Working Conditions for Minors

I. Introduction

Minors are in the process of growing up as adults, so they are less developed physically and mentally, and receive special protection because they are legally required to go to school.[1] Korea's Constitution (Article 32, Paragraph 5) stipulates that special protection shall be accorded to working minors, and Chapter 5 of the Labor Standards Act specifically describes the working conditions of minors. Minors work as short-term workers, fixed-term workers, and workplace trainees in 24-hour convenience stores, fast food restaurants, and production plants. Therefore, when considering their working conditions, it is necessary to consider the conditions at workplaces with fewer than 5 workers in mind. For field trainees in particular, working conditions vary by whether they are working as students or workers.

All the protections in the Labor Standards Act (LSA) apply to working minors as well as adult workers. This includes the prohibitions against discrimination, forced labor, and violence, restrictions on unfair dismissal and managerial layoffs, and the requirement to issue written employment contracts. However, in workplaces with fewer than 5 employees, dismissal restrictions, shut-down allowances, additional wages for overtime work, and annual paid allowances do not apply.[2]

I would like to list the working conditions for minors in detail by sections and special protection regulations together. In addition, I will examine whether trainees are students or workers in legal disputes.

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1) Lim, Jongyul, Labor Law (18th Ed.), Parkyoungsa, 2020, p. 611; Ha, Kapryel, The Labor Standards Act (33rd Ed.), Joongang Economy, 2020, p. 693.

2) 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 20~22, Article 23 (2), Article 26, Article 35~42
	Chapter 3.Wages	Article 43~45, Article 47~49
	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 66~69, Article 70 (2) & (3), Article 71, Article 72, Article 74
	Chapter 6. Safety & Health	Article 76
	Chapter 8. Accident Compensation	Article 78~92
	Chapter 11. Labor Inspectors, etc.	Article 101~106
	Chapter 12. Penal Provisions	Article 107~116
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.

II. Scope of Working Minors and Occupations from which They Are Prohibited

1. Scope of Working Minors

In principle, no person under the age of 15 shall be employed as a worker. However, those 13 to 15 years of age with an employment permit issued by the Minister of Employment and Labor may be so employed, as long as the employment does not interfere with their compulsory education (Article 64 of the LSA and Article 35 of its Enforcement Decree). The employer shall keep in the workplace a certificate proving the family relationships and written consent from their parent or guardian for each working minor under 18 (Article 66).

2. Prohibited Occupations

Under the Labor Standards Act, employers cannot assign pregnant women or those under 18 years of age to work that involves moral or health hazards or danger (Article 65). Prohibited occupations include high-pressure work and diving work, jobs or businesses that prohibit the employment or entry of children under the age of 18, work in prisons and mental hospitals, work in incineration and slaughter, and work dealing with oil.[3] However, they can be employed for gas station refueling service for passenger vehicles.

Employers shall not assign women or minors under the age of 18 to work in mines except where the work is temporarily needed to perform the certain duties such as health, medicine, news reporting, news coverage, etc. (Article 72).[4]

Employers shall not abuse workers in training, workers on probation or any other apprentice whose purpose is to acquire a technical skill, or assign them to domestic work or other work not related to the acquirement of technical skill (Article 77).

Businesses where entry and employment of minors (under the age of 19) is prohibited under the Youth Protection Act (Article 2, Item 5) are:

(1) Businesses where minors are prohibited from entering or working: entertainment and other bars, video rooms, karaoke rooms (businesses with facilities that make it legal for minors to enter are excluded from the entry ban), telephone rooms, dancing academies, dancing rooms, businesses involving speculative behavior, and those involving the handling of sexual devices.

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3) Prohibited occupations include: ① In the 「Rules on Occupational Safety and Health Standards」, high-pressure work and diving work, ② In the 「Construction Equipment Management Act」 and 「Road Traffic Act」, etc., driving, and its related works which are prohibited for those younger than 18 years, ③ Jobs or business employment or entry of minors under the age of 18 is prohibited by other laws such as the 「Youth Protection Act」, ④ Jobs in prisons and mental hospitals, ⑤ incineration and slaughter, ⑥ handling fuel tasks (excluding refueling passenger vehicles with gasoline), ⑦ Work related to 2-bromopropane handling or exposure, ⑧ Other tasks designated and publicly announced by the Minister of Employment and Labor after deliberation.

4) **Article 42 (Jobs Permitted for Working Inside Pits)** The jobs for which women and those under the age of eighteen may be placed temporarily inside a pit under Article 72 of the Act shall be as follows:
1. Jobs for health, medical treatment and welfare;
2. Jobs for the gathering and reporting of news for newspapers, or to publish and produce broadcasting programs;
3. Surveying for the purpose of academic research;
4. Jobs for management and supervision;
5. Practical training work performed in the fields relating to subparagraphs 1 through 4.

(2) Businesses prohibited from hiring minors: Accommodation, barber shops, bathing businesses in which a massage room is set up or which is divided into private rooms, tobacco retail, toxic product manufacturing, sales and handling, ticket coffee shop, places selling alcohol like soju bars, beer bars, cafes, etc., music record sales, video sales and rental shops, general game rooms, and comic book rental shops.

III. Special Protection of Labor Contracts

Employers seeking to hire minors shall draw up employment contracts for the minors to sign if they so desire in the same position in determining the working conditions (Article 4). In this case, the parents[5] or guardians[6] cannot act on behalf of the minor, but if the employment contract is deemed unfavorable to the minor, they can terminate it later (Article 67). Under the Civil Act, those under the age of 19 cannot engage in legal actions such as signing contracts independently, and so may engage in legal actions only with the consent of a parent or guardian. So, in the Labor Standards Act, those under the age of 18 must submit consent from their parents at the time of employment. However, working minors may independently engage in legal actions such as claiming wages and joining a labor union.

The employer must write and deliver the necessary items in the working minor's employment contract, and if working conditions are changed, a revised employment contract must be issued (Article 17). The written contents shall include: ① (Wages) Wage composition, calculation method, and payment method; ② (Contractual working hours) shall be determined within the legal working hours for minors (7 hours per day, 35 hours per week); ③ (Weekly holidays) If workers work more than 15 hours a week, they are entitled to an average of 1 or more paid weekly holidays per week; ④ (Paid Leave) Workplaces with five or more employees must guarantee monthly paid leave and annual paid leave; ⑤ (Place of employment and work to be engaged in).

IV. Wages

Employers must pay wages directly, in currency, and in full to working minors, at least once a month on a fixed date (Article 43). When working minors quit or the working relationship is terminated due to dismissal, any owed wages, severance pay, and other money shall be paid within 14 days of the termination (Article 36). Employers must not pay wages to the parents of their minor workers (Article 68). If working children are unable to provide work due to reasons attributable to the employer, they shall be paid 70% of their average wage (Article 46). If an emergency situation such as illness or accident occurs and working minors require immediate payment of wages for work performed before the request date in order to cover the related expenses, employers shall pay wages ahead of payday (Article 45).

Wages must be set at minimum wage at least, and cannot be lowered on account of the worker being a minor. However, for unskilled minors who have signed an employment contract

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5) **Civil Act - Article 909 (Custodian)** (1) Parents shall have parental authority over their minor child.

6) **Civil Act - Article 928 (Commencement of Guardianship for Minors)**
Where there is no person with parental authority over a minor or where a person with parental authority is unable to exercise all or part of his/her parental authority, a guardian shall be appointed for the minor.

for at least one year, the minimum wage may be reduced up to 10% for the probationary first 3 months. However, this is not applicable to simple labor work (Article 5 of the Minimum Wage Act, or "MWA").

If working children quit after continuing to work for one year or more, severance pay equal to the 30 days' average wage per year of continual work shall be paid (MWA, Article 34). However, there is no obligation to pay severance pay if the average working hours are fewer than 15 per week for each 4 week period. If some months the minor works an average of fewer than 15 hours per week and some months the minor works an average of 15 hours or more per week, only the months in which the minor worked an average of 15 hours or more per week are calculated, and severance pay is incurred only when such period is one year or longer (Article 18).

V. Special Protection of Working Hours and Rest

The working hours of persons aged 15 to 18 shall not exceed 7 hours per day and 35 hours per week. However, this may be extended by up to 1 hour per day and 5 hours per week if there is agreement between the parties. Since 1 week refers to 7 days including holidays, the longest working hours for working minors shall be 40 hours a week. Therefore, flexible working hours and selective working hours are not applicable to working minors (MWA, Articles 51 and 52).

An employer shall allow a recess period of 30 minutes or more for every 4 working hours and at least 1 hour for every 8 working hours during the work day. During these rest hours, rest should be freely available to working minors (Article 54).

If working minors continue to work for 15 hours or more per week, they are given paid weekly holidays (Article 55). If they have completed their contractual working hours for one week, they are entitled to a weekly leave allowance of one or more days (Article 55). The weekly leave allowance for working minors is determined according to the ratio calculated by the working hours of ordinary workers engaged in the same type of work at the workplace, just as the working conditions for part-time workers (Article 18).[7)]

When working minors have worked for more than the contractual working hours, employers must pay overtime allowance amounting to 50% or more of the normal wage, in addition to the normal wage (Article 6 of the Fixed-Term Employment Act).

Employers are not allowed to have those under the age of 18 work from 10 pm to 6 am or on holidays, unless the employer obtains the consent of those under the age of 18 and approval from the Minister of Employment and Labor (Article 70). According to the approval standards of the Ministry of Employment and Labor,[8)] if nighttime operations are inevitable for fast food restaurants where many minors work part-time, in consideration of the safety of working children, their health, and protecting their ability to learn during the day, the limit is 12 midnight, unless approval from the Minister of Employment and Labor is gained for special

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7) For 4 hours a day, 5 days a week, and an hourly wage of 10,000 won, the weekly vacation allowance is calculated according to the proportional principle of short-time workers. (20 hours / 40 hours per week) x 8 hours = 4 hours; 4 hours x 10,000 won = 40,000 won.

8) Ministry of Employment and Labor Guidelines on approval for minors to engage in night work (Equality Policy Division-July 26, 2004).

reasons. Here, the term "special reasons" refers to cases where the necessity for night work is accepted and will have no detrimental effect on the health of working minors.

Employers shall give 15 days of annual leave when working minors have attended the workplace for at least 80% of the contracted work hours during one year. Employers shall also provide one day of paid leave for each month to working minors who have continued to work for less than one year or those who have attended the workplace for less than 80 percent of the contracted work hours during one year (Article 60).

VI. Coverage by the Four Major Social Insurances

In principle, coverage by the four major social insurances are required for working minors. However, if the on-site trainees are students who are not workers, they are not eligible. For working minors, the four insurances are applied slightly differently. (1) Industrial Accident Compensation Insurance: Applies the same as for all workplaces using workers. However, on-site trainees who are not workers are exceptionally eligible for compensation from workers' compensation (Article 123 of the Industrial Accident Compensation Insurance Act). (2) Employment Insurance: Working minors who are employed for 1 day or longer are covered by employment insurance, but short-time workers with fewer than 60 working hours per month are excluded. (3) National Pension and National Health Insurance: The national pension is mandatory for those aged 18 or over and under 60 who work at a workplace. However, the National Health Insurance applies to all workers working in the workplace, regardless of age. The same applies to daily workers whose employment period is shorter than one month, and short-time workers whose contractual working hours per month are fewer than 60.

VII. Legal Issues related to Working Children

Whether or not the trainees in third grade of vocational high school are workers depends on whether or not they are students. If the main purpose for field training is to develop practical learning abilities to earn high school credits, they cannot be considered workers. However, if on-site trainees are recognized as having a subordinate relationship with the employer, they are considered workers under the Labor Standards Act.

1. Student Status[9)]

In accordance with the Industrial Education Promotion Act, 2 + 1 year public high school students take the 3rd year (1 year) course as students during the 3rd year of high school and engaged in industrial field training. A standard agreement is signed between the business, the school, and the students, and the students engage in on-site practice according to the on-site practice plan prepared in consultation with the business and the school. The business is supposed to evaluate trainee performance during on-the-job training according to the standards set by the school and notify the school of the results. Field training is a part of the curriculum in accordance with the Industrial Education Promotion Act and aims to help students acquire the knowledge, skills, and attitudes necessary for them to engage in industry in the future. In this case, it is difficult to see the trainee as a worker who provides work for the purpose of wages.

9) MOEL Guidelines: Employment support unemployment benefits-262, Jan. 19, 2011; Kungi 68207-1833, May 4, 2002.

2. Worker status[10)]

Applicants who are expected to graduate are considered workers, if a subordinate relationship is recognized, and the Labor Standards Act is applied. In other words, even if they are trainees who are expected to graduate from high school and their working period is temporary, it cannot be concluded that they are not covered by the Labor Standards Act only for these reasons. In cases where it is recognized that there is a subordinate relationship pursuant to Article 2 of the Labor Standards Act based on the actual relationship between the employer and the trainee regarding the employment contract, the nature and content of work, and whether or not compensation is paid, the Labor Standards Act shall apply to the trainee.

VIII. Conclusion

Working minors are in their mental and physical growth stages, and since education should be given priority, they need special protection beyond that needed by adult workers. Chapter 5 of the Labor Standards Act specifies the details of this special protection. Recently, there have been many cases of industrial accidents involving students in field training, so special caution is required. Because working minors are still developing physically and mentally, they absolutely need special protection. All special protection requirements for working minors are mandatory regulations, and employers will be liable for punishment if these regulations are violated.

Guidelines for Determining if Subcontracting is Actually Illegal Dispatch

I. Introduction

Dispatched workers are used for the flexibility and reductions to labor costs they entail for companies. However, as dispatched workers can only be used for 2 years and only for a limited range of jobs, companies have been looking for a way to make use of workers in a similar way. In-house subcontract workers are one way to gain the continuous benefit that dispatch employment cannot provide. In-house subcontracting requires independence and expertise. However, many companies in Korea do not outsource these specialized tasks, but often make use of in-house subcontracting for simple work or to increase their manpower for lower costs. If a company directs and orders subcontract workers in their work, this will be judged illegal dispatch and the employer will be subject to criminal punishment and an obligation to directly employ the in-house subcontract worker (Article 6-2 of the Dispatch Act).

To prevent illegal dispatch, on April 19, 2007, the Ministry of Employment and Labor has provided “Guidelines on Determining ‘Dispatch Workers’ to Distinguish between Dispatch and Subcontracting.” Nevertheless, the use of illegal dispatch and disguised subcontracting have

10) Supreme Court ruling on June 9, 1987: 86 daka 2920.

expanded across all industries. Accordingly, on December 30, 2019, the Ministry of Employment and Labor began emphasizing the criteria through its "Guidelines on Criteria for Determining Dispatch Workers."

II. Determining Illegal Dispatch

1. Understanding Illegal Dispatch

The term "worker dispatch" means a system in which a sending employer, while maintaining employment relations with a worker after hiring, has the worker work for a using employer under the direction and order of the using employer in accordance with a worker dispatch contract (Article 2 of the Dispatch Act). Whether or not it is a worker dispatch is judged based on the facts rather than the name or form of the contract between the using and sending employers.

A contract for work becomes effective when one of the parties has agreed to perform a certain job and the other has agreed to pay remuneration for such work (Article 664 of the Civil Act). This means that the subcontractor, at his own discretion and responsibility, uses his own employed workers to complete the work. In-house subcontracting refers to having a subcontractor perform some of the work in the contractor's workplace. When a subcontractor worker receives commands and control from the contractor at the contractor's workplace and provides work to the contractor, a dispatch relationship is established. In this case, it is illegal because the contractor does not meet the legal requirements for dispatch workers.[11)]

2. Procedures for Determining Disguised Subcontracting and Illegal Dispatch

First, whether the subcontractor is a substantive company needs to be verified. If there is no substantive employer entity, the subcontractor workers are given direct employment instructions. When a subcontract employer entity is recognized, the next step is to judge whether disguised subcontracting is occurring or not.

(i) Determining the substantive employer entity: When engaged in subcontracting using external personnel within the company, first review whether the subcontractor is recognized as an employer entity. If the subcontractor entity is not recognized as the employer, the subcontract workers are deemed to have a direct labor contract relationship with the contractor company.

(ii) Determining whether a subcontract worker is dispatched: When a subcontractor is recognized as the substantive employer entity, next to be determined is whether the contractor actually exercises command and control over the subcontract workers, and whether a subcontract worker is in fact a dispatch worker.

III. Criteria for Determining Disguised Subcontracting and Related Cases

1. Whether a Subcontractor is the Substantive Employer Entity

11) Lim, Jongyul, Labor Law (18th Ed.), Parkyoungsa, 2020, p. 647; Ha, Kapryel, The Labor Standards Act (33rd Ed.), Joongang Kyungjei, 2020, p. 793.

The Supreme Court provides the following criteria in relation to a subcontract to hide the employment relationship in a contract. "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."[12)]

Whether the subcontractor is recognized as a substantive employer entity is determined by considering whether the subcontractor has an entity and independence as employer regardless of the type and name of the contract between the subcontractor and contractor. However, if the subcontractor has some degree of entity and independence as a business owner, it is judged that there is a substantive entity as employer.[13)]

(1) Rights to hire, dismiss, etc.: Review whether the subcontractor decides on the working conditions and personnel affairs of the worker.
(2) Responsibility to raise funds and make the necessary expenditures: Review whether the subcontractor raises its own money for establishing a business, renting an office, and other tasks.
(3) An employer's legal responsibilities: Review whether the subcontractor has withheld earned income tax, whether or not its workers have been subscribed to the four social insurance plans, and whether rules of employment have been established and enforced.
(4) Responsibility for providing machinery, facilities, tools and instruments: Review whether the subcontractor possesses the machinery, facilities, and legal documentation necessary to do business independently.
(5) Professional skills and experience: Review whether the subcontractor plans the business independently, exercises management decision-making power and has the professional skills or experience necessary for the business.

2. Related Cases

(1) Cases of substantive employer entity recognized

<Kumho Tire: Supreme Court ruling on Dec. 22, 2017, 2015 da 32905>
① A subcontractor established a separate company away from the contractor, acting as an independent business entity, and registering the business; ② joined the 4 social security insurances; and ③ prepared separate employment rules and controlled working status.

<Incheon Airport Corporation: Supreme Court ruling on July 25, 2013. 2012 da 79439>

12) Hyundae Mipo Shipbuilding Company: Supreme Court ruling on Sept. 23, 2003 2003du3420.
13) Supreme Court ruling on Feb. 26, 2015, 2010da106436.

① Subcontractors have separate employment rules, control working status, and exercise disciplinary rights; ② They signed service contracts with other companies besides this contractor, and hired 2,730 workers assigned to several companies.

(2) Cases of a substantive employer entity denied

<SK Insight: Supreme Court ruling on Sept. 23, 2003. 2003du 3420>
① The contractor instructs the subcontractor's employees to work without distinction from its own employees, and performs all personnel management directly; ② The subsidiary of the contractor holds 100% of the stock of the subcontractor, and this subcontractor carries out the contractor's work.
➔ The contractor only used the subcontractor's business registration in order to take advantage of workers in the form of disguised subcontract. However, in reality, there is an employment contract relationship as if they'd been hired directly.

<Hyundai Mipo Shipbuilding: Supreme Court ruling on July 10, 2008. 2005da75088>
① The subcontractor has been contracted for about 25 years handling assigned tasks from the contractor, who notified the subcontractor of hiring, disciplinary requests, and a list of eligible persons for promotion; ② The contractor decides working hours and overtime work for the subcontractor workers, and assigns them to work other than the contracted work; ③ The contractor pays the bonus, severance pay, etc. directly to the subcontractor workers.
➔ Actually, without having independence in business performance or in business management, the subcontractor functions as a business unit of the contractor or as a worker provision agency.

IV. Criteria for Determining Illegal Dispatch and Related Cases

The Supreme Court set the standard precedent for illegal dispatch as follows. "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."[14)]

1. Substantial Contractor Command and Control

Whether the contractor directly or indirectly instructs the subcontractor workers on the specifics of the work to be performed is reviewed, and whether the subcontractor workers are

14) Hyundai Motor Case: Supreme Court ruling on Feb. 23, 2012, 2011doo7076.

significantly controlled by these instructions and commands from the contractor. Even if the subcontractor's field manager gives specific instructions and orders to the subcontractor workers, it can be a sign of dispatch employment if the subcontractor's field manager only conveys decisions not made by the subcontractor. However, if ① the contractor only determines such things to an appropriate extent for a contractor, such as specifying the scope of the subcontractor's work, while specific work details are determined and instructions on such are conveyed by the subcontractor's field manager and ② the contractor does not order subcontractor workers on a regular basis, but instead it instructs only in emergencies or only in temporary situations, then requiring subcontractor workers to follow the contractor's safety and health instructions as required in accordance with Article 63 of the Occupational Safety and Health Act does not, in itself, mean the subcontract workers are actually dispatch workers.

<Related Cases>

<Examples of command and control that determines dispatch employment>

○ In cases where the contractor has decision-making authority to assign work to the subcontractor's workers, and decides the place and time.[15)]

○ In cases where the contractor prepares a work manual or work instructions with work methods and details, etc., and issues it to the subcontractor's workers, and they have to perform the work accordingly.[16)]

< Examples of when command and control do not determine dispatch employment>

○ When the subcontractor establishes its own work plans to execute the contract, and accordingly and independently determines the number of workers to be put to the work, the work arrangement and changes, and work time.

○ Even if the contractor is involved in the work of subcontractors, such as by placing a work manual, etc., in cases where the subcontractor workers carry out their work in accordance with their own field manager's work instructions.[17)]

2. Subcontractor's Actual Engagement in the Contractor' s Business

① Subcontractor workers can consist of groups working with the contractor's workers, ② groups performing work besides the contractual work, and ③ those who substitute for contractor workers in the event of the latter's absence. In these cases, it will be reviewed whether the subcontractor workers have actually been transferred to engagement in the contractor's own business.

If a subcontractor worker performs the same work in the same space as a contractor worker, there is a high chance it will be deemed dispatch employment. Even if the workplaces are the same, it is difficult to assume that the individual workers are included in the contractor's business when they perform the work independently according to the contract purpose of the subcontractor.

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15) Hyundai Motor Case: Supreme Court ruling on Feb. 26, 2015, 2010da106436.
16) Kumho Tire Case: Supreme Court ruling on Dec. 22, 2017, 2015da32905.
17) KT&G Case: Supreme Court ruling on Jan. 25, 2017, 2014da211619.

<Related Cases>

<Examples of when actual engagement in contractor's business determines dispatch employment>

- ○ (Same workplace) When subcontractor and contractor workers are placed in the same group and perform the same tasks together.[18)]
- ○ (Different workplace) When subcontractor and contractor workers are spatially separated, but subcontractor workers participate in one of a series of processes or subdivided work steps in one process and are closely linked.[19)]

<Examples of when actual engagement in contractor's business do not determine dispatch employment>

- ○ (Same workplace) Even if subcontractor workers work together in the same space as contractor workers, when the details of the work are different and the work is done independently and has no relation to the work of the contractor workers.[20)]
- ○ (Different workplace) When subcontractor workers do not perform the same tasks when mixed with contractor workers.[21)]

3. Personnel and Labor-related Decisions

Reviewing who makes decisions related to personnel and labor determines whether the subcontractor exercises management authority independently.

<Related Cases>

<Examples of the subcontractor being unable to exercise personnel rights>

- ○ New placements of subcontractor workers must be approved by the contractor, and subcontractor workers must be replaced if the contractor requests it.[22)]
- ○ The contractor decides the subcontractor's working hours and whether overtime is to be performed, etc.[23)]

< Examples of the subcontractor being able to exercise personnel rights>

- ○ When subcontractors provide training necessary to perform their jobs at their workplace, and have basic authority on recruiting and disciplinary action to directly manage the work time and worker attendance.[24)]

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18) Hyundai Motor Case: Supreme Court ruling on Feb 26, 2015, 2010da106436.
19) Kumho Tire Case: Supreme Court ruling on Dec 22, 2017, 2015da32905.
20) KT&G Case: Supreme Court ruling on Jan. 25, 2017, 2014da211619.
21) Korea Tire Case: Supreme Court ruling on Dec. 13, 2018: 2015na2023411.
22) Gunpo-si Case: Supreme Court ruling on July 22, 2016, 2014da222794.
23) Hyundai Motor Case: Supreme Court ruling on Feb. 26, 2015, 2010da106436.

4. Subcontractor Expertise and Technology

Whether the work to be performed by the subcontractor worker(s) is specifically determined shall be reviewed, as well as whether it is distinct from the work of contractor workers and whether the subcontractor has the necessary expertise and technology.

<Related Cases>

<Examples of the subcontractor lacking the needed expertise and technology>

- ○ When the subcontractor's scope of work is undefined and it simply carries out the work assigned by the contractor.
- ○ When the subcontractor's work is the same as that of the contractor and is not clearly classified.[25)]

<Examples of the subcontractor possessing the needed expertise and technology>

- ○ In cases where the subcontractor's work is performed independently from the contractor's work.
- ○ When subcontractor workers perform only the work specified in the contract, but do not perform additional work under direction of the contractor.[26)]

5. Company Organization and Facilities

It is reviewed whether the subcontractor has an independent business organization, equipment, or equipment necessary to achieve the purpose of the contract as a party to the contract.

<Related Cases>

<Examples of the subcontractor lacking an independent corporate organization and facilities>

- ○ If the subcontractor has not invested its own technology or capital.[27)]
- ○ If the subcontractor does not have separate human and material facilities, does not have specific expertise and consists simply of a large number of workers.[28)]

<Examples of the subcontractor possessing independent corporate organization and facilities>

- ○ The subcontractor has an organization to achieve the purpose of the contract, and is actually working for a number of companies besides the relevant contractor.[29)]

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24) KT&G Case: Supreme Court ruling on Jan. 25, 2017, 2014da211619.
25) Hyundai Motor Case: Supreme Court ruling on Feb. 26, 2015, 2010da106436.
26) KT&G Case: Supreme Court ruling on Jan. 25, 2017, 2014da211619.

IV. Conclusion

Recently, the Korean subsidiary of a foreign automobile company consulted with me about correcting illegal dispatch. In addition to a diagnosis of the situation, I suggested measures for correction of illegal dispatch in accordance with the related labor law, court rulings, and Ministry of Employment and Labor Guidelines. While consulting with the company, it was surprising to learn that the company was like a body where only the head and chest were managed directly, while the torso and limbs were outsourced to subcontractors. These subcontractors ran the company's car sales, car deliveries, its car parts warehouse, customer call center and in-house training, while they also managed the in-house computers and vehicles, as well as quality.

Such subcontract management is used as a way for companies to reduce costs and adjust their employment situation in a globally competitive system. However, such subcontracting is possible only through strict management of subcontractors. In other words, subcontractors must maintain their independence and possess the expertise needed by the contract. It is easy for an employment situation to be deemed illegal dispatch unless thorough and continuous action is taken to avoid these and other examples of it.

Criteria for Determining Whether a Truck Owner/Driver is an Employee

Ⅰ. Introduction

Understanding the criteria for determining whether employee status exists is becoming more important. There is little confusion when an employee provides work under an employment contract or if a freelancer provides a service independently. In general, there are a lot of problems when looking at those whose status lies somewhere between employee and freelancer. When a truck owner/driver who owns his delivery truck provides labor service together with his truck, this creates an issue of whether the truck owner/driver is an employee or not. In the case of a driver who is engaged in the delivery of goods with his own vehicle, he is not an employee but a self-employed person because he provides transportation services and charges service fees. However, in recent years, truck owner/drivers have often been recognized as employees if they have been registered as truck owner/drivers and provided considerable work as a driver under a company’s specific work directions. On the other hand, if a truck driver charges a service fee according to the number of transport instances, he is not recognized as an employee, even if he has been working for a long time and on an exclusive basis. In other words, this truck owner/driver can be recognized as an employee if there has been a strong subordinate relationship involving supervision and control between the employer and the service provider, but not if there have been only strong economic dependencies between them and no subordinate relationship.

Herein, I will look into the criteria for determining whether a truck owner/driver can be deemed an employee, and consider the criteria for judging their employee status based upon the details in selected cases.

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27) Hyundai Motor Case: Supreme Court ruling on Feb. 26, 2015, 2010da106436.
28) Kumho Tire Case: Supreme Court ruling on Dec. 22, 2017, 2015da32905.
29) KT&G Case: Supreme Court ruling on Jan. 25, 2017, 2014da211619.

Ⅱ. Determining Whether a Truck Owner/Driver Has Employee Status

1. Common criteria for determining employee status

A definition of 'worker' in Article 2 paragraph 1 of the Labor Standards Act stipulates, "A worker means a person who provides work to a business or a workplace for the purpose of wages, regardless of the type of occupation." It is said that the employee ① receives wages in return for labor service, ② must be exclusively engaged in the employer's business or workplace, and ③ must provide labor service. All three criteria must be met for determination as an employee. Missing one of them excludes someone from being an employee.[30)]

The courts used to judge on a case-by-case basis when determining employee status, until the Supreme Court provided specific criteria (2004 Da 29736). This Supreme Court ruling has served as the standard for dealing with cases related to employee status.[31)] The criteria set by the Supreme Court include the following general principles. First, regardless of whether the contract is a service contract or not, the actual relationship is what matters. Second, there are nine enumerated criteria for determining a subordinate relationship (see the following paragraph), which are divided into three groups: subordinate relations, economic dependency, and weighting factors. Third, in determining the criteria for determining a subordinate relationship, the factors that can be determined from the superior position of the employer in the relationship are the weighting factors to increase the argument for existence of an employee status, but they cannot be regarded as negative factors for judgment.

In this case, the Supreme Court ruled, "Whether a person is considered an employee under the Labor Standards Act shall be determined by whether, in actual practice, that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages, regardless of the contract type, such as an employment contract or a service contract. Whether or not a subordinate relationship with the employer exists shall be determined by collectively considering: ① whether the rules of employment or other service regulations apply to a person; whether that person's duties are decided by the employer, and whether the person has been significantly supervised or directed during his/her work performance by the employer; ② whether his/her working hours and workplaces were designated and restricted by the employer; ③ who owns the equipment, raw materials or working tools; ④ whether the person can be substituted by a third party hired by the person; ⑤ whether the person's service is directly related to business profit or loss as is the case in one's own business; ⑥ whether payment is remuneration for work performed or ⑦ whether a basic or fixed wage is determined in advance; ⑧ whether income tax is deducted for withholding purposes; whether the person is registered as an employee in accordance with the Social Security Insurance Act or other laws; ⑨ whether work provision is continuous and exclusive to the employer; and the economic and social conditions of both sides. Provided, that as whether basic wage or fixed wage is determined, whether income tax is deducted for withholding, and whether the person is registered for social security insurances can be determined at the employer's discretion by taking advantage of his/her superior position, the characteristics of "employee" cannot be denied because of the absence of these mentioned items."[32)]

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30) Lim, Jongyul, Labor Law (18th Ed.), Parkyoungsa, 2020, p. 33.

31) Lim, Sangmin, Truck Owner's Employee Status, Justice, Korea Law Institute, Apr. 2014, p. 318; Yoon, Aerim, Truck Owner's Employee Status, Labor Law (44), Dec. 2012, Korean Labor Law Association, p. 186; Yoo, Sung-Yeop, Criteria for Determining Truck Owner's Employee Status, Labor Law (63), Korean Labor Law Association, Sept. 2017, p. 153; Koo, Gunseo, Consideration of Court Rulings on Employee Status for Truck Owners, Labor Law Forum (12), Practical and Theorical Labor Society, Apr. 2014, p. 82.

32) Supreme Court ruling on Dec. 7, 2006, 2004da29736: Full-time instructors' employee status.

2. Truck owner/driver and determining employee status

A truck registration system represents a contract signed between a truck owner/driver and a delivery company. Externally, the truck owner/driver entrusts his/her truck to the delivery company, who in turn controls the ownership and operation of the truck. But internally, the delivery company receives a certain amount in management fees from the truck owner/driver driving the registered truck for their delivery operations.[33] The truck owner/driver is deemed not to have employee status when he/she governs/controls actual ownership or operation of the truck.[34]

The following four items constitute the key factors in determining employee status for the truck owner/driver, whose characteristics differ from those of ordinary employees. These individual factors are considered comprehensively.

First, does the employer command and supervise the truck owner/driver? If the employer directly instructs the truck owner/driver about work orders, the route, and work assignment, this represents a strong argument for employee status.[35]

Second, how is the truck owner/driver paid? This is determined by whether compensation is paid by the number of trips or the content of the deliveries, or whether the worker is provided a fixed monthly wage. In general, if receiving a fixed salary, there is no risk in business, and their employee status is considered to be strong because the salary is fixed regardless of their personal efforts.[36]

Third, the subordinate relationship is strong when the truck owner/driver provides labor according to the employer's business purpose, not when the truck owner/driver decides whether to provide the labor by his own calculation.[37]

Fourth, the continuity of work provision and whether the truck owner/driver works exclusively for the employer are important references for determining employee status.[38]

III. Items for Judging a Truck Owner/Driver Has Employee Status

1. Criteria for judging truck owner/drivers' employment status

According to the Labor Standards Act, a judgment that employee status exists shall consider the following items: first is the actual labor supply relationship, not the type or name of the contract; second is that the items for determining the labor supply relationship shall be considered comprehensively; and third is the factors that exist or not at the employer's discretion should be classified separately. These items for judgment criteria are classified into three groups: 1) subordinate factors, 2) economic dependence factors, and 3) weighting factors. The reason for classifying them is that the Supreme Court's judgment standards are arranged in parallel, which is causing confusion in the judgment of employee status. Therefore, objectivity can be maintained in different cases by grading each factor according to these standards for determining general employee status. In particular, weighting factors are matters that can be determined unilaterally by the employer due to his/her superior position in the relationship. So

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33) Yoon, Aerim, Truck Owner's Employee Status, Labor Law (44), Dec. 2012, Korean Labor Law Association, p. 171.
34) Ministry of Employment and Labor Guide on March 10, 2000: Kungi 68201-695; Supreme Court ruling on July 11, 2013: 2012 da 57040.
35) Supreme Court ruling on Apr. 26, 2013: 2012 do 5385.
36) Supreme Court ruling on June 9, 2011: 2009 do 9062.
37) Seoul Administrative Court ruling on Nov. 29, 2007: 2007 koohap 2241.
38) Seoul Administrative Court ruling on July 20, 2018: 2018 koohap 57660.

the items can add weight to determining employee status, but the absence of these items does not mean no employee status exists.

2. Checklist for determining employment status[39)]

Supreme Court Ruling (9 items: details for judgment)			Factual Grounds for the Truck Owner	Judgment	
				Employee	Employer
Subordinate factors	1) Direction & supervision from the employer	① Application of rules of employment	Whether the rules of employment apply	o/x	o/x
		② Arrival/departure from work, annual leave	No control over arrival/departure time, no annual leave granted		
		③ Work direction, supervision	Considerable supervision during work performance		
	2) Working hours and workplaces	④ Working hours	Whether working hours are controlled		
		⑤ Workplace	Whether the workplace is mandated		
Economic dependence factors	3) Equipment, working tools, expenses	⑥ Ownership of equipment, working tools	Who owns equipment, tools, etc.		
		⑦ Expenses	Whether operating costs are subsidized, expenses reimbursed, etc.		
	4) Substitution	⑧ Substitution with a 3rd party	Whether work is exclusive or person can be substituted in the event of absence		
	5) Earning	⑨ Pursuit of profit	Whether pursuit of profit through individual effort is possible		
	6) Characteristics of wage	⑩ Remuneration for labor	Whether wage is decided by evaluation of total deliveries, or paid at a fixed amount in return for work provided		
	7) Continuous service, exclusive work	⑪ Continuous work	Long-term service		
		⑫ Exclusive work	Whether the driver can work for another company during employment		
Weighting factors	8) Basic pay	⑬ Whether basic pay is fixed	Whether the majority of pay is based on basic wage or incentive pay		
	9) Income tax and social security insurances	⑭ Income tax and social security insurances	Whether corporate tax or income tax is deducted; whether premiums for social security insurances are deducted		
Evaluation & Opinion				total	total

* In the review, weighting is divided into two stages: employee status and employer status. The more items that are calculated in the total sums, the stronger the consideration of the relevant status.

39) Jung, Bongsoo, "A Study on the Employee Status of Native English Teachers", Korea University graduate school MA thesis paper, Dec. 2013, p. 79.

IV. Application of Judgment on Whether a Truck Owner is an Employee

1. Court cases that deny employee status

(1) Supreme Court ruling on July 11, 2013: 2012 Da 57040 (Truck owner/driver)

It was ruled that the truck owner/driver could not be seen as an employee as he repeatedly carried out a specific transportation task according to a fixed transportation schedule and transportation route for a considerable period of time according to the transportation service contract. The district court (Suwon District Court 2011 Na 20352) admitted the truck owner/driver's subordinate relationship and economic dependence and recognized him as an employee. However, the Supreme Court decided that the plaintiff could not be seen as an employee because he signed a contract for the transportation of goods with the transportation company and provided services. However, this ruling has been criticized as going against the criteria set by the Supreme Court for judgment of employment status.[40)]

(2) Supreme Court ruling on Oct. 6, 2000: 2000 da 30240 (Individual business owner)

A truck owner/driver registered a business entity under his own name and while he was injured at the workplace, it was while conducting a personal transportation job under his own responsibility. As a result, he was regarded as an individual business owner, not an employee.

(3) Seoul Administrative Court ruling on Apr. 7, 2016: 2015 Guhap 76254 (Individual business owner)

The employer assigned cargo delivery services to certain truck owners/drivers, but did not supervise them individually. The truck owners/drivers were able to receive the promised amount of money simply by completing the assigned cargo deliveries, regardless of whether they performed the cargo delivery themselves or hired a third party.

(4) Supreme Court ruling on June 24, 2005: 2005 doo 3875 (Truck owner/driver under a goods transportation contract)

A truck owner/driver regularly delivered the goods of a specific company designated by the employer in accordance with a goods transportation contract, and received a fixed monthly payment. In this case, the employer did not control the truck owners/drivers regarding their commute, did not ask them to report their work, nor gave direct work instructions for the truck.

(5) Supreme Court ruling on June 9, 2011: 2009 doo 9062 (Truck owner/driver who received service fees according to the volume of goods delivered)

Certain truck owners/drivers signed a goods transportation contract, maintained their vehicles at their own cost, and could have the goods delivered by a third party without prior permission. As they received service fees according to the volume of goods delivered, they were deemed business owners for the purpose of transportation services.

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40) Lim, Sangmin, Truck Owner's Employee Status, Justice, Korea Law Institute, Apr. 2014, p. 323; Park, Eunjung, Employee Status of the Truck Owner/Driver, Labor Review (104th Ed.), Korean Labor Institute, Nov. 2013; Goo, Gunseo, Consideration of Court Rulings on Employee Status for Truck Owners, Labor Law Forum (12), Practical and Theorical Labor Society, Apr. 2014, p. 92.

2. Court cases recognizing employee status

(1) Supreme Court ruling on April 26, 2013: 2012 do 5385 (Directly-hired truck owner/driver)

In a subordinate relationship to a specific company, truck driver/owners used their own vehicles to provide work and received a comprehensive set of fixed wages, including expenses for maintaining their trucks. They delivered iron wire products manufactured by the employer to the suburbs of Seoul in accordance with the employer's instructions.

(2) Seoul High Court ruling on April 4, 2018: 2017 Noo 67843 (Delivery fee paid monthly by the company)

There are two types of delivery jobs in the transportation company. Some truck owners/drivers were paid transportation fees for each trip while others received a fixed amount each month. The truck owners/drivers who received a transportation fee for each trip had to take their own risks due to the change in the volume of delivery goods. However, the truck owners/drivers who received a fixed amount paid monthly always had to be ready to make urgent or unscheduled deliveries for the company. Accordingly, the truck owners/drivers who received monthly fixed fees were deemed eligible for severance pay.

(3) Seoul Administrative Court ruling on July 20, 2018: 2018 goodan 57660 (Truck owner/driver directly hired by the company)

An employee's status changed from employee to truck owner/driver, and worked in the same way as before. He delivered goods and also conducted errands as requested by the company.

(4) Seoul Administrative Court ruling on Nov. 29, 2007: 2007 goohap 2241 (Truck owner/driver under the employer's supervision)

Although the truck owner/driver appeared to be a private business owner that had entered into a cargo transportation service contract with the company, he actually provided work in a subordinate relationship to earn wages. The details supporting the existence of this subordinate relationship included a fixed monthly salary, fixed commuting time, application of off-day rules and retirement regulations, exclusive work for the company, and preparing and delivering a report on daily operations, and application of other company regulations.

V. Conclusion

The employment status of a truck owner/driver should be determined according to the actual work characteristics rather than the contents of an external transportation service contract. In the field, it is common for a truck owner/driver working according to subordinate relations to still be considered an individual business owner in accordance with the transportation service contract, and so in many cases, they do not benefit from the Labor Standards Act. Therefore, it is necessary to have a clear understanding of the criteria for judging employment status to avoid running afoul of Korean labor law.

Understanding Cultural Differences at Work Between Korea and the West

Ⅰ. Introduction

While Korea has been making free trade agreements (FTAs) with the United States and the European Union, more and more foreign companies have been establishing branches in Korea. Companies here are hiring more foreign professionals in an effort to enhance their competitiveness in the markets of advanced nations. While working in the same company or workplace, it is very common for disagreements or misunderstanding to arise between Koreans and Westerners due to differences in culture, occupational habits and language. It is very difficult to understand our counterparts if we do not understand the cultural characteristics that have formed over long periods of time, which of course can lead to an atmosphere that is not conducive to business. There are many differences in the way we think and behave at work, such as the kind of hierarchy we are familiar with, the way we relate to each other through linguistic expression, the way we address each other, and the way we express our opinions. I would like to deal with this issue through one tragic case involving culture, and the opinions of some foreigners living and working in Korea.

Ⅱ. Culture: the Secret Behind a Plane Crash

At about 1:42 am on August 6, 1997, a Korean Air passenger plane approached Guam Airport and attempted to land, but because of the low visibility due to stormy weather and pilots' accumulated tiredness, the plane went off the runaway and crashed into a small hill nearby the airport. This accident resulted in the deaths of 228 of the 254 passengers onboard. As the pilots were trying to land, they could not see the runway due to the poor weather. When the ground proximity alarm sounded at 500 feet (152 meters), the co-pilot suggested gently "Let's give up the landing." When the pilot did not do so, the co-pilot said again, strongly this time "No visibility, give up the landing!" The pilot then gave up trying to land, but it was too late: the plane continued to descend and crashed. If the co-pilot had spoken in a commanding voice instead of a suggestion, the pilot would have understood the emergency situation they were in, and prevented the crash.[41)]

After David Greenburg from Delta Air was hired by Korean Air to be a flight safety manager, he discovered the fundamental causes for this tragedy: the complicated ways of expressing oneself in the Korean language and Korea's vertical hierarchy. His approach was to create a rule for Korean Air pilots: they must speak English. "The official language in Korean Air is English. If you want to continue to work as a Korean Air pilot, you must be able to

41) Malcolm Gladwell, "Outliers" Chapter 7, page 252, (The Ethnic Theory of Plane Crashes)

speak English fluently." English does not have such strict rules regarding politeness, and emotional authority between positions and ages is not as high as in Korea. In the 'Power Distance Index,' which indicates the degree of authority people in higher social positions have over those in lower positions, Korea places among the highest, while the US places among the lowest. Although a pilot and co-pilot work in a situation which requires them to operate a plane together in cooperation, Korean pilots have a very clear vertical hierarchy of superior and subordinate, putting the co-pilot in a position of obedience to the pilot. The pilot can discipline his co-pilot by hitting his hand for minor mistakes, something taken for granted. In addition, this vertical hierarchy includes complicated expressions of language. The superior talks down to the subordinate while the subordinate talks in high forms to the superior. For example, using the lowest form of language includes orders "you will do this"; talking in low form would be "do this"; talking in high form would be "please do this"; talking in the highest form would be "would you please do this?" Under such a strict vertical hierarchy and the required forms of expression, a subordinate cannot simply point out his superior's mistakes, but must speak indirectly in a way that does not offend the superior.

Since Korean Air began employing Mr. Greenburg, accidents have almost ceased and the company was able to restore confidence, both internally and in terms of how other entities view Korean Air. Mr. Greenburg changed the cultural atmosphere inside the cockpit by insisting on the use of English, hiring more civilian pilots to join an organization made up mostly of former military pilots, and standardizing technical terms and conversational methods. By making adjustments to these organizational cultures, Korean Air has been able to prevent similar plane crashes, and has become an example of air safety for other airlines. On April 10, 2010, a plane with the Polish president, Lech Kaczynski, aboard, crashed while trying to land at a Russian airport in very foggy conditions, killing 97 passengers. One of Poland's major daily papers, Gazeta Wyborcza, introduced Korean Air and its recent safety history. "During the late 1990s, Korean Air faced a crisis: Air France and Delta Air were requesting the airline leave their alliance, and the American Federal Aviation Agency (FAA) had given it a very poor safety rating. However, Korean Air was able to get through the crisis with the help of safety consultants. The answer was to 'speak English.' Korean culture demands such a high form of respect for superiors or seniors that a co-pilot could not address directly the fact that a pilot was making a mistake. But through English communication, the airline was able to work around this strong hierarchical structure rooted in the Korean language 'trap'."

Ⅲ. Cultural Differences Related to Position and Age

1. Cultural differences: position

In Korea, addressing someone by their title or position is important. People at work call each other by their job positions, while westerners use first names, or Mr., Mrs., or Ms., plus family names for respect. In western culture, position titles only indicate persons-in-charge, and are not used when addressing that person. Mr. or Mrs. is acceptable regardless of someone's

position, with first names used once two people are on friendly terms. In Korea, title indicates status, so if someone is addressed in a way that is not suitable for his age or position, he or she may be offended and feel they are being talked to as an inferior. Sales employees introduce themselves using a title that is higher than their own, to give themselves authority in the eyes of customers.

Following are some titles used in Korean companies when addressing other persons or describing their positions.

Korean Titles	Chinese Titles	Pronunciation	English Title
회장	會長	Hway jang	Chairman
대표이사	代表理事	Dae pyo isa	Representative Director
사장	社長	Sa jang	President
부사장	副社長	Bu sa jang	Vice President
전무이사	專務理事	Jun moo isa	Executive Managing Director
상무이사	常務理事	Sang moo isa	Managing Director
이사	理事	Isa	Director
부장	部長	Bu jang	General (Senior) Manager
차장	次長	Cha jang	Manager
과장	課長	Gwa jang	Section Chief (Manager)
대리	代理	Dae ri	Assistant Manager
사원	社員	Sa won	Employee

2. Cultural differences: age

In Western culture, people can be friends with whomever they want, while in Korea you can only call someone your friend if he or she is the same age as you. In Western culture, people keep in mind the age difference and give respect where it is due, but nevertheless they are free to befriend anyone they please.

In the Korean work environment, to be in a higher position than someone older than you is difficult because age is very important. To be young and in a higher position than someone older puts you in a predicament because you are not able to conduct yourself as that person's senior as they may think there's nothing to learn from you or you have no authority to lead them because you are younger. In western cultures, positions in the workplace are more respected than here.

Ⅳ. Cultural Differences Related to Behavior

Here are examples of cultural differences related to behavior that I collected from expatriates living and working in Korea.[42)]

1. "In Korea it is polite to decline something that is offered to you and maybe on the 2nd or 3rd time it is offered you accept it. In western culture if something is offered to you and you want it you can gladly accept it the first time it is offered."
2. "Also in Western culture, the use of "thank you" is much more common than in Korean culture. It is quite common for friends, spouses, and family members in Korea not to say thank you to each other for little gifts, for giving someone something they requested etc., whereas this would be quite rude in Western culture. We even say "thank you" to the salesperson at a store when we buy something, for giving us our change."
3. "In Korea when people eat they have to wait for the oldest member to eat first (in family) or the teacher (in school/institute) before they can start eating. In Western culture it doesn't really matter."
4. "If a Korean knows you then they're extremely kind and helpful but if they don't know you they ignore you like you don't exist. In Western culture people are relatively friendly even if they don't know each other: e.g. they'll greet and start a conversation, etc."
5. "Saying 'OK OK OK' or 'Yeah yeah yeah' in English can be ***extremely*** rude. In Korea, it just means 'I really understand or 'Yes, right away.' In English it means 'OK, shut up. I don't want to hear what you are saying.'"
6. "Koreans cannot confront their superiors directly (for example, when they feel they have been treated unfairly, or the superior is doing something in the wrong way). Westerners usually can, and do."
7. "In Western culture, a graduate school student can discuss freely, ask questions, and provide opposing opinions about his/her major subjects to his/her academic advisors (professors), but in Korea his/her professors are so authoritarian that the student cannot oppose their opinions, and so generally accepts their opinions unequivocally."
8. "A common mistake for Koreans is to say 'Mr. Shawn' or 'Miss Jennifer.' In English, we don't use the first name with 'Mr.' or 'Miss etc. We use the family name instead. So, Shawn Stenson would be 'Mr. Stenson,' and Jennifer Beal would be 'Miss Beal' or 'Mrs. Beal' (if she's married)."

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42) Opinions of cultural differences are provided by expatriates who have lived more than two years in Korea. They are: an Italian PhD candidate at Sookmyung Women's University, a Canadian employee of Daewoo Ship Building Co., an Italian embassy staff member, a South African native English teacher at SDA, and a Polish employee of SBNTECH.

Ⅴ. Conclusion

The cultural differences between Korea and the West are very wide, go very deep, and reach into a huge variety of situations. If employees are unable to come to a cultural understanding of these differences, even in this Global Era, then Koreans and expatriates working together will have to settle for a relationship of 'close in proximity, but distant in relationship'. When cultural differences are allowed, accepted, and understood, employees can work better, more constructively, and in greater cooperation. With a partnership based on this acceptance, Korean employees can work well with foreign expatriates, improve their own work efficiency and help the company increase its competitiveness with leading companies from around the world.

The Personal information Protection Act and Personnel Management

Ⅰ. Introduction

Personal information is easily obtained in our internet-driven information society, and there have been many cases of abuse. Recently, financial companies, search engines, game companies, and others have been the victims of information hacking, resulting in a plethora of spam mail, illegal use of other people's names, voice phishing, and identity theft. Accordingly, in the endeavor to provide a consistent code to protect personal information, the "Personal information Protection Act" was signed into law on March 29, 2011, and enforced from September 20, 2011. This act is a general law that combines all laws related to protection of personal information and contains strong penal provisions. This law also covers all processes of gathering personal information, both on- and offline.

I would like to explain the main points of the Personal information Protection Act, and then guide in understanding what companies need to do to prepare for appropriate management of their labor force.

Ⅱ. Major Details of the Personal information Protection Act

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

1. Expansion of Scope

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

2. Expansion of Protection

The scope of protection of personal information covers not only information processed electronically, but also paper records such as those used in Civil Service Offices, etc. “Personal information” means data that distinguishes or reveals individual identity (including name, resident registration number, date of birth, address, etc.) and data that reveals an individual’s past and current conditions and situations (including educational background, financial status, medical history and health, etc.).

3. Restrictions on use of unique identifying information

Unique identifying information provided to the individual by law, such as resident registration numbers, shall be prohibited, in principle, from processing. In cases where a specific law requires such information, or where it is deemed obviously necessary for the urgent benefit of life, body or property of a subject of information or a third party, gathering such information is permitted. Individual resident registration numbers shall not be required on websites. Any person violating this shall be punished with imprisonment of up to five years or with a fine not exceeding fifty million won.

4. Restrictions against use of video recording devices

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

5. Collection and use of personal information

The collection of personal information must satisfy certain criteria, and any information gathered shall only be used in the specified way. These criteria are: 1) The target person must have agreed to give such information; 2) an article of law exists which requires the collection of such information in order to observe the law; 3) it is needed by a public agency to carry out duties assigned by related law; 4) it is necessary for one party to enter into or implement a legal contract with the individuals concerned; 5) such information is urgently necessary to protect life, body, and interest of individuals and/or third parties; 6) it is necessary for the justifiable interests of the handler of such information, and is more important than the rights

of individuals. In this last case, it shall be closely related to the justifiable interest of the handler of such information, and shall not exceed a reasonable scope. A person who violates this shall be punished with a fine for negligence up to fifty million won.

6. Duty to report leaks of personal information

When recognizing that personal information has been leaked, the handler of such information shall notify the individuals concerned of this fact without delay, and shall include: 1) the details of the leaked personal information; 2) the time the leak occurred, and any related details; 3) information about how the individual can minimize any damage caused by the leak; 4) any countermeasures the handler of such information has taken, and procedures for remedy for any damage; and 5) the contact information of the department individuals can contact to report any resulting damage.

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

Ⅲ. Management of Personnel and Personal information

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

1. Details on management of employees' personal information

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

Can personal information obtained through resumes, etc. at the time of hiring be exempt from the requirement for consent from employees to collect or use their information, as it can be considered "necessary for one party to enter into or implement a legal contract with the individuals concerned"? [43)]

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

2. Company use and management of video recording devices

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

'Public places' refers to places like roads, parks, plazas, and other places the public is free to use. The lobby of a company building can be used by many unspecified people, so it is included in the restrictions on installing a video recording device. However, the inner rooms and hallways of the company building, where access is strictly controlled and only to internal employees and those receiving permission, would be considered closed to the public, and so are excluded from restrictions on installation of video recording devices. Provided, in cases where the video recording device was installed and is in operation to collect individual imagery information, other protections of privacy still apply. That is, when a company obtains the employee's permission, and when the recording is necessary to accomplish the justifiable interests of the handler of such information, installing and operating a video recording device is allowed.

Case: Monitoring the Workplace[44]

Some companies install and operate video recording devices to monitor work activities. Such video recording devices installed in the workplace have been the cause of conflict

43)"Explanation of Laws and Decrees Concerning Protection of Personal information" (the Ministry of Public Administration & Security, Dec. 2011, pg. 90)

44) "Explanation of Laws and Decrees Concerning Protection of Personal information" (the Ministry of Public

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

Ⅳ. Conclusion

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

Civil and Criminal Liability for Deleting Company Documents

Ⅰ. Question

The employee concerned (hereinafter referred to as "the Employee") was hired by an Employee Dispatch Company ("Company A"), signed a dispatch employment contract, and started to work for Company B, the Using Company, as the company president's secretary. During the month the Employee was working for Company B, she was scolded by her superior. The Employee voluntarily resigned on February 21, 2011, and on the following day, February 22, she did not come to work. Company B replaced her with another employee in the afternoon of February 22. When the new secretary started working, she discovered that the Employee had deleted from her computer all the data and files which had been kept by her predecessors over the last four years.

The Employee had deleted important computer files related to company work processes. Is she civilly or criminally liable for this?

Administration and Security, December 2011, Page 166)

Ⅱ. Criminal Liability

1. Related articles in the Criminal Code

(1) Property damage (Article 366 of the Criminal Code)

Anyone who harms utility by damaging or concealing another person's property, documents or special recordings, such as electronic recordings, etc., shall be imprisoned up to three years or fined up to 7 million won.

(2) Obstruction of business (Article 314 of the Criminal Code)

① Anyone who obstructs another person's business by the method detailed in Article 313 (damage of trust) or by force, shall be imprisoned up to five years or fined up to 15 million won.

② Anyone who obstructs another person's business by damaging information processing devices like computers or special media recordings, like electronic recordings, by inputting falsified information or illegal commands, by causing errors in information processing, or using other methods shall be punished the same as in ① above.

2. Opinion

Property damage and obstruction of business are crimes. If the company is certain that the Employee deleted all work-related documents accumulated over the last four years, this action by the Employee may be considered one of the above two crimes. In particular, as the Employee damaged useful company assets supporting business, proving her actions are crimes of property damage according to Article 366 should not be difficult. But this only applies if the company faced obstacles in its business or work performance due to the property damage.

The court may determine a sentence in consideration of qualitative aspects (the importance of the deleted documents or files), quantitative aspects (how much the Employee deleted), and the degree of the employee's self-reflection. Generally, the court does not give heavy penalty for either of these crimes, but determines the severity of the sentence by punishing the greater violation. As this labor law firm is not in a position to know how serious the damage or consequences were to the company, we are unable to give a concrete answer, but we have seen similar cases where employees were fined one million won.

On the other hand, there is also a possibility that the Employee will not be considered to have committed a crime. For example, in cases where the data that an employee deletes are preserved in original copy or in hard-copy, electronic recordings are indirect and subordinate means to preserving the documents. The deleted documents likely have an insignificant market value, so the employee wouldn't be considered to have inflicted property damage or obstructed business.

Ⅲ. Civil Liability

1. Related articles in the Criminal Code

(1) Claims for illegal acts (Article 750 of the Civil Code)

Anyone who harms another person by an illegal act intentionally or by negligence shall be responsible for the damage and resulting compensation.

(2) Claims for default (Article 390 of the Civil Code)

In cases where the debtor cannot carry out repayment of the debt, the creditor can claim compensation for damage. However, in cases where the debtor unintentionally (and not due to negligence) does not carry out repayment, the creditor cannot claim compensation.

2. Opinion

In this case, the company can claim civil and criminal liability for damage, as well as compensation equivalent to the property value of the deleted documents. Civil liability would include claims against illegal acts and claims against default at the same time. That is, if an employee under employment contract neglects his/her responsibility to keep or preserve work-related electronic records in good faith and return those records to the employer, the employer can claim compensation for damage.

However, as the employer is responsible for measuring the property value of the deleted documents and estimating how much, in monetary terms, the deletions cost the company, if the employer cannot do so adequately, there is a possibility that the claim will be refused for inability to prove damage.

Ⅳ. Legal Procedures

1. Criminal complaint procedures

Generally, the company submits a letter of complaint to the police with jurisdiction over the place where the incident happened, or the address of the employee. When complaining to the police, it is advantageous to include all applicable crimes, including obstruction of business and property damage, so that the law enforcement agency does not miss any. In any case, as the investigator estimates items to be prosecuted after completing investigation, the company does not have to make a detailed list of violations in advance.

Furthermore, as the police are an investigative agency, statements and documents they submit are not open to either party unless both parties agree on disclosure of their statements and submitted documents. This inevitably makes it very hard for one party to understand directly what documents the other party has submitted and what statements have been made.

2. Procedures for compensation claims

The company shall file claims for compensation with the District Court that has jurisdiction over where the incident occurred or where the employee lives. The company can make legal claims of liability for illegal actions and defaults at the same time. The advantage of lawsuits

is that each party can directly see, hear, and receive all statements or documents submitted by the other party. Therefore, in cases where one party submits falsified documents or gives falsified statements in the court, the other party has procedural opportunity to refute in detail the other party's documents or statements.

However, since it is up to the employer to verify how much damage was done, and how compensation will be calculated, the employer first needs to review how much financial damage the deleted documents cost in terms of property value.

V. Overall Comments

The company may submit a criminal complaint to the police and file a civil lawsuit with the court at the same time. The general tendency these days is for one or the other. When both criminal and civil claims are made together, the police tend to view this as the company making a criminal complaint in order to take advantage of it for civil claim. Therefore, it is more effective to open one claim at a time, and if necessary, begin the second after seeing the results of the first. Common procedure is that criminal complaints are made first, and civil claims are filed after the results of the police investigation are known. However, the opposite order is also possible.

In conclusion, since in a case like this, it is hard to calculate damages after determining the property value of the deleted documents, there seems to be no benefit to making a civil claim. If the company is concerned about this point, it would do better to file a criminal complaint first and see the employee punished with a small fine. This conviction will then allow the employer to restore order to the company and return to pursuing profit with its business.

Business Transfers & Employment Relations

I. Introduction

Due to the deteriorating economy, corporate business adjustments, mergers and acquisitions have recently become frequent. As corporations are restructured, employees often continue to maintain employment while their employer changes. This is known as a business transfer: the employees and their duties remain the same, but the employer does not. As there is no clear explanation stipulated in the Commercial Act, the Civil Act or Korean labor law of how business transfers are to affect employment relations or working conditions for employees, we have to depend on judicial precedent for issues that arise. Herein I will review the legal principles of business transfers, the details and limitations of transferred employment, and relation with the rules of employment or collective agreements.

II. Legal Principles of Business Transfer

1. Basic principles

(1) Business transfers involve the transferring of a business from one entity to another, while retaining the people, property, and business identity. Partial business transfers are also possible. When a business transfer occurs, responsibility for employment of the employees concerned shall be handed over inclusively to the transferee in principle. Whether an employee previously transferred from another company is accepted as part of a business transfer shall be decided not by how much property was transferred, but by whether the transferred business organization was totally or partially retained. For example, if all properties are transferred after an organization is liquidated, it is not a business transfer. On the other hand, if a business facility partially retains its organization when it is handed over, and if the transferred portion retains its previous role, this is a business transfer.[45)]

(2) Business transfers can involve the entire business or a particularly important portion being transferred. In order for the transfer of a particularly important portion to be accepted as a business transfer, the transferred business must be able to at least operate its systematic function and perform the particular business involving the business facilities and the employees therein in the same way before and after the business transfer.[46)]

(3) Whether a business transfer has occurred or not shall be determined by whether the transferred business can perform the same profitable business as before through the transferred property as a systematic organization while also managing the previous level of business without starting anew.[47)]

2. Exceptions

(1) Conditional business transfers

If a business is transferred, labor relations between the transferor (original employer) and the employees are transferred inclusively to the transferee (new employer) in principle, unless there are special conditions imposed in the transfer agreement. If one of the conditions between the parties involved in the transfer is to exclude some employees, those excluded employees will not be transferred. Such a condition shall be justifiable under Article 23 (1) of the Labor Standards Act, because it is equivalent to actual dismissal. However, it is not justifiable to dismiss an employee on account of a business transfer.[48)]

(2) Contract for sale and purchase of property: When POSCO (the transferee) purchased a particular business section operated by Sami Special Steel Company (the transferor), the transferee took over only the assets of the plant but not claims and liabilities. The transferee took on most of the employees from the transferor, but employed them

45) Supreme Court ruling of March 29, 2002, 2000doo8455 (Unfair dismissal); July 27, 2001, 99doo2680
46) Supreme Court ruling of June 9, 2005, 2002da70822
47) Supreme Court ruling of November 25, 1997, 97da35085
48) Supreme Court ruling of June 28, 1994, 93da33173

individually after dismantling the previous personnel organizations upon transfer and hiring them again under a probationary period, after which it placed them in new positions according to the transferee's new business schedule. This was not a business transfer, but rather a transfer of an asset.[49]

Ⅲ. Business Transfers & Employment Relations

1. Principles

(1) When making a contract to purchase some parts of a business of another company, in cases where the buying company agrees to take over the rights and duties of the employees working at that business section inclusively, their employment is transferred to the buying company in principle. However, the employment relations transferred at this time refer to the employment conditions the buying company agreed to as of the signing date of the contract, but does not include an employee who was dismissed from that business section prior to the contract-signing date and who was in the middle of a legal dispute regarding claims of unfair dismissal.[50]

(2) In the event of a business transfer, an employee's employment relations are transferred to the transferee company and considered to be continuous. Just because the transferred employee received severance pay at the time of business transfer, does not mean that the employee was terminated by the previous company (the transferor), beginning new employment with the company that purchased the business. Provided, that if the employee submitted a resignation letter voluntarily and then received severance pay, it can be regarded that the employee agreed to the termination of employment. In contrast, in cases where an employee had to resign and be re-hired by the company according to its unilateral decision and in accordance with its business policy, even though the employee receives severance pay, the employment has not been terminated.[51]

2. Exceptions

(1) Employment relations transferred in a business transfer refer to those with the employees working at the particular section being transferred as of the signing date of the contract, but do not apply to employees who were dismissed from that business section prior to the contract signing date, even if they were in the middle of a legal dispute over claims of unfair dismissal. However, if it is clear that the transferee company knew that the orders of the transferor company to the transferring employees were not valid (as the employees rejected them), and accepted the business transfer clearly knowing this fact, the employment relations of those employees would be transferred to the transferee company as is.[52]

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49) Supreme Court ruling of July 27, 2001, 99doo2680: Sami Special Steel; Lim Jongyul, "Labor Law", Parkyoung Sa, 14th edition, page 522.
50) Supreme Court ruling of May 25, 1993, 91da41750; July 14, 1997, 91da40276
51) Supreme Court ruling of November 13, 2001, 2000da18608: Severance pay

(2) In the event of a business transfer, employment relations with the employees concerned are transferred inclusively in principle, but if opposing the transfer to the transferee company, the employees can choose to stay with the transferor company or resign from both the transferee and the transferor companies. The employee may also choose, upon his/her own volition, to resign from the transferor company and thereby terminate continuous employment, and then seek a new job with the transferor company. At this time, the employee's intention to oppose the business transfer should be expressed to the transferor company or the transferee company within a reasonable time from the date that the employee came to be aware of the business transfer.[53]

Ⅳ. Applicability of the Rules of Employment & the Collective Agreement

1. The rules of employment

(1) If employment relations were transferred inclusively, the employee can expect to have the same working conditions with the transferee company as he/she had with the previous company (transferor). In cases where the employer intends to change the rules of employment unilaterally or require the transferred employees to agree to comparatively disadvantageous rules of employment with the transferee company (the new employer), the employer shall obtain the consent of the majority of employees to whom the transferor company's rules of employment apply, by means of a collective decision-making process. Without this type of agreement, the employees concerned shall not be subject to the transferee company's rules of employment, but shall remain subject to the previous rules of employment as they are.[54]

(2) In cases where employment relations are transferred inclusively due to business transfer or company merger, the transferor employer's contract working conditions shall be transferred. If the severance pay regulations from the transferor company are superior to the severance pay regulations of the transferee company, the inferior transferee severance pay regulations shall not apply after the transfer unless the transferee company obtains the transferred employees' consent through the collective decision-making process stipulated in Article 94 (1) of the Labor Standards Act. After the employment relations are transferred inclusively, if the transferee company's severance pay system is inferior to that of the transferor company, the transferor company's severance pay system shall be continuously applied to the employees from the transferor company. As a result, two different severance pay systems would be operated in one company. In this exceptional case, two different severance pay systems can be legitimately established and applied.[55]

2. Relation to the collective agreement

(1) Even though employment relations were transferred inclusively in the business transfer, if the company newly agrees with the labor union through a collective agreement that the previous working conditions would change, or be adjusted or unified with the transferee company's working conditions, this new collective agreement shall be applicable.[56]

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52) Supreme Court ruling of May 31, 1996, 95da33238
53) Supreme Court ruling of May 10, 2012, 2011da45217: Severance pay
54) Supreme Court ruling of January 28, 2010, 2009da32362
55) Supreme Court ruling of December 26, 1995, 95da41659: Severance pay

(2) Even though multiple companies are merged, the collective employment relations and working conditions between the merged companies and their employees are transferred and continue to apply as they were in the pre-merger companies until the labor union representing those employees can make a new collective agreement that unifies the different working conditions. Even though the labor union of the new company has a union shop membership system, the merged companies' employees will not automatically become members of the new company's labor union, until the labor union representing all employees (including the merged companies' employees) agree on union shop membership or conclude a collective agreement on the issue with the employees from the merged company.[57]

Ⅴ. Conclusion

If employees are re-hired selectively through a contract for sale and purchase of property, and if that contract substantially represents a business transfer, such dismissals can still be deemed unfair. For business transfers, the employees are generally transferred inclusively, but if the contract is for the sale and purchase of property, the employees working on such property are not considered eligible for reemployment. Accordingly, we can see many cases where transferee companies take advantage of this legal application by formally dismissing the transferor company's employees through a contract for sale and purchase of property, despite the transaction being substantially a business transfer. Sticking to strict application of the legal principles of a business transfer is required to prevent such abuse.

Legal Effect of a Retention Bonus (Signing Bonus)

Ⅰ. Introduction

A company can use several methods to retain highly-skilled workers for a long time, with two representative examples. One is through a non-compete clause[58] in the employment contract or rules of employment, whereby the employer prevents capable workers from transferring to competitive companies, and the other is through a signing bonus,[59] where the employer tries to restrict the transfer of workers through financial means. A non-compete clause is hard to validate as it restricts the freedom of a worker's occupation. The Supreme Court has argued that "even if there is a non-compete agreement between the employer and the employee, if such an arrangement excessively restricts the constitutionally-guaranteed

56) Supreme Court ruling of October 10, 2001, 2001da24051: Wage
57) Supreme Court ruling of May 14, 2004, 2002da23185
58) A non-compete clause means that the employee promises not to transfer to a competitor company, and if the employee subsequently violates the clause, the company violated may claim compensation from the employee.
59) A signing bonus is a special bonus, in that a company pays a lump sum to an employee when signing an employment contract, in an effort to recruit talented people.

freedom of occupation, or the right to work or free competition, an action contrary to good social order, such as good customs as set forth in Article 103 of the Civil Law, should belong to invalidity."[60] For this reason, many companies prefer signing bonuses, which have a direct effect on the reduction of turnover by good manpower.

I recently received an inquiry from a company about the effectiveness of a retention bonus clause[61]. For this company, 30% of the annual salary is set as bonus, with 50% paid with the 1st year's salary in January, and the remaining 50% paid in January of the following year. In return, the worker must work for three years. The employer wants to include the following clause: "If the employee resigns prior to the agreed three years, the retention bonus shall be returned." The company asked for a legal review of the validity of this. In this case, I concluded that for the retention bonus to be set for three years would be no problem, considering related matters such as the nature of the related wage, the prohibition of forced labor, the Prohibition of Predetermination of Nonobservance, etc.

In this article, I would like to deal with this issue in more depth, reviewing (ii) the characteristics of a special bonus and violation of the Labor Standards Act; (iii) the legal effect of a signing bonus; and (iv) the criteria for a signing bonus.

Ⅱ. The Characteristics of a Special Bonus and Determining Whether it Violates the Labor Standards Act

1. The Characteristics of a Special Bonus

The term "wages" as defined in Article 2 of the Labor Standards Act refers to "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." Regarding the wage status of bonuses, such bonus can be regarded as wage if payment conditions and payment timing are set in a collective agreement or employment rules, etc. and if the payment of such bonus is customary for all employees. If the above conditions are satisfied, such special bonus can be recognized as having the characteristics of wages. Concerning the legal characteristics of a "Retention Bonus", the Ministry of Employment and Labor judged that this bonus could not be considered as wages under the Labor Standards Act if payment was not stipulated in a collective agreement or rules of employment, etc., and if the employer temporarily or voluntarily paid it on condition of securing longer employment.[62] Therefore, it is not included in the average wage for the calculation of severance pay.

2. Determining Whether a Special Bonus Violates the Labor Standards Act

"Prohibition of forced labor" as stipulated in Article 7 of the Labor Standards Act means

60) Supreme Court ruling on March 11, 2010: case number 2009da82244.
61) If an employee fails to work for the mandatory tenure, the employee will return some or all of the amount paid in advance, which is called a signing bonus or a retention bonus.
62) Labor Ministry guideline on April 27, 2010: Labor Standards-883

that “No employer shall force a worker to work against his own free will through the use of violence, intimidation, confinement or any other means which unlawfully restricts mental or physical freedom.” It is forced labor to cause workers to carry out unwanted work. However, it is not forced labor for an employer to direct, supervise or legally sanction workers to fulfill their obligation to provide work under an employment contract.[63] The penal provisions of Article 7 (prohibition of forced labor) impose a penalty of imprisonment of not more than 5 years or a fine of not more than KRW 30 million, while the penalty for violation of Article 20 (Prohibition of Predetermination of Nonobservance) is a fine of less than KRW 10 million. Therefore, in the application of the signing bonus case, Article 20 of the LSA Act, which includes the voluntary intentions of the employees, is more appropriate than Article 7, which governs only direct physical and mental restraint, such as assault, intimidation and confinement.[64]

The prohibition of predetermination of nonobservance prescribed in Article 20 of the Labor Standards Act stipulates that "No employer shall enter into a contract by which a penalty or indemnity for possible damages incurred from breach of a labor contract is predetermined.” This is to prevent an employee from being forced to continue to work against his/her will by previously agreeing to pay a certain amount of money without determining the type and degree of the actual damage to the employer because of non-fulfillment of the employee’s employment contract.[65] In order to guarantee performance in a contractual relationship, the Civil Act may apply penalties or damages for default in advance at the conclusion of a contract (Article 398 of the Civil Code ‘Liquidated Damages’). However, while a penalty for non-fulfillment of work is a means of securing long-term employment of good manpower for the employer, it does prohibit employees from resigning, because of the burden of penalty payment.[66] As concerns provisions for the prohibition of ‘Liquidated Damages’, labor contracts in the form of penalties for existing wages are not allowed, but reimbursement of training costs and bonuses with reasonable and valid content is permitted, because it does not unduly limit freedom of resignation.[67]

Ⅲ. Legal Effectiveness of a Signing Bonus

1. Situations where the return commitment of the signing bonus is valid

(1) Suwon regional court ruling on May 13, 2013: 2002gahap12355: An employee agreed that he would receive KRW 150 million as a retention bonus for 3 years’ compulsory stay, which he

63) Lim Jong-yul, 「Labor Law」, 14th edition, Parkyoungsa, Feb. 2016, page 378.
64) Kwon Oh-Sung, "A Study on the Effectiveness of Signing Bonus Return Agreements", 「Sungshin Law」, Sungshin Women's University Law Research Institute, February 2013, page 136.
65) Supreme Court ruling on April 28, 2004: 2001da53875.
66) Lim Jong-yul, 「Labor Law」, 14th edition, Parkyoungsa, Feb. 2016, page 388.
67) Supreme Court ruling on October 23, 2008: 2006da37274.

would repay if he left the company prematurely. After 7 months of service, he moved to a competitor company. The court ruled, "The retention bonus does not belong to the wage and can be excluded from application of Article 20 of the LSA (Prohibition of Predetermination of Nonobservance), but the company paid the bonus for the purpose of retaining the employee for 3 years. Therefore, the employee should repay the retention bonus."

(2) Seoul regional court ruling April 29, 2013: 2013kahap231: An employee received a signing bonus of KRW 50 million, which he agreed to repay if he left the company before two years after receiving this money. He then left the company after 7 months. The court ruled, "This signing bonus to retain the employee for a certain period of service cannot be translated as forced labor, and it also does not violate Article 20 of the LSA (Prohibition of Predetermination of Nonobservance)."

(3) Changwon District court ruling on November 17, 2007: 2007na9102: According to a mutual agreement between a company and an employee, the company was to pay a special bonus to the employee in accordance with the length of service, ranging from 12 months to 41 months of the normal wage, in return for which the employee would stay for two years from the date on which the employee was paid. The agreement stipulated that in the event that the employee resigned from the company, the special bonus would be returned to the company for a period not exceeding two years. The employee who received the compensation from the company submitted a resignation letter and resigned on the day after the receipt of the compensation. In this case, returning compensation based on two years of obligatory work does not restrict the freedom of choice of the workplace or freedom of retirement. The court agreed with the company's rule that the special bonus should be returned.

2. Instances where the return commitment of the signing bonus is invalid

(1) Supreme Court ruling on Oct. 23, 2008: 2006da37274: When an employee joined the company, he signed a retention bonus agreement whereby he would receive KRW 500 million and serve the company for 10 years. If he resigned before 10 years, he would repay a penalty of KRW 1 billion. In this case, the court ruled that this retention agreement violated Article 20 of the LSA (Prohibition of Predetermination of Nonobservance) and became null and void.

(2) Inchon regional court ruling on April 29, 2013: 2013gahap3994: An employee promised to stay in the company for at least 5 years, and received KRW 50 million as a retention bonus. In the agreement, the employee agreed to repay 3 times the value of the retention bonus received if he did not fulfill the agreement. After 5 months of service, the employee resigned. The company claimed KRW 150 million, three times the amount of the retention bonus. In this case, the court rejected the employer's claim.

3. The Supreme Court ruling on Signing Bonuses[68)]

(1) Case details: A company that manufactures robot doctors (ROBODOC) hired an experienced engineer in the field of fuel cells at S company on January 13, 2009 for a period of four years. The company made a recruitment agreement to pay KRW 100 million as a signing bonus separate from the salary. The recruitment agreement contained a stipulation that the company guaranteed employment for seven years, and the employee would work for the company for seven years. The employee resigned on April 12, 2010 for personal reasons. The company sued for return of the signing bonus, but the district court dismissed the plaintiff's (company's) claim (Dongbu District Court, 2010kahap13266). The company appealed, and the Seoul High Court partially accepted the claim that the employee should pay a prorated amount of the signing bonus, stating that the signing bonus was: 1) a special incentive to join the company, 2) a full down payment for 7 years of pre-emption, and 3) a special bonus to expect 7 years' service (Seoul High court 2011na22827).

(2) Decision of the Supreme Court: The Supreme Court dismissed the plaintiff's claim, saying, "As the company concluded labor contracts as a way of hiring experienced professional personnel, the so-called "signing bonus", the following points should be taken into consideration: ① Whether or not they have the characteristics of compensation for job turnover or the conclusion of a labor contract; ② Whether to pay for the prohibition of resignation during the compulsory working period; ③ Whether or not there is a written statement concerning returning the bonus upon retirement or turnover in the middle of the period." Based on the aforementioned premises, the signing bonus was judged to have the characteristics of a reward because there was no description of a specific method of payment or any return obligation. In other words, the signing bonus for this case is an instance in which the nature of the reward for employment is judged to be stronger than the nature of the mandatory working period of seven years.

Ⅳ. Conclusion (Criteria for a Signing Bonus)

The judging criteria for a signing bonus must adhere to the following principles:

(i) If there is a disagreement over the interpretation of the contract between the parties: ① The contents of the document, ② The motivation and the manner in which the agreement was made, ③ The purpose of achieving by agreement, and ④ The true intention of the parties should reasonably be interpreted according to logic and empirical rules.[69)]

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68) Supreme Court ruling on June 11, 2015: 2012da55518.

69) Supreme Court ruling on May 27, 2005: 2004da60065; Supreme Court ruling on September 20, 2009: 2006da158166.

(ii) It is effective for the employer to stipulate a return of the employee's bonus, which is provided separately from the employee's wage, for the special purpose of preventing the employee from transferring to another company. In principle, these return arrangements are required to ① balance the amount of the signing bonus award and the duration of the contract of employment, and the degree of the former restriction; ② not infringe on the essential condition of the employee's freedom of changing occupation; ③ the bonus should not have the characteristics of a wage, and ④ there should be no reason related to the employer for the employee's transfer to another company.[70)]

In other words, it must be made clear that the signing bonus is awarded on the condition that the bonus is to be paid for a period of mandatory service; the duration of such obligatory service should be as short as possible and; the returning amount should be the same or less than the amount that the employee received for the mandatory service period. In addition, a contract for returning the bonus award is valid only if the employee voluntarily resigns.

Employment Relations by VISA Type

Ⅰ. Introduction

As of the end of June 2018, the number of foreigners residing in Korea stood at 2,291,653. This includes 1,198,900 registered as non-Korean foreign nationals, 423,393 people as Korean foreign nationals, and 664,360 people as foreign nationals on short-term stays. Four percent of the people living in Korea are foreign nationals, who are forecast to increase to 3 million in 5 years, or 6% of the total number of people in Korea. There are concerns about whether Koreans will suffer from a high unemployment rate due to the rapidly-increasing number of foreign nationals and whether foreigners will commit more violent crimes, thereby making Korea a more dangerous place. However, as we attract more high-quality human resources and continue to use greater numbers of cheap, skilled workers in work involving the "three Ds" (difficult, dirty, dangerous), there are many advantages.

Unfortunately, it is difficult to know where all the foreign nationals are placed and how many of them are working, what qualifications they have, what kinds of work they are engaged in, and what kinds of foreign workers are allowed to be employed. This is because there are so many types of visa under a very complicated immigration law. Herein, I would like to look at the classification of 36 visa types under different categories, and then look at the types of visa granted for employment and what relationship exists between the Immigration Control Act and labor laws.

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70) Seoul District Court ruling on January 25, 2005: 2004kadan128716.

Ⅱ. Visa Types & Categories

1. Visa types & current status of stay for each visa type[71]

[Visa Types, Status of Sojourn & Maximum Length of Stay per Visit][72]

No	Category	Status of Sojourn	Currently in Korea	Length of Stay	No	Category	Status of Sojourn	Currently in Korea	Length of Stay
1	A: Official Duties	A-1 (Diplomacy)		Work period	19	E: Long-term Employment	E-1 (Professor)	2,414	5 years
2		A-2 (Official business)			20		E-2 (Language teaching)	13,539	2 years
3		A-3 (Conventions)			21		E-3 (Research)	3,164	5 years
4	B: Short-term Stays without Visa	B-1 (Visa-exempt)	218,884	Agreed period	22		E-4 (Technology instruction)	165	
5		B-2 (Tour & transit)	143,900		23		E-5 (Professionals)	606	
6	C: Short-term Stays	C-1 (Temporary broadcasting)		90 days	24		E-6 (Artistic work)	3,307	2 years
7		C-3 (Short-term visit)	215,218		25		E-7 (Particular activities)	20,338	3 years
8		C-4 (Short-term employment)	2,588		26		E-9 (Non-professional)	268,208	
9	D: Non-professional	D-1 (Culture & art)	62	2 years	27		E-10 (Ship crewmen)	15,281	1 year
10		D-2 (Studying abroad)	91,816		28	F: Long-term Stays & Family Relations	F-1 (Family visitation)	110,784	2 years
11		D-3 (Technical training)			29		F-2 (Residence)	40,870	5 years
12		D-4 (General training)	50,221		30		F-3 (Dependent family)	21,814	Same as spouse
13		D-5 (News gathering)	97		31		F-4 (Overseas Korean)	432,485	3 years
14		D-6 (Religious activities)	1,658		32		F-5 (Permanent resident)	138,143	No
15		D-7 (Overseas assignment)	1,312		33		F-6 (Marriage immigrant)	119,455	3 years
16		D-8 (Investment)	5,893		34	G: Others	G-1 (Miscellaneous)	31,877	1 year
17		D-9 (Trade)	2,576		35	H: Working Holiday/ Working Visit	H-1 (Working holiday)		Agreed period
18		D-10 (Job-seeking)		6 months	36		H-2 (Working visit)	243,339	3 years

71) Lee Hee-Jeong, "Stay of Foreigners", 「Immigration Control Act」, Parkyoung Sa, 2016, pp. 127-188; Ministry of Justice, "Guide Manual of VISA Issuance", 2016; Ministry of Justice, "Translation of the Immigration Control Act" 2011.

72) Monthly Report by the Immigration Office (June 2018); Number inside parentheses '( )' refers to those who stay for temporary periods; Underlined italics refer to permitted to engage in money-making activities.

In order to understand more about the foreign nationals staying in Korea, it is necessary to know the types of visa available to them and the purpose and status of stay. A visa determines the economic activities (if any) that foreign nationals can conduct in their host country, and their status. The visa type makes it easy to recognize the purpose of their visit, whether or not they are allowed to engage in money-making activities, whether they have family relations in Korea, and whether they are overseas Koreans. The current Immigration Control Act places foreign nationals in one of eight categories (A to H) which are comprised of 36 visa types in total. Group A is related to official duties and includes those working in diplomacy and those conducting official government duties and the accompanying family of foreign nationals in this category. Group B refers to visitors for short-term stays such as tourists and those exempt from visa requirements due to bilateral conventions between countries. Group C includes those visiting for short-term activities such as broadcasting, short-term tourism, and short-term employment. Group D covers those staying long-term and professional personnel engaged in culture and the arts, those engaged in technical training, corporate investment, international trade, job-seekers, those studying abroad (including language studies), and media correspondents. Group E covers employment activities for professors, native language instructors/teachers, researchers, technology guidance supervisors, professionals (specific jobs with high salaries such as IT engineers, translators and lawyers etc.), non-professionals (such as simple factory jobs), and ship crewmen. Group F covers those staying long-term due to family relations. Group G does not cover any specific type of traveler, but is rather a temporary stay visa issued for emergency situations and others. Last, Group H includes those on working holidays and employment of Korean foreign nationals.

2. Visa Categories[73)]

(1) Group A: Official work related to relations with other countries

1) Diplomacy (A-1): Diplomats and consular post members, and their families.
2) Official business (A-2): Civil servants working for other countries or international organizations, and their families.
3) Conventions (A-3): People without alien registration according to various Conventions, and their families. A typical example is those staying in Korea under the SOFA (the US-ROK Status of Forces Agreement).

(2) Group B: Short-term stays without visa

1) Visa-exempted (B-1): Activities related to bilateral visa-exempt agreements between countries. Korea has entered into such agreements with 102 countries as of June 2015.
2) Tour & transit (B-2): Entering for the purpose of travel or transit.

(3) Group C: Short-term stays (90 days or less)

1) Temporary broadcasting (C-1): Temporary news gathering and broadcasting activities
2) Short-term visit (C-3): Business activities like market surveys, business networking, consultation, and contract-making, as well as travelling, transit, medical treatment, visiting relatives, goodwill sports matches, and participating in event or conferences, etc.
3) Short-term employment (C-4): Earning money by means of circus shows, advertisements or fashion shows, lectures, research, technical instruction, etc. for a short period of time.

73) Enforcement Decree of the Immigration Control Act, Attached Table #1 of Article 12

(4) Group D: Non-employment professional and long-term stays

1) Culture & art (D-1): Activities related to academic and artistic studies without pursuing profit.
2) Study abroad (D-2): Studying as part of a regular curriculum at a junior college or higher education institute.
3) Technical training (D-3): Training at Korean companies.
4) General training (D-4): Studying the Korean language at a language institute; technology or skill training in a public research center; and interns with foreign companies.
5) News gathering (D-5): Journalist activities assigned or contracted by a newspaper or other broadcasting company.
6) Religious activities (D-6): Missionary activities at branch offices or related religious organizations in Korea after assignment from a foreign religious or welfare group.
7) Overseas assignment (D-7): Assigned to associated or subsidiary companies after working at the head office of a foreign company for at least one year.
8) Investment (D-8): Foreign managers or engineers engaged in management and operation of foreign-invested companies according to the Foreign Investment Promotion Act; foreign entrepreneurs holding intellectual rights.
9) Trade (D-9): Foreign entrepreneurs involved in a trade business established in Korea.
10) Job-seeking (D-10): Those looking for jobs and holding qualifications sufficient for E-1 to E-7 visas.

(5) Group E: Long-term employment engaged in economic activities

1) Professor (E-1): Those engaged in education or research and instruction activities in technical colleges or higher, or equivalent institutions.
2) Language teaching (E-2): Those engaged in teaching foreign languages at foreign language institutes, elementary level or higher schools, etc.
3) Research (E-3): Those engaged in research and development of the natural sciences or industrial cutting-edge technology at various laboratories.
4) Technology instruction (E-4): Those engaged in providing professional knowledge regarding the natural sciences or technologies.
5) Professionals (E-5): Those with certification and engaged in fields recognized as professional by Korean law.
6) Artistic work (E-6): Those engaged in art activities such as music, painting, and literature, or in entertainment, performances, plays, sports, advertising or fashion modeling, etc., for the purpose of earning money.
7) Particular activities (E-7): Those engaged in professional activities specifically designated by the Minister of Justice.
8) Non-professional (E-9): Those eligible for employment in Korea according to the Act on Foreign Workers' Employment, with non-professional skills.
9) Ship crewmen (E-10): Those with crew employment contracts on the condition of providing labor for 6 months or longer in companies that do business in accordance with the Maritime Transport Act or the Fishing Industry Act.

(6) Group F: Long-term stays due to family relations; investment immigrant

1) Family visitation (F-1): Those visiting relatives, family living together, dependent(s), or others; domestic workers hired by foreigners.
2) Resident (F-2): ① A foreign national spouse of a Korean national or their underage child, or the underage child of a foreign national with a permanent resident visa (F-5); ② Child born after marriage to a Korean national; ③ A recognized refugee; ④ A resident who has stayed for three years or longer with a D-8 visa.
3) Dependent family (F-3): Spouse or underage child of a D-1 to E-7 visa holder.
4) Overseas Koreans (F-4): 'Overseas Koreans' and 'Koreans with foreign nationalities'. Overseas Koreans are Korean nationals with foreign resident rights, while Koreans with foreign nationalities are those who once had Korean nationality, or their children or grandchildren.
5) Permanent resident (F-5): ① Those with D-7 to E-7 visas or F-2 visas who have lived in Korea for more than five years; ② Spouses of Koreans or the permanent residents with F-5 visas who have lived in Korea for more than two years; 12 other cases as recognized by the Minister of Justice.
6) Marriage immigrant (F-6): ① Spouses of Korean nationals; ② Parents-in-law of a Korean who are raising a child of their daughter; ③ In cases where a foreign spouse has lost their Korean spouse through death, disappearance, or was divorced due to other reason not attributable to the foreign spouse.

(7) Group G: Miscellaneous (G-1). Unrelated to any of the above groups, this visa is generally used to deal with emergency situations.

(8) Group H: Working holidays & working visits

1) Working holiday (H-1): Visitors can travel and work in accordance with agreements or memoranda of understanding between Korea and other countries regarding 'working holidays'.
2) Working visit (H-2): Overseas Koreans of at least 25 years of age engaged in permitted jobs.

Ⅲ. Relationship between the Immigration Control Act & Labor Laws

The types of visa which allow employment are C-4 (Short-term employment), all visa types in Group E, F-2 (Resident), F-4 (Overseas Koreans, F-5 (Permanent resident), H-1 (Working holiday) and H-2 (Working visit). Foreigners are treated as equal to Korean nationals according to Article 6 (Equal Treatment), which works to prevent discrimination, but here it is difficult to judge whether illegal foreign workers are protected by Korean labor law. There are three types of illegal foreign worker: ① a foreign national working without the proper visa; ② a foreign national whose visa has expired; and ③ a foreign national engaged in a job besides those allowed by his or her visa. Illegal workers are subject to punishment and are deported for violating the Immigration Control Act, but labor laws permit all rights given due to labor services provided by illegal workers, contrary to the Immigration Control Act. For example, even though an illegal worker had a work-related accident, he/she is protected by Industrial

Accident Compensation Insurance, and entitled to severance pay and has the right to claim annual paid leave for work provided in advance.

In relation to this, the Supreme Court ruled the relationship between the Immigration Control Act and labor laws as follows: "The Immigration Control Act regulates that a foreign national intending to be employed in Korea shall attain a status of sojourn required for employment activities, and also regulates that no foreign national having the relevant status of sojourn shall work at any place other than the designated working place. Therefore, the purpose of this legislation was not simply to prohibit illegal stays by foreign nationals, but also to regulate the qualifications of eligibility for employment and block foreign nationals ineligible for employment to protect the domestic employment market from competition from ineligible foreign workers, manage the foreign workforce effectively, and protect domestic workers. This means that this law was enacted to directly prohibit employment of ineligible foreign workers in fact. The regulation restricting employment of foreigners is a control act to prohibit foreign nationals who are ineligible for employment from being employed. This is not a regulation to restrict the legal effect of labor rights that an illegal foreign worker without eligibility for employment has obtained by providing labor service, and the legal effect of labor laws concerning employment status."[74)]

Ⅳ. Conclusion

Korea has grouped its 36 visa types into 8 categories (A to H). This classification is quite unwieldy for the average employer to understand. So, for the sake of employers who use foreign workers, it is necessary to reorganize these visa types according to new criteria such as the purpose for entry, whether or not the foreign nationals are engaged in economic activities, have family relations in Korea, and whether they are overseas Koreans or not. In particular, groups D and E, which include so many types, need to be simplified, so as to better manage so many similar jobs more easily. In addition, in the process of employing foreign nationals, the Immigration Office has too much discretionary authority while the procedures for hiring are very complicated. Accordingly, I would like to suggest a method for managing foreign nationals where foreign professionals are classified according to their salary level, and that their employment should not be managed by the Immigration Office, but rather by the free market by means of levying a tax against Korean employers hiring foreign professionals.

Contractual Working Hours and the Inclusive Wage System

Ⅰ. Introduction

74) Supreme Court ruling of September 15, 1995, 94nu12067: Occupational accident case.

When the Labor Standards Act (LSA) is revised, related rulings also change. A representative example is the change of the Supreme Court ruling in relation to the inclusive wage system as contractual working hours are introduced as mandatory items in employment contracts. Prior to July 1, 2007, the LSA stipulated wages, working hours and other working conditions acceptable for employment contracts, but since that date, it now stipulates wages, contractual working hours, statutory holidays, statutory leave and other working conditions. This means that a previous employment contract that specifies only "working hours" remains unclear in content, but the revised law stipulates that it should include "contractual working hours". Contractual working hours refer to the time set by the employer that the employee is to work, within the allowable total working time (40 hours per week, 8 hours per day) (Article 2, paragraph 8 of the LSA). Therefore, since the revision, the wage in accordance with the contractual working hours has to be specified, which in effect limits the inclusive wage system.[75)]

Before revision (prior to July 1, 2007)	After revision: Labor Standards Act [Implementation: 2007.7.1] [Law No. 8293, January 16, 2007, some amendments]
Article 24 (Stipulation of Working Conditions) The employer shall specify the wages, working hours and other working conditions for workers at the time the employment contract is concluded.	Article 24 (Stipulation of Working Conditions) The employer shall notify the employee of the wages, the contractual working hours in accordance with Article 20, holidays in accordance with the provisions of Article 54, annual paid vacation in accordance with the provisions of Article 59, and other working conditions to be determined.

In order to understand the content of such changes, it is necessary to examine specifically the meaning of the contractual working hours introduced with revision of the Labor Standards Act in 2007. In this regard, I would like to discuss the judicial precedents introduced due to the revised law, and then look into the types of suitable employment contract where an inclusive wage system is justifiable.

Ⅱ. Contractual Working Hours

1. Regulations on contractual working hours

The contractual working hours shall be determined between the worker and employer in the range of working hours pursuant to Article 50 (Legal Working Hours) of the Labor Standards Act, Article 69 (Working Hours for Minors) or Article 46 (Hazardous and Dangerous Work) of

75) Lim, Jongyul, 「Labor Law」 17th edition, Park Young Sa, 2019, p. 470.

the Industrial Safety and Health Act. This means that the contractual working hours must be set within the statutory working hours. Article 17 of the Labor Standards Act requires wages, contractual working hours and other working conditions to be specified in the process of making an employment contract. Therefore, wages defined in the employment contract are limited to 40 hours a week, and in principle, inclusive wages are a violation of the Labor Standards Act. Article 58 of that Act stipulates that if a worker fails to calculate working time by working all or part of the working hours outside the workplace due to business trips or other reasons, he/she shall be deemed to have worked the contractual working hours. Even for part-time workers, "the employer shall obtain the consent of the employee concerned if they have a part-time worker work beyond the contractual working hours prescribed in Article 2 of the Labor Standards Act. In this case, they cannot work more than 12 hours a week. The employer shall pay the part-time worker an additional 50% or more of the ordinary wage for the overtime exceeding the contractual working hours" (Article 6 of the Fixed and Part-time Employment Act). In the past, overtime pay was introduced only for working hours exceeding legal standard working hours. However, for part-time workers, the overtime pay shall be paid if the working hours exceed the contractual working hours (introduced on March 18, 2014). This means that if the part-time worker has 20 contractual working hours per week, an additional wage shall be paid for the hours exceeding those 20 contractual working hours.

2. Reasons for limiting work hours

Contractual working hours refer to the time that the worker has to work within the legal standard working hours. Here, legal standard working hours generally refer to 40 hours per week and 8 hours per day. The limitation on extended work is up to 12 hours in excess of statutory working hours (Article 53 of the LSA). Overtime work for part-time workers is also recognized within a limit of 12 hours by adding to the weekly contractual working hours of part-time workers. That is, extended hours for part-time workers are judged based on contractual working hours rather than legal standard working hours (Article 6 of the Fixed-Term and Part-time Employment Act). In Article 17 of the LSA, stipulating the contractual working hours in the employment contract is mandatory, and then based upon this, wages and contractual working hours are determined. This limits the maximum working hours and ensures the right of employees to protect their health and pursue happiness.

The inclusive wage system refers to a wage system that does not calculate basic wages in advance for a given working time, but rather stipulates that daily or monthly wages shall include the total amount of statutory working hours plus additional working hours.[76] Since the LSA stipulates that basic wages and contractual working hours shall be defined in the employment contract, the inclusive wage system is in effect in violation of that Act.

Ⅲ. Changes in Court Rulings Regarding the Inclusive Wage System

1. Court rulings – details of changes

Related rulings can be divided into those before and those after July 2007. Before July 2007, the courts did not specifically determine contractual working hours because employment

76) Lee, Seunggil, "A Study on Judicial Principles and Benefits of the Inclusive Wage System", 「Labor Law Studies Collection」 29th ed., Korean Comparative Labor Law Study Association, December 2012, p. 575.

contracts were not required to stipulate wage, working time or other conditions. In other words, even if the basic wage was not calculated in advance, but the inclusive wage equaled the sum of applicable allowances plus the monthly wage in a way that was not disadvantageous to the employee, it was considered valid. As a result, it was possible to accept the inclusive wage system for both jobs where the working hours were difficult to calculate, and jobs where the working hours were not difficult to calculate, but the system was conducive to convenient management.

In 2010, however, the Supreme Court ruled that the difficulty of calculating working hours would determine whether an inclusive wage system was justified and that such a system was not acceptable if the working hours could be calculated.[77] This case is considered to set a related precedent because the employment contract specifies contractual working hours in accordance with Article 17 of the LSA. In other words, the basic wage should be determined on the basis of the contractual working hours when concluding an employment contract, and in principle, the inclusive wage system cannot be introduced when working time can be calculated. Thus, the inclusive wage system is acceptable for workers with supervisory and intermittent duties that make it difficult to calculate working time, but not easily for workers whose working time can be calculated.

Amendment of the Labor Standards Act resulted in the following changes in rulings on inclusive wages.

Before revision (prior to July 1, 2007)	After revision: The Labor Standards Act [Enforcement 2007.7.1]
The Supreme Court concluded that if an employer receives the consent of the employee as a means of encouraging the convenience of calculating working hours and promoting employee willingness, and it is not disadvantageous to the employee in light of collective agreements and rules of employment, the inclusive wage agreement in a collective wage system is valid".[78]	In 2010, the Supreme Court distinguished between cases where it was difficult to calculate working time and cases where it was not. ① In cases where it is deemed difficult to calculate working hours such as surveillance work, even if a so-called inclusive wage contract is concluded, it is valid if it is not disadvantageous to the employee and is recognized as justified in light of various circumstances. (2) If there is little difficulty in calculating working hours, the principle of wage payment according to working hours in the Labor Standards Act shall apply unless there are special circumstances in which it is impossible to apply the provisions of the Labor Standards Act.[79]

77) Lim, Dongchae, Cho, Younggil, Kim, Junkeun, "A Study on the Court Ruling of the Navy Welfare Corporation regarding the Effect of the Inclusive Wage System", 「Kangwon Law Study」 25th ed., February 2019, Gangwon University Comparative Law Study Center, p. 453.

2. Trends in rulings on the current inclusive wage system

Since July 2007, consistent judicial precedents have been set, denying the existing inclusive wage system. A Supreme Court case in 2014 provides a clear explanation (Supreme Court Decision 2016.66, Decision 12114, 2011). “In the cases where the inclusive wage system can be deemed justifiable, it is necessary to consider the type and nature of the work (such as whether it involves surveillance and intermittent work), and the difficulty of calculating the working hours when considering the working time. The amount of allowance included in the statutory allowance is set as a monthly benefit or daily wage, or the basic wage calculated in advance, but if the statutory allowance is not classified and a fixed amount is set as the statutory benefit allowance, it is valid when a wage contract under the inclusive wage system is concluded. However, it should not be disadvantageous to the workers. Therefore, it is justified in light of the various circumstances mentioned above.”

In addition, the rulings also reject the inclusive wage system if calculation of the working hours is not difficult, unless there is a special situation where the working hours regulation in the Labor Standards Act cannot be applied. In this case, if a contract is concluded in advance under the inclusive wage system, it is judged whether the inclusive wage contract is legal or not after reviewing if the statutory allowance included in the inclusive wage is correct. If the wages paid under the inclusive wage system fall short of the statutory allowance calculated according to the standards established by the LSA, and if it will be disadvantageous to the employees, it will be null and void. In such a case, the company shall compensate the employee(s) equal to the amount to be paid in legal standard allowances."

3. When it is difficult to calculate working hours

If the calculation of working hours is difficult, the inclusive wage system can be introduced. The following types of work to which this system is applicable are presented in the Labor Standards Act.

(1) Supervisory/intermittent work: The working hours, rest and holiday regulations in the Labor Standards Act shall not apply to workers engaged in supervisory/intermittent work once the employer has received approval from the Minister of Employment and Labor (Article 63 (3) of the LSA).

(2) Work outside the workplace: If a worker is unable to calculate working time due to working all or part of the working time outside the workplace (or other reasons), he/she shall be deemed to have worked the contractual working hours (Article 58 (1)).

(3) Discretionary work: The discretionary work in Article 58 (3) of the Labor Standards Act refers to tasks where it is difficult to calculate working time because of the characteristics or performance rather than the amount of work. Written consent is required from the employee representative in order to qualify the work as within the contractual working hours. Specific tasks include designing and analyzing research and development and information processing systems, organizing articles for newspapers and broadcasts, designing

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78) Supreme Court ruling on Oct 25, 1993, 83do1050; Supreme Court ruling on April 25, 1997, 95da4056; Supreme Court ruling on March 24, 2019, 96da24699; Supreme Court ruling on May 28, 1999, 99da2881; Supreme Court ruling on June 11, 1999, 98da26385.

79) Supreme Court ruling on May 13, 2010, 2008da6052 (Cares regarding Navy Welfare Corporation)

and designing-related job, and producing and supervising broadcasting and film production (Article 58, Clause 3).

Ⅳ. Case Studies on Introducing an Inclusive Wage System

1. Inclusive wage agreement for workers in a restaurant business

(1) Inclusive wage system: Workers work for 6 days from Monday to Saturday, and work 8 hours a day over the hours from 11 am to 10 pm (resting between 2 pm and 5 pm), and earn a monthly salary of 3 million won, including pay for overtime.

If the employment contract is written as above, 3 million won will be the basic wage, with an extra wage of 753,588 won per month for an additional 8 hours per week (35 hours per month) paid additionally.

(2) Suggestions for correction: There are 40 contractual working hours per week and 8 hours per day. The monthly base rate for this is 2,401,560 won, with overtime of 598,437 won for 8 additional working hours per week. Therefore, the monthly total amount is 3 million won. This amount should be divided into two parts: 80 percent as basic pay and 20 percent for overtime pay. To be recognized as a justifiable inclusive wage contract, the monthly wage for the contractual working hours should be clarified, and the additional working hours and wages stipulated and paid.

2. Inclusive salary for white-collar workers

(1) Issue to be mattered: In the case of some white-collar workers, the monthly wage is set at 76% basic wage and 24% fixed overtime allowance. Under this standard, the inclusive wage-based employment contract includes 40 hours of work per week plus an additional 10 hours per week. The company pays inclusive wages every month to the workers regardless of whether they worked overtime or not. Therefore, it is not necessary for the company to pay an additional overtime allowance for up to 10 hours of extended work. Is this inclusive wage system for these white-collar workers possible under current law?

(2) Judging whether the inclusive wage system is violated: There have been two judicial precedents for determining whether an inclusive wage system is possible for white-collar workers. The first involved a white collar worker employed by a foreign life insurance company. In this case, the court deemed it difficult to calculate working hours, unlike production workers, because the business culture common to this company centered on performance tasks due to the nature of the company's insurance sales work. In such cases, the inclusive wage system is recognized.[80] The second involved white-collar workers who concluded an inclusive wage contract by signing a collective agreement offering a fixed overtime allowance of 10 hours per week for 40 hours of work per week. Workers did

[80] Seoul Central District Court ruling on February 13, 2018

not receive any extended allowance for up to 10 hours a week even if overtime was performed that week. The Supreme Court concluded that such a wage system cannot be regarded as monthly remuneration based on an hourly wage or as a legitimate inclusive wage system in light of the fact that workers can calculate their hours easily.[81)]

Judging from the principle in rulings on the inclusive wage system and the above two examples, the criteria for determining the justification for an inclusive wage system is whether the working hours of workers can be calculated or not

Ⅴ. Conclusion

The purpose of making it mandatory to list the contractual working hours in the employment contract is to ensure that workers are able to pursue happiness while maintaining human dignity by providing work within statutory working hours. Since the inclusive wage system promotes long hours of work, it should be applied only to those industries where there is significant difficulty in calculating hours worked. Long working hours have been the widespread norm for white-collar workers through the inclusive wage system, which is based on a fixed overtime allowance. This can be said to be a violation of the principle that wages must be calculated according to the contractual working hours. Therefore, there should be restrictions on fixed overtime allowances that may result in long hours of work for office workers.

The Employer's Obligations in the Recruitment Process

Ⅰ. Introduction

Recruitment of workers is in principle the employer's prerogative, and for years there was no law to regulate it. While the employment documents and recruitment review costs required by employers when hiring employees are a great burden to job seekers, there have been rare instances where the employer has returned the employment documents voluntarily or has returned them when requested by the job seeker. In addition, there have been irregularities in the recruitment process, such as retaining business suggestions of job seekers, and posting false recruitment advertisements for the purpose of promoting companies.[82)] As a result, the Act on the Fairness of the Recruitment Procedures (hereinafter referred to as the "Recruitment Procedure Act" or “the RPA”) was enacted in 2014, and employers who ordinarily employ more than 30 workers fall under this Act, which limits their rights in the recruitment process (Article 3).

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81) Supreme Court ruling on December 10, 2009

82) Seunggil Lee/Jooho Lee, "Employment Freedom and Restrictions on Labor Laws: focused on the Recruitment Procedure Act," 「Social Law Research」, Volume 26, Aug. 2015, Korean Social Law Association, p 112.

Numerous recruiting scandals have occurred recently in both public and private companies, and so a need was perceived for systematic supplementation in order to guarantee the fairness of the recruitment process.[83] On July 17, 2019, the Recruitment Procedure Act was partially amended and implemented. The RPA prohibits anyone from illegally asking, pressuring, or forcing hiring practices in violation of the law (Article 4-2, Paragraph 1), and also prohibits the act of giving or receiving goods, entertainment, or property regarding recruitment (Article 402, Paragraph 2). In addition, a penal clause (Article 17) has been newly-established in case of violation, which implements effective sanctions measures.
In this article, I will look closely at how strictly unfair employment practices can be sanctioned and the employers' obligations in the process of hiring. This should help you understand the employer's obligations in the recruitment process.

Ⅱ. Sanctions on Unfair Practices in Hiring Procedures

1. Prohibition of false advertising (Article 4 of the Act)

Employers shall not put out a false recruitment advertisement for purposes such as collecting ideas or publicizing the workplace under the pretense of recruitment. Any employer who puts out a false recruitment advertisement in violation of this Act shall be punished by imprisonment of up to five years or a fine not exceeding KRW 20 million (Article 16 of the Act). This Article was designed to protect the interests of job applicants and to prevent the occurrence of social costs and damages.[84]

In addition, the employer shall not change the recruitment advertisement adversely to the job seeker without justifiable reason, or adversely change the working conditions presented in the recruitment advertisement without justifiable reason after employing the job seeker. The employer shall not force the applicant to assign his ownership of intellectual property rights such as employment documents and related papers. In violation of this, the employer will be charged a fine of up to KRW 5 million (Article 17).

This implies that a change in the type of job, type of employment and/or working conditions proposed in the recruitment advertisement by the employer violates the principle of good faith, and shall not be allowed in consideration of the need to protect the trust of jobseekers in the job announcement. The prohibition against changing the working conditions as presented in the recruitment advertisement is intended to protect the interests of the job seeker by prohibiting an unfavorable change of working conditions, considering the fact that the job seeker is inferior to the employer. In addition, the copyright and intellectual property rights of the jobseekers are protected by related laws such as the "Copyright Act" and "Intellectual Property Basic Law", but because of the lack of substantive protection, the introduction of such restrictions in the Recruitment Procedure Act will enlarge the scope of direct protection.[85]

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83) Kwonchul Shin, "Fairness in recruiting – focused on employment irregularities" 「Labor Law Studies」 (67), August 2018, Korea Labor Law Society, pp. 95-96.
84) Ministry of Employment and Labor, "Practical Manual for Fair Recruitment Procedures", 2015, pages 23-25.
85) Ministry of Employment and Labor, above manual, page 37.

2. Prohibition of unfair recruiting (Article 4-2 of the Act)

Whether or not an employer hires a particular individual is the employer's own prerogative, and needs to be respected. However, if employees are being hired through open competition rather than individual recruitment, they should be given fair competition opportunities based on the job announcement. The revised Law on Recruitment Procedures enacted in July 2019 is intended to prevent unfair employment practices and to prevent actions such as unfair requests, oppression and force that hinder sound employment and the social order; this Act also prohibits the offering or receiving of money or goods. In case of violation, it imposes a fine of up to KRW 30 million.

Although the existing penalties for unfair employment apply to business obstruction of the Criminal Law, there are limits to the application for criminal offenses. Therefore, the Recruitment Procedure Act introduced this new content and can now punish unfair recruitment practices as a labor law. In order to establish a business obstruction in Article 314[86] of the Criminal Act in the case of unfair recruitment, it is necessary to have an illegal act in the form of hierarchy or power information-processing, and the action must interfere with human affairs; that is, the work of others. However, there is a legal limit applying this Criminal Act because the person who engages in illegal recruitment is usually the decision-maker of the company, and the recruitment work corresponds to his original work and does not correspond to the 'other person's work'.[87] Therefore, it is meaningful that we can now partially supplement the vacancy in the punishment of unfair recruitment practices in the Criminal Act by introducing the prohibition of unfair recruitment practices in the Recruitment Procedure Act.[88]

3. Prohibition of requesting personal information that is not relevant to the job (Article 4-3 of the Act)

The employer is not allowed to require that the applicant include personal information in the Basic Recruitment Form that is not required for the performance of his/her job, or to collect it as evidence material. Such restricted personal information shall be collected and processed only in accordance with the following conditions: (i) the physical condition of the applicant's appearance, height, weight, etc., (ii) the area of origin of the applicant, marital status and property; (iii) education, occupation, and property. In case of violation, a penalty of up to KRW 5 million will be imposed. However, in the legislative process, the attachment of an identification photo to the employment documents was excluded from the collection restrictions. The reason for this is that ID photos are considered a necessary part of the applicant's identity verification in both the recruitment review and the interview.[89]

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86) Article 314 (Interference with Business)
(1) A person who interferes with the business of another by the method of Article 313 or by the threat of force, shall be punished by imprisonment for not more than five years or by a fine not exceeding fifteen million won.
(2) Any person who interferes with another person's business by damaging or destroying any data processor, such as a computer, or special media records, such as electromagnetic records, or inputting false information or improper order into a data processor, or making any impediment in processing any data by other way, shall also be subject to the same punishment as referred to in paragraph (1).

87) Jongchul Jung, "Illegal Recruitment and Related Legal Responsibility", 「Labor Law」, June 2018, Jungangkyungjae.

88) Kwonchul Shin, "Fairness of Recruitment – focused on Falsified Recruitment, 「Labor Law Study」(67th), Sep. 2018. Korean Labor Law Society, pages 95-96.

4. Prohibition of jobseekers paying for recruitment review (Article 9 of the Act)

The employer shall not incur any monetary cost (recruitment review fee) for the job seeker other than the cost of submitting the job application document to the applicant. However, if there is an unavoidable circumstance due to the specific nature of the workplace or occupation, it may be approved by the Minister of Employment and Labor to have a job seeker pay a portion of the recruitment review fee. In case of violation of this, a penalty of up to KRW 3 million is imposed.

Here, the recruitment review costs are directly related to the recruitment, such as the cost of planning and preparing the recruitment, the cost of the recruitment ad, etc., and the cost of recruiting applicants, which refers to any indirect costs. The employer shall be fully liable for this cost in accordance with the principle of beneficiary burden.[90]

Ⅲ. The Employer' s Obligation in the Recruitment Process

1. Notification obligations

The employer has a total of four notice obligations to job seekers. They should be notified that the recruitment documents have been properly received, that the recruitment schedule and procedures are on-going, the recruitment status, and the right of failed applicants to have their documents returned. Notification methods include posting on a homepage, text transmission by mobile phone, e-mail, fax, and telephone, without delay for the relevant matters in the recruitment procedure.

① Notice at the stage of receiving application documents: The acceptance of application documents (Article 7, Clause 2 of the Act);
② Notice of the stage of the recruitment process: recruitment schedule and recruitment process (Article 8);
③ Notice of the stage of recruiting: whether to be hired or not (Article 10);
④ Notice after employment status is confirmed: return of employment documents, etc. (Article 11, Paragraph 6).[91]

2. Obligation to return documents (Articles 11 and 17, Paragraph 3)

Since the employer requires various types of qualifications and proofs when recruiting workers, to identify a job seeker's ability , job seekers are required to pay an average of KRW 150,000 per application, and so the average cost for a job seeker to get a job is KRW 449,500 (when applying 29 times).[92] If a job seeker receives a return of the employment documents, the cost of finding a job can be reduced.

If a job seeker whose final recruitment is refused requests the company to return recruitment documents, the employer shall send or deliver the recruitment documents to the jobseeker within 14 days from the date on which the jobseeker requested the return, after confirming the job seeker's identification. However, the company shall not be obliged to return any documents

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89) Reporter Younghee Kwak, "Although the recruitment procedure law has been passed, it is still possible to request an 'ID photo'", monthly magazine 「Labor Law」 , May 2019, Jongankyungjae
90) Ministry of Employment and Labor, above manual, pages 64-65.
91) Specific items employers need to tell job seekers (I) the fact that the job seeker may claim the return of the hiring document; (ii) the type and scope of the hiring document to be returned; Implementation period, (v) return method and cost burden, (vi) retention period and destruction of employment documents.
92) Kyeryun Shin, a lawmaker who got the search result after asking the recruiting company, 'Human', Feb 3, 2013.

submitted through the homepage or e-mail or documents which were voluntarily submitted by the applicant without the employer's request. To be prepared for the request for return by a job seeker, the employer shall keep the employment documents for a period determined by the company within 180 days after 14 days from the date of failed employment of the job seeker, and notify the job seeker of the period of retention. In principle, the cost of returning the employment documents is borne by the employer. However, the job seeker may be liable to pay expenses to receive the documents according to the individual application. If the company does not fulfill its obligation to retain the employment documents, or if the company does not notify the job seeker, the employer will be subject to a penalty of up to KRW 3 million.

3. Storing and deleting documents

The employer shall keep the employment documents for the period prescribed by Presidential Decree. However, the employer shall be deemed to have fulfilled the obligation to return the employment documents if the employment documents are lost due to natural disaster or other reasons not caused by the employer (Article 11 (3)). The retention period is from the date of recruitment application to the date of request for the return of documents, or when requested for return of the documents, the employer must send the documents by the special delivery service of the postal office (Article 3 of the Enforcement Decree of the Act).

The employment documents contain the personal information of the job seeker, and as the need for privacy is paramount, the documents should be destroyed after a certain period of time. If the requesting period of return expires or if the employment documents are not returned, the employment documents must be destroyed in accordance with the "Personal Information Protection Act" (Article 11, Paragraph 4).[93] In this case, the destruction of the employment documents should be made without delay (within 5 days) as stated in the Personal Information Protection Act.[94] The method of destroying personal information is as follows: ① For electronic files: permanent deletion in a way that cannot be restored; ② For recorded, printed, written or other recording mediums: crushed or incinerated (Article 16 of the Enforcement Decree of the Personal Information Protection Act).

Ⅳ. Conclusion

Since in the past there were no restrictions on the employer's right to employ workers, employers have sometimes abused their right in the course of hiring workers, which has caused high costs of recruitment for job seekers and even led to frequent recruitment irregularities. In this regard, the Recruitment Procedure Act will contribute to the restriction of the abuse by the employer in the recruitment process, reduce the job seeking expenses of the job seeker, and establish fair recruitment procedures. However, since there is a lack of social awareness or publicity regarding the Recruitment Procedure Act, it is generally accepted and recognized that job seekers cannot always be protected in reality. Therefore, it is desired that strict enforcement of the Recruitment Procedure Act is very much necessary in order to restrict

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93) Article 21 (Destruction of Personal Information) (1) A personal information controller shall destroy personal information without delay when the personal information becomes unnecessary owing to the expiry of the retention period, attainment of the purpose of processing the personal information, etc.: Provided, that this shall not apply where the retention of such personal information is mandatory under other statutes.

94) Ministry of Public Administration and Security, Ministry of Employment and Labor, "Guidelines for Personal Information Protection - Personnel and Labor Fields", 2012. Page 23.

some of the previously-unlimited rights of the employer and ensure the rights of job seekers.

The Ant-Corruption Act and the Employer's Legal Liabilities

Ⅰ. Introduction

Even though Korea has reached the status of a developed country, many indices still show that the morality of public officials is perceived as being relatively low. According to a survey by the Anti-Corruption and Civil Rights Commission (ACRC), on the corruption perception index, 57% of the people who participated in the survey responded that civil servants are corrupt. Even in an international evaluation in 2015, Korea's Corruption Perceptions Index ranked 56; in 27th place out of 37 OECD countries.[95] Accordingly, it became necessary to legislate a comprehensive anti-corruption act in order to overcome the limitations of the existing anti-corruption laws (the Criminal Act, the Public Service Ethics Act, etc.) in preventing corruption, get rid of the corruption within the public services, and reach a transparent society. Thus, the "Improper Solicitation and Graft Act (hereinafter referred to as the "Kim Young-Ran Act" or the "Anti-corruption Act" was enacted on March 27, 2015 at the suggestion of Kim Young-Ran, the chief of the ACRC, and was implemented on September 28, 2016. This Kim Young-Ran Act includes in its scope of application employees engaged in media companies, private schools, and even the spouses of employees, and so affects the lives of ordinary people.[96] In particular, this Act contains joint penal provisions that can be used to punish a company when an employee violates this law regarding improper solicitation or provision of financial or other advantages, and so all companies should implement thorough precautions for the purpose of ensuring the avoidance of any joint punishment.

Hereunder, I will review the Kim Young-Ran Act in terms of its principals and the exceptions to what is considered improper solicitation and prohibited financial or other advantages, after which I will also carefully examine its joint penal provisions, their application, and the necessary efforts required of a company.

Ⅱ. The Anti-corruption Act

1. Concept and scope of application

(1) Concept: The purpose of this Act is to ensure that civil servants and relevant persons fulfill their duties in an upright manner and to secure the public's confidence in public institutions by forbidding improper solicitation of civil servants or other relevant persons and by prohibiting them from accepting financial or other advantages. This Act is composed of two major parts: anti-solicitation measures and prohibited financial and other advantages.

(2) Scope of application

1) "Civil servants and relevant persons" refers to ① civil servants and employees working in ② public service-related organizations,[97] ③public institutions, ④ schools of various levels

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95) Document issued by the Anti-Corruption and Civil Rights Commission in 2016.

96) The scope of application is much wider, and so several petitions to the Constitution Court were submitted, but all were rejected. The Constitution Court ruling on July 28, 2016 (2015 Hunma 236, 412, 662, 273 combined cases)

97) Public service-related organizations: The Bank of Korea, public companies (Korea Electric Power

and educational corporations, and ⑤media companies.

2) Spouses of civil servants and relevant persons

3) Private persons performing public duties: ① members of various committees, ② persons who have authority delegated by a public institution, ③ persons on assignment from the private sector to a public institution, ④ professionals who engage in deliberation or assessment in relation to public duties.

4) General people: persons who improperly solicit civil servants or who offer them financial or other advantages

2. Prohibition of improper solicitation[98]

(1) Details (14 types): ① Authorization, permission, and any other actions, ② mitigating or remitting various administrative dispositions or punishments, ③ intervening or exerting influence in the appointment, promotion, or any other personnel management of civil servants, ④ using influence so that a person is appointed to or rejected from a position which is involved in the decision-making of a public institution, ⑤ using influence so that a specific individual is chosen or rejected by a public institution, ⑥ using influence so that duty-related confidential information on tenders, auctions, etc., is disclosed, ⑦ using influence so that a specific person is selected or rejected as a party to a contract, ⑧ intervening or exerting influence so that subsidies, etc., are assigned to, provided to, invested in, or deposited with a specific person, ⑨ using influence so that a specific person buys, exchanges and/or uses goods and services that are produced, provided or managed by public institutions beyond the normal monetary value, ⑩ using influence so that admissions, grades, performance tests or other matters related to schools of various levels are handled and/or manipulated, ⑪ using influence so that physical examination for conscripts, assignment to a military unit, appointments or any other matters related to military service are handled in a specific way, ⑫ using influence so that, in various assessments and judgments performed by public institutions, specific assessments or judgments are made, ⑬ using influence so that a certain person is selected or rejected as the subject of administrative guidance, control, inspection or examination, or where the outcome thereof is manipulated or discovered violations are ignored, and ⑭ using influence so that the investigation, judgment, adjudication, decision, conciliation, arbitration, or settlement of a case or any other equivalent function is handled in a specific manner.

(2) Exceptions: In order not to discourage claiming legitimate rights, claiming, or demanding, the following 7 items are permitted under the Anti-corruption Act:

① Requesting certain actions, such as asking for remedy against or resolution of

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Corporation, etc.); local corporations (Seoul Metro, etc.); government-invested corporations/subsidiary organizations (Korean Red Cross, etc.); work assignment organizations (National Agricultural Cooperative Federation, etc.); institutes appointing directors (Korea Workers' Compensation and Welfare Service, etc.).

98) Punishment for improper solicitation (Articles 22, 23 of the Act)

Violation	Punishment
A stakeholder improperly solicits a civil servant directly	None
A stakeholder improperly solicits a civil servant through a third party	Fine for negligence not exceeding KRW 10 million
A person improperly solicits a civil servant on behalf of a third party (private person)	Fine for negligence not exceeding KRW 20 million
A civil servant improperly solicits another civil servant on behalf of a third party	Fine for negligence not exceeding KRW 30 million
A civil servant or relevant person who performs functions as directed by an improper solicitation	Imprisonment for not more than two years or a fine not exceeding KRW 20 million

infringement of a right; suggesting or recommending the establishment, amendment or rescission of related Acts and/or subordinate statutes and standards; ② Publicly soliciting a civil servant or relevant person to take a certain action; ③ Where an elected public official, political party, civil society organization, etc., conveys a third party's complaints and grievances the public interest; ④ Requesting or demanding that a public institution complete a certain duty within a statutory deadline, or inquiring or asking verification about progress; ⑤ Applying or making a request for verification or certification of a certain duty or juristic obligation; ⑥ Requesting an explanation or interpretation of systems, procedures or Acts and/or subordinate statutes related to a certain duty in the form of an inquiry or consultation; and ⑦ Any other conduct not deemed as contravening social norms.

3. Acceptance of financial or other advantages[99)]

(1) Details: The previous Anti-Corruption Act required both a "work-related connection" and clear "benefits given in return for favors" in order for an action to be subject to punishment, but this new Act does not require directly-related "bribery in return for favors", and any civil servant who receives more than KRW 1 million will be punished without the need for any work-related connection. In cases where a civil servant or relevant person accepts, requests, or promises to receive any financial or other advantage with a value in excess of KRW 1 million at one time or a total of KRW 3 million within the same fiscal year from the same person, regardless of the relationship between such offer and his or her duties, he/she is subject to criminal punishment. However, in instances where less than KRW 1 million is accepted at one time, or less than a total of KRW 3 million within the same fiscal year, the civil servant is subject to criminal punishment only if there is a connection with his/her duty.

Financial and other advantage refers to money, goods, and other financial gain, as well as tangible or intangible gains which provide convenience or satisfy the person's needs or desires. Examples are 1) money, property, hotel vouchers, memberships, admission tickets, etc., 2) meal, alcohol or golf, provision of transportation, etc., 3) providing economic benefits such as relief of debt, provision of employment, offering of favors, etc.

"Work-related connection" refers to the "duties handled by one's position." Examples are: 1) duties authorized generally and abstractly under the law, 2) duties performed actually or habitually, 3) duties to support or influence decision makers, and 4) duties closely related to the job.

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99) Punishment for Graft (Articles 22, 23 of the Act)

Violation	Punishment
· A civil servant receives a financial or other advantage in excess of KRW 1 million at one time or a total of KRW 3 million within the same fiscal year from the same person, regardless of a connection to his or her duties · A civil servant does not report the fact that his or her spouse received a financial or other advantage · A person provides a financial or other advantage	Imprisonment for not more than three years or a fine not exceeding KRW 30 million
· A civil servant receives a financial or other advantage not exceeding KRW 1 million in connection with his or her duties, regardless of whether such offer is given in exchange for favors · A civil servant does not report such financial or other advantage received by his or her spouse · A person provides a financial or other advantage to a civil servant or his or her spouse.	Fine for negligence of two to five times the received amount
· A civil servant receives an honorarium exceeding the allowable limit for an outside lecture	Fine for negligence not exceeding KRW 5 million

(2) Exceptions: There are 8 valid situations for accepting financial or other advantages:

① Financial or other advantages that a public institution offers to civil servants or relevant persons who belong to the institution or are on assignment thereto, or which a senior civil servant or relevant person offers to his or her subordinates to either raise their morale or console, encourage, or reward them;

② Food and drink, congratulatory or condolence money, gifts, or other items that are offered to facilitate performance of duties or for social relationships, rituals, or assistance to festivities and funerals, the value of which is within the limit provided by Presidential Decree:

- Meals are allowed to a value of not exceeding KRW 30,000;
- Gifts are allowed to a value of not exceeding KRW 50,000 (however, up to 100,000 won for agricultural and fishing gifts);
- Congratulatory and condolence payments are allowed to a value of not exceeding KRW 50,000 (However, up to 100,000 won for congratulatory and condolence floor;

③ Financial or other advantages that are offered from a legitimate source due to a private transaction;

④ Financial or other advantages that relatives (under Article 777 of the Civil Act) of a civil servant or relevant person offer;

⑤ Financial or other advantages that employees' mutual aid societies, clubs, alumni associations, ethnic societies, friendship clubs, religious groups, social organizations, etc. related to a civil servant or relevant person offer to their members in accordance with the rules prescribed by the respective organizations, and financial or other advantages from those who have long-term and continuous relationships with a civil servant or relevant person;

⑥ Financial or other advantages that are uniformly provided by an organizer of an official event related to the duties of a civil servant or relevant person to all participants thereof, including transportation, accommodation, and food and drink;

⑦ Souvenirs or promotional goods distributed to many and unspecified persons, or awards or prizes that are given by a contest or lottery; and

⑧ Financial or other advantages that are permitted by any other Acts and/or subordinate statutes, standards or social norms.

Ⅲ. Joint Penal Provisions and the Employer’ s Obligations

1. Concept

The joint penal provisions refer to a system of punishing the employee and the employer together for violations of the law by the employee in the course of his/her work. Article 24 of the Anti-corruption Act (Joint Penal Provisions) stipulates that “Where an employee commits a violation: improper solicitation and/or provision of financial or other advantage, the violator and his/her employer are punished together. Provided, that this shall not apply where the employer has not been negligent in giving due attention and supervision concerning the relevant duties so as to prevent such violation.”

The Supreme Court ruled, concerning the reasons for the employer to be exempted from liability, that whether the employer has been negligent in giving due attention and supervision shall be determined by considering the following items collectively: ① the violation and its relevant situation, such as the purpose for enacting that law, the severity of damages coming from infringing rights due to violation of the relevant law, and the purpose for introducing the joint penal provisions in that law; ② the concrete details of the violation and actual damage caused by the violation of this law; and ③ the size of the business, along with the degree of command and supervision by the employer; and ④ the company’s efforts to prevent violations.[100)]

2. Related cases[101]

1) Improper solicitation

Case 1: In a case where employee X of a construction company solicited civil servant A of 00 District Administration Office for permission for a building project in violation of construction laws: In applying the joint penal provisions, the construction company will receive a fine not exceeding KRW 20 million.

Case 2: In a case where employee X of a construction company solicited civil servant A of 00 District Administration Office for permission for a building project, providing whiskey worth KRW 700,000: If "bribery" as defined in the Criminal Act, is applied, the construction company will not be punished by the joint penal provisions, but if the case is not admitted as "bribery" under the Criminal Act, the joint penal provision is applied and a fine will be given, not exceeding KRW 20 million.

2) Accepting financial or other advantages

Case 1: While a construction company was waiting to receive a construction permit from the District Administration Office, in a case where employee X provided whiskey worth KRW 700,000 to the civil servant in charge of construction permits, employee Y provided gift tickets worth KRW 500,000 to the same person, and employee Z provided a meal equivalent to KRW 200,000 to the same person, all in different work-related meetings: In applying the joint penal provisions, the construction company shall bear a fine of between KRW 2.8 million and KRW 7 million won.

Case 2: In a situation where employees X and Y of a construction company invited newspaper reporters A, B, C, D to a work-related dinner and spent KRW 120,000 for the dinner, and paid KRW 240,000 at the bar in a second location: As entertainment of the civil servants by employees X and Y is evaluated as one behavior, in applying the joint penal provision, one fine will be levied, which will be between KRW 120,000 and KRW 300,000 won: A fine for negligence of two to five times the received amount → (120,000/6 persons) + (240,000/6 persons) = KRW 60,000.

3. Cases in other countries

1) The United States' Anti-corruption Compliance: Whether the company established and normally operated effective anti-corruption compliance plays an important part in cases where the court decides to prosecute the company or determine a level of corporate punishment. A company simply preparing the compliance documents is not sufficient, but whether in actuality their preparations were effective or not. The US provides guidelines in its anti-corruption law and stipulates substantial obligations that the employer must strictly adhere to.

2) The United Kingdom's Anti-corruption Act: In cases where an employee of a company or other related person in its agency and/or subordinate company provides bribes to other people in order to acquire more business or expect favors, the company itself will be charged for criminal violation. Provided, the company will not be liable if the company can verify its efforts to implement appropriate measures to prevent persons from giving bribes.

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100) Supreme Court ruling on February 25, 2010 (2009do5824), on September 9, 2010 (2008do7834), etc.
101) Document issued by the Anti-Corruption and Civil Rights Commission in 2016.

Ⅳ. Conclusion

In relation to the Kim Young-Ran Act, a company's main concern is how it can avoid activities that may be punishable by the joint penal provisions. In order to avoid such liability, the company must prepare both preventative and disciplinary measures as well as rules for compliance, conduct ethics education, and actually take disciplinary action for offenders. In particular, with the introduction of the Kim Young-Ran Act, it is necessary to recognize that a company's existing entertainment practices could be detrimental not only to the employee him or herself, but to the company as well. The Anti-corruption Compliance program in the United States or its equivalent in the United Kingdom can be good reference points for adequate procedures to prevent corruption. The best way for a company to avoid this joint punishment is to exert real effort in terms of implementing considerable attention and supervision.

노동법 앱 개발
App Development Project

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자동계산 Automatic Calculation	1. 연차휴가 2. 퇴직금 3. 4대보험	1. Annual Paid Leave 2. Severance Pay 3. Social Insurance Premiums
질문/답변, 인사감사 Labor Auditing, FAQ	1. 주요 질문/답변 2. 인사감사	1. FAQ 2. Labor Auditing

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