

④ Requests to come to the company workplace due to reasons such as business meetings, work orders, work performance evaluation, education, events, etc. must be followed.

IV. Application of the Labor Standards Act

1. Attendance management

The Labor Standards Act regulations on working hours and rest also apply to workers working from home. However, working from home is a form of work in which workers' working hours and daily home life cannot easily be separated due to the nature of the workplace. It is difficult to manage and supervise such working hours as they are at home. In the end, it is left to the worker whether to fulfill the duty to provide work during the specified working hours. However, online attendance records and information and communication devices can provide some assistance with worker management.

Regulation example: Work-from-Home Service Regulations

① Workers who have been approved to work from home are expected to manage their time and attendance well, including the time they start and finish their work each day. If necessary, the authorized person can confirm this by telephone or an in-person visit.

② Workers shall not leave the at-home workplace for personal reasons during the performance of work. If they need to work outside their home or at the applicable "smart work" location, this must be approved by the relevant company authority in advance. However, if it is unreasonably difficult to obtain this relevant authority's prior approval, the worker must immediately report to the relevant authority after changing the place of work for a late approval.

③ The worker shall immediately report any emergency while working from home to the approval authority, who shall respond with appropriate instructions.

④ Those working from home must provide an electronic report of their work plan and outcomes to the approval authority at least once a week.

2. Working hours, overtime, night work allowance

When the work-from-home system is introduced, whether or not an overtime allowance, night work allowance, or holiday work allowance occurs depends on the specified working time for the worker or the time normally required to perform the work and the range of working hours established by the labor-management agreement.

In principle, if the teleworkers (which is another term referring to those working from home for an employer) required to perform a specific task in accordance with the employer's instructions work overtime, at night or during a holiday, overtime and nighttime work allowance must be paid. However, it is desirable to prepare a similar procedure for general workers to apply for overtime, night, and holiday work in advance and be approved by the employer before working those hours. For example, a procedure might include reporting in advance plans to work over a holiday to obtain the employer's permission and then report the outcome in detail.

3. Leave and rest time for tele-workers

If the rules of employment do not provide separate rules for leave and rest for ordinary workers working from home, the employment rules on working hours, leave, and rest for ordinary workers apply. In this regard, it is desirable for the employer to set in advance the matters concerning working hours and non-working hours (for example, non-working hours due to vacation or sick leave).

4. Job training and compulsory training

It is unavoidable that workers who work remotely or from home are susceptible to some concern that they may lag behind their colleagues in development of their abilities, etc., because working from home does make it difficult to have the educational opportunities normally obtained during on-the-job training (OJT). When a separate in-house education or training system, or legally-required program is run, this should be reflected in the employment rules. In particular, as education on safety and health (Article 29 of the Industrial Safety and Health Act), preventing sexual harassment (Article 13 of the Equal Employment Act), and protecting personal information (Article 28 of the Personal Information Protection Act) is normally run for workplace workers, the employer will need to provide equal training opportunities to those working from home.

5. Safety and Health Standards

Depending on the nature of their work, if it falls under the safety and health standards in the Industrial Safety and Health Act, those working from home will need to follow those rules. Accidents arising during the work at home will be considered occupational accidents and those injured/ill are eligible to insurance benefits under the Industrial Accident Compensation Insurance Act. However, accidents caused by workers' actions unrelated to work are not recognized thus.[3)]

6. Performance evaluation

When employees are working from home (full time), it is desirable to establish a system so that workers do not worry about performance evaluation and personnel management issues because they are not working at the normal workplace. The most difficult thing for companies who have workers providing work from home is ensuring efficiency from those workers. In the course of evaluating work performance, tele-workers are often less productive and feel less managed. It is a good idea for the company to do the following: (i) measure the performance of tele-workers based on visible results; (ii) manage quality of work from teleworkers, and (iii) implement performance evaluations

3) Labor Ministry Guideline: medical care 0509-90, February 14, 1996

for teleworkers as necessary, and report summary results and explain to them their ongoing progress.

V. Conclusion

In order to increase work efficiency and promote the morale of workers working from home, it is necessary that a work environment is put in place that is suitable for independent work. In addition, it is important to separate work duties from the private lives of the workers so that they can continue to work from home. Therefore, rather than having them work from home the entire week at the beginning, it is necessary to introduce working from home on an occasional basis to ensure it is possible to do so on a regular basis later.

Whether Union Activities by Union Officials is Company Work

I. Introduction

I would like to discuss an accident related to overwork, which will be deemed a work-related accident eligible for compensation depending on whether union activities by a union official are determined to be company work. In determining this, I will examine laws, guidelines, and precedents.

1. Summary of the Case

On January 24, 2018, a 49-year-old KTX train driver working for the Seoul High Speed Railway Office (hereinafter referred to as the "Employee") died from a heart attack around 11 pm while resting at home after returning from a workshop of labor union officials. In response, the surviving family filed an application for survivor's benefits with the Ministry of Employment and Labor, claiming that the Employee had overworked, but received a decision against payment. The Ministry of Employment and Labor determines the occurrence of overwork primarily based on working hours, and generally believes that workers overwork only when they work an average of 52 hours or more a week for 12 weeks.[4] In this case, general KTX drivers work an average of 18 days every four weeks, depending on the train shift work, and 36 hours per week on average.[5] The Employee worked 23 days over 4 weeks as of the date of the accident and worked an additional 5 days, averaging 46 hours per week for 4 weeks. The reason the Employee worked more was because KTX had sent more than 10 percent of their drivers to the newly-constructed Gyeonggang Line, built for the PyeongChang Olympics.

Of particular note is that while the Employee was directly engaged in driving KTX trains, he also held two positions in the Seoul High Speed Railway's labor union: as union vice-chairman and union manager of safety and health. In this case, the hours not recognized as providing work for the company are as follows: (i) the Employee participated in a two-day labor union officials' workshop just before the accident, returning to work on the day of his death, after working 16 hours; (ii) The Employee performed his duties as the union's person responsible for adjusting shiftwork schedules (a monthly average of 8 hours required), and (iii) as the union safety manager, the Employee consulted

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4) Brain stroke and heart disease (Ministry of Employment and Labor Notice No. 2017-117, issued on Dec. 29, 2017)

5) The shift work is assigned on a six-day rotation, consisting of "day – day – night - night & morning work – off-day - holiday." As the working day is calculated as eight hours, when it is calculated for four weeks, drivers work 18 days, with an average of 36 hours per week.

with the company manager about an accident that had resulted in operational delays for a KTX train the previous day (1 hour). The Ministry of Employment and Labor did not recognize the union activities of this Employee as work provided to the company, so the case was rejected as an occupational accident due to a lack of working hours meeting the criteria for overwork.

2. Confirmed Facts[6)]

- The Employee was employed by the company on December 12, 1990 and had driven trains according to the shiftwork schedule of a high-speed railway driver until he died from a heart attack on January 24, 2018.
- The Seoul High-Speed Railway Office's labor union consists of 230 train drivers, and the Employee held the positions of union vice-chairman and safety and health manager.
- The Seoul High Speed Railway Office dispatched 27 train drivers to support operation of the recently-opened Gyeonggang Line high-speed railway, built for the PyeongChang Olympic Games in January 2018, which resulted in the Employee working an additional five days over a four-week period before his death.
- The Employee was responsible for preparing the shiftwork schedule for the union and confirmed and adjusted the schedule for 230 train drivers together with the management's operations manager on a monthly basis. There were many difficulties adjusting the schedule for February 2018 as it was a special transportation period for Lunar New Year.
- The labor union held a workshop for union officials at Daecheon Beach Condo from January 23-24, 2018. This workshop is held twice a year in accordance with the union's operational rules, and the company's union manager was notified in advance in accordance with the collective agreement. Only union funding was used, with no financial support from the company.

II. Criteria to Determine Whether Union Activities Equal Overwork in the Event of Death

1. Criteria to Determine Overwork as Cause of Death

Death due to overwork is recognized by the Industrial Accident Compensation Insurance Act (IACI Act) as an occupational accident only if it is recognized that the work and disease are related to a significant causality. That is, the IACI Act recognizes that overwork can result in cerebrovascular (brain stroke) or heart disease (Article 34 (3) of the Act). For a death to be recognized as a work-related injury, there must be a considerable causal relationship between work and the incident. To prove this causal relationship, work must have been performed and contributed to the already existing disease if work has been performed, and there is potential for it to be recognized as the cause of the disease-related death . However, for work to be recognized as the main cause of the death when the death occurs while work is not being performed, the surviving family must prove a significant causal relationship between the death and the work. The burden of proof lies with the surviving family: it will not be recognized as a work-related death if they cannot prove the causal relationship.[7)]

In order to fall under the IACI Act, which lists work-related injuries, work-related diseases and accidents on commuting (Article 37(1)), there must be a substantial causal relationship between work

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6) References: Fact Confirmation Reports from the Seoul High Speed Railway Office and the Seoul High Speed Railway Labor Union branch.

7) Practical Labor Law Research Council, Translation of the Labor Standards Act (III), Parkyoungsa, 2020, p. 607; Lee, Hee-ja, "Criteria for Recognizing Work-related Accident concerning Overwork-related Death," Labor Law, monthly magazine, Feb. 2007.

and accident. When determining that an injury is work-related, the accident needs to (i) occur while the worker is performing work or an act in accordance with his/her employment contract; (ii) occur due to a defect in, or the careless management of, facilities, etc. provided by the employer while the worker is using these facilities, etc.; (iii) occur while the worker is participating in or preparing an event organized by the employer or an event following the directions of the employer; or (iv) occur during recess hours due to an act that can be seen as under the control of the employer. What should be noted here is that 'an accident that happens while the worker is participating in or preparing an event organized by the employer or an event following the directions of the employer' can also be recognized as a work-related accident. The standard for determining work-related diseases is virtually the same as determining work-related injuries.

2. Criteria for Determining Whether Union Activities are Work Provided to the Employer

Injuries and diseases caused by union activities are not specified in the IACI Act. However, where union activities of full-time or part-time union officials are recognized as work according to criteria are limited to activities outlined in the collective agreement or activities approved by the employer. In addition, the court considers injury or disease during labor union activities as work-related in accordance with a wider application of the current criteria for work-related injuries.[8)]

The court has recognized as work-related accidents involving full-time and part-time union officials that occurred while such officials were engaged in union activities that met the following criteria. First, it involved full-time or part-time union officials using the paid time-off system. Second, the labor union's work was closely related to the company's labor management work, which means that employers allowed union officials to take charge of the work on behalf of their original work. Third, accidents that occur outside of working hours were work-related union activities.

However, the following are union activities by full-time or part-time union officials that are not regarded as work: first, activities unrelated to the work of the company concerned by an umbrella union; second, illegal labor union activities; and third, confrontational labor-management relations over a period of time from the existence of a labor dispute to conclusion of a collective agreement. Fourth, activities outside of working hours that are not specifically related to the employers' labor management work.

(1) Union activities approved by the employer shall be those involving company labor management.

The fact that a full-time labor union official has been engaged in labor union activities without having to do the work originally outlined in the labor contract is due to a collective agreement or company consent. Labor union activities allow a full-time union official to engage in company labor management tasks, which can be seen as work provided to the company, instead of his original work. Thus, an illness or accident occurring to a full-time union official in the course of performing or its related labor union activities constitutes a work-related injury or disease.[9)]

(2) Paid-time union activities approved by the employer are company labor management duties.

The same shall be deemed to apply to accidents in the course of union officials, who are not full-time union officials, performing or engaging in ordinary activities approved by the company.[10)]

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8) Lim, Jongyul, Labor Law, 17th ed., 2019, p. 497.
9) Supreme Court ruling on Feb. 22, 1994: 92nu14502; Supreme Court ruling on Dec. 8, 1998: 98doo14006; Supreme Court ruling on Mar. 29, 2007: 2005doo11418; Supreme Court ruling on May 29, 2014: 2014doo35232.
10) Supreme Court ruling on May 29, 2014: 2014doo35232.

(3) Union activities shall be related to company labor management.

In the need to form smooth and stable labor-management relations, the full-time union official system allows union officials to take charge of labor union affairs instead of the work originally outlined in the labor contract, while still holding the status of employees. In order for a full-time union worker to be regarded as having a work-related accident under the IACI Act, the labor union activities performed by the full-time union official must be directly and specifically related to company labor management.[11)]

(4) Union activities during which accidents or illness are not recognized as work-related

The following union activities are not considered work: (i) activities related to umbrella unions above or allied to the relevant union and unrelated to the employer's business; ② illegal union activities, and ③ activities that occur during the dispute stage in a conflict with the employer.[12)]

III. Cases related to Union Activities and Recognition of Occupational Accidents

1. Cases where Accidents during Labor Union Activities are Recognized as Work-related

(1) Accidents occurring when a union official was engaged in paid-time union activities.

"A delegate of Kumho Tire's labor union participated in a meeting paid for by the company. The delegate applied for industrial accident compensation after losing his footing and breaking his leg while going down the stairs to get the report, which the Supreme Court acknowledged as an occupational accident. The union delegate was paid to attend the meeting, and the company also provided the meeting place. Furthermore, the agenda of the meeting was as closely related to the company's labor management as day-to-day union activities."[13)] This is a case where an injury occurring to a non-full-time union official was recognized as work-related as he or she was engaged in union activities during working hours with company approval.

(2) A full-time union official had a heart attack on his way home from a union workshop.

"Upon conclusion of a collective agreement bargaining, a full-time union official attended a union workshop conducted as part of follow-up actions. This union official had a heart attack on his way home after the workshop. The series of processes in attending the union workshop can be considered company work."[14)] The heart attack of a paid full-time union official while returning home after a union workshop was regarded as a work-related accident.

(3) An accident occurred while a full-time union leader was removing a banner used in a union campaign.

Prior to collective bargaining, a union official stepped on some plywood while removing a banner used in a union campaign. The plywood fell about 6.5 meters to the floor, during which the official was injured. In order to promote union member solidarity ahead of collective bargaining, the campaign was held between 18:00 and 21:00 after working hours, and was officially permitted by

11) Supreme Court ruling on July 14, 2015: 2005doo5246.
12) Supreme Court ruling on Mar. 29, 2007: 2005doo11418; Supreme Court ruling on May 29, 2014: 2014doo35232.
13) Supreme Court ruling on May 29, 2014: 2014doo35232.
14) Ulsan District Court ruling on Aug. 2, 2006: 2006goohp846.

the company in advance and permitted use of the indoor gymnasium facilities on company premises."[15] Although the accident occurred outside working hours, it was recognized as a work-related injury because it happened while handling the incidental tasks for union activities recognized by the company.

(4) A union official had an accident during a workshop hosted by the industrial labor union.

"The industrial union, like a company labor union, is a single-organization labor union which workers in the same industry directly join and, in principle, have the right to collectively bargain, apply for mediation, and enter into a dispute at an individual company, and so matters in the industrial labor union cannot be treated as umbrella union activities." Labor union work in the industrial union cannot be viewed as activities related to a higher umbrella union or allied labor unions unrelated to the employer's business."[16] In fact, the labor union activities of this industrial union were regarded as activities to improve working conditions at this company because the members had joined the industrial labor union directly.

2. Cases where Accidents during Labor Union Activities are not Recognized as Work-related

(1) A full-time union official was injured during a union sports competition held after working hours.

"A full-time union official was injured during a sports competition, held after working hours, to promote union membership ahead of collective wage bargaining."[17] This is a case where an incident during individual union activities after working hours without the employer's supervision was not recognized as a work-related accident.

(2) An accident involving a full-time union official occurred during the dispute stage of a conflict between labor and management.

"By the time of the accident, the company and the labor union had failed to reach a compromise despite several rounds of wage negotiations, and the labor union was at odds with management and in a state of labor dispute after reporting the dispute to the relevant agencies according to the dispute mediation procedures."[18] This accident was not recognized as work-related because it occurred in the middle of conflict between the labor union and the company.

(3) An accident occurred where a full-time union official was injured during a soccer game organized by an umbrella union.

“A full-time union official participated in some sports organized by the umbrella labor union as a representative of the union. The company did not give its approval to the union official to participate in the sports in this case, and did not pay any expenses."[19] In this case, incidents during activities of the umbrella union are not recognized as industrial accidents occurring during the activities of an upper level umbrella union, as the activities were not related to the improvement of working conditions for the labor union.

IV. Opinions on this Case

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15) Supreme Court ruling on Dec. 8, 1998: 98doo14006.
16) Supreme Court ruling on Mar. 29, 2007: 2005doo11418.
17) Supreme Court ruling on Mar. 28, 1997: 96noo16170.
18) Supreme Court ruling on Mar. 15, 2004: 2003doo923.
19) Supreme Court ruling on 2005doo5246.

In determining whether the death of the KTX driver was due to overwork and therefore an occupational accident, it is necessary to consider not only whether the incident occurred during working hours but also the special working conditions of the victim and the union activities he was involved in as a union official. The average working hours of the victim were only 46 hours per week over 4 weeks, but they were 27% more than the normal high-speed train drivers' average of 36 hours per week over 4 weeks. There are also environmental factors such as the number of night or irregular shifts, and tension and noise in the driver's cab arising from the high-speed train's single-driver and high-speed operations.[20] In particular, the Employee had attended a two-day union officials' workshop held according to a regular schedule on the day before the date of the incident. At the same time, on the day of the incident, the Employee had carried out the work of preparing the shiftwork schedule for union members at his home, and also protested on behalf of the union members to company staff about the delayed railway operations as the labor union's safety and health manager.

In judging whether this case is related to overwork, the Seoul Administrative Court should consider the union activities carried out by this union official as well as the Guidelines on Working Hours for Determining Overwork issued by the Ministry of Employment and Labor.

Criteria for Determining Whether a Unified Bargaining Channel Can Be Separated

I. Introduction

Recently, there have been two separate cases in which a state-run company in charge of post office deliveries and logistics applied to have its bargaining unit divided: one being accepted and the other rejected. The Labor Relations Commission (LRC or the Labor Commission) approved the application from the Korea Delivery Workers' Union, taking into account the differences in outstanding working conditions between the labor unions of the current corporation and this KDW union, and employment patterns. However, it rejected the application from the office workers union at the same public corporation. The reason for this different response is that the Trade Union Act only recognizes exceptions, when deemed necessary, to the principle of unifying negotiation channels.[21] In other words, any differences in working conditions or employment patterns were not significant enough to separate the bargaining unit between office workers and other workers, and no practice was in place for the employer to bargain separately. The Labor Commission determined that any separate needs of the office workers' union could be resolved through fulfillment of the obligation of the designated bargaining representative union to fairly represent the minority labor unions.

These two labor unions are unlikely to have much difficulty in determining the separation of bargaining units due to clear reasons for their employment patterns and working conditions, but in various cases, the Labor Commission uses its own discretion to determine the criteria for the separation of bargaining units which can be unpredictable. In this regard, I would like to examine in detail the objective criteria for determining the separation of bargaining units, and some judgments as examples.

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[20] Brain stroke and heart disease (Ministry of Employment and Labor Notice No. 2017-117, issued on Dec. 29, 2017)
[21] Supreme Court ruling on Sept. 13, 2018: 2015 doo 39361.

II. Understanding the Separation of Bargaining Units

1. Significance of separating bargaining units

With the introduction of multiple unions in one business or workplace from July 1, 2011, the system for unifying collective bargaining channels was implemented to reduce the adverse effects of multiple unions. The single bargaining channel system is required to create a practical guarantee of collective bargaining rights - namely the implementation of proper working conditions on the principle of equal power in labor-management decision-making.[22] Allowing two or more labor unions to negotiate individually with the employer at one workplace is expected to result in conflicts between labor unions and increase the employer's bargaining costs.[23] To this effect, current law requires negotiation be done by a designated representative union if there are two or more labor unions in an organization in one business or one workplace (Article 29-2 of the Trade Union Act). Nevertheless, if there are significant differences in working conditions, employment patterns, and negotiation practices in one business or workplace, separate bargaining units may resolve conflicts between labor unions and improve working conditions for workers. Where it is deemed necessary to separate the bargaining unit to this effect, this may be done with the approval of the Labor Commission (Article 29-3 of the Act).

Separating bargaining units can weaken the bargaining power of labor unions, as unity and numbers in collective bargaining help to protect the power advantage with the employer. Therefore, the Trade Union Act allows unions to unify their collective bargaining channels and only recognizes the decision to separate them in exceptional circumstances.[24]

2. Procedure for separating the bargaining unit

(1) Applicants: A company or a labor union party to labor relations may unilaterally file for separation of bargaining units (Article 29-3 (2) of the Act). Labor unions that have not participated in the process of unifying bargaining channels may also apply, as may branches or unit unions under the umbrella of industrial unions (Article 14, Paragraph 1, 2 of the Enforcement Decree to the Act).

(2) At the time of application: (i) The labor union or employer may apply for a decision on the separation of bargaining units (Paragraph 1 of the above law) before the employer gives notice of the request and (ii) after the date on which the representative labor union is determined. Therefore, it is possible to apply for a separate bargaining unit decision at any time except for the period during which the negotiation channel unification process is carried out.

(3) Effect of application: The Labor Commission shall, upon receipt of an application for separation of bargaining units, notify all labor unions and the employer of the business concerned and require them to submit their opinions. The Labor Commission shall make a decision on separation within 30 days from the date of receipt of the application. Once an application for

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22) The Constitutional Court confirmed constitutionality of the law: Judging on Apr. 24, 2012, hunjae 2011 hunma 338.
23) Lim, Jongyul, 「Labor Law」 17th ed. Parkyoungsa, 2019, p. 124; Lee, Sungwook, "Content and Issues of the Bargaining Union Separation System" Labor Review, Korea Labor Institute, June 2011, p. 8.
24) Supreme Court ruling on Sept. 13, 2018: 2015 doo 39361.

separation of bargaining units is made, the process of unifying the bargaining channel shall cease (paragraphs 1 through 5).

(4) Upon decision: If the Labor Commission decides to split the bargaining unit, the labor union may ask the employer for collective bargaining. In such a case, the employers required to engage in collective bargaining shall resume the process of unifying the bargaining channels for each separate bargaining unit from the beginning. However, if there is an existing collective agreement, collective bargaining may be requested from the date three months before expiration of that collective agreement (paragraph 3).

(5) Procedures and standards for appeal: The provisions of Article 29-3 and 69 of the Act apply to the procedures for non-compliance with the Labor Commission's decision to separate the bargaining units. Thus, an objection may be raised with the National Labor Relations Commission within 10 days if it is felt that the Labor Commission's decision is illegal or it is overstepping its authority. The Supreme Court has stated, “The arbitration award may be appealed only if the procedure is illegal or its contents are illegal due to violation of the Labor Standards Act, or if the arbitration is beyond the scope of the dispute between the parties without justifiable reason, on the grounds that it is illegal or overstepped. Appeals made simply because the arbitration is unfavorable to either party will not be accepted."[25)]

3. Requirements for separation of bargaining units

The court or LRC determines the need for separate bargaining units based on four criteria: (i) there shall be differences in working conditions, (ii) there shall be differences in form of employment, and (iii) there shall be differences in the negotiating practice, and (iv) these together shall require separation of the bargaining unit. The Labor Commission decides after a comprehensive look at the higher value of benefit between 'maintenance of procedures for unifying negotiation channels' and 'separation of bargaining units'.[26)]

(1) Significant differences in working conditions: Differences in working conditions need to be those where it would be considered reasonable for collective bargaining to be conducted separately, not as a difference in the individual nature of the workers. Thus, differences in personal attributes (such as proficiency, experience, educational background, years of service, etc.) do not constitute objective differences.[27)]

(2) Employment types: There should be a difference in employment patterns objectively, beyond simply whether a worker is temporary, contract, or part-time, to include things such as whether a specific job is designed for part-time workers after retirement, so it is desirable to elect a separate representative union to conduct collective bargaining independently.[28)]

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25) Supreme Court ruling on Aug. 20, 2009: 2008 doo 8024.
26) Shim, Yo-seop, "Legislative Issues in the Separation of Negotiation Units," Labor Law Forum (23), Labor Law Theory Working-level Study Society, pp. 290-291.
27) National Labor Relations Commission, decision on Nov. 21, 2012: Central 2012 Unit 8 (The Only One Company Labor Case)
28) Labor Relations Commission, decision on Sept. 11, 2013: Seoul 2013 Unit 42 (Korean Air Case)

(3) Negotiating practices: Negotiating practices are not considered based on negotiations in formally separated units, but on the basis of the need to negotiate in separate units. In other words, the separation of bargaining units is not always justified by having collective bargaining practices that are different from the majority labor union of one company due to reasons such as occupation, merger or business establishment.[29)]

(4) Necessity to separate bargaining units: The Labor Commission shall elect a separate negotiation representative union to determine whether the essential basis of labor-management relations is different to the extent that each union needs to engage in independent collective bargaining. The Labor Commission shall make a decision in consideration of the actual status of labor-management relations in the business or workplace, such as the distribution and number of members, negotiation requirements, the details and nature of labor relations, and the degree of independence in personnel management.[30)]

III. Decisions on Separation of Bargaining Units – Cases of Acceptance

1. Entrusted and directly operated workers[31)]

One company has a general labor union and a postal delivery service union. The company's general labor union engages in collective bargaining with the bargaining representative union. The new postal delivery union applied for separation of bargaining units on the grounds that the working conditions and employment types were different because they were postal delivery service providers with qualifications as individual business operators, not full-time employees of the company.

The Labor Commission acknowledged that it was necessary to separate the bargaining representative union into separate bargaining units for effective negotiations between labor and management, as there were wide differences in working conditions and types of employment for general employees and entrusted postal delivery service workers, and uniformity in working conditions was not reasonably achievable.

2. Separation of bargaining units for broadcasting personnel[32)]

Broadcasters have the right to call for collective bargaining because they are workers under the Trade Union Act. Therefore, the Labor Standards Act recognizes the validity of their application for separation of bargaining units due to their different working conditions.

3. Non-fixed-term contract workers and full-time employees[33)]

Fifty-nine non-fixed-term workers in a certain corporation were responsible for office assistance, parking, driving, facilities and counseling, while 137 persons were full-time employees in general, technical or functional positions. The corporation recognized a labor union composed of full-time workers as the representative labor union and engaged in negotiations with it. Non-fixed-term workers were not permitted into the full-time union.

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29) Labor Relations Commission, decision on July 27, 2011: Seoul 2011 Unit 1 (Road Traffic Corporation case)
30) Park, Dong-gook, "The Issue on Deciding to Separate Bargaining Units," Labor Law, Central Economy, Jan. 2015.
31) Labor Relations Commission, decision on Aug. 16, 2018: Seoul 2018 Unit 11 (Postal Logistic Agency case)
32) Supreme Court ruling on Oct. 12, 2018: 2015 doo 38092 (KBS)
33) Supreme Court ruling on Sept. 13, 2018 (Goyang-si City Management Corporation)

The Supreme Court has separate management regulations for wage levels and employment types are divided into non-fixed-term and regular jobs. Negotiating practices also do not apply to regular workers' collective agreements. Therefore, the Supreme Court recognizes the separation of bargaining units as negative to stable labor-management relations as it can cause more conflict between labor and management.

4. Different workplaces[34)]

In one business, several divisions were divided into separate factories, there were wide differences in working conditions, and individual bargaining was carried out according to practice. The labor union in a relatively superior position applied for the bargaining unit to be separated.

The Labor Commission agreed to separate, recognizing the interests of the labor unions involved, as each business unit had different working conditions and negotiated individually.

IV. Decision-making on Separation of Bargaining Units – Cases of Rejection

1. Office workers and field workers in one workplace[35)]

A union of office workers was recently established in a company in charge of post office logistics. Previously, three labor unions (about 1,300 union members in total) were formed around the site and had been negotiating through the bargaining representative union. After the office workers' union reported its establishment with 110 general office workers, the office workers applied for a separation of bargaining units on the grounds of a wide gap in working conditions.

However, the Labor Commission judged that there were no significant differences in working conditions or employment patterns between office workers and other workers. It rejected the request for separation in accordance with the principle of unifying negotiating channels, in the interest of unified labor conditions and stability in labor-management relations.

2. Street cleaners and other public service workers[36)]

Street cleaners in Jeju City applied for separation of bargaining unit. However, there is not much difference in working conditions between street cleaners and non-fixed-term workers. In terms of employment status, retirement age is guaranteed as they are considered non-fixed-term contract workers, similar to civil servants. However, there was a negotiation practice in which individual negotiations had been held even before the single negotiation channel was taken. In response, the Labor Commission rejected the request for separation of bargaining units in accordance with the principle to maintain a single bargaining channel for multiple labor unions.

3. Non-fixed-term contract workers and fixed-term workers in the restaurant industry, and full-time workers[37)]

A newly hired non-fixed-term contract worker and a fixed-term worker in charge of restaurant

34) National Labor Relations Commission ruling Apr. 2, 2018: NLRC 2018 unit 3
35) LRC decision on Mar. 12, 2020: Seoul 2020 union 8 (POLA)
36) Seoul Hight Court ruling on Oct. 19, 2016: 2016 noo 48234 (Jeju City)
37) NLRC June 4, 2018: Joongang 2018 unit 5.

affairs, both working for the same restaurant, applied for separation of bargaining units into one for non-fixed-term workers and one for regular workers. In application of remarkable working conditions, the Labor Commission has found that there is no difference in working conditions as regular and non-fixed-term contract workers have the same salary system, as do part-time workers. The types of employment given were that nutritionists and chefs with the necessary qualifications were considered full time, while the rest of the staff were hired on contract. There has been no practice of separate negotiations. Therefore, it was deemed reasonable to keep the bargaining channel unified to protect the labor-management relations that would not be so stable if separate negotiations were to occur.

V. Conclusion

The Labor Commission, as a mediator of disputes between labor and management, allows separation of bargaining units only as an exception to the principle that negotiation channels should be unified. These exceptions include wide differences in working conditions, employment patterns, and negotiation practices between labor unions with the same company, in which unified bargaining channels are more disadvantageous to the labor unions. When it comes to collective bargaining, labor unions must have a large number of members to ensure sufficient negotiating power that will lead to advantageous results. Therefore, the Labor Commission must review objective facts when deciding whether to allow separation of bargaining units, and permit such separation only when it meets the required criteria.

Disguised Outsourcing Cases and Criteria for Judgment

I. Introduction

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

II. Dismissal of Employees Outsourced to Hyundai Mipo Shipbuilding Company

1. Summary

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

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

A. Legal principles for implied employment: As a person hired by the original employer provides labor service for a third party at the third party's location, to be regarded as an employee of the third party, his employment shall satisfy the following: 1) The original employer does not have independence in management and works as an agent of the third party in managing employees; 2) The original employer's business entity is nothing more than formal and nominal, and the employee shall be subordinate to the third party in reality; 3) The party that actually pays wages to the employee is the third party; 4) The party to which the person provides labor service is the third party. Based on these criteria, it should be concluded that there was already an implicit employment contract made between the employees and the third party (Supreme Court, Sep 23, 2003 2003du3420).

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

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

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

While the Subcontractor handled income tax deductions, income reports, and bookkeeping for its employees under its own business name and registration, it used offices provided by the

Shipbuilder, as well as all required facilities such as rooms for its own employee education.

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

III. Disguised Outsourcing Case of Hyundai Motors Company

1. Summary

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

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

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

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

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

HMC possessed the general rights to give the applicants their work duties and change their work area, and determined the volume of work to be finished, working methods and working procedures. HMC directly managed the applicants or indirectly gave them substantial work orders through an

on-site manager of the Subcontractor. In considering the characteristics of the applicants' work, the responsibility of the on-site manager was simply as the messenger of HMC orders to the applicants.

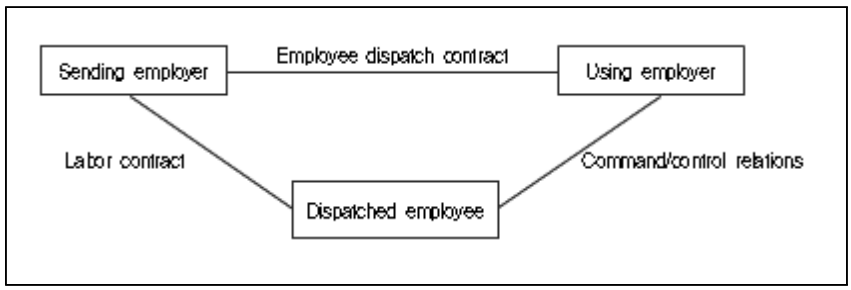
HMC decided the starting and finishing times of each work shift, recess hours, overtime and night work, shift duties, the pace of manufacturing, etc., for the applicants, and in cases where HMC's regular employees were absent due to occupational accidents or leaves, the applicants would fill in.

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

IV. Criteria for Evaluation

1. Guidelines for determining "employee dispatch"[38)]

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



B. Judgment method

1) Whether employment is subject to rules under 'employee dispatch' shall be determined by whether the sending employer who made the employment contract with the employee can retain the substantive entity of "employer".
2) In cases where the sending employer is not considered to have the substantive entity of "employer", the using employer (who did not hire the dispatch employee) shall be judged as having directly hired the dispatch employee.
3) In cases where the sending employer is considered to have the substantive entity of "employer", the situation of the corresponding employee shall be investigated as to whether he/she is under the direction or authority of the using employer. The corresponding employment contract shall also be evaluated to determine whether his employment is direct or dispatch.

C. Criteria for judgment

38) Joint guidelines of the Ministry of Labor and the Ministry of Justice, April 19, 2007

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

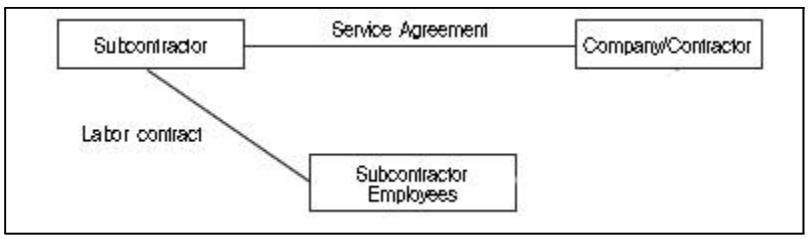
If the sending employer does not have authority over the following items, it is unlikely that he/she shall be considered as having the substantive entity of "employer": ① Rights to hire, dismiss, etc.; ② Responsibility to raise funds and make the necessary expenditures; ③ An employer's legal responsibilities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

2) Judgment on directions and orders from the using employer

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

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

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



B. Method and criteria for judgment

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

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

V. Conclusion

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

Criteria for Distinguishing Dispatch and Outsourcing

I. Necessity for Criteria

The greater utilization of dispatched employees has benefited Companies in maintaining labor flexibility and in reducing labor cost. However, the ban of hiring dispatched employees for more than two consecutive years has consequently forced Companies to seek internal outsourcings. Although the Company may offer an outsourcing contract, it treats the employee like a dispatched employee in practice. Addressing this issue, the Supreme Court clearly distinguished the difference between a dispatched employee and outsourcing employee with its judicial ruling on July 10, 2008. This article will review the main contents from the ruling that outlined dispatch and outsourcing and the criteria for 'Worker Dispatch' (Joint guidelines of the Ministry of Labor and the Ministry of Justice, April 19, 2007).

II. Criteria for Distinguishing Dispatch and Outsourcing – Judicial Ruling

An employee who is hired by the primary employer, but engaged in providing labor service for the third party at its location, can be regarded as the employee of the third party. (July 10, 2008, Supreme Court 2005 da 75088)

The defendant (Hyunda Mipo Shipbuilding) signed a formal outsourcing contract with the third company (Youngin Company) and received labor service from the plaintiffs (employees of Youngin Company). However, the third company does not technically have any authority regarding work or business management, but merely serves a subsidiary role as one of business departments of Hyundae Mipo Shipbuilding Company or as a substitute organization to manage its workforce. Furthermore, the defendant received labor service from the plaintiffs while maintaining subordinate relations and determining their wages in addition to other working conditions. Therefore, it can be concluded that there was already an implicit employment contract between the defendant and the plaintiffs as if the dependent directly hired the plaintiffs.

"When Youngin Company—outsourced by Hyundai Mipo Shipbuilding Company—declared bankruptcy, its 30 employees filed a suit to seek their employment status, claiming that they had been employed by Hyundai Mipo Shipbuilding Company since July 2000, according to the Provision of the 'Worker Dispatch Act'. Upon careful review, the Supreme Court ruled, "Youngin Company performed a subsidiary role as one of business departments of Hyundae Mipo Shipbuilding Company or as a substitute organization to manage workforce, and its employees provided labor service under subordinate relations with Hyundai Mipo Shipbuilding Company. Therefore, it can be concluded that there was already an implicit employment contract as if Hyundae Mipo Shipbuilding Company directly hired the employees"

III. "Guidelines to evaluate the criteria of 'Worker Dispatch'

(Joint guidelines of the Ministry of Labor and the Ministry of Justice, April 19, 2007, Irregular Employee Handling Team-1303).

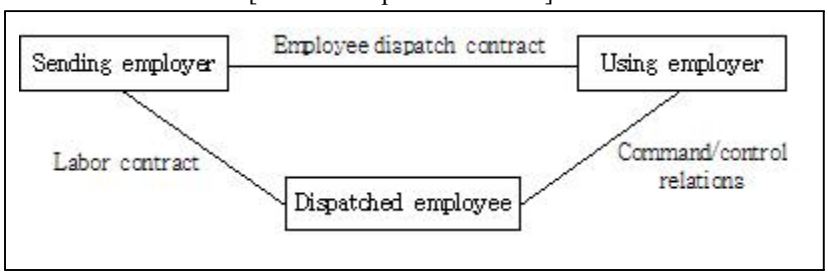
1. Purpose

The purpose of setting guidelines is to stipulate the judgment criteria in distinguishing 'Worker Dispatch" from non-worker dispatch in accordance with Article 2 (1) of 「Act Relating to Protection, etc. for Dispatched Workers」 (hereinafter called "Worker Dispatch Act" to maintain proper operations by regulating employment types in violation of the Worker Dispatch Act.

2. Subjects of Composition

The 'Worker Dispatch' in accordance with Article 2 (1) of the Worker Dispatch Act is composed of tripartite relations: the 'Sending Employer' who performs as the dispatch employee agent, 'Using Employer' who hires the employee under a worker dispatch contract, and 'Dispatched Employee' who is hired by the Sending Employer and subject to worker dispatch.

[Worker Dispatch Relations]



3. The Structure of Judgment

(1) Order of Judgment

1) Whether it is subject to rules under 'Worker Dispatch' of Article 2 (1) of the Worker Dispatch Act shall be judged by whether the Sending Employer, subcontractor, etc. contracted with the employee (hereinafter referred to as "Sending Employer, etc.") can remain as a substantial entity of the employer.
2) In the case where the Sending Employer, etc. is not admitted as a substantial entity of the employer, the Using Employer, contractor, etc. not contracted with the employee (hereinafter referred to as "Using Employer, etc.") shall be judged for violations of relevant labor laws upon assumption that the corresponding employee has been directly hired.
3) In the case where the Sending Employer, etc. is admitted as substantial entity of the employer, the corresponding employee shall be investigated whether he/she is under direction or order of the Using Employer, etc, and the corresponding employment contract shall also be evaluated for compliance to rules of 'Worker Dispatch'.

(2) Judging method (synthetic judgment)

Whether rules of 'Worker Dispatch' of Article 2 (1) of the Worker Dispatch Act shall subject to each article of the following paragraph 4 (1) and (2) collectively. In this case, 1), 2) and 3) of the subparagraph B shall be important criteria to judge the worker dispatch.

4. Criteria of judgment

(1) Judgment on substantial entity as the employer concerning the Sending Employer

Regardless of the name, form, etc. of the service contract made between the Using Employer and the Sending Employer, in the case where the Sending Employer does not have jurisdiction over the following items, it is difficult to admit the Sending Employer as a substantial entity of the employer, and cannot be regarded as "the Sending Employer who maintains the employment relations after hiring" in the definition of 'Worker Dispatch', from Article 2 (1) of the Worker Dispatch Act.

1) Decision-making right for hiring, dismissal, etc.
   ※ Interview-check list, rules of employment, labor contract, safety training for newly hired employees, and other dismiss-related document shall be confirmed.
2) Responsibility for raising and spending necessary money
   ※ Lease contract of the office, payment of the establishment expenses, in case of a stock company, ownership rate of stocks, allotment of shares, etc. shall be confirmed.
3) Employer's responsibility according to laws
   ※ Certificate of joining four social security insurance, various tax related documents such as resident tax, corporate tax, etc. service contract made between the Using Employer and the Sending Employer, whether directors can be rotated, other collective agreement-related document, etc. shall be confirmed.

(2) Judgment on direction and order of the Using Employer

Regardless of the name, form, etc. of the service contract made between the Using Employer and the Sending Employer, in the case where the Using Employer exercises the following authorities for the corresponding employee, it is determined that "the Sending Employer engages the employee in work under the direction and order of the Using Employer" in the definition of 'Worker Dispatch', from Article 2 (1) of the Worker Dispatch Act.

1) Decision-making right for work assignment and transfer
   ※ Working plan, manpower assignment plan, meeting materials, other work assignment-related documents and repeated practices, etc. shall be confirmed.
2) Right of work direction and supervision
   ※ Daily work order, safety training record, morning meeting minutes, method to deliver work-related direction, etc. shall be confirmed.
   ※ Especially, when dispatched employees perform identical or similar work to that of the directly hired employees, the right to implement work direction and supervision shall be carefully considered.
   ※ In the case where the contents or purpose of work are so abstract that the Using Employer's direction can only clarify such contents and work assignments, or the terms are too broad to outline specific work, the Using Employer may be admitted for his/her right of work direction and supervision.
3) The right to manage attendance for leave, sick leave, etc. and the right of disciplinary action
   ※ Leave, absence, leaving early, work outside, tardiness, attendance record, other disciplinary action-related document shall be confirmed.
4) The right to evaluate work performance

※ Evaluation sheet concerning work performance or achievement, whether the employee of the Sending Employer supervises or evaluates or not, correction measures or repeated practice in case false work performance is found, etc. shall be confirmed.

5) Decision-making right for extended, holiday, night time work (provided, that it is excluded for jobs required by work characteristics.)

※ Details of used annual and monthly paid leave, daily work status, other working hours-related documents shall be confirmed.

IV. Conclusion

The criteria to distinguish dispatch and outsourcing are based on whether or not the contractor (company) implements the substantial right of personnel and labor management, and whether or not the subcontractor (company) maintains autonomy in management. The company often tries to evade employer's responsibilities of labor laws through various types of the employment contract such as commission and outsourcing, but judicial rulings consistently scrutinize labor contract through substantial labor relations. Accordingly, when the company converts its dispatched employee into an outsourcing employee, it shall not direct or supervise work, but shall permit autonomous governance to the outsourcing company. Also, to continue to maintain the type of outsourcing contract, the outsourcing company shall manage and directly supervise its outsourcing employees as substantial employer and maintain separate governance in management from the contractor (company).

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

I. Introduction

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

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

II. Employees at Workplaces Ordinarily Employing Fewer than Five People

1. Background

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

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

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

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

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

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

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

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

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

am) or holiday work.

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

III. Domestic Workers Employed by a Company

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

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

1. Background

"Domestic worker" refers to a person paid to engage in work that runs a particular home as a

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

2. Domestic worker not covered by the Labor Standards Act[39)]

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

3. Domestic worker covered by the Labor Standards Act[40)]

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

4. Judgment

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

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39) Gyunggi Labor Relations Commission: 2012 buhae 1130
40) Industrial Accident Compensation Insurance Review Committee 2004-910, Sep 14, 2004

IV. Conclusion

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

Equal Treatment: Criteria for Judgment & Related Cases

I. Introduction

Recently, one of the most noticeable court rulings is one where the court ruled as discrimination by social status in a case where the employer made up a particular group of only non-fixed employees recently transferred and treated them unequally to their regular employee counterparts. This verdict has increased public interest in matters related to equal treatment. The Constitution of the Republic of Korea (Article 11-①) stipulates, "...there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status." In aligning with this, the Labor Standards Act contains a provision on equal treatment which includes the additional item of 'nationality', stipulating, "No employer shall discriminate against employees on the basis of gender, or give discriminatory treatment in relation to working conditions on the basis of nationality, religion or social status." Other provisions on equal treatment are gradually being introduced in other Acts as social need arises to do so, regarding irregular employment status, age, disability, and foreign workers, etc.

There are two principles the Court uses in identifying the criteria for determining whether discriminative treatment, which it defines as "the same thing treated in a different way, or different things treated in the same way", is justifiable or not. First, in order for a situation/action to be considered discriminative treatment, the primary requisite is that the employees claiming discrimination should be basically in the same working group with the target comparison employees. [41] Second, even though the employees claiming discrimination and the target comparison employees are working in the same workplace and at the same kind of job, if the employer discriminates in their working conditions based upon reasonable criteria in consideration of the detail and type of work and other conditions, this discrimination can be considered justifiable. [42] In this article, I

41) Supreme Court ruling on October 29, 2015: 2013da1051.
42) Supreme Court ruling on February 26, 2002: 2000da39064

would like to review the criteria for judgment of whether discriminative treatment is justifiable or not, and related cases.

II. Gender Discrimination

1. Criteria for judgment

Gender discrimination is prohibited under Article 11(1) of the Constitution, with a more detailed explanation given in Article 32(4): "Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions." Article 6 of the Labor Standards Act prohibits gender discrimination and includes penalties for violations. In particular, the Equal Employment Act enacted in 1987 defines gender discrimination (Article 2) as follows:

First, the term "discrimination" means that an employer applies different hiring and working conditions to employees, or takes other disadvantageous measures against them without justifiable reason on account of gender, marriage, status within the family, and whether or not they are pregnant or have had a child, etc.

Second, it is discrimination even if an employer applies the same hiring or working conditions, but the number of one gender to whom the conditions apply is considerably less than that of the opposite gender, thus causing a disadvantageous result to the opposite gender. This reflects the fact that indirect discrimination due to corporate culture can be deemed as gender discrimination.

Third, provided that this shall not apply to cases involving any of the following items: ① Where a specific gender is inevitably required in view of the nature of the duties; ② Where measures are taken to protect maternity, such as during pregnancy, childbirth or breastfeeding by female employees, etc.; or ③ Other cases where affirmative action measures are taken under this Act or other Acts. These exceptions are designed to avoid any reverse discrimination. [43)]

2. Details of gender discrimination

Concrete provisions regarding gender discrimination in the Equal Employment Act can be summarized as follows: ① An employer shall not discriminate on grounds of gender in recruitment and hiring of employees. When recruiting and hiring female employees, an employer shall not present nor demand certain physical conditions, such as appearance, height, weight, etc., and marital status not required for performance of the relevant duties (Article 7). ② An employer shall provide equal pay for work of equal value in the same business. The criteria for work of equal value shall be skills, efforts, responsibility and working conditions, etc. required to perform the work (Article 8). 'Work of equal value' in judicial rulings means the same work when comparing men and women in the corresponding workplace and nearly the same work in practical terms, or the work of basically the same value as evaluated through objective job evaluations in spite of slightly different jobs. Whether the work is of equal value or not shall be estimated in comprehensive consideration of technology, working conditions, education, career, working period, etc. [44)] ③ An employer shall not discriminate on grounds of gender in providing benefits, such as money, goods or loans, etc., in order to compensate his/her employees aside from wages (Article 9). ④ An employer shall not discriminate on grounds of gender in education, assignment and promotion of his/her workers (Article 10). ⑤ An employer shall not discriminate on grounds of gender in retirement age or whether certain workers are dismissed or designated to retire. No employer shall make a labor contract that

43) Jongryul Lim, 「Labor Law」, 14th edition, 2016. Parkyoungsa, p. 374.
44) Supreme Court ruling on March 14, 2003: 2002do3883; Supreme Court ruling on March 14, 2013: 2010da101011.

stipulates marriage, pregnancy or childbirth of female workers as grounds for resignation (Article 11).

III. Discrimination Based on Nationality

1. Criteria for Judgment

Nationality refers to the status according to the Nationality Act, and discrimination can exist for certain employees such as foreigners without Korean nationality, overseas Koreans, and illegal migrant workers, etc. Recently, discrimination due to nationality has caused significant social issues due to the increased number of foreign workers. Article 22 of the Foreign Workers Employment Act enacted in August 2003 stipulates, "No employer shall discriminate or unfairly treat any person on the grounds that he/she is a foreign worker." However, this article does not include any penal provisions and only applies to non-professional workers in relation to the employment permit system. Accordingly, the prohibition of discrimination based on nationality follows Article 6 of the Labor Standards Act that "No employer shall give discriminatory treatment in relation to the working conditions on the basis of nationality," and the penal provisions therein. However, justifiable discrimination is allowed, with the related Labor Ministry Guidelines explaining, "Determining whether discrimination based on nationality exists or not shall require consideration of all related items collectively: whether the discrimination in working conditions was only based on nationality or not; other entire factors regarding the working conditions such as wages and working hours; and in addition, whether discrimination exists that exceeds reasonable criteria for the work." [45)]

2. Related cases

There are many cases related to discrimination due to nationality.

① A Constitutional Court ruling in 2007, in which it stipulated, "Even though industrial trainees with a trainee's contract provided labor service under the employer's direction and supervision, they then received wages. In actual relations, as only foreign industrial trainees were excluded from the application of major labor laws without justifiable reason, we find this unreasonable." The fact that industrial trainees are excluded from some parts of the Labor Standards Act, unlike ordinary employees, is arbitrary discrimination. [46)]

② Supreme Court ruling in 1995: Foreign worker "A" from Thailand, who came to Korea under a trainee working visa, was seriously injured while working beyond the permitted sojourn period. Foreign worker A applied for compensation from the Employee Welfare Corporation for medical treatment, but was rejected by the Corporation as foreign worker A was an illegal migrant worker working illegally. However, the Supreme Court ruled that even though illegal employment is clearly an act warranting punishment, the work already provided is actual performance that makes the worker subject to the protection of labor law. Accordingly, illegal foreign workers may apply for and receive Industrial Accident Compensation Insurance.[47)]

③ Supreme Court ruling in 2015: Some illegal foreign workers living in Seoul and Gyeonggi Province submitted a report of their establishment of a labor union to the Seoul Regional Labor Office on May 3, 2005, but their application was rejected due to their illegal status. Even in the courts there have been disputes on whether a labor union of illegal foreign workers is permissible or not, but the Supreme Court ruled on June 25, 2015 that it was.[48)]

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45) Labor Ministry Guideline: May 25, 1994, Gungi 68207-585.
46) Constitutional Court (Industrial trainee system): August 30, 2007 2004hnma670.
47) Supreme Court ruling: September 15, 1995: 94nu12067 (Rejection for application of occupational injury)
48) Supreme Court ruling on June 25, 2015: 2007do4995 (Rejection of labor union's report of establishment)

IV. Religious Discrimination

1. Criteria for judgment

The Labor Standards Act regulates that no employer shall give discriminatory treatment in relation to working conditions on the basis of religion, which includes specific religions, religious beliefs, world view, socialist creed, or political line of a particular political party, etc.[49] However, with the exception of purpose-based companies organized to carry out business directly connected to specific ideas, it is not deemed a violation if there is discrimination regarding an employee whose behavior is in conflict with the purpose of the company he or she works for.

2. Related cases

① In 2005, the Constitutional Court ruled as justifiable dismissal in cases where the employee behaved in violation of the purpose of his/her employing company. "Whether there is justifiable reason or not when an employer intends to dismiss an employee shall be considered concretely for each individual case. Such general reasons are that the employee's violations should be serious enough to make it very difficult to maintain continuous employment relations with the employer, which means that the employer cannot expect any further work from the employee concerned due to the serious violation. Justifiable reasons for dismissal include: in cases where the employee's work performance was seriously inferior to his/her occupational abilities; in cases where the employee cannot work due to some illness; and, exclusively for purpose-based companies organized to carry out business directly connected to specific ideas, in cases where the employee disagrees with the purpose of his/her employing company; and others.[50]

② In 1994, the Supreme Court ruled that an employee's behavior that violates the purpose of his/her employing company is deemed a justifiable reason for dismissal. "Even though the employee's real estate speculation, which was the reason for disciplinary dismissal, seemed like some minor misconduct in his personal life, in comprehensive consideration of the purpose of his employer, the Urban Development Corporation, which was established to create for citizens housing security and improve welfare through residential land development and supply, housing construction, etc., and the work scope of the employee engaged in real estate-related compensation, this real estate speculation by the employee could cause very negative effects of the social evaluation for the Urban Development Corporation." [51]

V. Social Status

1. Criteria for judgment

'Social status' which is a position formed over a considerable time and part of social evaluation refers to a social position that one cannot adjust through one's intention or performance.[52] A judicial ruling on June 19, 2016 explained, "Social status is a position formed over a long time in society and part of social evaluation, and refers to the social classification that a specific group of employees cannot adjust through their intention or performance." [53]

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49) Hyungbae Kim, 「Labor Law」, 24th edition, 2015, Parkyoungsa, p. 239.
50) Constitutional Court decision on March 31, 2005: 2003hunba12 (Justifiable reasons for dismissal).
51) Supreme Court ruling on December 13, 1994: 93nu23275 (ruling related to a purpose-based company)
52) Jongryul Lim, p. 376; Hyungbae Kim, p. 240; Kaprae Ha, 「The Labor Standards Act」 28th edition, Joongang Economy, p. 79.
53) Seoul Southern Court ruling on June 19, 2016: 2015kahap3505.

2. Related cases

Recently, there has been some headline news on a judicial ruling regarding a case of discrimination owing to social status. The employees concerned were transferred to non-fixed term employment and then placed in their own group after being hired for temporary positions. Unlike regular employees, the workers in this group were not eligible for title promotions. Different salary regulations were applied, and they were also ineligible for housing or family allowances, or meal expenses. The employees concerned took legal action for the unpaid allowances, stating that this discrimination was null and void due to it being a violation of equal treatment according to Article 6 of the Labor Standards Act. The court ruled, "Besides job, the type of work and position can be part of social status if they require social evaluation or are social classifications that an employee cannot change through intention or performance." The court judged that being part of a group of workers with non-fixed employment status was part of social status, adding, "With the exception of salary regulations, the same rules of employment and personnel regulations apply to non-fixed term employees. The quantity, quality and difficulty of their work and their contribution to the company were not less than their regular employee counterparts, so this discrimination amounts to a violation of Article 6 of the Labor Standards Act."

VI. Conclusion

The Labor Standards Act contains a penal provision for discrimination on the basis of gender, nationality, religion or social status, and an employee can seek an order for correction of such discrimination through a petition or making a claim with the Employment Labor Ministry. Hereby, the employee can also retroactively claim that lower wages were paid in a discriminatory manner. On the other hand, a particularly notable point in the prohibition of discrimination on the basis of gender is that an employer shall not discriminate on such grounds in recruitment and hiring of employees. Also, it can be deemed as indirect discrimination when an equal number of men and woman are employed at entry level, but this is not the case at the managerial level. The provision against discrimination on the basis of nationality has become a social issue due to the increased number of foreign employees, while regarding discrimination on the basis of religion, more cases have been related to purposed-based companies rather than against particular religions. Finally, in discrimination on the basis of social status, the courts recently ruled discrimination exists against social status when an employer sets up a certain working group only for those with non-fixed employment status.

Limit on Employment Period of Fixed-term Employees and its Exceptions

I. Introduction

We can distinguish the employment contract into three categories based upon employment period. They are 1) the contract without fixed-term, 2) the contract necessary for the completion of a project, and 3) short-term employment contract within two years. Since the protection laws for irregular employees were enforced starting July 1st, 2007, the employment period is determined within two years, excluding the contract without fixed period, and in cases where the labor contract has been repeated, exceeding more than two years, the contract is transformed to the one without fixed term. Accordingly, as the employment contract reaches two years' period, the employer shall

decide to change him/her to permanent position or terminate the employment. [54)]

Even thought the employment contract has been renewed repeatedly several times previously, the employment was estimated to be terminated due to the expiration of its period as the employer did not renew his/her last employment contract. In reality, the employer had to receive a judicial judgment through the labor commission or the court to make sure whether the employment that had been renewed repeatedly several times could be an employment contract without fixed period. Generally in the court ruling, in cases where the fixed term employee had worked for about five years and renewed his/her employment contract more than four times, the contract was regarded as expired when there was no more renewal in his/her last contract; but in cases where the fixed term employee had worked for about six years and renewed his/her employment contract more than five times, the contract was regarded as transferred to employment without fixed term when there was no more renewal.[55)] The protection laws for irregular employees limit two years for the period of the fixed-term employment to clarify any disputes coming from the employment period. However, even though the employment period for fixed-term employees is regulated mandatorily, some exceptions were introduced due to the business characteristics, work characteristics, relations with other laws, and legislative policies.

The following will explain its contents and purposes concerning the limit on the effective service period and exceptions of its employment period.

II. Limit on Employment Period of Fixed-term Employees

"The Act on the Protection, etc. of Fixed-term and Part-time Employees (hereinafter referred to as 'the Fixed-Term Employee Act)", its Article 4 regulates that "an employer may hire a fixed-term employee for a period not exceeding two years (In the case of repeated fixed-term labor contracts, the sum of the periods of such contracts shall not exceed two years.)" Accordingly, the employer cannot use fixed-term employees more than two years, but in using more than two years it is regarded as employed as regular employees. That means, if the employment contract was terminated after exceeding two years, the employee's status is changed to a regular position or a position without fixed-term. Accordingly, the Fixed-Term Employee Act was designed to get rid of any disputes over repeated and renewed employment by stipulating two years' limit on the employment period, and to promote temporary employees into regular positions. The reasons to limit the employment period of fixed-term employees are firstly to prevent legal disputes coming from renewed or repeated employment contract, and secondly to estimate two years' period as appropriate period to induce fixed-term employment to regular positions.

In using fixed-term employees, many foreign countries regulate restrictions on reasons for employment, but Korea does not regulate any restriction, but protects them by regulating the limit on employment period.

III. Exceptions for Employment Period of Fixed-term Employees and its Purposes

1. Cases where the period is needed to complete a project or particular task

If a construction project is proved objectively to be a fixed-term business requiring a certain amount of time to complete, it is allowed to make the employment contract for the period required to complete the project exceeding two years. In this case, this project-based exception is limited to the characteristic of temporary or one time business. Such businesses or tasks to complete a project

54) Reference: Article 4 (Employment of Fixed-term Employees) of the Fixed-Term Employee Act; Article 3 (Exceptions to Limit on Employment Period of Fixed-term Employees)

55) National Human Rights Commission, "Survey on human rights of fixed-term employees' labor conditions" Nov 2008

or particular task are as follows: 1) construction project; 2) temporary surveyor during statistical survey period; 3) temporary commissioned projects; and 4) secretary of the part-time director with three-year contract period.

2. Cases where the fixed-term employment contract is made with the aged

"The Aged Employment Promotion Act" is established to promote the employment of old aged people, and the aged refer to the age of 55 years. The aged are exempted from application of limited employment period at the fixed-term employment contract.

3. Cases where a job requires professional knowledge and skills

1. A certified architect according to the Article 7 of the Certified Architect Act
2. A certified public labor attorney according to the Article 3 of the Certified Public Labor Attorney Act
3. A certified public accountant according to the Article of 3 of the Certified Public Accountant Act
4. A customs house broker according to the Article 4 of the Customs Law
5. A patent attorney according to the Article 3 of the Patent Attorney Act
6. A lawyer according to the Article 4 of the Lawyer Act
7. An Actuary according to the Article 182 of the Insurance Business Act
8. A loss adjuster according to the Article 182 of the Insurance Business Act
9. A real estate appraiser according to the Article 23 of the Act concerning the Notification of Real Estate Price and Appraisal and Assessment on Real Estate
10. A veterinarian according to the Article 2 of the Veterinary License Act
11. A certified tax attorney according to the Article 3 of the Certified Tax Attorney Act
12. A pharmacist according to the Article 3 of the Pharmaceutical Affairs Law
13. An oriental medicine pharmacist according to the Article 4 of the Pharmaceutical Affairs Law
14. An oriental medicine salesman according to the Article 45 of the Pharmaceutical Affairs Law
15. A oriental medicine dispensing chemist in the attachment article 2 of the enforcement decree of the Pharmaceutical Affairs Law
16. A doctor according to the Article 5 of the Medical Law
17. A dentist according to the Article 5 of the Medical Law
18. A oriental medicine doctor according to the Article 5 of the Medical Law
19. A certified management consultant according to the Article 46 of the Act concerning the Promotion of Small and Medium Companies and their Products
20. A certified technology consultant according to the Article 46 of the Act concerning the Promotion of Small and Medium Companies and their Products
21. A business pilot according to the Article 26 of the Civil Aeronautics Law
22. A transportation pilot according to the Article 26 of the Civil Aeronautics Law
23. An air traffic controller according to the Article 26 of the Civil Aeronautics Law
24. A flight engineer according to the Article 26 of the Civil Aeronautics Law
25. An aviation specialist according to the Article 26 of the Civil Aeronautics Law

Those cases refer to those falling under any of the following: 1) In cases where a person, who holds a doctoral degree is engaged in the relevant field; 2) In cases where a person, who holds a national technical qualification of a technician level, is engaged in the relevant field; and 3) In cases where a person, who holds a professional qualification (25 fields) is engaged in the relevant field.

Those with a doctoral degree, a national technical qualification of a technician level, and a professional qualification issued by the government for 25 fields are generally recognized as a specialist with professional knowledge and skills for a particular field. This exception was adopted by reflecting characteristics of those professional specialists. The technician refers to a person who holds a national technical qualification of a technician level pursuant to the National Technical Qualifications Act. Professional certificate holder means a specialist who was qualified at the 25 fields recognized by the government by the relevant law.

4. In cases where a separate law defines the employment period of fixed-term workers differently

(1) "The Regulations for Contractual Position of the Public Servants" regulate that the employment period for contractual position of the public servants shall be a necessary period within five years.
(2) "The Enforcement Decree for Staffing Educational Personnel" and "The Private School Act" regulates that the employment period of fixed-term teachers shall be within one year, and if necessary, can be extended up to 3 years.
(3) "The Act on Foreign Workers' Employment" regulates that foreign workers can be employed within three years since entering Korea.

5. In cases where there is a rational reason

(1) The fixed-term employee is needed to fill a vacancy arising from a worker's temporary suspension from duty or dispatch until the worker returns to work: In cases where the employee took leave of absence due to giving birth, disease, joining the military service, etc., and took a long-term dispatch, a fixed-term employee can replace its position.
(2) The period needed for a worker to complete schoolwork or vocational training is defined: When the employee took a change to develop his/her job capability, his/her employment period shall be exceptional for its limit.

6. Consideration of legislative policies (this exception is gradually extended.)

(1) In cases where the earned income falls within the highest 25% (Introduced from July 12, 2010)
In cases where the earned income of persons engaged in occupations like managers, professionals, and other similar jobs according to the Korean Standard Classification of Occupations falls within the highest 25% (or 48,855,000 won per year as of year 2010), these fixed-term employees does not belong to the limit of employment period. The earned income is evaluated based on the average annual earned income of the past two years.
(2) In cases where jobs are provided to develop the public's vocational competency, promote employment and offer necessary social services in accordance with other laws such as the Basic Employment Policy Act and the Employment Insurance Act
(3) In cases where jobs are provided to promote the employment of discharged soldiers and stabilize their livelihoods pursuant to Article 3 of the Support for Discharged Soldiers Act
(4) In cases where a person who has professional military knowledge or skills recognized by the Minister of Defense is engaged in the relevant field or where a person teaches national security and military science in a university pursuant to subparagraph 1 of Article 2 of the Higher Education Act (Introduced from Feb 4, 2010)
(5) In cases where a person, who has exceptional experience, is engaged in a field related to national security, national defense, diplomacy or unification (Introduced from Feb 4, 2010)

(6) Where a person is engaged in work specified in any of the following items in a school under Article 2 of the Higher Education Act (including graduate schools under Article 30 of the same Act): 1) Work of a teaching assistant under Article 14 of the Higher Education Act; and 2) Work of an adjunct teacher, professor emeritus, part-time instructor, visiting teacher, etc., under Article 7 of the Enforcement Decree of the Higher Education Act.
(7) In cases where a part-time worker's weekly working hours, under Article 18 of the Labor Standards Act, is evidently short
(8) In cases of sports athletes under subparagraph 4 of Article 2 of the National Sports Promotion Act and where a person is engaged in teaching sports pursuant to subparagraph 6 of the same Article.
(9) Where a person is directly engaged in research work or directly involved in research work as an assistant, such as by carrying out an experiment, a survey, etc., in any of the following research institutions (Introduced from Feb 4, 2010): 1). National or public research institutions; 2) Government-invested research institutions established under the Act on the Establishment, Operation and Fosterage of Government-Invested Research Institutions and the Act on the Establishment, Operation and Fosterage of Government-Invested Science and Technology Research Institutions; 3) Specific research institutions under the Support of Specific Research Institution Act; 4) Research institutions established under the Act on the Establishment and Operation of Local Government-Invested Research Institutes; 5) Public institution-affiliated research institutions under the Act on the Management of Public Institutions; 6) Company- or university-affiliated research institutions; and 7) Research institutions which are a corporation established under the Civil Act or any other Act.

IV. Conclusion

Since the enforcement of protection laws for irregular employees, the discrimination correction is strictly applied, but the employment period has introduced more exceptions gradually. These exceptions are those who earned more than highest 25 percent in the earned income, separate applications to those temporary teachers at schools and lecturers at the universities, those applicable to other compulsory laws, etc. Due to the enlargement of exceptions to the limit to the employment period, the target temporary employees to be able to be under the protection of the law are gradually reduced. The reason to stipulate two years' maximum period to use fixed-term employees in the protection law was to promote the employment of temporary employees after using two years. If the exception to the limit on the employment period is extended gradually, the purpose of the protection laws for irregular employees cannot be achieved, and further it would not carry out right roles as protection laws. Accordingly, while keeping the purpose to protect irregular employees, minimum exceptions of two years' limit shall be allowed in consideration of business distinct characteristics and occupational differences.

The Right of Fixed-term Workers to Expect Renewal of their Employment Contract

I. Introduction

The problem of non-regular workers in Korea occurred due to the overuse of irregular workers through managerial dismissal and worker dispatch laws, in efforts to cope with the IMF financial crisis in 1997. In order to limit the use of non-regular workers and encourage their use as full-time workers whenever possible, the Act on the Protection, etc. of Fixed-term and Part-time Workers

(hereinafter referred to as the "Fixed-term Workers Act") was enacted. For the protection of irregular workers, the Fixed-term Workers Act, enacted in 2007, stipulates that fixed-term workers can be used for a maximum of two years, and after two years, the fixed-term worker is regarded as a non-fixed term worker (Article 4 of the Act). This regulation was introduced to limit the use of fixed-term workers and to eliminate employment insecurity by promoting the renewal of their fixed-term employment in cases where fixed-term workers had worked for more than two years.

Article 4 of the Fixed-term Workers Act stipulates that fixed-term workers can be used for two years, with some exceptions. Nevertheless, the right to expect renewal is assured in cases where the fixed-term contract can be renewed, with a renewal condition; the worker expects to have his/her fixed-term contract renewed. In addition, the exemption clauses of fixed-term employment are exceptional for repeated employment contracts for professional workers and elderly workers, which add to the confusion in the worksite, making it necessary to establish the contents and specific criteria for this. In this regard, I would like to specifically examine the laws, precedents, and reasons for the right to expect renewal.

II. Restriction on the Term of the Fixed-term Workers Act (Article 4) and the Right to Expect Renewal

1. Contents of Article 4 of the Fixed-term Workers Act

Article 4 of the Fixed-term Workers Act limits the period of use for fixed-term workers to two years.[56] The reason this limitation is as follows: (1) In Article 16 of the previous version of the Labor Standards Act, the upper limit is set as one year, but there is no restriction on the total period of use through repeated renewal of the labor contract. This enabled employers to take advantage of repeating an employment contract for less than one year as a means of avoiding the restriction against dismissal according to Article 23 of the LSA. This has increased the number of workers in fixed-term contracts; and (2) it is a principle that employment is terminated automatically upon termination of the contract. However, if an employment contract is renewed several times, it may be interpreted as being an employment contract without a fixed term. In that case, as the habitual practice of the contract, the intention of the parties, the expectation of renewal, the nature of the work, and other various factors need to be considered, it has been pointed out that the workers are not likely to win a dismissal case, and that such dismissal cases are inconsistent, which led to the enactment of the Fixed-term Workers Act.[57] Since the adoption of the Fixed-term Workers Act, even if an employment contract is repeated a number of times, there is no such dispute because the term can only be a limit of two years. However, in instances of a fixed-term labor contract where there are conditions for renewal even if there is no provision for renewal, if there is a trust in the relationship for the renewal of the fixed-term contract, the right to expect renewal is still valid even after introduction of the Act.

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56) The Fixed-term Workers Act: Article 4 (Employment of Fixed-term Employees) ① An employer may employ a fixed-term employee for a period not exceeding two years (in cases where a fixed-term labor contract is repeatedly renewed, the total consecutive employment period shall not exceed two years.): Provided that an employer may employ a fixed-term employee for more than two years in any of the following cases:
1. Where the period required for completion of a project or particular task is defined;
2. Where a fixed-term employee is needed to fill a vacancy arising from a worker's temporary suspension from duty or dispatch;
3. Where the period required for a worker to complete his/her education or vocational training is defined;
4. Where a fixed-term labor contract is made with an aged person as defined in Article 2 Subparagraph 1 of the Aged Employment Promotion Act;
5. Cases prescribed by Presidential Decree, where the job requires professional knowledge and skills or is offered as part of the government's welfare or unemployment measures;
6. Other cases prescribed by Presidential Decree, where there are reasonable grounds equivalent to those described in subparagraphs 1 through 5.

② If an employer employs a fixed-term employee for more than two years, even though grounds under the proviso to paragraph (1) do not exist or cease to exist, the fixed-term employee shall be considered as a worker who has made a non-fixed term labor contract.

57) Labor Law Practice Study, 「Labor Standards Act Translation II」 ParkYoungsa, 2010, pp. 17-18.

2. The right to expect contract renewal

The right to expect renewal is not specified in the Fixed-term Workers Act, but has been consistently recognized in court rulings, and has the same role as the subsidiary clause of Article 4 of the Fixed-term Workers Act. The right to expect renewal means that if a contract is signed for fixed-term employment, but a contract renewal is reasonably expected, if the employer refuses to renew the contract with no rational justification, there is no effect as unfair dismissal. In this case, any employment after the contract expires shall be regarded as a renewal of the old labor contract.[58)]

The Supreme Court concluded, "In the case of a term of employment contract, the employment contract between the parties shall be terminated without waiting for a separate action such as dismissal of the employee when the period expires. However, (1) except in a case where the original period is renewed over a long period of time and the fixed period is only a form;[59)] (2) in cases where there is a provision stipulated in the employment contract and the rules of employment that the fixed-term contract will be renewed if certain requirements are met despite the expiration of the period; or (3) if there is a trust relationship between the parties that the employment contract will be renewed if certain requirements are met, even if there is no such specific provision; the refusal to renew the employment contract can be considered dismissal rather than termination of the contract due to expiration of contract period."[60)] Since the enactment of the Fixed-term Workers Act, the total contract period is limited to two years in principle, and the above issue (1) was solved to some degree. However, since issues (2) and (3) arise from the expectation of conditional renewal and the right to expect renewal, disputes have often arisen between workers and employers.

III. Rational Justification for Refusing Renewal after Recognition of the Right to Expect Renewal

1. Reasons to Refuse Renewal

The court ruling[61)] provides the criteria: "If a reasonable expectation that an employment contract will be renewed is granted to a worker, it is ineffective for the employer to unfairly refuse to renew the employment contract without reason. If there is reasonable justification to not renew the contract, even if the employee has a reasonable expectation of the renewal, such reasons can be evaluated by considering the following: (1) The employer's purpose and the characteristics of the business, workplace conditions, the employee's position and job responsibilities; (2) The process of signing an employment contract; ③ Whether or not the requirements and procedures for renewal of the employment contract are set up and its operational status; and ④ Whether the employee bears responsibility or not. The reason for refusal and the procedure should be judged based on socially-accepted standards, on the basis of being objective, reasonable and fair, and the burden of proof for such matters shall be borne by the employer."

Even if legitimate expectation of renewal of a fixed-term worker's employment contract is recognized, it is sufficient for the employer to refuse to renew the contract if there is a rational justification which is deemed to be equivalent to the socially-accepted standard, which is a relaxed standard rather than a legitimate reason.[62)] This is because it would suggest rational justification for replacing the renewal expectation, or suggest that the expectation of renewal has changed.

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58) Kiljoon Noh, 「A study of the fixed-term employment contract」, Graduate School of Ajou University (Doctoral thesis), 2018, p. 37.
59) Supreme Court ruling on Feb. 24, 2006, 2005doo 5673.
60) Supreme Court ruling on April 14, 2011, 2007doo1729; Supreme Court ruling on Nov. 10, 2016, 2014doo 45765.
61) Supreme Court ruling Oct. 12, 2017.10.12, 2015doo44493.
62) Seoul Appeal Court ruling Sep. 30, 2010, 2009noo36233.

2. Related labor cases

(1) Cases where there is no reason to refuse to renew the contract

(i) Worker A made an employment contract for two years from Oct 26, 2010 to Oct 25, 2012. According to the employment contract, the contract could be renewed one month before the expiry date. One month before the expiration of the contract, the company informed worker A that the labor relationship would be terminated on October 25, the expiry date of the employment contract. The company informed worker A that the personnel evaluation results were "not good", which was the reason for termination of the contract. However, at that time, the company's personnel evaluation criteria were vague, and objectivity was low.[63)]

(ii) The company is a foundation that operates social work support projects for unemployed people. Worker A joined the company on Oct 26, 2010, and worked as a team leader who supported the establishment of social enterprise. The enterprise informed a worker on September 24, 2012 that the employment contract would expire on October 25, 2012. One month before the expiration of the contract, the company considered whether or not it would switch to full-time employment through personnel evaluation.[64)]

(iii) Seoul Metropolitan Government Facility Management Corporation had concluded contracts for the transportation of persons with disabilities by setting a contract period of one year with the driver, and then did not renew the contract. It is stated that the Call Taxi for the Handicapped by the City of Seoul is to renew the contract period on a yearly basis and that the purpose for this is to be able to replace unsatisfactory people. This service for the disabled cannot be regarded as a temporary business and has term extension regulations for the contract with the drivers. Considering the aforementioned, it is considered that the drivers who belong to this facility management corporation are granted the right to expect that their fixed-term contract will be renewed.[65)]

(2) In the case of exceptional occupations, the right to expect renewal is recognized

(i) In the case of the plaintiff (an in-house lawyer), the labor contract cannot be regarded as having no fixed term, as the plaintiff worked four times over five years while renewing the labor contract. The plaintiff had reason to expect renewal as he/she had been responsible for necessary tasks as the lawyer for the company and has been renewing the contract with an expectation of doing so as long as he/she wishes to continue to work.[66)]

(ii) The defendant, Gimcheon City, had commissioned the plaintiffs (the symphony orchestra) as non-permanent members since December 1, 2004, and entered into two-year contracts. However, the City suddenly did not renew with the plaintiffs after the expiration period in January 2011. Gimcheon City had decided to select new members through a new screening process before the final contract expired, and in November 2011, it announced the recruitment of the Gimcheon

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63) Supreme Court ruling on Nov. 10, 2016, 2014doo45765: As there was no objectivity in the personnel evaluation, the case was admitted as an unfair dismissal.

64) Seoul Appeal Court ruling Nov. 6, 2014, 2013noo53679: At the end of the term contract period, the company evaluated whether to convert to full-time employment through personnel evaluation. The worker had an expectation of renewal, and the company was not fair in its personnel evaluation.

65) Supreme Court ruling on April 14, 2011, 2007doo1729: It is a regular business which re-contracts on a yearly basis. The company refused to renew the contract through personnel evaluation. There was no fairness and objectivity in the personnel evaluation.

66) Seoul District Court ruling on April 19, 2012: 2011gahap 21933. Professional jobs belonging to the exception to the limit of 2 years of the term of Article 4 of the Fixed-term Workers Act are applied to the right to expect renewal.

City arts group. The City asked the plaintiffs to join the new screening test. The candidates' current address of Daegu or Gyeongbuk as of the announcement date was added as a qualification requirement for common examination. Because of this, plaintiffs who lived in Seoul, Milyang, and Busan at that time failed to meet the qualification requirements and do the Gimcheon City refused to renew it.[67]

(iii) Company S entered into an employment contract with the plaintiffs for one year in October 2011, after which they worked as a golf course management team with no updated contracts until February 2014. Company S's retirement age was 55, and the plaintiffs had already reached this age before or during the term of the contract. Company S signed an employment contract with the plaintiffs in March 2014 which set the work period for one additional year, and notified the plaintiffs in January 2015 that their contract period would expire in February. In the case of the plaintiffs, it can be said that the retirement age did not convert them into unqualified workers. It could be expected that the labor contract would be renewed, and that there was no reason to refuse the renewal, and so it belongs to unfair dismissal.[68]

(3) Cases where the right to expect renewal cannot be established

(i) The employee had been working as a full-time professional commissioner in the Civil Rights Commission with a contract period ending December 31, 2008, and had been working as a professional adviser from January 1, 2009 to December 31, 2009. He had to resign because of contract expiration. There was no right to expect renewal because the Commission announced that this job was not a position which would be converted into non-fixed employment, in accordance with 'regulations on irregular workers in public institutions.'[69]

(ii) Hyundai Motors Company employed a fixed-term worker and renewed the employment contract 14 times over short periods of 2 weeks to a maximum of 6 months. After 2 years, it notified the worker of the expiry of the contract, which was not renewed on January 31, 2015. There were no precedent cases in which other irregular workers in the company were changed to full-time workers, and so there was no right to expect renewal because, while the position was constantly needed, it was regarded as a temporary task to fill the vacancies of regular workers.[70]

V. Conclusion

If there is a statement in a labor contract that provides conditions for the renewal of a fixed-term contract, etc., or if there is a relationship of trust that it will be renewed, and in the case of regular continuous work, the expectation of renewal is recognized even though a fixed-term employment contract was made. In the case of professional workers who are exempted from the maximum employment contract period, and workers who have not retired after the retirement age, there can be an expectation of renewal. Therefore, it is necessary to utilize regular employees whenever possible for permanent jobs. Employers will have to hire fixed-term workers for temporary work only, or for work not expected to be subject to renewal of a fixed-term contract.

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67) Supreme Court ruling on October 12, 2017: 2015doo44493. In the case of exemption from Article 4 of the Fixed-term Workers Act, the right to expect renewal is applied.
68) Supreme Court ruling on Feb. 3, 2017: 2016doo50563.
69) Seoul Appeal Court ruling on August 18, 2011: 2011noo9821.
70) Seoul Administrative Court ruling on October 20, 2016: 2015goohap71068.

Working Conditions of Part-time Workers

I. Introduction

In 2014, IKEA, a Swedish furniture company, entered Korea and recruited most of its field workers as part-timers working four hours a day, which shocked our society. This company was able to maintain better productivity than was normal in Korea while using part-time workers. It is very rare for Korean companies to use part-time workers as regular workers, mainly because they are employed as Alba, temporary or part-time low-wage workers in small businesses within the service sector. The proportion of part-time workers in Korea was only 10.8% in 2014, while it was 37.2% in the Netherlands, 27% in Japan, 24.9% in Britain, and 22.1% in Germany in the same period.[71] There are no differences in Korean labor laws compared to foreign labor laws regarding part-time workers: The working hours of part-time workers are shorter than those of regular workers, while their working conditions are similar to that of full-time workers.[72]

In fact, if working conditions for part-time workers are properly maintained, sharing of work with full-time workers is also possible, which is expected to result in greater productivity while creating more employment. In particular, it makes it possible to attract female workers and elderly people whose career quite often has been cut short in the labor market. In regards to the protection of short-term workers, I would like to specifically examine (i) the concept of the part-time worker, (ii) statutory working conditions, and (iii) the prohibition of discriminatory treatment.

II. Concept of the Part-time Worker

The term "part-time worker" in Article 2 of the Labor Standards Act (LSA) means an employee whose contractual working hours per week are shorter than those of a full-time worker engaged in the same kind of job in the same workplace. For example, since a full-time worker works 40 hours per week, a worker who has worked 8 hours for 4 days in a week (32 hours per week) is considered a part-time worker.

The concept of part-time worker includes (i) one-week basis, (ii) contractual working hours, and (iii) the working hours of regular workers.

(i) The one-week basis shall be the working hours of the week if the working hours are constant every week, but the average of 4 weeks shall be calculated for the weekly contractual working hours when weekly working hours are not constant (Article 18 of the LSA).

(ii) The number of contractual working hours per day for part-time workers is the number of hours divided by the number of days for a full-time worker for that period.[73] In other words, the calculation may vary depending on the total number of days worked by a full-time worker over a four-week period. Contractual working hours is defined as the working hours determined between the worker and the employer within the range of legal working hours, so the contractual working hours should be equal to or less than the legal working hours (Article 2 of the LSA).[74]

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71) Labor Ministry and Korea Labor Foundation, 「Introduction and Operational Guide of Time Selection System」, 2013.
72) Hyungbae Kim, 「Labor Law」, 24th edition, Parkyoungsa, 2015, page 1287.
73) The LSA Enforcement Rule, Article 9 [Attachment No.2]
74) The LSA: Article 50 – 40 hours per week and 8 hours per day; Article 69 (Working hours for minors) 7 hours per day and 40 hours per week; Article 46 of the Occupational Safety and Health Act (Harmful and dangerous work) 6 hours per

The calculation method for the contractual working hours per day is as follows: ① 6 hours per day from Monday to Friday and a 5-day working per week: [(30 hours x 4 weeks)/(5 days x 4 weeks) = 6 hours]. Or ②, if a regular worker works 6 days a week: [(30 hours x 4 weeks)/(6 days x 4 weeks) = 5 hours].

(iii) The standard for full-time workers is defined as "full-time workers engaged in the same kind of job in the same workplace" in Article 2 of the "Act on the Protection etc. of the Fixed-Term and Part-Time Workers" (FPA). The court explained that whether or not the work of the employee selected as a comparable worker corresponds to the work of the same or similar type as the work of a part-time worker is not based on the work content as specified in the rules of employment or the employment contract, but on the basis of the work actually performed by full-time workers. However, even if the tasks they perform are not completely in agreement with one another and there are some variances in the scope, responsibilities and authority of the tasks, they are considered to engage in similar tasks unless there is a substantive difference in the content of the main task."[75)]

III. Legal Working Conditions of Part-time Workers

Working conditions for part-time workers shall be determined on the basis of the relative ratio of their working hours in comparison to those of full-time workers engaged in the same kind of job in the same workplace (Article 18 of the LSA).

That is, even part-time workers are subject to all the provisions of the Labor Standards Act, but for statutory holidays and leaves, the principle of proportional working hours of ordinary workers is applied.[76)]

1. Employment contracts and Rules of Employment

(i) Employment contract: The employment contract of part-time workers must be issued in writing. In case of violation, a penalty of KRW 5 million is imposed (Articles 17 and 24 of the FPA). The items that must be included in the labor contract include: 1) Matters concerning the contract period; 2) Matters concerning working hours and rest hours; 3) Matters concerning components, calculation and payment methods of wages; 4) Matters concerning holidays and leave; 5) Matters concerning the place of work and required work; 6) Work days and working hours of each work day. The reason for requiring the employer to make labor contracts in writing is to prevent disputes for violation of the Labor Standards Act in advance.

(ii) Rules of Employment (ROE): The employer may create Rules of Employment that apply to part-time workers separately from those that apply to full-time workers. If an employer wants to make or change the rules of employment, the employer shall seek seek consultation of the majority of the part-time workers to whom the ROE will apply. However, if the ROE are to be modified in a manner that is unfavorable to the part-time workers, the employer must obtain the

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day and 34 hours per week.

75) Supreme Court ruling on October 25, 2012: 2011do7045.

76) For details, related information is in the Labor Standards Act and Article 9 of the LSA Implementation Rule attached, table number 2, the FPA, the Minimum Wage Act, etc.

consent of the majority of the part-time workers (Article 94 of the LSA). The purpose for this is to prevent the employer from unilaterally lowering the working conditions of part-time workers.[77]

2. Wages

(i) The wage calculation unit for a part-time worker is based on the hourly wage. If hourly wage is calculated as daily ordinary wage, the number of hours worked per day is multiplied by the hourly wage.

(ii) The wage shall be paid in full to the worker directly in Korean currency, and shall be paid at least once per month on a fixed date (Article 43 of the LSA).

(iii) For part-time workers, the average wage of 30 days or more for one year of continuous work shall be paid as severance pay. In this case, if the average wage is less than the ordinary wage, the ordinary wage must be paid as severance pay (Article 2 of the LSA). Also, in establishing a severance pay system for part-time workers, there should be no difference from that of the severance pay system for full-time workers.

(iv) Even if there is no comparable full-time worker, the minimum wage under the Minimum Wage Act must be paid.

3. Working hours

(i) The contractual working hours of part-time workers are strictly protected. The employer must obtain the consent of the part-time worker in cases of having the part-time worker work beyond the contractual working hours, and in instances such as this the Act (FPA) also stipulates that the part-time worker shall not work more than 12 additional hours from the contractual working time of one week. The employer shall pay part-time workers at least 50/100 of the ordinary wage for overtime work exceeding the contractual working hours within the legal working hours (8 hours per day, 40 hours per week). Under the Labor Standards Act, an additional wage of 50% or more of ordinary wage is paid only for overtime work exceeding legal working hours, but for part-time workers, payment of additional wages is prescribed even if the contractual working hours are exceeded within the legal working hours (Article 6 of the FPA).

(ii) Part-time workers are also paid an additional 50% for holiday work as specified in the rules of employment, and 100% for holiday work exceeding 8 hours (Article 56 of the LSA).

(iii) If a part-time worker performs night work between 10 pm and 6 am on the following day, the employer shall pay wages with an additional allowance equivalent to 50/100 (Article 56 of the LSA).

4. Holidays and annual paid leave

Holidays and annual paid leave for part-time workers are applied equally in accordance with the principle of proportional working hours for full-time workers.

(i) Holidays: An average of one paid holiday per week worked shall be guaranteed, for which the contractual working hours of one day must be paid. When calculating wages according to hourly wage, the employer shall pay an additional weekly holiday allowance. However, in the case of a

[77] Supreme Court ruling on May 28, 1990: 90da19647.

part-time worker who has been employed for weekend or holiday work, the weekly holiday should be given as a paid holiday on a non-weekend day.

① Calculating 6 hours per day from Monday to Friday, 5 days' work per week for full-time workers and payment of KRW 10,000 per hour: [(30 hours x 4 weeks)/(5 days x 4 weeks) = 6 hours], results in [6 hours x KRW 10,000 = KRW 60,000]. ② However, if full-time workers are working for 6 days a week: [(30 hours x 4 weeks)/(6 days x 4 weeks) = 5 hours], the result is [5 hours x KRW 10,000 = KRW 50,000].

(ii) Annual paid leave: The employer shall grant part-time workers a number of days of annual paid leave equal to that of full-time workers. Annual paid leave is calculated in hours, with less than one hour counting as one hour. Also, in case of monthly paid leave for those working less than one year, the contractual working hours of one day per each month should be given as monthly paid leave. The criteria for granting annual paid leave for part-time workers are as follows:

$$\text{Number of annual leave days for full-time workers} \times \frac{\text{Number of hours worked for part-time workers}}{\text{Number of hours worked for full-time workers}} \times 8 \text{ hours}$$

If a part-time worker works 20 hours a week, this works out to [15 days x (20 hours/40 hours) x 8 hours = 60 hours]. In other words, each four hours is guaranteed as an annual paid leave day.

(iii) Maternity Leave: The employer shall give 90 days of pre-and post-natal maternity leave for pregnant part-time female workers, with the first 60 days of maternity leave being paid. ① The maternity leave allowance is the amount calculated as the hourly wage of a part-time worker multiplied by the contractual working hours of one day and multiplied by 60 days. ② The remaining 30 days can be paid as maternity leave benefits as stipulated by the Employment Insurance Act (Article 74 of the LSA). Assuming that a part-time worker is paid KRW 10,000 per hour, and the contractual working hours is 5 hours per day. ① The maternity leave allowance is KRW 10,000 x 5 hours x 60 days = KRW 3,000,000. ② The maternity leave benefit is KRW 10,000 x 5 hours x 30 days = KRW 1,500,000.

IV. Prohibition of Discriminatory Treatment and the Exception of Applications

1. Prohibition of discriminatory treatment

An employer shall not give discriminatory treatment to any part-time employee on the grounds of his/her employment status compared to full-time workers engaged in the same or similar kinds of work in the business or workplace concerned. It is necessary to pay various allowances etc. in accordance with the Rules of Employment and employment contracts, and not discriminate against ordinary workers. The subjects of discriminatory treatment are ① Wages[78]; ② Regular bonuses, holiday bonuses, etc. and bonuses paid regularly; ③ Incentives according to business performance; ④ Other matters concerning working conditions and benefits, etc. (Article 2 of the FPA) If a part-time employee has received discriminatory treatment, he/she may file a request for correction with the Labor Relations Commission; this shall not apply if six months have passed since such discriminatory treatment occurred (or since such treatment ended in cases of continuous discriminatory treatment). The procedures for this are the same as those for remedy application of an unfair dismissal case (Articles 8, 10 to 15 of the FPA). The employer shall not discriminate against

78) Article 2 of the LSA: The term "wages" in this Act 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.

the part-time worker for the reason that he has applied for correction of discrimination (Article 16 of the FPA). If the employer fails to perform the correctional order of the Labor Relations Commission without just cause, he shall be subject to a fine of up to KRW 100 million (Article 24 of the FPA)

2. Exceptions of applications for part-time workers

With respect to workers whose contractual working hours is an average of less than 15 hours per week over a four-week period (or the employment period, if they have been employed for less than four weeks), ① weekly holiday allowance (Article 55), ② annual paid leave (Article 60), ③ monthly paid leave (Article 60), and ④ severance pay (Article 34) shall not apply. In addition, social security insurances such as employment insurance, national pension and national health insurance except for industrial accident compensation insurance are excluded.

If the employer sets the contractual working hours of one week to 14 hours, and concludes the employment contract by adding an additional 2 hours of fixed overtime work every day (for 5 days), the Ministry of Labor has decided that the total working hours, including fixed extended working hours, are defined as working hours actually taken, as long as there is no reason to believe otherwise. In such case, part-time workers are subject to severance pay. However, it is possible to exclude from fixed working hours if it is not fixed overtime work but extension work due to an agreement with the company at that time.[79)]

V. Conclusion

The reason part-time workers have been subjected to relatively poor working conditions is that it is difficult to find the same kind of workers working in the same workplace, to be able to compare for discriminatory treatment. To protect against discriminatory treatment of part-time workers, it is necessary to expand the scope of full-time workers for comparison.[80)] In addition, in the case of workplaces with fewer than 5 employees, legal correction for discriminatory treatment is not possible, as these workers are excluded from the protection of the labor laws, which is a blind spot in the labor law because it does not apply to overtime, night work or holiday work. Therefore, for the active use of part-time workers, it is necessary to gradually expand the scope of full-time workers to be compared and to apply the Labor Standards Act to workplaces with fewer than 5 workers, to reduce discriminatory treatment.

Dismissal during a Probationary Period

I. Principle

Even though an employee is hired under a probationary period, his dismissal shall be for a 'justifiable reason' in accordance with Article 27 of the Labor Standards Act. (Feb. 12, 1999, Seoul district court 98 gu 15558)

Even though an employee is hired under a probationary period, his dismissal shall be for a

79) Labor Ministry Guidelines: Working Standards-5085, December 1, 2009..

80) Park, Kyui-chun, "Legal Issues on Part-time Workers", 「Labor Review」, February 2008, Korea Labor Institute, page 25.

'justifiable reason' in accordance with Article 27 of the Labor Standards Act, because his labor contract was established just like that of a non-probationary employee. Provided, that the probationary system is designed to set a probationary period in order to judge whether or not the probationary employee shows competence for the job before confirming regular employment. The employer does not have to apply the identical requirements of the regular employee's dismissal for the decision of whether he may accept or cancel the regular contract at the time of completing his probationary period or during a probationary period. Accordingly, it is possible to refuse to hire him because of negative evaluations relating to job eligibility. It is also possible to dismiss him or to refuse regular employment when there is a justifiable reason for dismissal. Under this view, the probationary period plays a role in easing restrictions for dismissal. (Jan. 11, 1994, Supreme Court 92 da 44695; Sep. 8, 1987, Supreme Court 87 daka 555)

Justification for dismissal of the probationary employee during a probationary period (Aug. 4, 2006, Labor Standards Team-4040)
The employer shall not dismiss the employee without a justifiable reason in accordance with Article 30 of the Labor Standards Act. Whether or not there is a justifiable reason for dismissal shall be estimated on a case by case basis according to whether there is a special reason why the employer cannot continue to maintain employment of the employee. However, the probationary period shall be the period for deciding whether or not to offer formal employment for the new employee by evaluating his ability to be able to fulfill his duties. Accordingly, the scope of justifiable reasons for the new employee's dismissal is wider than that for a regular employee.

The employer shall not take disciplinary action, such as dismissal, toward the probationary employee without a justifiable reason, however, the range of justifications is wider compared to the regular employee. (Nov. 12, 1990, Kungi 01254-15636)
The employer shall not take disciplinary action, such as dismissal, toward the probationary employee without a justifiable reason; however, the range of justifications is wider compared to the regular employee. Provided, that the probationary period shall be a reasonable period in consideration of the job characteristics. If the period is extended unfairly, its extended probationary period is not effective in the view of social rationality: in cases where the probationary period exceeds 3 months, the advance notice of dismissal stipulated in Article 27 (2) of the LSA shall apply.

II. Justifiable Dismissal

It is justifiable to refuse formal employment of an employee under a probationary period on account of poor performance, negligence of duty, non-cooperative relationships with other coworkers, etc. (May 22, 2005, Seoul District Court 2004 guhap 30122)
The employee joined the company as a probationary employee with a six-month probationary period. Since the probationary employee showed remarkably poor performance compared to other probationary employees, was insincere at work, and could not get along with coworkers, superiors or other workers of related companies, the team leader gave him low evaluation rating. The employer made a decision to refuse to hire the probationary employee because of the low evaluation rating. Based on circumstances, the refusal of regular employment cannot be seen as an unfair dismissal.

It is justifiable to refuse to hire a probationary employee. (Jul. 2, 2001, NLRC 2001 Buhae 199)
The company estimated that continuous employment was unsuitable and refused to hire an employee applying the probationary period stipulated in the Rules of Employment. The reason was that the hotel manager (a probationary employee) on duty spoke violently to and threatened the managing director who was checking attendance. In the view of the purpose of a probationary period, the dismissal shall be objective, reasonable and justifiable according to the socially accepted idea.

It is justifiable to refuse to hire a probationary employee who did not describe his key role in a district labor union in his resume. (Jun 8, 2001, NLRC 2001 Buhae 144)
The probationary employee did not describe in his resume his experience as a vice-training/PR chief of Metal Workers Union in Seoul - East Area when he submitted a job application, and so the company could not evaluate his character comprehensively. It was considered justifiable for the company to refuse to hire him because of the omission of his previous union career in his resume and negligence of duty.

It is justifiable to dismiss a probationary employee on account of negligence of duty. (Aug. 11, 2000, NLRC 2000 Buhae 282)
The probationary employee received complains from customers because there were more dishes or less dishes available due to his miscalculation for the necessary amount of dishes. Furthermore, he resisted his supervisor's warnings and disturbed the company's order. Therefore, the company dismissed him because of negligence of duty, which can be seen as justifiable fulfillment of the employer's personnel right.

It is justifiable fulfillment of the personnel right when the employer dismissed a probationary employee on account of negligence of duty. (Jan. 21, 2000, NLRC 99 Buhae 626)
It is justifiable fulfillment of the personnel right for the employer to dismiss a probationary taxi driver in the probationary period because of indulgence of duty when he quarreled over the superior's directions and was late for work.

Even though the employer made a comprehensive personnel evaluation with some subjective aspects during a probationary period, which became a reason for dismissal, it would not be unfair enough to deny the whole evaluation result. (Apr. 8, 1999, NLRC 99 Buhae 64)

Even though the employer made a comprehensive personnel evaluation with some subjective aspects during a probationary period, which became a reason for dismissal, it would not be unfair enough to deny the whole evaluation result. **Because th**e employee cannot verify that the company manipulated the evaluation result afterwards, his dismissal is a justifiable dismissal.

It is justifiable to dismiss a probationary employee without disciplinary process on account of negligence of duty in accordance with the Rules of Employment. (Mar. 16, 1998, NLRC 97 Buhae 329)
For the employee in the middle of a three month probation period, it is justifiable to dismiss him without disciplinary process for his negligence of duty shown during the period.

III. Unfair Dismissal

Despite the employee being under a probationary period, it is unfair to dismiss him on account of the lack of job eligibility when he did not receive any customer orders within a short period of time (i.e., only two months). (Jan. 16, 2004, Seoul District Court 2003 Kahap 54613)

According to the company's personnel regulations, newly hired employees shall have a two-month probationary period and the company can cancel the employment for the probationary employees because of job ability, qualifications, and other job eligibility issues during a probationary period.

The employee was hired with an expectation to receive orders from 000 company and its subsidiary, but he did not have any customer orders and even did not make an effort to attract any sales order. Therefore, the company cancelled its probationary employment due to the poor job performance in accordance with its regulations. Despite the employee working in a probationary period, it is hard to conclude his job eligibility by the fact that he did not receive any sales orders within a short period of time (i.e., about two months). And there is no verification evidence to justify his dismissal. Accordingly, this dismissal is null and void because it was implemented without a justifiable reason.

As long as the result of probationary evaluation did not have an objective or reasonable reason as much as to refuse the regular employment, the refusal of employment is an unfair dismissal that abused the right of reserved cancellation. (Aug. 27, 2002, Administrative Court 2002 guhap 7210)

The company has not cancelled the employment of any probationary employees since its foundation. The probationary employees had not been informed regarding the criteria and methods for evaluating their work. Furthermore, the probationary evaluation system measured by the evaluation table was not yet introduced until the last month of the probationary period (i.e., June 7, 2001), and so it is difficult to judge whether the probationary employees had been evaluated continuously during a probationary period. In considering all those aforementioned conditions, even though they received the grade 'C', low enough to cancel employment, this was not judged objective and reasonable enough to refuse regular employment on account of a negative evaluation for their occupational ability and job eligibility according to the socially accepted idea. Therefore, the employer's refusal of regular employment was unfair dismissal that abused the right of reserved cancellation.

As long as the labor contract did not contain a clear article that applied a probationary period, the employee shall be regarded as a regularly employed, and cancellation of his labor contract is not termination of the contract, but dismissal of the employee. (Nov. 12, 1999, Supreme Court 99 da 30473)

Unless there was a clear article to apply a probationary period in the labor contract between the employer and employee, the employer shall be regarded as a regularly employed employee and not a probationary employee. The dismissal of the employee concerned shall be evaluated by whether or not there is a justifiable reason for dismissal of the regular employee.

It is unjustifiable to cancel employment immediately because of errors in the employment application document without giving an opportunity to rectify the errors and without an evaluation of job ability and attitude during a probationary period. (Aug. 22, 2002, LRC 2002 Buhae 104)

The probationary work system is to set a probationary period for the purpose of estimating the employee's vocational ability in the process of regular employment before making a confirmative labor contract. Therefore, because this is a system to reserve a certain period of time for whether or not to make a confirmative labor contract, it plays a role to ease dismissal restrictions. However, despite the probationary employee whose contract period is fixed for a certain period of time, the employee was hired just like the regular employees and his dismissal shall require a 'justifiable reason' in accordance with Article 30 of the Labor Standards Act.

Where there is no probationary period stipulated, it is to an abuse of the right of personnel to dismiss an employee for an abstract reason. (Jul 25, 2002, NLRC 2002 Buhae 288)
The employer hired an experienced employee through an internet advertisement. Although the employer informed the employee of the three-month probationary period verbally in the job interview, there was no evidence to verify it. The employer said that the employee was dismissed due to the lack of foreign language ability and interpretation skill and the low adaptation of human relationship at work and in the organization based on the employer's subjective judgment. In the disciplinary process, it is an abuse of the right of personnel to dismiss an employee for an abstract reason where the existence of a probationary period is in doubt.

Despite the justifiable reason for dismissal, it is unfair to cancel employment unilaterally without a disciplinary process for the employee who passed a probationary period. (Aug. 14, 2001, LRC 2001 Buhae 73)
Under the company's Collective Bargaining Agreement (CBA), the employee's probationary period shall expire in six months despite the absence of a company regulation regarding same unless there is special agreement between the mutual parties. As a temporary probationary driver, the company argued that the employee did not fall under the CBA and was dismissed due to a car accident occurring after the probationary period and unexcused absences from work. At the company, a majority of employees with the same kind of job fall under the CBA, and so an employee who has already passed a probationary period shall follow the disciplinary process stipulated by the CBA.

Justification of refusing regular employment for a contracted employee under a probationary period. (May 14, 2001, NLRC 2001 Buhae 32, 33)
The educational foundation, Chun Hae School, refused regular employment with probationary employees due to their negligence of duty, violation of directions, and evaluation as disqualified persons based on their personnel ratings. However, the employer did not provide concrete data showing that probationary employees did not follow the superiors' directions. Despite whether or not the personnel ratings were reasonable, the employer did not have relevant regulations in place and also there was no evidence that personnel ratings had been taken objectively and fairly. In an identical university, probationary employees have continued to work after an expiry of the probationary period, which gave them an expectation to be hired continuously. It is unfair dismissal for the employer to terminate the labor contract due to the expiry of a contract period for probationary employees without objective and justifiable reasons.

Justification of refusing regular employment for a probationary employee. (Mar. 21, 2001, NLRC 2000 Buhae 574)
The employer dismissed (refused to grant regular employment) probationary employees (tour bus drivers) on the reason that they fought with other colleagues after drinking and caused a violent incident. However, the violent incident occurred outside the workplace and after work. After this

incident, both parties involved in the incident reconciled amicably. Accordingly, the employer's refusal to grant regular employment to the probationary employees was an abuse of the right of personnel and was considered an unfair dismissal.

The company confirmed a position, salary table and announced the personnel order for a newly hired employee. However, if the company did not describe a probationary period in the labor contract, he/she shall be admitted as a regular employee. (Nov. 2, 1998, NLRC 98 Buhae 427)
When hiring a new employee on January 26, 1998, the employer confirmed a position and salary table (4th level – 2 ho), and then assigned him to the department (general affairs team) in the personnel order, which means he was hired as a regular employee. Then, the employer dismissed him on account of the lack of job ability, but in consideration of his first experience at work after graduation, this dismissal is so serious that it is unfair dismissal that abused the employer's personnel right.

Dismissal of a Probationary Employee

I. Introduction (Summary and Major Points in Dispute)

In March 2014, I received an inquiry regarding a case of dismissal from Company X (hereinafter referred to as "the Company") which is involved in the furniture wholesale business. The Company hired Employee Y (herein referred to as "the Employee") as a translator and assigned her translation duties, but the Employee was unable to carry out her duties well, so the Company terminated the employment contract within the probationary employment period of three months. The Company did not issue a written dismissal notice during the final meeting with the Employee, but simply obtained her signature on the evaluation sheet for probationary employees. Two months after her termination, the Employee filed an application for remedy for unfair dismissal. Considering that the Employee had passed a tough interview process and had worked hard during the probationary period, the Employee claimed that the Company's unilateral termination of her employment was unfair. For its part, the Company claimed that it had to terminate the employment contract after evaluating the Employee's performance during the probationary period as the Employee's translation skills were remarkably lower than expected or desired.

Major points of dispute in this dismissal of a probationary employee were: 1), whether the fact that the Company failed to issue a written dismissal notice was acceptable, and 2), whether the Employee's signature on her evaluation sheet can be regarded as agreement with termination of employment. In cases where an employee's signature on an evaluation sheet has not been regarded as agreement with termination of employment, termination has been considered unfair dismissal in violation of required dismissal procedures. The Labor Commission concluded on May 9, 2014 that this case would be regarded as if the employee had accepted termination indirectly, even though her signed evaluation sheet could not be seen as agreeing to termination, given that it was admissible that the employee's translation skills were insufficient for her position as a professional translator, and that the Employee did not refuse to sign the probationary employee evaluation sheet.

Here, I would like to review the claims of each party, the Labor Commission's judgment, and then the case itself.

II. Claims of both Parties regarding the Dismissal of a Probationary Employee

1. The Employee's Claim:

The Employee applied for an open position through an employment agency, had three separate job interviews and also took a three-hour translating test before being awarded the job in early October, and was assigned to a translator on the translation team on October 16, 2013. The Employee had worked very hard with no instances of lateness or absenteeism since she started with the Company. The Employee had official language qualification scores of 104 (TOEFL) and 980 (TOEIC) as well as a Masters degree from one of the top ranking US Universities, and had performed part-time work as a translator for three different broadcasting companies.

The Employee had never made any agreement with the Company concerning termination of employment. The Company notified the Employee of the termination of employment during the probationary period, but this dismissal during the probationary period should require an objective and rational reason to qualify as justifiable dismissal. Without such qualification, this action by the Company must be considered as unfair dismissal. The Company's dismissal is not justifiable due to the missing legal requirements such as a reason for dismissal, the severity of disciplinary punishment, and the dismissal process itself.

2. The Employer's Claim:

The Company rescinded the offer of employment during the probationary period due to the Employee's remarkably insufficient translation ability and relatively low-quality translations. As these results could be deemed reason for termination of employment in terms of not meeting reasonable standards, this could not be considered abuse of the employer's right to revoke an offer of employment. On the other hand, as this employee herself confirmed when she signed the probation evaluation sheet, this verified that both parties mutually agreed on the termination of employment.

When the Employee began her probationary period on October 16, 2013, she was assigned to translation duties, which involved the translation of English-language documents into Korean. Her translations did not meet the expected basic quality, and her translation efforts took twice the time of her colleagues. As her work contained so many translation errors, liberal translations with different meanings drastically from the original material, in addition to spelling mistakes, the translation team manager had to frequently re-translate her finished work. On December 4, 2013, the translation team manager implemented an intermediate evaluation on the Employee's performance for four items: 1) job knowledge; 2) work-performance quality; 3) cooperation with colleagues; and 4) communication skills. Except for cooperation with colleagues, she received the lowest evaluation result category ('requires considerable improvement') for all areas. The Employee signed her agreement with this evaluation.

On January 9, 2014, the translation team manager had a meeting with this employee, explained the evaluation results of the employee's probationary period, and then informed her of termination of her employment. The evaluation sheet of the probationary employee, on its front side, refers to 4 fields: job knowledge, work-performance quality, cooperation with colleagues, and communication skills, while the reverse side stipulates: "① The Company hires the employee; ② The Company extends the probationary period; and ③ The Company terminates employment." The translation team manager explained the results of the probationary evaluation that revealed an insufficiency for each rated item, and then, on the reverse side of the evaluation sheet, the manager checked the section "the Company terminates employment" and asked her to sign there for confirmation, after which she signed the evaluation sheet. In the meantime, the personnel team manager joined the meeting, and the Employee said: "My aptitude suggests that I prefer a marketing job to a translation job". The personnel team manager suggested that the Employee could apply for an open position related to marketing, and later gave a business card to the Employee. As the interview process continued during the final evaluation meeting, the Employee confirmed the items regarding termination of her employment with the Company and then signed the probationary evaluation sheet. In this situation, where the employee herself even mentioned that she would be more qualified for marketing than for translation work, her termination was mutually agreed upon.

III. The Labor Commission's Judgment[81)]

The major points of dispute in this case are firstly, whether or not there was a dismissal; and secondly, if there was a dismissal, whether or not such dismissal was justifiable. The Labor Commission, after considering both parties' claims, reviewing various submitted verification documents, and direct interrogations during the judgment hearing regarding these points of dispute, judged this case as follows:

The Supreme Court ruled, "the dismissal of an employee during a probationary period, or the refusal to enter into an employment contract after the expiration of a probationary period, are interpreted more generously than general dismissal, as concerns the employer's right to be able to cancel further employment, because the probationary system was designed to give the employer time to evaluate whether or not a new employee has the competence required for a given job." [82)]

In this case, the Employee did not agree on the termination of employment, and even during the probationary period, the employer's termination of the Employee without objective and justifiable reason shall qualify as an unfair dismissal. However:

1) The Employee was very not good at translations and frequently made mistakes.
2) Approximately one month after the joining the Company, the Employee complained to the personnel team about the inefficient working system and unfair work assignments, which had caused disagreements between the Employee and her direct superior, the translation team manager. After this incident, the Company decided to terminate the employment with this employee prior to completion of the three-month probationary period, due to the Employee's work deficiencies and poor communication skills with the translation team manager.
3) The evaluation sheet which the Employee confirmed and signed in the section of termination of her employment with the Company on January 9, 2014 could not be enough to verify mutually agreed-upon termination. However, the fact that she signed the evaluation could be understood as accepting dismissal, since she had signed an interim evaluation the month before (on December 4, 2013) which also highlighted her poor performance.
4) After receiving the lowest scores available in the probation evaluation performed on January 9, 2014, the Employee signed the evaluation sheet stipulating the termination of employment without dispute.
5) During the process of evaluating the probationary results and delivering notification of termination, the Employee stated that she could do better in marketing than in translation. In consideration of the documents submitted and interrogations conducted, the Employee was deemed to have suggested that the Company's original evaluation of her translation skills were not adequate for the job.
6) Even though the Employee did not want to accept it, she knew that there was a probationary period stipulated in the employment contract and the rules of employment, and so the termination of the probationary contract was not unilateral.

Considering all the items mentioned above, in terms of the purpose of setting the probationary period, the termination of employment between the Company and the Employee was implemented based on the negative results of her poor work performance.

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81) Labor Commission's Decision on May 9, 2014. Seoul 2014buhae703
82) Supreme Court ruling on July 22, 2003, 2003da5955; SC ruling on February 24, 2006, 2002da62432

IV. Major Points of Dispute in the Labor Commission's Decision

The major points of dispute in this dismissal during the probationary period are two: the first is whether it could be no problem when the Company did not provide written notification; and the second is whether the Employee's signing of the probation evaluation sheet can be regarded as agreed-upon termination. I would like to look into each.

1. In cases where the company does not give written notification of dismissal to the probationary employee, is the dismissal valid or not?

Article 23 (1) of the Labor Standards Act stipulates that the employer shall not dismiss a worker without justifiable reason. Article 27 of the LSA stipulates that when intending to dismiss a worker, the employer shall notify the worker in writing of the reason for dismissal and the date of such dismissal. These rules were designed to make the employer become more circumspect, and ensure whether dismissal in fact exists, and if so, the reason for the dismissal as well as the date it becomes effective, so the worker can easily make appropriate preparations if he or she seeks a remedy claim.[83)]

In cases where the probationary employee was dismissed, even though there was a justifiable reason to dismiss the probationary employee due to poor evaluation results of his/her occupational aptitude or job eligibility, if the company did not notify the probationary employee in writing of the reason for the dismissal and the date of such dismissal, such dismissal is regarded as an unfair dismissal due to no implementation of procedural justification.[84)] Accordingly, this particular dismissal case was implemented without the Company's written notification of dismissal, and so unless the case was considered an agreed-upon termination, as the Company claimed, this dismissal during the probationary period could only become invalid because the Company did not follow the procedural requirement of written notification.

2. Whether the Employee's signing of the probation evaluation sheet can be regarded as agreed-upon termination of employment?

The term, 'agreed-upon termination' is not defined in the labor laws, but refers to mutual agreement: the employee expresses his or her intention to resign, and then the employer accepts it, thus terminating the employment relationship.[85)]

First of all, the Labor Commission ensures that an employee's signing of a probation evaluation sheet does not automatically become an agreed-upon termination of employment. However, in this case, the Employee signed the evaluation sheet knowing that it stipulated that the result of the evaluation was to terminate the employment. The Employee admitted in the evaluation meeting that she was not qualified for a translation job, but as there were no open positions for marketing that she wanted to apply for, she applied for the translation position instead. Also, when the Employee joined the Company, she signed the employment contract based upon a probationary period. In the middle of the probationary period, the Employee received the intermediate probation evaluation, and after the final evaluation at the end of the probationary period, she was informed of the termination of the employment contract. Considering all the aforementioned items, although the Employee did not agree with the termination of employment directly, she could be regarded as agreeing with the termination of employment indirectly. Accordingly, it is evident that the Labor Commission's decision was fair.

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83) Lim Jongyul, Labor Law (12th edition), Parkyoung publishing co. pages 538-539
84) National Labor Commission's decision on October 17, 2011, 2011buhae676
85) Lim Jongyul, Labor Law (12th edition), page 541

V. Conclusion

It is common for the Company to notify of dismissal after probation evaluations without written notification, but this can be deemed an illegal dismissal in violation of the employer's duty to provide a written dismissal letter as stipulated by Article 27 of the Labor Standards Act. This particular dismissal during the probationary period was made without such written dismissal notification. Fortunately in this case, the Company made sure that the probationary employee understood the employer's reason for dismissal during the evaluation meeting and obtained the Employee's signature on the evaluation sheet. Because of this signature, the Labor Commission decided that the Company's termination of the probationary employee's employment was not a dismissal, but the agreed-upon termination of employment based on the previously-mentioned conditional employment contract concerning probation. If this case had been designated as an illegal dismissal, the Company would be at risk for huge financial and operational damages. Accordingly, it is recommended that when dismissing even a probationary employee, a company should observe the required procedures such as a written notification of dismissal along with justifiable reasons as per the Labor Standards Act.

Dismissal after Signing Employment Contract but before Official Start of Work

I. Introduction

The following labor case is regarding a company signing an employment contract with an applicant and terminating employment after negative feedback from an existing employee of the company who knew the applicant.

A multinational company located in the United Kingdom (hereinafter, "the Company") decided to hire Mr. H as a Korean branch manager (hereinafter, "the Employee") and signed an employment contract with him on Friday, May 12, 2016. The Employee was supposed to join the Korean branch office in three weeks. However, the Company heard some unfavorable feedback from one Korean branch employee who had once worked with the Employee (due to his harsh leadership in the previous company, this staff employee told the Company that if the Employee was hired, this employee would quit). The Company therefore canceled the employment contract with the Employee on May 17, 2016. The Termination Letter quoted Section 1 of the signed contract, which stated that, "The Company may terminate the employment relationship at any time without prior notice and for no reason at all," as well as clearly explaining that the dismissal was due to negative feedback about the Employee. In a quick response email, the Employee complained about the termination and threatened to take legal action if there was no acceptable compensation. The Company then suggested one month's salary as a cordial settlement, to which the Employee replied that he would accept 12 months' salary as compensation. In the meantime, the Employee had been busy disparaging the Company and speaking about it in a derogatory manner to the Company's Korean customers.

To deal with this incident, the Company sought legal advice from this labor attorney, whereupon I reviewed the case in light of related laws and court rulings and provided the most suitable legal opinion.

II. Related Laws and Court Rulings

1. Related Laws (the Labor Standards Act)

Article 15 (Labor Contract Contrary to This Act)
① A labor contract which establishes working conditions that do not meet the standards provided for in this Act shall be null and void to that extent.
② Those conditions invalidated in accordance with the provisions of paragraph (1) shall be governed by the standards provided in this Act.

Article 23 (Restriction on Dismissal, etc.)
① No employer shall dismiss, lay off, suspend, or transfer a worker, or reduce wages, or take other punitive measures against a worker without justifiable reason.

Article 28 (Application for Remedy for Unfair Dismissal, and Related Acts)
① If an employer dismisses a worker unfairly, the worker may apply to the Labor Relations Commission for remedy.
② The application for remedy under paragraph (1) shall be made within three months from the date on which the unfair dismissal, and related acts, took place.

Article 33 (Enforcement Levy)
① If an employer, after receiving a remedy order (including a decision on reexamination concerning a remedy order; hereinafter the same shall apply in this Act) from the Labor Relations Commission, fails to comply with the remedy order by the deadline for compliance, an enforcement levy of an amount not exceeding 20 million won shall be imposed on the employer. (Enforcement levy will be charged twice a year for two years, making a maximum of 4 times.)

Article 111 (Penal Provisions)
A person who fails to comply with a remedy order confirmed pursuant to Article 31 (3) or confirmed after the filing of an administrative lawsuit, or a decision rendered after reexamination of a remedy order shall be punished by imprisonment of up to one year or a fine not exceeding ten million won.

2. Related Court Rulings

(1) Where an employer canceled the employment contract before the employee started to work

1) A case where an employer canceled the employment contract after six months, without hiring the employees on the promised date

The employer notified the applicants at the end of November 1997 of the final decision to hire them, and asked them to submit the related employment documents, such as a confidentiality agreement in December 1997. The employer told them that new employees would start working on March 1, 1998. The employer delayed assigning them any jobs, and finally notified the new employees on June 18, 1998 that their employment had been cancelled. The employer's notice of cancelling the employment amounts to a dismissal, which was rendered null and void as there were no justifiable reasons for cancellation.[86)]

2) A case where the court determined a 50 percent responsibility to the hired applicants on the one hand, and the company on the other regarding wages to be paid during the period of waiting for employment to begin.

86) Seoul District Court ruling on April 30, 1999, 99gahap20043.

The company and the applicants agreed on employment terms, but the company delayed actually calling them into work for a considerable time. The company had not considered accurately how many new employees would be needed for its new work projects, and informed the hired applicants, after a long period of time, that they would not be hired in actuality due the company being unable to begin a new construction project. The hired applicants who were waiting to be called into work suffered damages as they had had to give up looking for other opportunities to get a new job while expecting to begin working for the company. In this case, the company should compensate the hired applicants for the damages due to lost time and missed opportunities.

On the other hand, the hired applicants were informed of the company's intention to hire them but were not notified of a specific start date. The hired applicants should have continuously inquired for clear information about the formal start date or what they should do in the event of cancelation of their employment, but the hired applicants had neglected to make any such efforts, which was taken into consideration in calculating the amount of compensation to be given. For this reason, the hired applicants were held partly responsible for their lost opportunities, and should also be willing to take 50% less in calculated compensation. The company was responsible for providing the remaining 50% of calculated compensation. [87)]

3) A case where the Court ruled that the company should pay the entire amount of wages for the period of waiting from the agreed-on start date to the date their employment contracts were canceled.

In this case, the employees were informed in November 1997 that they would be hired by the company, and they were supposed to start working on April 6, 1998. But the company delayed their start date without explaining the reason. Due to the delay, the employees took legal action. The Court concluded that the company had to pay their salaries from the date the decision was made to hire them to the date their employment was canceled (June 30, 1999).[88)]

2. A case where a new employee was dismissed due to falsification of information on previous misconduct

Supreme Court ruling on June 23, 2000, 98Da54940: Where an employee is found to have falsified or concealed his education and experience, the company might choose not to hire him/her (if discovered at the point of recruitment) or might choose not to provide the same working conditions (if discovered either at the point of recruitment or during the course of his/her service to the company). This assumption justifies taking appropriate disciplinary dismissal action.[89)]

3. Court rulings related to the employment status of a Korean branch manager:

(1) Executive officials are not employees as defined in the Labor Standards Act (LSA).

Executive officials, including directors, are mandated by their employer to deal with a certain scope of business management. In general, they are not in an employment relationship that requires them to provide a given type of work under the supervision and control of the employer and receive a given amount of wages in return. In this sense, executive officials

87) Seoul District Court ruling August 27, 2003.
88) Seoul High Court ruling on April 28, 2000, 99na41468.
89) Supreme Court ruling on June 23, 2000, 98Da54940.

shall not be considered employees under the LSA, unless under some exceptional circumstances.[90]

(2) A person who provides a specific service under the direction and supervision of others, such as a director, and who receives fixed pay as remuneration can be regarded as an employee defined by the Labor Standards Act.

Whether it is appropriate to regard a director as an employee defined by the Labor Standards Act has nothing to do with the manner in which the contract is made but whether the director was paid to provide a service that requires him to be subordinate to another. Such a director can be regarded as an employee regardless of whether he/she is holding the position or title of a company director or auditor, in the real sense or just in name, as long as he/she receives remuneration as compensation for providing a specific labor service under the direction and supervision of the employer or he/she receives remuneration as compensation for taking charge of a specific labor service under the direction and supervision of persons such as the representative director in addition to the duties assigned to him/her by the company.[91]

III. Answers to Questions on the Issue

The following questions and answers describe the employment situation on which this labor attorney was asked to provide legal advice, and the best course of action.

Question 1. Can the Company cancel employment with the Employee based on Section 1 of the Employment Agreement or not according to Korean Labor Law?

Since the employment contract has been made, its cancellation requires a justifiable reason to be considered legal. The Company should verify the justification for termination.

However, the level of justification differs according to timing[92]:

1) From the time the employment contract is signed to actually starting work → Low-level justification required. If the employer has reasons to cancel then, this is the best time.
2) From actually starting work at the workplace to the end of the first 3 months → Mid-level justification required. To terminate employment, the employer should verify why the employee is not suitable for the work. However, this 3 month period is still a time when more weight is allowed for the employer's judgment.
3) From the fourth month of employment → The criteria for justifiable termination are much stricter.

Question 2. If the Company cancelled the employment contract before the Employee started to work, what legal liabilities would the Company face? If the Company cancelled the employment contract after the Employee started to work, what legal liabilities would the Company face?

As long as an employment contract has been made, the employer cannot dismiss the Employee without a justifiable reason. If the Employee is dismissed, the Employee can apply to the Labor Relations Commission (LRC) for remedy. The LRC may determine that the employer must reinstate

90) Supreme Court ruling on Dec. 22,1992, 92Da28228.
91) Supreme Court ruling on Sept. 26, 2003, 2002Da64681.
92) Lim, Jongyul, 「Labor Law」 17th edition, Park Young Sa, 2019, p. 406.

the dismissed employee and pay back pay. If there is a justifiable reason for the Company deciding not to hire him, it would be a justifiable termination. Review of dismissal cases related to the cancellation of employment contracts before employees start to work reveals that some companies have delayed for long periods of time the start date for hired employees, which resulted in significant cost to the employees in terms of lost time and lost opportunities. Most cases ended with the companies having to pay salary during the waiting period.

Question 3. How much compensation for damages would be appropriate to the Employee for a peaceful settlement?

The Company heard the negative feedback about the Employee only 5 days after signing the employment agreement. If the Company had heard such negative feedback before signing, it likely would not have signed on the Employee. Since the Company canceled the employment contract before he started working, the Employee's damage will likely be considered only 6 lost days for opportunities to find other options. If the Employee had begun working for the Company, it would have to hold itself to very strict standards in terminating the employment contract. However, the termination was done only five days after the agreement was signed and still before the Employee had begun to work.

From the Employee's perspective, he had been looking for a job, and did not quit his previous one specifically for this opportunity. The Company has also had clear negative feedback about the Employee from a previous coworker.

Furthermore, since the employment contract was canceled, the Employee has denigrated the Company in conversations with Company clients, damaging the Company's reputation. This can be very clear evidence that the Company cannot reinstate him.

In this light, I felt the Company should pay compensation amounting to 6 days' salary. However, I respect the company's decision to give one month's salary as compensation, deeming it a reasonable way for the Company to avoid any unnecessary legal litigation or additional disputes.

Question 4. What legal actions can the Employee take to get the best possible compensation in the Korean legal system?

The Employee may take legal action in the form of applying to the civil court or the LRC for remedy. Ninety-five percent of dismissal cases are handled by the LRC directly.

① Applicant à Regional Labor Relations Commission (3 months required in legal process)
② Appealing Applicant à National LRC (3 months required in legal process)
③ Appealing Applicant à Administrative Court (one year or longer) àHigh Court (one year or longer)à Supreme Court (one year or longer)
④ Applicant à Civil Court (more than one year) à High Court (more than one year) à Supreme Court (more than one year)

In 2017, about 10,995 dismissal cases were processed in the LRC and the National LRC.[93] Civil suits take more time and money and are more difficult. The LRC provides many advantages in this legal remedy process. No fees are required, and a decision is made within three months.

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93) Ministry of Labor & Employment, 「2018 Employment & Labor White Paper」 p. 227

IV. Opinion

Whether the Employee takes legal action or not is up to him, but he will certainly take action if there is a good possibility of winning significant compensation. However, if his case is not strong enough, he will not. I want to give two different opinions based upon this employment case for the cancelation of a just-signed employment contract.

1. If the employment contract is signed directly between the CEO of the UK multinational and the Employee, and if the actual work has not started at the workplace, it is like a normal contract between party A and party B. Also, the Employee was supposed to work as a country manager in charge of the Korean branch office. This means his status is more like a commissioned contractor than an employee protected under the Labor Standards Act. In this case, Party A can cancel the contract in accordance with what is stipulated in the employment agreement, of which Section 1 states the Company may terminate the employment relationship at any time without prior notice or for no reason at all.
2. The employment contract is more likely to be subject to Korean labor law, as it describes that it would be subject to Korean labor law. In this case, the Employee may file an application with the Labor Relations Commission (LRC) for remedy against unfair dismissal. If the Employee does so, the Company will need to appoint a legal representative to respond. In order to prevent such action, it is reasonable to offer compensation of one month's salary. The Employee's demand for 12 months' wages is beyond consideration, and likely comes simply from his desire to receive more than what is offered.