The Fatal Accidents Act and Employer Obligations

I. Introduction

The Occupational Safety and Health Act (hereinafter referred to as the "OSH Act") was completely revised in January 2020 to prevent fatalities and other serious industrial accidents that regularly occur at industrial sites, but fails to significantly contribute to preventing serious accidents. This is because, in an industrial accident, only the site manager responsible for the safety of the work site is punished. The employer, who is actually responsible for the project escapes responsibility, because it is next to impossible to prove an employer is intentionally negligent under criminal law.[1] Korea's Supreme Court denied the charge of manslaughter against an employer for occupational negligence when the onsite director was supervising construction at the site, and determined that a worker killed in an accident at work was not under the supervision of the employer during construction.[2] In fact, if employers remain unpunished, awareness of the risk of industrial accidents will remain inadequate, and employers will remain less willing to invest in the personnel, funding, and effort necessary to prevent industrial accidents.

On April 29, 2020, 38 workers died and approximately 10 workers were injured during a fire at the Icheon Logistics Warehouse construction site. This was shocking news, and resulted in passage of the Act on the Penalty of Fatal Accidents (hereinafter referred to as the "Fatal Accidents Act" or "FAA") on January 26, 2021. The FAA will come into effect January 27, 2022, after a one-year grace period. However, businesses with fewer than 5 employees will remain exempt, while businesses with 6-49 employees will have a three-year grace period (until January 2024).

The purpose of the FAA is "to stipulate the punishment of employers, business managers, civil servants and corporations, etc. to prevent accidents and protect the lives and health of workers." In other words, it seeks to prevent industrial accidents through strict punishment for inadequate safety measures at a place of employment. In order for an employer to avoid liability for a serious industrial accident, they must fulfill the safety and health obligations required by this Act and the Enforcement Decree as well as the safety and health measures under the OSH Act. In this regard, I would like to take a detailed look at the specific details and applied practices.

II. Main Details of the Fatal Accidents Act

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1) Kwon, Hyuk. "Legal Systemic Status and Legislative Policy Significance of the Fatal Accidents Act," Labor Law Forum (34), Labor Law Theory and Practical Society, November 2021, p. 4.
2) Supreme Court ruling on Nov. 24, 1989: 89do1618.

The FAA consists of four chapters and 16 articles, covering general rules, serious industrial accidents, serious civil accidents, and supplementary rules.

1. Understanding the key definitions

Some terms used in this law are different from other laws.

1) "Serious industrial accident" refers to an accident resulting in (i) one or more fatalities, (ii) two or more persons injured in the same accident and requiring treatment for at least six months, (iii) three or more people in the accident becoming ill and requiring treatment for three months or longer for the same cause. In the OSH Act, serious accidents were defined in the enforcement regulations of the OSH Act, and so there was some ambiguity, but in the FAA, the definition of serious accidents is clearly explained in the Act.
2) "Employee" refers to (i) a worker as defined in the Labor Standards Act, (ii) a person who provides labor in return for reward for the purpose of operation of the business, regardless of the type of contract, such as subcontract, service, or consignment. Their protection was more extended than workers under the Labor Standards Act. The term "employer" has also been expanded to include those who run their own business and those who are provided with the labor of others.
3) "Business manager, etc." refers to a person who has a relationship of equal responsibility with the employer, and who has the authority to represent the business and responsibility for its management, or a person in charge of safety and health-related tasks equivalent thereto. In other words, "employer" refers to actual owners of the company and those with the authority to make company-wide decisions.

2. Obligations of employers and business managers to secure safety and health (Article 4)

An employer or business manager shall work to protect the safety and health of workers in the business or workplace they control, operate, or manage, in consideration of the business or workplace scale and characteristics. Specifically, they are responsible for: (i) Ensuring the establishment and implementation of a safety and health management system, including the necessary personnel and funding to prevent serious accidents; (ii) Ensuring orders from the local government for improvement, correction, etc., are followed in accordance with relevant laws and regulations; (iii) Taking the administrative measures necessary to fulfill their obligations under relevant laws and regulations related to safety and health, and (iv) Measures necessary for fulfillment of obligations under safety and health related laws and regulations. Parts (i) and (iv) above are explained in detail in the Enforcement Decree to the Fatal Accidents Act.

3. Details on punishment of employers and business managers when serious industrial accidents occur

(1) Punishment of employers and business managers

If the employer or business manager is found to be responsible for the violation of safety and health requirements in the FAA, resulting in an accident that kills one or more persons, the employer or business manager shall be subject to a minimum one year of imprisonment or a fine of not more than KRW 1 billion. Penalties are also imposed for injuries or occupational illness. If two or more persons are injured and require treatment for at least six months due to the same accident, or if three or more persons suffer an occupational illness within one year due to the same hazards, the employer or business manager shall be subject to imprisonment of a maximum 7 years imprisonment or a fine of not more than KRW 100 million (Article 6 (2)). If the same type of fatal accident recurs within five years, the penalties shall be increased by 50% (Article 6 (3)). In addition, the person in charge of corporate management at that workplace must attend and complete safety and health education. If the person in charge of corporate management fails to complete the education without justifiable reason, a fine of not more than KRW 50 million shall be imposed (Article 8 of the FAA, Article 6 of the Enforcement Decree).

(2) Joint penal provisions

The Fatal Accidents Act imposes a fine of not more than KRW 5 billion for corporations and up to KRW 1 billion for injuries or occupational illness. However, if a corporation has taken considerable care and supervision to prevent violation but a fatal accident still occurs, no fine shall be imposed (Article 7 of the FAA).

(3) Punitive compensation for damage

The Fatal Accidents Act introduces punitive compensation for damage, which is nonexistent in the OSH Act. In the event that an employer or head of operations intentionally, or by gross negligence, violates his or her obligation to take measures to protect safety and health and this results in a fatal accident, the relevant employer or corporation shall be held liable for compensation not exceeding 5 times the damage suffered by the injured person, or the surviving family. However, this does not apply if the accident occurs despite the corporation having given considerable attention to implementing safety measures and supervision over the relevant risks and hazards (Article 15 of the FAA).

III. Requirements for Employer Immunity in the Event of a Serious Industrial Accident

Even if a serious industrial accident occurs, there will be no punishment if the employer has fulfilled his or her duty to protect safety and health. Specific details are described in the establishment of a safety and health management system (Enforcement Decree Article 4) and administrative measures necessary for fulfillment of obligations in accordance with safety- and health-related laws (Enforcement Decree Article 5).[3)]

3) Ministry of Employment and Labor, "Fatal Accident Punishment Act – Related to Serious Industrial Accidents," November 2011.

1. Establishment of a safety and health management system and implementation measures (Enforcement Decree Article 4)

The details of the safety management and health management system required by Article 4 Paragraph 1 of the Fatal Accidents Act are explained in nine clauses in Article 4 of the Enforcement Decree. These can then be divided into six areas: i) preventative measures, ii) organization and arrangement of an exclusive organization, iii) prior hazard and risk assessment, iv) listening to workers' opinions, v) creating an emergency response manual of actions to be taken in the event of a serious accident, and vi) managing service agency personnel.[4] Since companies have different hazards and risks according to the size, characteristics, etc. of their business or workplace, and the manpower and financial situation are different, it is difficult to uniformly determine specific means and methods to control those hazards and risks, and so room must be made to allow for autonomous reasonable judgment.

(1) Establishment of safety and health goals and management policies, and budgeting and execution (Clause 1 and 4).

The goals and management policies related to safety and health may overlap substantially with the employer's plans for safety and health as stipulated in Article 14 of the OSH Act (Reporting to and Approval of the Board of Directors, etc.). However, if the safety and health plan established and reported by the employer considers the situation of the workplace every year, the safety and health goals and management policies required by the Fatal Accidents Act are always considered in each sector while carrying out their business. Such a plan shall contain the basic management philosophy and general guidelines for decision-making regarding safety and health (Clause 1).

The individual employer or business manager shall formulate a budget and ensure the existence of funds necessary for the provision of personnel, facilities, and equipment related to safety and health to prevent serious accidents and decrease risk and the occurrence of hazards, etc. (Clause 4).

(2) Exclusive organization and personnel arrangement (Clause 2, 5, 6)

According to the Occupational Safety and Health Act, individual employers or corporations must have at least three persons in charge of safety and health in all workplaces: a safety manager, a health manager, and an occupational health doctor. In addition, together, they should form an exclusive organization. This exclusive organization is to be in charge of overall management of safety and health for a business or workplace (Clause 2).

An employer or business manager shall assign a safety manager, health manager, and occupational health doctor in accordance with the OSH Act. However, if other laws and ordinances stipulate otherwise for the allocation of relevant personnel, those other laws or ordinances shall be followed. In cases where the personnel to be allocated concurrently hold other duties, time for fulfillment of safety and health responsibilities shall be guaranteed in accordance with the standards set and announced by the Minister of Employment and Labor (Clause 6).

The employer or business manager shall grant the necessary authority to the

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4) Jeon, Hyeong-bae. "Issues in Interpretation of the Fatal Accident Punishment Act," Labor Law Forum (34), Labor Law Theory and Practice Society, November 2021, pp. 278-282.

person(s) in charge of safety and health management and shall grant the funding necessary for such person(s) to fulfill the tasks prescribed in the OSH Act, and evaluate and manage whether the relevant tasks are faithfully performed at least once every six months (Clause 5).

(3) Prior hazards and risk assessment (Clause 3)

The employer or business manager shall prepare business procedures to identify and mitigate hazards and risk according to the characteristics of the business or workplace, and confirm, at least once every six months, whether such identification and mitigation has been carried out. However, if the procedure for risk assessment is prepared in accordance with Article 36 of the Occupational Safety and Health Act, the risk assessment is conducted according to said procedure and the implementation reported, confirmation of whether these activities have been carried out shall be considered to have taken place.

(4) Listening to the opinions of workers (Clause 7)

The employer shall prepare procedures to hear the opinions of employees on matters related to safety and health at a business or workplace, and shall confirm, every six months, that improvement measures have been prepared and implemented. If any abnormalities or omissions are identified, the employer shall be responsible for taking necessary countermeasures. However, when an occupational safety and health committee, as defined in the OSH Act, and the safety and health consultative body discuss, deliberate, or decide on the safety- and health-related situation of a related business or workplace, it shall be deemed that the opinions of the relevant workers have been heard.

(5) Creation of a manual on action to be taken in the event of a serious industrial accident (Clause 8)

The employer shall prepare a manual covering actions to occur in the event a serious industrial accident has occurred or imminent risk of occurrence of such an industrial accident exists in the business or workplace. The employer shall check whether measures are taken according to the manual at least once every six months. The manual shall include the following: (i) Response measures such as cessation of work, evacuation of workers, and removal of hazards; (ii) Relief measures for persons injured in serious industrial accidents; and (iii) Measures to prevent further damage.

(6) Management of external service agency workers (Clause 9)

When work is subcontracted, outsourced, or entrusted to a third party, standards and procedures are to be prepared to ensure the safety and health of third-party workers, which are to be inspected by the employer at least every six months. The standards and procedures are to include the following: (i) Those receiving the contract, service, entrustment, etc., are to have standards and procedures in place to evaluate the third party's ability and technological level to take the actions necessary to prevent industrial accidents; (ii) Those receiving the contract, service, entrustment, etc., shall have their own standards for funding the management of safety and health; and (iii) Those receiving the contract, service, entrustment etc. in the construction and shipbuilding industries shall have their own standards for construction period or building period for the safety and health.

2. Administrative measures necessary for the fulfillment of obligations under safety and health-related laws and regulations (Enforcement Decree Article 5)

(1) The employer shall inspect, at least every six months, to confirm that the obligations under safety and health-related laws have been fulfilled.

(2) As a result of the inspection or report in (1) above, if it is confirmed that the obligations under safety and health-related laws and regulations have not been fulfilled, the employer shall take action necessary to fulfill those obligations, such as assigning additional manpower or providing additional funding and ensuring its execution.

(3) The employer shall inspect at least every six months whether safety and health education on hazardous and dangerous work, which is mandatory in accordance with safety and health-related laws and regulations, has been provided. If the employer is not the one to directly engage in the inspection, he or she shall receive a report on the findings from those the employer delegates to perform the inspection.

(4) The employer shall take the action necessary to ensure that any unfulfilled education requirements identified in such an inspection or related report in accordance with (3) above, takes place, providing additional manpower and/or funding as necessary and without delay.

IV. Conclusion

The Fatal Accidents Act has been enacted with stiff punishment clauses to prevent industrial accidents by ensuring compliance with the Occupational Safety and Health Act. Industrial accidents cause pain and suffering not only for the victims themselves, but also for their families, as well as incurring significant social costs. Serious industrial accidents can really only be prevented through periodic and continuous attention and funding. The Fatal Accidents Act is expected to play a major part in reducing the occurrence of serious industrial accidents.

Rules of Employment and the Employer's Legal Responsibilities

I. Introduction

Rules of employment set up an important system so that employers can

systematically and uniformly manage their workers in a business or workplace. These rules refer to the employer determining the regulations needed to maintain corporate order and work efficiency at the workplace and the working conditions that will apply to all workers.[5] These rules of employment must be observed by the workers in the process of providing work, and also outline consequences for violating these rules. "Working conditions" refer to the conditions stipulated in the rules of employment in relation to worker wages, working hours, procedures for dismissal, and other treatment.[6]

Rules of employment can be written and enforced unilaterally by the employer, but once they are written, the employer and employees are bound to them and consequences for breaking those rules will apply to the applicable party, whether worker or employer. Employers cannot unilaterally change working conditions that have already been established. Any unfavorable changes are of no legal effect without the consent of a majority of the workers to whom the changes apply. In addition, the employer has both a legal obligation to prepare and report the rules to the Ministry of Employment and Labor, and a legal obligation to notify the workers of those rules in a public way. This is to ensure that the minimum standards set by the Labor Standards Act apply, through the rules of employment, to workplaces.[7]

I would like to take a detailed look at the legal requirements for rules of employment and how they are applied in practice.

II. Legal Nature of Rules of Employment

Rules of employment enforce legal regulations that must be observed in the workplace (legal effect), while providing the principle of equal decision-making between labor and management in determining working conditions (contractual effect).[8] The courts have ruled, "Rules of employment are written by the employer, based on the employer's corporate management rights, in order to unify the service rules and working conditions of workers at the workplace. This is because the purpose of the Labor Standards Act is to protect and strengthen the position of workers in their reality of subordinate labor relations to protect and improve their basic livelihoods. This compels that rules of employment be drafted and become the legal norm."[9]

"Contractual effect" refers to the effect that arises from the relationship between the employer and the worker in the employment contract. Although working conditions are

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5) Supreme Court ruling on Nov. 28, 1997: 97da24511.
6) Supreme Court ruling on June 23, 1992: 91da19210.
7) Lee, Seonggil, "A Legislative Review of the Employment Rules System," Labor Law Research (8) 69-119, Seoul National University Labor Law Research Society, June 1999, p. 78.
8) Kim, Hyungbae, 「Labor Law」 24th ed., Parkyoungsa, Feb. 2015. p. 297; Lim, Jong-ryul, 「Labor Law」, 24th ed., Parkyoungsa, p. 366.
9) Supreme Court ruling on July 26, 1977: 77da355.

stipulated in rules of employment, any unfavorable changes are of no legal effect without the consent of the majority of the target workers (proviso to Article 94 of the Act). This is in accordance with the principle of protecting workers' vested rights and determining equal working conditions (Article 4 of the Act).

III. Specific Legal Obligations of the Employer in Relation to the Rules of Employment

Rules of employment are legal obligations that must be prepared by employers who employ at least a certain number of workers. Their specific details and effect are described in the Labor Standards Act.

1. Size of workplaces obligated to draw up rules of employment rules

(1) Legal requirements

Employers who employ “10 or more ordinarily-employed workers” must prepare rules of employment and report them to the Minister of Employment and Labor (Article 93 of the Act). It is much more difficult for smaller workplaces to have rules of employment in place, so their preparation is left to the discretion of the employer and is not a legal obligation.

(2) Practical application

The number of “ordinarily-employed workers” is determined by dividing the number of total employees by the number of working days in the one month prior to the date of occurrence of the reason for application of the law (the time when it is necessary to determine whether the rules of employment have been drawn up and the duty to report) (Enforcement Decree to the Labor Standards Act, Article 7-2). While employers employing fewer than 10 workers are not obligated to prepare or report establishment of rules of employment, if they are drawn up, all regulations stipulated by law related to those rules apply.[10] Here, employers obliged to prepare and report establishment of rules of employment refer to those who have substantial authority and responsibility for matters that constitute the details of those rules, such as workplace rules and working conditions.[11]

2. Items to be stated in the rules of employment

(1) Legal requirements

Article 93 of the Labor Standards Act lists the items to be written in the rules of employment as it relates to working conditions and employment regulations to be

10) Seoul High Court ruling on Sep. 15, 2005: 2004nu23621.
11) Supreme Court ruling on Dec. 24, 1992: 92do2341.

uniformly applied to a business or workplace. Article 93 consists of 13 items and applies to all workers in the relevant business or workplace, and can be divided into mandatory and optional items.

(2) Practical application

Of the matters listed in Article 93 of the Labor Standards Act, rules of employment must stipulate essential working conditions such as wages, working hours, recess hours, and holidays. Since there are no standards required by law in a number of areas related to shift work, family allowance, and others, including these items in rules of employment is optional. However, any wage reductions in the rules of employment (as part of the employer's disciplinary options) are limited to no more than 10% of one pay period. Finally, nothing in the rules of employment can be of a lower standard than in the Labor Standards Act or the applicable workplace collective agreement (Articles 95 and 96).

3. Procedures for drafting and changing rules of employment

(1) Legal requirements

The law defines how rules of employment are to be drafted and changed. The employer shall hear the views of the labor union organized by a majority of workers, or if there is no union organized by a majority of workers, the employer shall hear the views of a majority of workers in the relevant business or workplace. However, if the rules of employment are to be changed unfavorably for workers, their consent must be obtained before such change will have any effect (Article 94 of the Act). If the employer does not hear the views of applicable workers or obtain their consent before changing the rules unfavorably, a fine of not more than 5 million won shall be imposed (Article 114 of the Act). This is to protect the principle of equality between labor and management in determining working conditions and to ensure decent working conditions for the workers.

(2) Practical application

In general, if the already-existing working conditions or employment regulations are written into rules of employment, it is sufficient to inform the workers that rules of employment have been created and reflect the already-existing working conditions/employment regulations. When introducing any new regulations into the rules, the views of a majority of the workers must be heard. If there are any changes that will be unfavorable to the workers, the consent of the affected workers must be obtained.

Changes to rules of employment that are considered unfavorable to workers generally include lowering the working conditions or removing the existing rules on working conditions and introducing new rules that are less favorable. There are three categories

of criteria for judging whether changes to the rules of employment are disadvantageous. First, if there are multiple changes to the rules, a decision will be made for each individual working condition, but if there is an interactive relationship or linkage between factors that determine one working condition, it shall be decided comprehensively. For example, even if the severance pay rate is adjusted downward, it is not considered a disadvantage if the total amount of severance pay does not decrease because the number of wage items included in the average wage increases.[12] Second, if a change to the rules of employment is beneficial to some workers and unfavorable to others, it is deemed unfavorable if the benefits resulting from the favorable and unfavorable are mixed with each other.[13] Third, if the change subdivides and materializes the contents conceptually because the existing regulations are unclear or comprehensive, and therefore are intended to resolve controversies in interpretation, it cannot be regarded as a disadvantageous change.[14]

4. Reporting rules of employment

(1) Legal requirements

Employers who regularly employ 10 or more workers must prepare rules of employment and report them to the Minister of Employment and Labor after hearing the views of their affected workers (Articles 93 and 94 of the Act). Before reporting the establishment or changes to the rules of employment, the employer must submit ① the employment rules and ② documents proving that the views of the labor union representing the majority of the workers, or the majority of the workers themselves, have been heard. If changes to the rules are unfavorable, documents must be submitted proving that consent has been obtained from the labor union representing the majority of workers, or from the majority of workers themselves (Article 15 of the Enforcement Regulation).

(2) Practical application

When a report of establishment of or changes to the rules of employment is received, the labor inspector shall check whether the necessary information pursuant to Article 93 of the Labor Standards Act is included and whether documents have been attached that prove that the views have been heard/consent has been obtained from a labor union representing the majority of workers, or a majority of the workers themselves. After that, a review is made by the labor inspector within 20 days of receiving the report, to ensure the details of the rules of employment do not conflict with relevant laws or regulations or the relevant collective agreement, and that any changes to the rules of employment, without proof of worker consent, are not

12) Supreme Court ruling on Aug. 28, 1997: 96da1726.
13) Supreme Court ruling on May 14, 1993: 93da1893.
14) Supreme Court ruling on Aug. 25, 2011: 2010guhap42263.

unfavorable. If the procedural requirements for the rules of employment are not met, or if the details are in violation of law or collective agreements, a period of up to 25 days shall be given to comply with an order for correction.[15] Here, if the employer submits a "Report on Establishment of/Changes to Rules of Employment" certified by a licensed labor attorney, along with a report of that labor attorney's review of the rules of employment or changes to those rules, an additional examination of the relevant rules by the labor inspector will be waived.[16]

5. Obligation to notify workers of the rules of employment

(1) Legal requirements

Employers must post or retain the rules of employment in a place where workers can read them at any time, and make them widely known to workers (Article 14 of the Act). The rules must not be seen by the workers as merely internal documents of the employer and of no effect. Since rules of employment are the norms within the company as determined by the employer, it is not necessary to follow the method stipulated in Article 14 of the Labor Standards Act for new or changed rules to take effect, but the rules of employment must be made widely known to the workers by any suitable method.[17]

(2) Practical application

The workers must be notified by the employer for the drafted or changed rules of employment to have any effect. Although the method of posting is not described in detail by law, if the right of access is guaranteed so that workers can read them at any time, it can be considered that the duty of disclosure has been fulfilled by the employer, even if the rules are posted on the internal computer network.[18]

6. Representation of a majority of workers

(1) Legal requirements

When reporting the rules of employment, the views of the labor union shall be heard if there is a labor union organized by a majority of workers in the relevant business or workplace, or the opinion of a majority of workers shall be heard if no such labor union exists. Consent must be obtained from this union, or the majority of workers if no such union exists, if changes are unfavorable (Article 94 of the Act). "A majority of workers" refers to the majority of the workers who are subject to the change(s) in the rules of employment.[19]

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15) Ministry of Employment and Labor, Regulation No. 48, "Guidelines for Examination of Rules of Employment."

16) Labor Standards Team-8048, Nov. 29, 2007, "Guidelines for Waiving Examination of Workplace Rules of Employment upon Confirmation of Examination by Certified Labor Attorney."

17) Supreme Court ruling on Feb. 12, 2004: 2001da63599.

18) Supreme Court ruling on June 23, 1992: 92nu4253.

19) Supreme Court ruling on Feb. 29, 2008: 2007da85997.

(2) Practical application

1) When the rules of employment are applied uniformly: In order to unilaterally make changes to existing working conditions in a way that is unfavorable to workers, consent from the group of workers to whom the previous rules of employment apply must be obtained through a collective decision-making method. In addition, if the changes to the rules are to apply only to a specific group of workers at the time of the change, but application to other groups of workers is expected in the future, consent from all workers expected to be affected now or in the future shall be obtained. In other words, even if only company executives are directly disadvantaged in the immediate changes to the salary system for executives, if the rules shall apply to any general employee in the future through promotion, the consent of a majority of all employees—executives and general employees—is required.[20)]

2) When working conditions differ between worker groups and separate employment rules apply: There are no personnel transfers between worker groups, and workers in the two groups have different working conditions at the time of hiring. Under such circumstances, if the rules of employment are changed for a specific group, “the majority of workers” is deemed to be the majority of workers in the affected group, not the entire workforce. This would apply, for example, in a workplace where personnel are divided into production and management according to business necessity.[21)]

3) Labor union organized by a majority of workers: A labor union organized by a majority of workers refers to a union organized by a majority of all workers for whom the existing rules of employment apply, regardless of whether or not they are members of a union: i.e., it does not mean a labor union organized by a majority of only workers eligible to join a labor union. Even if changes are made disadvantageously only towards executives who are not eligible for union membership, if the changed working conditions will likely apply to ordinary workers in the future, consent from the union organized by a majority of workers shall include those for whom the changed working conditions are expected to apply in the future.[22)]

IV. Conclusion

Legally requiring that rules of employment be introduced at workplaces ordinarily employing at least 10 workers, and reporting the establishment of rules of employment to the Ministry of Employment and Labor, is designed to ensure at least a minimum standard for working conditions at workplaces and in worker management and supervision. Rules of employment stipulate the employer's regulations for employment and employee working conditions. If the rules of employment are changed in a way unfavorable to the workers, then consent must be obtained from the majority of workers (through the worker representative(s)) or the labor union representing the majority of workers. This measure protects the principle of equality in working

20) Supreme Court ruling on May 28, 2009: 2009doo2238.
21) Supreme Court ruling on Dec. 7, 1990: 90daka19647.
22) Supreme Court ruling on Nov. 12, 2009: 2009da49377.

conditions by law. Employers need to therefore make systematic efforts to create, through their rules of employment, a workplace culture able to maintain and improve working conditions while establishing a desirable management order.

Introduction of "Labor Directors" (Board Level Employee Representation) in Public Institutions

I. Introduction

On January 11, 2022, an Act on introduction of a "labor director" system (known as "board level employee representation" in Europe) was enacted during the National Assembly plenary session. This was accomplished through a revision of the Act on the Management of Public Institutions (hereinafter referred to as the "Public Institutions Management Act") requiring public corporations and quasi-governmental institutions to appoint one outside director to the board of directors that will represent the majority of workers and who has been recommended by that majority of workers. Although the labor director system had been introduced as an ordinance within the existing local self-government system, this is the first time it has been legislated, and is expected to have significant ripple effects on society as a whole. Since the amended law will take effect six months after the date of promulgation according to this supplementary provision, it is expected that introduction of the labor director system will begin in earnest in all public institutions in the second half of this year.

Currently, 351 entities are designated as public institutions in 2021—37 public corporations, 96 quasi-governmental institutions, and 218 other public institutions. According to the Public Institutions Management Act, the Ministry of Strategy and Finance is the competent ministry, evaluating the management of public institutions affiliated with it and supervising their work. The labor director system introduced this time applies only to public corporations and quasi-governmental institutions, and is not mandatory for other public institutions.[23)]

The labor director system is one in which workers participate in management decision-making, as outside directors in meetings of the board of directors, the highest decision-making body in public institutions, to receive reports on important management issues, and become the major agents of deliberation and decision-making. In existing boards of directors, decisions and implementation were unilaterally led by the chairperson of the board (head of the institution), but it is expected that the labor director will raise detailed concerns on key issues on behalf of the employees, who are the main stakeholders of the institution.

Herein, I will take a look at the background to introduction of the labor director

23) Lim. Seiwoong, "Labor Director System Bill passed by the Planning and Finance Committee," Daily Labor News, Jan. 6, 2022.

system in public institutions enacted this time and review how it has run through the outside director system for workers in Seoul.

II. Background to the Introduction of a Labor Director System in Public Institutions

1. Current status of the labor director system in other countries

As mentioned, the labor director system is known as board level employee representation in Europe, where it developed and where 19 of the 31 nations have adopted it. If we classify this according to the target of application, it can be divided into countries where the labor director system is universally applied to the public and private sectors, countries where it is applied only to the public sector, and countries where it is not applied at all. Thirteen countries, including Germany, France, and Sweden have introduced a labor director system in both the public and private sectors, while six (Ireland, Spain, Portugal, Poland, Czech Republic, and Greece) have introduced the labor director system only in the public sector.[24] Nations with British-American shareholder capitalism, such as the United Kingdom, the United States, Canada, and Japan, have not adopted the labor director system.[25]

The system became the subject of great international attention during the financial crisis caused by the subprime mortgage crisis in 2008. The co-decision-making system, which is the basis of the labor director system, was considered an anachronism due to excessive welfare costs. However, Germany was able to recover from the financial crisis sooner than other nations and continued to grow, so a re-evaluation began to take place. The “German model” came to the fore as the co-decision-making system was seen to prevent large-scale layoffs and serve as an important driver in German economic recovery while maintaining purchasing power.[26]

2. Introduction of the labor director system in Seoul, etc.

In May 2016, former Mayor of Seoul, Park Won-soon decided to introduce a labor director system, which requires one or two worker representatives to participate in boards of directors, at 15 investment-funded institutions. In 2016, the Seoul Metropolitan Government was the first local government to enact the relevant ordinance (Ordinance on the Operation of the Seoul Metropolitan Government's Worker Director System) and introduced the labor director system to investment-funded institutions in Seoul. This ordinance stipulates that institutions with 100 or more workers must adopt the system, while institutions with fewer than 100 employees can adopt it or not upon resolution of their boards of directors. Starting with appointment of the first labor director at the Seoul Research Institute in 2017, 22 labor directors have been appointed

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24) Kim, Kang-Sik, Nam, Jae-Hyeok, “Is it necessary to legislate the labor director system?” Journal of Orderly Economy, Vol. 24, No. 1, Korean Society for Orderly Economics, March 2021, p. 98.

25) Choi, Jun-seon, “Critical Review of the Labor Director System of Public Institutions”, Monthly Labor Law, JoongAng Economy, March 2021.

26) Kim, Hong-seop, “Duality of the German co-decision-making system,” German Language and Literature, Vol. 78, Korean Society of German Language and Literature, 2017, p. 41.

in 16 institutions in three years in Seoul, as of 2020.[27] Gyeonggi Province introduced the system in November 2018, when it enacted related ordinances, following the inauguration of Governor Lee Jae-myung. Since then, it has been implemented in Gwangju Metropolitan City and Incheon Metropolitan City. As of the end of 2020, 62 labor directors have been appointed and are working in 49 local public institutions.[28]

3. Tripartite agreement on introduction of the labor director system in public institutions

The labor director system in Seoul Metropolitan City and local governments, which was introduced in 2017, has stabilized, and the need to expand the positive role of the system at public institutions has emerged. In turn, the Economic, Social and Labor Commission has begun to discuss, in depth, expanding the system.

On November 18, 2020, the Economic, Social and Labor Commission's Public Institutions Committee announced an "Agreement for the Sustainable Development of Public Institutions," along with the "Introduction of the Labor Director System at Public Institutions." Then, on February 19, 2021, the Economic, Social and Labor Commission agreed at a plenary meeting to introduce the labor director system at all public institutions nationwide.[29] This agreement then led to amendment of the Public Institutions Management Act as a legislative bill.

III. Legislation of the Labor Director System in Public Institutions and Role of the Labor Director

1. Details of the legislated labor director system

According to the amendment of the Public Institutions Management Act passed at the plenary session of the National Assembly on January 11, 2022, the labor director system must be introduced at all public corporations and quasi-governmental institutions. Other public institutions are not subject to mandatory application. The labor director is a non-standing director and must have been employed for at least 3 years. There is to be one labor director, who shall be appointed for a two-year term, followed by the potential for renewal every year. Persons recommended by the workers' representative (referring to the representative of the labor union if there is a labor union organized by a majority of workers) or with the consent of a majority of workers is selected and appointed upon recommendation by the executive recommendation committee. The specific details will be determined by the Enforcement Decree. The labor director remains a part-time position so as to maintain his/her status as an employee, as full-time directors cannot simultaneously be employees so would have to take a leave of absence. Where the board level employee representation system

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27) Lee, Jeong-hee, "Experimentation with the Seoul Metropolitan Government's Labor Director System, its Results and Tasks," Monthly Labor Review, Korea Labor Institute, March 2020, p. 3.

28) Lee, Jongsun, "ESG Management Paradigm and Introduction of the Labor Director System in the Post-Corona Era," Monthly Labor Law, JoongAng Economy, March 2021.

29) Kim, Kang-Sik, Nam, Jae-Hyeok, "Is it necessary to legislate the labor director system?" Journal of Orderly Economy, Vol. 24, No. 1, Korean Society for Orderly Economics, March 2021, p. 91.

is in operation overseas, and in local governments in Korea, all labor directors are part-time. The reason labor directors must have been employed for at least 3 years is to ensure some level of experience in management of the institution.[30]

2. The role of the labor director

According to Article 17 (Establishment and Functions of the Board of Directors) of the Public Institution Management Act, public institutions must make important decisions on overall management while establishing and operating a board of directors. The head of a public institution is the chairperson, who is also chairperson of the board of directors. The board of directors consists of that chairperson, directors, and an auditor, and must make decisions on major management topics for the institution. In particular, the head of the institution (the chairperson) must report to the board of directors on major details related to management, accounting, and overall operation of the institution.

The employee appointed as a director attends a board of directors' meeting as an outside director to deliberate and decide on major agenda items with the board of directors.

(1) The labor director deliberates and decides on major agenda items with the board of directors.
   1) Management goals, budgets, operating plans and mid- to long-term financial management plans, 2) settlement of accounts, 3) acquisition and disposal of basic assets, 4) changes to the articles of incorporation, 5) enactment and changes to internal regulations, etc.

(2) The head of the agency reports major tasks to the board of directors.
   1) State audits, company audits, major audit details, 2) collective bargaining results and budget, 3) other matters required to be reported by the head of the agency.

IV. Legal Limitations and Implications for Operation of the Labor Director System in Seoul Metropolitan City

1. Legal limitations of labor directors

There are two categories of legal limitations in operating the labor director system. First, if there is a majority union, the labor directors are recommended by the union, or in the absence of such a majority union, are decided by the consent of a majority of the workers. The question is whether the labor directors can maintain their union membership. Currently, the labor directors of local governments should give up their membership in the union, as becoming an outside director is one of the disqualifiers for union membership, according to Article 2, item 4 of the Trade Union and Labor Relations Adjustment Act, which says, "provided that participation of the employer or any person acting on behalf of the employer's interests at all times is not permitted." However, if the labor director has to withdraw from union membership as they would then represent the employer's interests, his/her status may become unclear.

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30) Lim. Seiwoong, "Labor Director System Bill passed by the Planning and Finance Committee," Daily Labor News, Jan. 6, 2022.

Second, it is about the level of participation of the labor directors. As an outside director, their authority may be limited to listening to management information and making decisions in a passive position. Under the current ordinance, labor directors have the same powers as outside directors. Accordingly, the labor director has no authority like (i) the right to submit agenda items to the board of directors and or to withhold (postpone) deliberation, (ii) the right to request an audit on management matters, (iii) the right to read management information documents and the right to request data provision, (iv) the right to participate in the executive recommendation committee, etc.[31)]

2. Outcome of Seoul's labor director system

The evaluation of labor director activities within the board of directors is generally positive. Directors representing workers are participating in boards to monitor, and as they convey the viewpoint of labor to the board, a fundamental change in the perception of the sustainability and publicness of the entire organization is sprouting.[32)] The role of the labor director can be said to have brought about positive results in the following areas.[33)] First, introduction of the labor director system ensures diversity in composition of the board of directors, which public institutions at the central and local government level are being asked to ensure. However, those directors' positions have been limited to a small group of professionals such as professors and lawyers centered on experts. The participation of an employee representative on the board of directors for the institution has helped bring changes in the way the board operates. Labor directors with extensive experience in the field attend and earnestly discuss the agenda presented, helping to revitalize the board. Decisions that had previously been made unilaterally now have been decided based upon practical debates.

Second, the labor director system converges demands from the field. The board of directors is the final decision-making unit for overall organizational management, including personnel and organization, budgeting and settlement of accounts, and business plans. Labor directors ensure the perspectives of labor and of employees are present in board meetings, which otherwise have tended to be overlooked. The voices of workers are communicated to the management through the union, but not to the board of directors, the highest decision-making body. Labor directors bring the variety of problems for employees to the board, making the problems clearer.

Third, labor directors help mediate and arbitrate labor-management conflict. Because the workplaces within the institution are dispersed and many workplaces have multiple unions, conflicts between labor and management may be frequent. Labor directors help coordinate the interests of both parties and resolve such conflicts.

V. Conclusion

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31) Noh, Gwang-pyo, "Status of Seoul Metropolitan City's Labor Director System and Improvement Plan," Monthly Labor Law, JoongAng Economy, Oct. 2020.

32) Lee, Sang-Jun, Lee, Jeong-Hee, "Operational Status of and Issues in the Seoul City's Labor Director System," Labor Review, March 2020, P. 20.

33) Noh, Gwang-pyo, "Status of Seoul Metropolitan City's Labor Director System and Improvement Plan," Monthly Labor Law, JoongAng Economy, Oct. 2020.

By introducing the mandatory labor director system in public institutions, public institutions can promote cooperation and coexistence between workers and employers, and secure transparency in management while keeping the public interest in mind. Overall, the system will contribute to improving the quality of public services.

Ⅳ. Feature Articles

Service Regulations in the Rules of Employment

The Relationship between the Fatal Accidents Act and the Occupational Safety and Health Act

I. Introduction

The Act on the Penalty of Fatal Accidents (hereinafter referred to as the "Fatal Accidents Act" or "FAA") was enacted on January 8, 2021. The Occupational Safety and Health Act (hereinafter referred to as the "OSH Act" or "OSHA") was also completely revised from January 2020 to reduce fatal industrial accidents. However, as fatal accidents have not decreased, a fatal accident penalty law was introduced that is much stronger than the existing penal provisions of the OSH Act.[34] The Fatal Accidents Act covers both major industrial accidents occurring on company premises as well as major fatal accidents/incidents out in society at large, such as the Sewol ferry accident and the air purifier disinfectant fatalities. The legislative purpose of this law is to punish employers, managers, and corporations for fatal accidents from actions in violation of the obligation to follow the mandatory measures to protect safety and health, so that companies can ① secure the workers' (and the general populations') right to safety, and ② prevent fatalities from negligent practices or a deficient safety management system.[35] This aims to protect workers and the general population from injury or death (Article 1 of the FAA).

However, the current OSH Act requires that employers establish a management system for occupational safety and health, to take steps to prevent incidents with harmful/dangerous equipment, facilities, materials, working environment, etc., and at the same time to periodically provide workers with the necessary safety and health education to further work to reduce industrial accidents. In cases where an employer is found to have violated the Fatal Accidents Act, the employer will be punished immediately, to further incentivize other employers to make it a habit to protect occupational safety and health and work to avoid accidents. The Fatal Accidents Act is a punitive law that imposes strong penalties on business owners whose workplaces have been the site of a fatal incident, while the OSH Act is a preventative law against industrial accidents.

The purpose of the Fatal Accidents Act will be better understood through comparison with the Occupational Safety and Health Act. I will also look at the relationship between the two laws in detail.

II. The Concept of Fatal Accident and Duties of the Employer

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34) Safety Journal, "The obligation to secure safety and health of employers has been further strengthened", Jan. 15, 2021; Daily Labor News, "[The total amended Occupational Safety and Health Act is insufficient] The number of deaths from industrial accidents increased in 2020", Jan. 5, 2021: Industrial accident fatalities did not decrease between 2018 and 2020 (971, 855 and 860, respectively).

35) Proposer: Chairman of the Legal Affairs and Judicial Council of the National Assembly, Reasons for the legislative proposal in "Draft of a Fatal Accidents Act", Jan. 2021.

1. Concept of fatal accident

Fatal accidents as stipulated in the Fatal Accidents Act, are accidents where ① one or more deaths have occurred, ② two or more persons are injured and require treatment for six months or more due to the same accident, or ③ three persons contract an occupational illness (such as acute poisoning) due to the same hazard within one year (Article 2 of the FAA).[36] The OSH Act specifies fatal industrial accidents as the following: ① one or more deaths have occurred, ② two or more people are injured at the same time and require at least 3 months of medical care, or ③ 10 or more people are injured or contract an occupational illness at the same time (Article 2 of the OSH Act, Article 3 of the Enforcement Regulations). Therefore, it can be seen that the FAA and the OSHA have similar definitions of "fatal accident."

2. The scope of application and responsibilities of employers

The Fatal Accidents Act does not apply to workplaces with fewer than five regular workers (Article 3 of the FAA). However, the OSH Act applies to all workplaces. All or part of the law may not apply in consideration of the degree of harm or risk, business type and size, and business location. In general, some provisions are excluded for ① pure administrative work, educational service work, foreign institutions, ② workplaces using only white-collar workers, and ③ workplaces employing fewer than five regular workers (Article 3 of the OSH Act, Article 2-2 of its Enforcement Decree, Appendix 1). The difference in scope of application is that the OSH Act describes all required occupational safety and health measures for the entire workplace, while the Fatal Accidents Act is limited to fatal and other serious accidents.

In both the Fatal Accidents Act and the Occupational Safety and Health Act, persons protected goes beyond only workers as defined in the Labor Standards Act, to include all those who provide work. This includes ① workers as defined in the Labor Standards Act, ② those who provide labor for the purpose of income for the execution of business, regardless of type of employment relationship, such as contract, service-based, or consignment, and ③ all contractors at each level in a multi-contract project (Article 2 (7) of the FAA).

In the Fatal Accidents Act, the person responsible for reducing the risk of fatal accidents is specified as the employer and head of operations (Articles 3 and 4 of the FAA). "Employer" refers to a person who runs his or her own business or a person who conducts business by receiving the labor of others (Article 2 (8) of the FAA). The head of operations refers to a person who has the authority and responsibility to represent the business and is in charge of it, or a person who is in charge of safety and health related to work (Article 2 (9) of the FAA).

However, while the OSH Act places on employers the duty to maintain and promote

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36) The Fatal Accidents Act is divided into fatal industrial accidents and fatal civil accidents. A fatal civil accident is an accident ① caused by defects in design, manufacture, installation, or management of specific raw materials or products, public facilities or public transportation means, ② in which 10 or more people are injured and require medical care, or ③ 10 or people become sick and need treatment for at least 3 months due to the same cause (Article 2 of the FAA, section 2).

worker safety and health, the implementation of specific safety and health management responsibilities can be delegated to a person (the safety and health manager) who substantially supervises site offices, factories and etc. (Articles 5, 15, 38, 39 of the OSHA). Accordingly, when an accident occurs at an actual workplace, legal sanctions are imposed mainly on the general manager in charge of safety and health, such as the site manager and the plant manager, rather than the representative director.

3. Employer's obligations

The Fatal Accidents Act stipulates the obligation of the employer to take actions to protect safety and health, and provides for severe penalties for fatal accidents due to the employer violating his or her obligations. In the event that a fatal accident occurs because of a violation of the obligation to protect safety, penalties will be imposed. Conversely, if the employer fulfills his or her duty to put safety and health measures in place, penalties can be avoided.

Employers and heads of operations must establish a safety and health management system to reduce risk and hazards to safety and health in workplaces that are substantially controlled, operated, and managed, and take measures to prevent recurrence in the event a fatal accident occurs (Article 4 of the FAA). Actions to protect safety and health shall also be taken when subcontracting, servicing, or entrusting a third party to engage in the required work, to prevent fatal industrial accidents from occurring among third party employees. However, this is limited to cases where the employer, corporation, or institution is substantially responsible for controlling, operating, and managing the facility, equipment, and place where the third party employees are working (Article 5 of the FAA).

Under the OSH Act, when a fatal accident occurs, the employer must immediately stop the related work and take steps necessary to protect the safety and health of other workers, such as evacuating the workplace. In addition, the employer must immediately report to the Minister of Employment and Labor when he/she becomes aware that a fatal accident has occurred (Article 54 of the OSHA). When a fatal accident occurs, the Minister of Employment and Labor can order all work to stop in relation to ① the job in which the fatal accident occurred, ② the job(s) corresponding to the job in which the fatal accident occurred, if it is determined that there is an imminent risk of recurrence at that workplace. Upon request of the employer whose work has been suspended, the Minister of Employment and Labor shall lift the suspension of work after decision by a deliberation committee composed of experts on cancellations of work suspensions (Article 55 of the OSH Act). In accordance with the revised OSH Act (January 2020), the Minister of Employment and Labor shall issue an order to suspend work to a workplace where a fatal accident has occurred. Work can be resumed at the workplace only after a considerable period of time has elapsed, which places a significant burden on the company.

III. Penalties and Employer's Responsibilities

1. Penalties for employer and head of operations

The Fatal Accidents Act applies stronger penalties for fatal accidents than the OSH Act, with fines up to 10 times higher. If at least one person dies due to a violation of the safety and health measures by the employer or head of operations, the employer or head of operations will be sentenced to imprisonment for at least one year or a fine of not more than KRW 1 billion. Penalties are also imposed for injuries or occupational illness. If two or more persons are injured and require treatment for at least six months due to the same accident, or if three or more persons contract an occupational illness within one year due to the same hazards, the employer and/or head of operations shall be sentenced to imprisonment for no more than 7 years or a fine imposed of not more than KRW 100 million won. (Article 6 (2) of the FAA). If the same type of fatal accident recurs within five years, the penalties are levied again but increase by half (Article 6 (3) of the FAA). In addition, the person in charge of corporate management at that workplace must attend and complete safety and health education. If the education is not completed without justifiable reason, a fine of not more than KRW 50 million is imposed (Article 8 of the FAA).

A person who causes the death of a worker for violating the obligation to take measures for occupational safety and health under the OSH Act shall be punished by imprisonment for not more than 7 years or a fine not exceeding KRW 100 million. If the same type of fatal accident recurs, the punishment is levied again, but also increased by half (Article 167 of the OSH Act).

2. Joint penal provisions

The Fatal Accidents Act imposes a fine of not more than KRW 5 billion won for corporations and up to KRW 1 billion won for injuries or occupational illness. However, if a corporation has taken considerable care and supervision to prevent violation but a fatal accident still occurred, no fine will be imposed (Article 7 of the FAA). The OSH Act imposes a fine of not more than KRW 1 billion on corporations for the same case where one person or more has died due in a fatal accident (Article 173 of the OSHA). The Fatal Accidents Act has strengthened penalties at least fivefold over the existing OSH Act.

3. Punitive damage compensation

The Fatal Accidents Act introduces a punitive damage compensation system that is not found in the OSH Act. In the event that an employer or head of operations intentionally or by gross negligence violates the obligation to take measures to protect safety and health and this results in a fatal accident, the relevant employer or corporation shall be held liable for compensation not exceeding 5 times the damage suffered by the injured person, or the survivors. However, this does not apply if the accident occurs despite the corporation having given considerable attention and supervision of the relevant risks and hazards (Article 15 of the FAA). The courts shall decide the amount of punitive damage compensation in consideration of the following seven items: ① the severity of intentional or unintentional negligence, ② the type and details of the violation of the obligation to protect, ③ the scale of the damage caused by violation of the obligation to protect, ④ the economic benefit obtained by the employer or the corporation due to violation of the obligation to protect, ⑤ the

duration and number of violations, ⑥ the corporation's property holdings, and ⑦ the extent of the corporation's efforts to mitigate the damage and prevent recurrence.

As there has been no punitive damage compensation system so far, damages have been based only on calculations of the amount of compensation for industrial accidents and civil damages. According to this method, when a worker dies from an industrial accident, the company handles it through industrial accident compensation insurance and is not held liable for compensation. However, if the company is liable for negligence in the event of a worker's death, such as due to a lack of safety measures, the company shall be liable for damages under the Civil Act in addition to compensation from the workers' industrial accident compensation insurance to the survivors. The scope of compensation provided under he Civil Act refers to all damages to the injured person/survivors in relation to the company's negligence and considerable causality, with the range of damage recognized by court rulings divided into active, passive, and mental damage. In general, when a worker dies, the scope of passive loss include income (lost income from the time of death to what would have been the time of retirement) and retirement allowance (loss of severance pay due to early termination of employment). Funeral expenses are active damage, while any alimony is included in mental damage.

In the future, it will be possible to request up to 5 times the amount of compensation for existing damages available under he Civil Act when industrial accidents result in death. As a result, the bereaved family and the company will need to engage in a prolonged period of determination of compensation for the bereaved due to disputes over whether an employer was negligent or not, which will act as a considerable burden on the company's ability to quickly handle the aftermath of fatal accidents.[37]

IV. Implementation Date and Application

The Fatal Accidents Act has a grace period of one year and comes into effect on January 1, 2022. For workplaces with fewer than 50 regularly hired workers (or construction companies engaged in an average project value of less than KRW 5 billion), there is a three-year grace period, meaning the Act comes into effect on January 1, 2024.

Fatal accidents are classified in the FAA as fatal industrial accidents and fatal civil accidents. Major industrial accidents are handled by Ministry of Employment and Labor inspectors, who investigate the situation for workers and contractors who are directed and supervised by the employer concerned. Since a fatal civil accident involves members of the public who are using a facility or public mode of transportation, the Ministry of Justice, through police officers, has jurisdiction. Therefore, since the two different ministries have jurisdiction over fatal accidents separately, differences in interpretation and disposition of the law are expected in its enforcement, leading to some confusion.[38]

V. Conclusion

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37) Chung, Daewon. "Major Details and Topics in the Fatal Accidents Act," HR Insight, Jan. 11, 2021.
38) FKI press release, "Concerns about side effects of the Fatal Accidents Act," Jan. 1, 2021.

The Fatal Accidents Act was designed to raise awareness about the need to prevent accidents through strong penalties for employers found to be at fault (through failure to fulfill OSHA requirements) for fatal and other serious accidents. On the other hand, the OSH Act requires that employers have an occupational safety and health system in place to reduce the chance of industrial accidents occurring, take actions against incidents involving hazardous work or substances, and continuously provide education for the purpose of preventing industrial accidents. Therefore, the law should be enforced not expecting that these two laws are compatible with each other, but that they complement each other to reduce the occurrence of fatal accidents and other serious incidents. In addition, with enactment of the Fatal Accidents Act, employers and heads of operations in each workplace should strengthen the safety and health protections in place for workers in advance, and faithfully fulfill their duty of care and supervision, to avoid criminal liability in the event of a fatal accident.

The Occupational Safety & Health Act, and Employer Duties

Ⅰ. Concept

On April 16, 2014, a ferry named Sewol, bound for Jeju island from Incheon, sank in the ocean near Jindo Island, and about 300 passengers lost their lives. This is known as the “Sewol ho Accident,” one of the worst tragedies in Korea, and one which could have been avoided if the employer had fulfilled his duty to observe safety regulations.

The current Occupational Safety & Health Act(hereinafter referred to as “the Act”) requires the employer to establish a management system for occupational safety and health, to prepare preventative measures for harmful and dangerous equipment, facilities, materials, working environment, etc., and at the same time to periodically provide workers the necessary safety and health education to prevent industrial accidents from happening. Also, in cases where an employer is found to have violated the Act, the employer is punished immediately so that activities to protect occupational safety and health and avoid accidents become habitual. Workers can also be punished with a fine for negligence when they violate the Act.

Occupational safety cannot be emphasized enough, as it protects personnel, property, and investment by preventing accidents. This Act, which stipulates the observance of occupational safety and health regulations, is very complicated, and enumerated with many technical articles, and so here I have attempted to define the management structures of the Act clearly and divide the employer’s duties according to their

characteristics in order to make the Act more easily and clearly understood.

In particular, major changes to the Act, which was enforced from January 16, 2020, included: ① expanding coverage and expanding from workers to labor providers; ② introducing such shutdowns for serious disasters; and ③ strengthening penalties for accidents.

Ⅱ. The Scope of Application

1. Extended purpose and scope of application[39)]

(1) Purpose

The purpose of this Act is to maintain and promote the safety and health of those who provide work by preventing industrial accidents through establishment of standards on industrial safety and health and clarifying where the responsibility lies, and by creating a comfortable working environment(Article 1). As the Industrial Accident Compensation Insurance Act recognizes the occupational accidents for persons in special types of employment, the Occupational Safety and Health Act extends the scope of industrial accidents from workers to those who provide work, which include not only workers but also special types of workers and delivery workers for safety and health measures(Articles 77 and 78 of the Act).[40)]

(2) Scope of application

This Act shall apply to all businesses: Provided that this Act may not apply wholly or partially to businesses taking into consideration the degree of harm and hazard, the type and scale of business, the location of business, etc. Generally, those excluded from application are ① public administration, education service, foreign agencies; ② businesses that use only office employees; and ③ any business that ordinarily employs fewer than 5 workers(Article 3).

2. Management structure

(1) Appointment duties

1) The general manager is in charge of safety and health management

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39) Kim, Hyungbae『Labor Law』, 26th, ed., Parkyoung Publishing Co. 2018, page 474-487; Kim, Hyungbae/Park Ji-soon, 『Lectures on Labor Law 』8th ed. Shinjosa, 2019, pp. 341-348.

40) The Industrial Accident Compensation Insurance Act: Article 125 (Special Case concerning Persons in Special Types of Employment)(1) Notwithstanding Article 6, the business which receives labor service, from persons who engage in jobs prescribed by Presidential Decree, among the persons who are not subject to the Labor Standards Act, etc., even though they offer labor service similar to that of employees regardless of the type of contract, and therefore need protection from occupational accidents, and who also meet all the following requirements (hereafter in this Article referred to as "persons in special types of employment"), shall be deemed business subject to this Act: <Amended on January 27, 2010>

1. They mainly provide one line of business with labor service necessary for the operation thereof on a routine basis, and receive payment for such service and live on such pay;
2. They do not use other persons to provide such labor service.

The general manager is responsible for general control of occupational safety and health and supervises safety and health managers. Accordingly, the general manager shall be capable of managing the company's business(e.g., plant manager)(Article 15). Companies that ordinarily employ 50 workers or more engaged in manufacturing etc., companies that ordinarily employ 100 workers or more engaged in wholesale and retail sales, etc., and companies that ordinarily employ 300 or more engaged in pure office administration, such as finance, etc., must appoint a general manager to be in charge of safety and health management.

2) Supervisor

An employer shall designate the head of a division within the management structure, who directly manages and supervises production work and employees involved therein or who takes charge of such a position, to carry out safety- and health-related duties such as safety and health inspections(Article 16).

3) Safety manager and health manager

An employer shall assign a safety(health) manager at the workplace to assist the employer or the general manager in technical matters concerning safety among the matters regarding safety and health, and to instruct and advise the supervisor on such matters.

The business owner of a manufacturing company or etc., ordinarily hiring 50 workers or more shall generally appoint a safety(health) manager, but for companies with fewer than 300 employees, the business owner may assign the safety(health) manager an additional safety management job or refer to a professional institution to perform the necessary safety management measures(Articles 17 and 18).

(2) Industrial safety and health committee

The business owner shall establish an industrial safety and health committee comprised of an equal number of worker and employer representatives for workplaces ordinarily hiring more than 100 employees, or which has between 50 to 100 employees engaged in dangerous work. The committee shall meet once per quarter and its decisions shall be posted, and shall be faithfully implemented(Article 24).

(3) Safety and health management regulations

In order to maintain safety and health in the workplace, an employer shall prepare safety and health management regulations, post and/or keep them in the workplace, and notify workers thereof. The employer and workers shall observe the safety and health management regulations(Article 25). These rules shall apply to workplaces ordinarily hiring 100 workers or more; provided that for service businesses like finance, etc. these rules shall apply to workplaces ordinarily hiring 300 workers or more.

Ⅲ. Employer's Duties

1. Report industrial accidents

In cases where a worker dies due to an occupational accident, or is injured or contracts an illness requiring medical treatment for three days or more, the employer shall submit to the Minister of Employment & Labor an accident investigation form regarding the occupational accident within one month from the occurrence date of the occupational accident. Provided, in cases where a "serious accident" occurs, the employer shall report it without delay(Article 57).

2. Measures to prevent harm & hazards

(1) Notice of substance of acts and subordinate statutes

The business owner shall inform workers of the major aspects of orders enacted under this Act by posting them at each workplace(Article 34).

(2) Attachment of safety signs

The business owner shall install or attach safety and health signs to warn employees of dangerous facilities and places in the workplace and provide emergency drills to promote safety awareness(Article 37).

(3) Safety and health measures

The business owner shall take measures necessary to prevent the following hazards in operating the business: ① hazards caused by machines, tools or other equipment; ② hazards caused by explosive, combustible or inflammable substances; ③ hazards caused by electricity, heat or other forms of energy; ④ Hazards caused by improper work methods in excavating, quarrying, loading and unloading, timbering, transporting, operating, dismantling, handling of heavy objects, etc.; and ⑤ hazards in places where workers might easily trip and fall, sand, structures, etc.,(Article 38).

The business owner shall take measures necessary to prevent the following from causing health problems commonly encountered in the course of business operations: gas, dust, high temperatures, low temperatures, remnants, precision work, poor ventilation or lighting, computer terminals, radiation, simple repetitive actions, etc(Article 39).

(4) Suspension of operation due to a serious accident or possible risk

If there is imminent danger of an industrial accident, or if a serious accident has occurred, the business owner shall take necessary measures for safety and health, such as immediately suspending operations, evacuating workers from the workplace, etc., until work can be resumed after meeting safety requirements(Article 51).

If an industrial accident seems impending, any worker can suspend work and evacuate. In this case, he/she shall report it without delay to the immediate superior officer, who shall take appropriate measures to rectify the situation(Article 52).

(5) Measures in case of a serious accident

1) Employer's measures

The employer shall immediately take necessary measures concerning safety and health, such as stopping work immediately and evacuating workers from the workplace when a serious accident occurs. In addition, the employer shall report to the Minister of Employment and Labor without delay if he finds out that a serious disaster has occurred(Article 54).

2) Measures by the Minister of Employment and Labor

The Minister of Employment and Labor shall, when a serious accident occurs and if it is determined that there is an immediate danger of recurrence, ① if the work during which the serious accident occurred is continuing, or ② if similar work to the work during which the serious accident occurred is continuing, give an order to cease the work. In addition, the Minister of Employment and Labor shall stop the work in case of unavoidable circumstances such as the occurrence of a serious accident due to the collapse of earth and sand, fire, explosion, leakage of harmful or dangerous materials, and the spread of industrial accidents around the place where such serious accident occurred.

The Minister of Employment and Labor shall lift the suspension of work after deliberation by a review committee composed of experts on the work environment, if the employer requests cancellation of the above cases(Article 55).

(6) Other measures to prevent harm and hazards

Article 80 (Protective Measures, etc. for Harmful or Dangerous Machines, Instruments, etc.)	Machines and instruments requiring harmful or hazardous work or operated by power, shall not be transferred, leased, installed or used, or displayed for the purpose of transfer or lease, without taking protective measures for the prevention of harm and hazards.
Article 83 (Safety Certification)	To assess the safety of harmful or dangerous machines, instruments, equipment, protective devices and personal protective equipment, the Minister of Employment & Labor may determine and announce safety certification criteria concerning safety performance, the manufacturer's technological capacity, production systems, etc.
Article 93 (Safety Inspection)	An employer who uses harmful or dangerous machines and equipment shall receive a safety inspection on whether the performance of the harmful or dangerous machines, etc. meet safety standards.
Article 118 (Permission to Manufacture, etc.)	A person who intends to manufacture or use "substances subject to permission"shall obtain, in advance, permission from the Minister of Employment & Labor. This provision shall also apply if the person intends to make a change to anything that has previously been permitted.
Article 119 (Asbestos Investigation) Article 122 (Asbestos Disposal or Removal by Asbestos Disposal or Removal Service Provider)	If structures or facilities are to be demolished or dismantled, the owner or lessee, etc., of the structures or facilities shall conduct a "general asbestos investigation" and record and keep the results thereof. The owner, etc., of structures or facilities subject to an institutional asbestos investigation shall have an "asbestos disposal or removal service provider"dispose of or remove the asbestos.

Article 114 (Preparation, Keeping, etc. of Material Safety Data Sheets)	A person who transfers or supplies a chemical and/or chemical-containing preparations meeting the classification standards pursuant to "target chemicals" shall make and provide a Material Safety Data Sheet (MSDS) to the person to whom they are transferred or supplied.
Article 36 (Risk Assessment)	An employer shall identify hazards and determine the potential for harm caused by structures, machines, instruments, equipment, raw materials, gas, vapor, dust, etc., work behavior or work, determine the level of risk, and take measures under this Act and any order issued under this Act according to the findings, and if necessary to prevent risks or health problems for workers, take additional measures as required.

3. Safety and health measures for contractor businesses

(1) Safety measures

The business owner of a contractor business shall institute safety measures to prevent industrial accidents which can occur when those employed by the business owner and the contractor work simultaneously at the same place(Article 63).

(2) Prohibition of contract for harmful and dangerous work

Sectors of work recognized as harmful or dangerous to safety and health shall not apply under a separate contract without the approval of the Minister of Employment & Labor(Article 58).

(3) Setting aside of funds for safety management

Upon entering into a subcontract or independently executing construction, shipbuilding or repair work, or other projects, funds for industrial safety and health management shall be set aside for activities to prevent occupational accidents when planning subcontract or project costs(Article 72).

4. Safety & health education (Chapter 3 of the Act)

In order to prevent possible safety-related accidents while working, the employer shall provide education for new workers, regular education for existing workers, education for workers changing jobs within the company, and special education as necessary.

(1) Regular education

The employer shall periodically conduct employee education on safety and health issues(one hour or longer each month for office/sales workers, two hours or longer per month for production workers, and 16 hours per year for supervisors).

(2) New workers' education

When hiring workers, the employer shall provide safety and health education

regarding their respective jobs for 8 hours or longer(one hour for daily workers).

(3) Education when changing jobs within the company

When changing the contents of their jobs, the employer shall provide safety and health education regarding their changed jobs for 2 hours or longer(one hour for daily workers).

(4) Special education

The employer shall provide safety and health education for 16 hours or longer to workers working in harmful and/or hazardous workplaces(two hours for daily workers).

5. Management of worker health

(1) Evaluating the working environment

An employer of a business dealing with dangerous or harmful chemical substances or producing a high level of noise shall evaluate the working environment within 20 days from the date when a new workplace or work process is added or when there is any change in the existing workplace or work processes. An additional evaluation shall be made every 3 months for 1 year. The evaluation results shall be reported to the local labor office within 30 days from the completion date of the evaluation(Article 129).

(2) Health examinations

The business owner shall periodically conduct health examinations of the workers. Health examinations must also be given upon the hiring of new workers(Article 125).

1) Employees who are required to take a special medical checkup(as they are engaged in work dealing with harmful substances or materials) shall have a medical checkup before they are assigned to the work. In addition, medical checkups shall be conducted for them whenever necessary.
2) All employers shall ensure that a general medical checkup is conducted at least once every two years for employees engaged in office work and at least once every year for other employees.
3) When an employer receives the results of a special medical checkup from the medical service provider, he/she should take any measures necessary to protect the employee's health and then report to the jurisdictional local labor office.

(3) Prohibition or restriction of work for sick persons

For persons diagnosed with infectious disease or mental illness, or any other condition that can be aggravated by work, the business owner shall prohibit or restrict work according to the medical diagnosis. However, upon recovery, the business owner shall, without delay, permit the employee to resume their original work(Article 138).

(4) Extending working hours prohibited

The business owner shall not have an employee who is engaged in harmful or

dangerous work working more than six hours per day or thirty-four hours per week(Article 139).

(5) Restriction of employment by qualification

The business owner shall not allow any persons other than those who have the qualifications, license, experience, and/or required skills, to perform harmful or dangerous work(Article 140).

(6) Documenting & keeping records

Documented records concerning appointment of safety and health personnel and the examinations on harmfulness and toxicity of new substances shall be kept for 3 years(internal inspection records shall be kept for 2 years). Records on working environment evaluations and employee medical examinations shall be kept for 5 years(Article 164).

(7) Enhanced penalties for employers for occupational accidents

1) Employers, contractees, and contractors who fail to comply with their safety or health care obligations and cause the death of any worker shall be punished by imprisonment for not more than seven years, or a fine not exceeding 100 million won. The offense is aggravated up to one-half of the sentence if the identical offense is repeated within 5 years(Article 167).
2) In case a worker dies due to a representative's or other worker's violation of safety or health care obligations, not only shall such offender be punished accordingly, but the corporation or contractor shall also be punished by a fine of up to 1 billion won(Joint penalty provision: Article 128).
3) If the court convicts a person for the death of a worker due to a violation of health and safety measures, he or she may have a 200-hour study-attendance order necessary to prevent industrial accidents in addition to the punishment(Article 174).

Ⅳ. Conclusion

Almost all accidents occurring on construction sites and in industrial workplaces, including the tragic Sewol ho accident, can be connected to the absence of a safety and health attitude. We need to remember that happiness and safety at work does not occur without the proper planning, and can only be guaranteed when the employers and workers strictly observe this Act.

The Workplace Harassment Prevention Law and the Employer's Duty

I. Introduction

Recently workplace harassment within large corporations has become a social problem. Every day it seems that the executives of these companies are reported by the media on issues such as abusive language, assault, and inhumane treatment of their employees, but these acts which are revealed to the public are but the tip of the iceberg. According to a survey by the Korea Labor Institute,[41] 66.3% of respondents said that they had experienced direct harassment at their workplace in the past five years. Also, according to the Human Rights Commission's survey,[42] 73.3% of respondents experienced workplace harassment over the past year. The average number of harassment was 10.0 cases, the experience of personal harassment was 39.0%, and the experience of collective harassment was 5.6%. These workplace harassments have resulted in negative reactions such as consideration of resignation (66.9%), less confidence in the company and its senior officials (64.9%), a decline in work performance and concentration (64.9%), and a reluctance to relate with peers (33.3%).

The damage due to workplace harassment continues to grow and so the Workplace Harassment Prevention Law was enacted because of public demand for improvement. This Law, as it was finalized, was a considerable retreat from the original legislative initiatives. When first suggested in April 2018,[43] it included very strong articles: (1) the obligation of the employer to provide training on harassment prevention in the workplace, and (2) a victim of workplace harassment could seek remedy through the labor relations commission. These were both deleted in the final draft. Nevertheless, it is meaningful that it was introduced into the Labor Standards Act. The details are described below.

II. Content of the Workplace Harassment Prevention Law

1. Amendments to the Labor Standards Act

41) Keunjoo Kim/Kyunghee Lee, 「A Survey of Workplace Harassment and The Countermeasures」, Korean Labor Institute, December 2017.

42) Sungsoo Hong et al, 「A Survey of Workplace Harassment」, The National Human Rights Commission of Korea, November 2017.

43) Byungwon Kang and 23 other lawmakers' legislative initiative, 「A Draft of the Workplace Harassment Prevention Act」, No. 13290, April 27, 2018.

(1) The employer's obligation to prohibit workplace harassment

Article 76-2 (Prohibition of Workplace Harassment) The employer or an employee shall not cause physical or mental suffering or deteriorate the working environment, exceeding the appropriate level of bearable limits, by taking advantage of his or her position or relationship in the workplace (hereinafter referred to as " workplace harassment").

(2) Obligations of the employer in case of an occurrence of workplace harassment

Article 76-3 (Measures in case of bullying in the workplace)

① Any employee who has been informed of the occurrence of workplace harassment can report the fact to the employer.

② The employer shall conduct an investigation to confirm the facts without delay if the employer acknowledges the occurrence of harassment in the workplace or accepts a notification under Paragraph 1 above.

③ The employer shall, when necessary for the protection of workers who have suffered damage related to workplace harassment within the period of investigation pursuant to paragraph 2 (hereinafter referred to as "victims"), implement appropriate measures such as a change of place of work, paid leave order, etc. In this case, the employer shall not take such measures against the will of the victim.

④ The employer shall take appropriate measures such as changing the place of work, job transfer, order of paid leave etc. when the victim requests it, if the fact of workplace harassment is confirmed as a result of the investigation pursuant to Paragraph 2 above.

⑤ The employer shall take all necessary measures such as disciplinary punishment, change of work place, etc. without delay when it is confirmed that workplace harassment has occurred. In this case, the employer shall consider the opinion of the victim about the proposed measures prior to taking any action, such as disciplinary action.

⑥ The employer shall not dismiss or take any other unfavorable steps against the employee who reported the occurrence of harassment in the workplace or the victim.

(3) Addition of required items listed in the Rules of Employment

Article 93 (Preparation and Filing of Rules of Employment) 11. Matters concerning prevention of and measures to handle an occurrence of workplace harassment

(4) Prohibition of disadvantaged treatment of complainant or victim

Article 109 (Penalty) The employer shall be punished by imprisonment for not more

than three years or a fine of not more than KRW 30 million if found in violation of Paragraph 6 of Articles 76-3 of this Act.

2. Amendment to the Industrial Accident Compensation Insurance Act

Article 37 (1) of the IACI Act, which lists reasons for acceptance as occupational diseases, has added "illness caused by work-related mental stress, such as workplace harassment and abuse of the worker pursuant to Article 76-2 of the Labor Standards Act".

3. Amendments to the Industrial Safety and Health Act

Article 4 of the ISH Act (Government obligations) added a new item: “10. Establishment, guidance and support of measures to prevent workplace harassment pursuant to Article 76-2 of the Labor Standards Act”.

III. Explanation of Workplace Harassment

1. Definition of workplace harassment

It is meaningful that the definition of workplace harassment clearly defines the obligations of the related employer and the standard of related harassment incidents. Until this concept was established, the labor law had no legal obligation or liability for workplace harassment. Therefore, under the existing legal system, the measures that a victim who had been harassed in the workplace could take to the employer included (1) a claim for damages based on the liability of the victim for illegal acts (Article 750 of the Civil Act); 2) a suit for damages (violation of the obligation of safety considerations by labor contract) (Article 390 of the Civil Act), and (3) a complaint under Article 30 (Human Rights Violation) of the National Human Rights Commission Act. In general, it is very meaningful that the Labor Standards Act has stipulated a definition of workplace harassment in order to strengthen the obligations of employers and to protect the workers with measures to receive remedy for workplace harassment.

2. Establishment of the employer's duty for action in case of workplace harassment

In case of workplace harassment, the victim or a third party can notify the employer. An employer who has been informed of the occurrence of workplace harassment must conduct an investigation to confirm the fact. In the course of this investigation, measures should be taken to protect the victim and, if the investigation confirms the workplace harassment, disciplinary action should be taken without delay.

In the event of such workplace harassment, the rules for reporting and the processing procedures in the workplace apply equally to the sexual harassment remedy procedures under Article 14 of the Equal Employment Act. Nevertheless, the Equal

Employment Act enforces a fine of up to KRW 10 million if a company does not investigate and take appropriate measures when sexual harassment occurs in the workplace, but there is no similar penalty clause in the Workplace Harassment Prohibition Law. In addition, even if the employer has sexual harassment in the workplace, there is a penalty in the Equal Employment Act, but there is no fine in the amendment bill of the Labor Standards Law prohibiting workplace harassment if the employer becomes a perpetrator. Provided, in the same way as the Equal Employment Act, if the employer gives unfavorable treatment to employees and victims who have reported workplace harassment, the employer can be punished by imprisonment for up to three years or a fine of up to KRW 30 million.

3. The addition of 'workplace harassment' in the required items of the Rules of Employment

An employer who routinely employs 10 or more workers must fill out the 12 required items in the Rules of Employment and report them to the Minister of Employment and Labor (Article 93 of the LSA). Here is the required item added in relation to workplace harassment: "11. Matters concerning prevention and measures in case of occurrence of workplace harassment." In other words, it is stipulated in the Rules of Employment that the company has implemented measures related to workplace harassment.[44)]

4. Penalties applicable for unfavorable treatment by an employer

It is regulated as the employer's duty, in the self-governing rules, that the employer should explore preventive measures against workplace harassment and take appropriate measures. However, if disadvantageous treatment of victims is taken, the employer should and can be severely punished, similar to the Equal Employment Act. In other words, Article 110 of the Labor Standards Act stipulates "imprisonment for up to three years or a fine of not more than KRW 30 million in violation of Article 76-3 (Paragraph 6) of this Act".

5. Amendment to the Industrial Accident Compensation Insurance Act

The current Article 37 (1) of the IACI Act did not recognize occupational accidents caused by workplace harassment, but the revised law does recognize an occupational accident due to "illness caused by work-related mental stress such as workplace harassment", and so this article will provide a legal basis to occupational accidents. Diseases caused by workplace harassment were difficult to have recognized as a

44) Labor Ministry Guideline: "Operational Guides for the Rules of Employment", LSA Dept-1119, April 24, 2009.

work-related injury by the Korea Workers' Welfare Corporation, and were accepted exceptionally only after complicated legal disputes. However, with the revised law, the Welfare Corporation has opened the way for victims to be recognized more quickly in the first work-related accident assessment stage.

6. Amendments to the Industrial Safety and Health Act

Workplace harassment has an adverse effect on the mental and physical health of the workers, undermining their opportunity to work in a healthy environment. Therefore, the amendment to Article 4 of the ISH Act, to prevent illness caused by workplace harassment, imposes upon the government an obligation to act. In this regard, the Ministry of Employment and Labor has prepared 'A Practical Manual for the Prevention of Workplace Harassment and Countermeasures Against It', which will be distributed to all companies. Unfortunately, this obligation to prevent workplace harassment is defined as an obligation of the state rather than a direct obligation of the employer, so that the employer is not responsible for violations of the ISH Act.

IV. The Effect and Limitations of the Workplace Harassment Prevention Law

1. Effect of the Workplace Harassment Prevention Law

It is not easy for ordinary workers to take legal action for harassment against a workplace because such matters take a considerable amount of time and money. However, the amendment to the Labor Standards Act clarifies the concept of workplace harassment, and in particular the obligation of prohibition of workplace harassment by an employer, along with the obligation to implement relief procedures that will enable victims to receive protection and relief from workplace harassment more quickly.

2. Limitations of the Workplace Harassment Prevention Law

Although this law will contribute greatly to the improvement of the human rights of workers, there are some shortcomings.

First, there is no provision for legal sanction against an employer's workplace harassment. New amendments to the workplace harassment law do not specify penalties against the company or penalties for the offender him/herself'. In general, as workplace harassment is often the result of a high-ranking official becoming the perpetrator in a power relationship, this revision of the Labor Standards Law is insufficient.

Second, there is no legal sanction if an employer does not to take reasonable action when a complaint of workplace harassment occurs in the workplace. The revised bill stipulates that in the event of harassment within the workplace, the Act on the Equal Employment between Men and Women is the same as the obligation to implement

measures related to the occurrence of sexual harassment in the workplace. However, in the case of sexual harassment in the workplace, the employer will be punished if the employer does not take reasonable measures. As the amendment to the Labor Standards Act does not require the employer to assume legal responsibility for undertaking any necessary investigation or other reasonable action in case of an occurrence of workplace harassment, it is limited in its protection of workers.

V. Conclusion

Even if there are many deficiencies, it is meaningful that the introduction of the Workplace Harassment Prevention Law stipulates the duty of the employer to prevent workplace harassment, whether within the company or between workers. Although there are no direct penalties for the employer, we expect that this new law will contribute to creating a fair and desirable workplace culture.

The Anti-Corruption Law and Joint Penal Provisions Related to 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.[45] 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.[46] In particular, this Act contains

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

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,[47] ③public institutions, ④ schools of various levels 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[48]

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46) 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)

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

48) 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

(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 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[49)]

49) 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	Fine for negligence of two to five times the received amount

(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.

(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

· 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.	
· A civil servant receives an honorarium exceeding the allowable limit for an outside lecture	Fine for negligence not exceeding KRW 5 million

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.[50]

2. Related cases[51]

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

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

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.

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.

Criteria for Judging whether a Non-Compete Agreement is Valid

I. Introduction

Recently, there have been many cases in which an employee skilled with the core technologies of a small and medium-sized enterprise (SME) has moved to a large company, and the advanced technologies developed by the SME over several years can easily be stolen. To avoid this, SMEs may require professional engineers to sign non-compete agreements to reduce the chance they will end up working for the SME's competitors. However, countering this is the freedom that workers have to choose jobs that provide better working environments.

The non-compete agreement seeks to prevent workers with knowledge of the company's unique trade secrets or important information related to business from transferring to that employer's competitors and damaging the employer. This non-compete agreement is of limited effect due to the fact that it may violate the right to work and freedom of occupation, which are the basic rights of the people under the constitution. Since the employer's unique trade secrets are valuable and worth protecting, the non-compete agreement is valid when certain requirements are met: the company's expertise, production method, or business activities must be trade secrets with protective value, and the company must have made sufficient efforts to keep them secret. When these conditions are satisfied, a company's technology is recognized as a trade secret, and the non-compete agreement with the employee remains legitimate.[52)]
In this article, I would like to explain the requirements for a non-compete agreement to be effective, the details of related laws and standard guides, and related labor cases.

II. Protection of Trade Secrets and Non-Compete Agreement

1. Protection of trade secrets

The Unfair Competition Prevention and Trade Secret Protection Act (hereinafter the "Unfair Competition Prevention Act"), defines company trade secrets and also regulates compensation for damages from workers who have acquired trade secrets with protective value and transferred them to competitors. In other words, the term "trade secret" is a product that is not publicly known and has independent economic value, and refers to production methods, sales methods, and other technical or management information useful for business activities and into which considerable effort is made to keep them confidential (Article 2). The company may ask the court to prohibit or prevent employment of former workers if they have transferred or are likely to transfer the company's trade secrets (Article 10). In the event of damage due to such transfer,

52) Jung, Young-Hoon, "Workers' Obligation to Seize Competitive Employment", 「100 Labor Cases」, Parkyoungsa, 2015, pp. 44-45.

the company may request compensation (Article 11). In practice, when a resigned worker is employed by a competitor, action is taken by the previous employer in the form of a provisional disposition for violating the prohibition against employment with a competitor or a lawsuit for damages.

2. Standard precedent on non-compete agreements

The Supreme Court has stated, “If the non-compete agreement between employers and workers excessively restricts workers' freedom of occupation and work rights, etc., guaranteed by the constitution, or excessively restricts free competition, the good morals and social order set forth in Article 103 of the Civil Act, it is invalid as an act that runs contrary to law. To be deemed in effect, such a non-compete agreement must include the following: ① the interests of the employer worthy of protection, ② the employee's position and job description before resignation, ③ the period and place of the restriction on changing jobs, ④ the presence or absence of compensation for the worker, ⑤ the reasons for resignation, and ⑥ public interests and other circumstances must be comprehensively considered. The term “employer's interests worth protecting” as referred to herein is not only a “trade secret” defined in Article 2 of the Unfair Competition Prevention Act, but also knowledge or information owned only by the relevant employer even if it has not reached the level of trade secret. A non-compete agreement is a pledge not to divulge such secret to third parties, or to maintain customer relations or business credit.”[53)]

This precedent explains that the non-compete agreement must be interpreted strictly as it may infringe on the basic rights of workers guaranteed by the constitution, and is effective only when certain requirements are met. Therefore, determining whether or not a non-compete agreement is effective is based on which value is more important: the benefit of the employer who protects trade secrets or the right of the worker to change jobs.[54)] In order to compare the weight of these two rights, it is necessary to make a comprehensive and detailed judgment based on the following six considerations suggested by precedents.

III. Specific Criteria and Examples of Non-Compete Agreement Validity

1. Trade secrets worth protecting

In order for a trade secret to be deemed the interest of an employer that deserves protection, the secret must: ① not be widely known in the same industry and have an independent economic value, and ② be mentioned in a security pledge with the

53) Supreme Court ruling on Mar. 11, 2010: 2009 Da82244; Supreme Court ruling on Oct. 17, 2013: 2013ma1434

54) Lim, Jong-ryul, 「The Labor Law」, 18th ed. Parkyoungsa, 2020, p. 361; Jung, Young-Hoon, “Workers' Obligation to Non-Competition”, 「100 Labor Cases」, Parkyoungsa, 2015, pp. 44-45.

worker as to what is not to be transferred to a third party. Customer information, client company information, and know-how are also employer interests worth protecting if they meet the above requirements. However, even if the worker later uses technical or management information acquired during the time of employment with a previous employer, if the information was known to some extent throughout the industry, and even if some specific information was unknown, if it would not be very expensive to obtain it, it is judged to not constitute an interest worth protecting as it did not require significant effort to obtain it.[55)]

In some cases, it is difficult to say that each item of information obtained by a worker in the course of business activities or personal relations between a salesperson and a business partner is an interest worth protecting through a non-compete agreement, or that the protective value is significant.[56)]

At the time the non-compete agreement is signed, the employer's legal protection interests were within the scope of the employer's legal protection interests, but currently, if the employer's legal protection interests are said to have lapsed due to changes in business type, region, or trade secret, it can be considered that the resigned worker's obligation to adhere to the non-compete agreement has also lapsed.[57)]

2. Worker's position and job description before resignation

Non-compete agreements are based upon the fact that the signing worker acquires valuable information by engaging in work related to trade secrets or interests worthy of protection in the workplace before his or her employment relationship ends. Therefore, the non-compete obligation is very relevant to R&D positions. On the other hand, it is difficult to say that the company's trade secrets were acquired if only simple and repetitive production work was performed.

A worker was employed as a semiconductor-related researcher in 1998 by a certain company. In 2017, he resigned for health reasons after many years in research and development. Just three months after his resignation, he was hired by a competing company for a higher annual salary. This was considered a violation of the non-compete obligation.[58)]

As a sales manager for a pharmaceutical company, another worker imported and sold peritoneal dialysis solution. Information such as cost analysis data for products acquired by workers during their work, agency margins, discount rates, prices, and new product development plans are important trade secrets. If he was employed by a competing pharmaceutical company that sells similar products, he would be in violation of the obligation to not work for a competitor.[59)]

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55) Supreme Court ruling on Mar. 11, 2010: 2009Da82244.
56) Seoul Eastern District Court ruling on Nov. 11, 2010: 2010 Gahap 10588.
57) Kwon, Doo-Seop, "Part of the Labor Contract", 「Annotation of the Labor Standards Act」, 2020, Parkyoungsa, p. 187.
58) Seoul High Court ruling on July 8, 2019: 2019 Ra 20390.
59) Seoul Central District Court ruling on June 17, 1997: 97 Kahab 758.

3. Period and place of non-compete restrictions

The period of non-compete restrictions is an important factor in determining the validity of a non-compete agreement. The period of non-compete restriction should be reasonable because it can be directly linked to the right to live and freedom of job choice, and yet remains necessary to protect the employer's trade secrets. In general, if the period is short, it is generally legally recognized, while if the period is long, it can be deemed a violation of rights. The courts may limit the prohibition period to a suitable range if the contracted non-compete period is excessive,[60] and may specifically limit it to 1 to 2 years.

When an employee of a semiconductor company worked in R&D for a long period of time and then was hired by a competitor for the same job 3 months after resigning (due to health reasons), the court ruled that a two-year prohibition period is an appropriate time for trade secrets to be protected.[61]

A worker was employed by a software development company but was hired by a competing company after one year. At the time the labor contract was signed with the employer, the worker signed an agreement prohibiting him from moving to a competitor for one year after resignation. The court ruled that the agreement under which workers were obligated to adhere to a non-compete provision for one year after resignation was valid.[62]

Even considering the importance of the protective value to company profits, technology in the mobile phone market changes rapidly, outdating technologies older than a year. In this reality, prohibiting workers long term for working for a competitor excessively limits their freedom of occupation. A two-year prohibition period stipulated in a non-compete agreement in another case was deemed somewhat excessive for the related employee, and the court ruled that the obligation to adhere to a the non-compete agreement for “two years from the resignation date” was unfair.[63]

Some other plaintiffs worked as academy instructors at Daechi-dong Academy for one year, and signed a non-compete agreement, which stipulated, "You cannot engage in the same kind of work without consent within 5 km from Daechi-dong Academy for one year after your employment with Daechi-dong Academy ends." This was ruled as invalid because the restriction was beyond reasonable, and unfairly restricted the freedom of occupation and threatened livelihood.[64]

4. Whether compensation is provided to workers

Whether or not workers have been paid to adhere to the non-compete agreement is an important factor in determining its validity. There are many court precedents

60) Supreme Court ruling on Mar. 29, 2007: 2006 ma 1303.
61) Seoul High Court ruling on July 8, 2019: 2019 Ra 20390.
62) Seoul High Court ruling on May 16, 2012: 2011 ra 1853.
63) Seoul Central District Court ruling on Apr. 29, 2013: 2013 Kahab 231.
64) Seoul Central District Court ruling on Jan. 10, 2008: 2007 Gahap 86803.

showing that if money is paid in exchange for a non-compete agreement, the worker is obligated to avoid reemployment in the same industry during a reasonable period after employment with the signing employer ends. However, even if there is no compensation made for the non-compete agreement, if the item in question is deemed a company trade secret, the obligation remains.

In the case involving the worker finding employment with a competing semiconductor company after signing a non-compete agreement with the previous semiconductor company, which also paid special incentives in exchange for adherence to the non-compete obligation, the two-year ban against working for a competitor company was deemed reasonable.[65]

A worker who was employed at a software development company signed a non-compete agreement for one year. In exchange for complying with this non-compete obligation, a certain amount of bonus was paid. As the company paid such a bonus, the worker going on to work for a competing company within one year after resignation from the signing company was ruled by the court as the employee violating the non-compete obligation.[66]

A certain defendant worked as a trade manager for a company that manufactures and sells nail clippers. The company had the trade manager sign a non-compete agreement in the labor contract, prohibiting employment with competing companies for two years. In a lawsuit in which the defendant established his own company and entered into a competitive relationship with the company, the court dismissed the non-compete agreement as the period was too long (two years after resignation) and no compensation had been paid for this non-compete period. Here, whether or not the company had provided additional payment to compensate for this non-compete period became an important item in the ruling on this non-compete agreement.[67]

5. Workers' reasons for resignation

The non-compete agreement is a document designed to protect the employer's trade secrets when a worker leaves the company and is rehired by a competitor. However, when a resignation is due to reasons attributable to the employer such as overdue wages, unfair dismissal, or layoff, the obligation to prohibit change of employment cannot be enforced even if the employee moves to a competitor.[68] Therefore, the non-compete agreement is effective only if the reason for resignation is the employee's voluntary decision.

6. Specific and comprehensive review

In order for a non-compete agreement to take effect, the five detailed considerations

65) Seoul High Court ruling on July 8, 2019: 2019 Ra 20390.
66) Seoul High Court ruling on May 16, 2012: 2011 Ra 1853.
67) Supreme Court ruling on Mar. 11, 2010: 2009Da82244.
68) Kwon, Doo-Seop, "Part of the Labor Contract", 「Annotation of the Labor Standards Act」, 2020, Parkyoungsa, p. 185.

mentioned above must be reviewed comprehensively and in detail. It is particularly necessary to evaluate the weighting of the secrets in terms of profits by examining specific cases where worker rights to choice of occupation are weighed against the need to protect employer trade secrets through a non-compete agreement. It is also essential to review, before any action in court, which of the company's trade secrets are worth protecting, whether the period of the non-compete agreement is reasonable, whether the company has paid anything to compensate the worker for protecting the trade secrets, and the worker's reasons for resignation.[69)]

IV. Conclusion

A company can require an employee to sign a non-compete agreement if the worker will have access to the company's trade secrets. If the worker later voluntarily resigns and is reemployed by a competitor, and the first company suffers damages due to the worker violating this non-compete obligation, the company may claim compensation for damages. In addition, if a competing company intentionally scouts this worker with the company's trade secrets and hires him to acquire the company's advanced technology, the scouted company may claim compensation for damage against this competing company.

However, since workers also have the right to work in a better environment and the right to pursue happiness, this needs to be balanced with the need to protect the company's unique trade secrets. If the worker does not have access to such secrets or has not received a certain amount of compensation in return for keeping the non-compete agreement, the worker's rights should take precedence over the obligation to protect the employer's trade secrets.

Ordinary Dismissal & Personnel Management

I. Introduction

Recently I received two questions regarding ordinary dismissal from two different companies for whom I have provided regular consultation. The first question was from a company engaged in unloading imported vehicles from a car carrying ship at a car dock. Around 8:20 pm on July 4th, 2015, while driving vehicles out of a ship and on to a parking lot, a car accident occurred in which the driver hit a structural support on the ship while turning a corner. The driver should have easily seen the supports as he had driven vehicles on such ships many times. This particular driver had had a

69) Supreme Court ruling on Mar. 11, 2010: 2009Da82244.

visual impairment when he was hired on January 1st, 2009, but it was not serious enough at the time to disqualify him from employment. Since that time, he had had ten accidents including this most recent one, so the company asked him to go for an eye examination at a hospital designated by the company, and turn in the results. If the employee's eye exam is poor enough that he would have been disqualified from being hired, can the company dismiss him so as to prevent further accidents and safeguard other employees?

The second question was from a company whose sales manager went missing after embezzling 400 million won in funds received by the company in return for products delivered to customer companies. This sales manager had large personal debts, and used the company money to pay them. So the company pressed charges against the employee after a search and investigation by the police. On July 15, 2015, the company requested this labor attorney for advice on how to handle this employee in terms of his embezzlement and long term absence.

Both companies in these cases should dismiss the relevant employees: one due to his disqualification from employment, the other for embezzlement and long-term absence for personal problems. Generally, companies describe procedures for disciplinary dismissal in their Rules of Employment, but hardly make mention of procedures for ordinary dismissal. Herein, I would like to explain the criteria for the concept of ordinary dismissal, types, and justification in related labor cases.

II. The Concept & Types of Ordinary Dismissal

1. The concept of ordinary dismissal

"Ordinary dismissal" refers to termination of the employment contract due to the non-performance of the employee's obligation to provide labor service in accordance with the employment contract. Therefore, ordinary dismissal requires a reason attributable to the employee that the employee cannot provide work.[70] "A reason attributable to the employee" means that the employee falls into the remarkable condition where the employee becomes mentally or physically disqualified from providing the work which is the employee's main obligation according to the employment contract, and as a result, the employee cannot carry out his assigned work sufficiently in the workplace.[71] That is, "the term 'employment contract' in the Labor Standards Act means a contract which is entered into in order for a worker to offer work and for an employer to pay wages for that work (Article 2 of the Labor Standards Act)." As the reason the employee cannot provide work according to the employment contract is attributable to the employee, the employer can terminate the employment contract on the grounds of the employee's severe violation of the employment contract. This is referred to as ordinary dismissal.

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70) Hyungbae Jun, "A study on the Justification of Ordinary Dismissal per Type", Seoul Labor Relations Commission, 2011, page 1.

71) Jongryul Lim, 「Labor Law」, 13th edition, 2015, Parkyoung sa, page 353.

2. Types of ordinary dismissal

In most cases, ordinary dismissal is a result of reasons attributable to the employee, but court rulings also place termination of an employment contract due to company bankruptcy or voluntary closure in the category of ordinary dismissal.

(1) Dismissal due to reasons attributable to the employee

1) In cases where the employee is not qualified for work, or lacks the necessary vocational skills

① In cases where the employee is unable to obtain a qualification certificate essential for work, or failed an examination required for appropriate work performance, or he is lacking the necessary professional knowledge or skills, this may be grounds for ordinary dismissal.[72)]

② If the employee's work performance has been evaluated as very poor, the employer cannot dismiss the employee for that reason only. However, in cases where the employee's work ability has been evaluated remarkably deficient in objective reviews, a dismissal may be determined as attributable to the employee.[73)]

③ In cases where the employee has a severe handicap after completing medical treatment for an occupational injury, if the employee cannot carry out or completes his previous assignments very poorly, the employer may be justified in dismissing the employee.[74)]

2) In cases where the employee is sick with an illness that makes it unreasonably difficult to provide work.

① In cases where a driver has become blind, or in cases where a cook has contracted an incurable infectious disease, dismissal is regarded as attributable to the employee.[75)]

② In cases where the employee was injured due to actions unrelated to work, and cannot work as normal for a considerable time even after taking leave of absence twice, dismissal may be justifiable.[76)]

3) In cases where potential exists for a company's secrets to be leaked

In cases where an employee is in a position to know a company's business secrets and has a close relationship, through marriage, with a competitor's management, or the employee has a close relative or friendly relationship with a competitor company's directors, dismissal may be acceptable to prevent the leakage of business secrets.[77)]

(2) Dismissal due to reasons attributable to the employer

① In cases where a bankruptcy administrator dismisses all employees after the declaration of bankruptcy, this dismissal is not managerial dismissal, but ordinary dismissal, and so the company does not need to follow the requirements in the Labor Standards Act as to the process for dismissal for managerial reasons. [78)]

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72) Supreme Court ruling on July 25, 1989, 88daka25595.
73) Seoul Civil Court ruling on April, 1990, 89gahap33263.
74) Supreme Court ruling on November 12, 1996, 95nu15728.
75) Supreme Court ruling on December 6, 1996, 95da45934.
76) Administrative Court ruling on March 3, 2006, 2005goohap14158.
77) Constitution Court decision on March 31, 2005, 2003hunba12; Hyungbae Kim & Jisoon Park, the above book, page 217.

② In cases where the employer has made every effort to resolve financial problems, and has concluded that closing the business is the most reasonable method, and closed the business and dismissed the employees, these dismissals are justifiable.[79)]

③ In cases where the employer has dismissed an employee because the work that was supposed to be carried out is no longer needed, this dismissal is not for managerial reasons, but is ordinary dismissal. [80)]

④ In cases where an employee was hired to work at a specific workplace, and the company's license to use the specific workplace has expired, dismissal of that employee may be justifiable. [81)]

III. Reasons Necessary for Ordinary Dismissal

1. Ease of dismissal

In cases where the employee neglects his primary duty in the employment contract to provide work, or carries out his assigned duties insufficiently, the employer can notify the employee of termination of his employment contract. This ordinary dismissal serves to increase the number of reasons for terminating the employment contract and make flexibility in manpower management possible.

There are three types of dismissal: ordinary dismissal, disciplinary dismissal, and managerial dismissal. Here, disciplinary dismissal and managerial dismissal have strict requirements and procedures that must be followed for the dismissal to be determined justifiable.

Disciplinary dismissal requires the employer to follow the disciplinary procedures stipulated in the Collective Agreement or the Rules of Employment. If the employer does not do so, the dismissal becomes unfair even though the reason was serious enough to justify dismissal. In one case, the courts ruled, "The Collective Agreement, the Rules of Employment, and its related rules regulated that the employer should hold a disciplinary committee that includes a Labor Union representative, and provide the employee concerned the opportunity to attend the disciplinary action meeting where he/she may explain his opinions and submit any defending documents. However, if the employer dismissed the employee concerned in violation of the disciplinary procedures, this dismissal is unfair and invalid regardless of any justifiable reason for dismissal.[82)]

Managerial dismissal requires very strict conditions and the employer to comply with procedures according to dismissals for managerial reasons in Article 24 of the Labor Standards Act to be determined justifiable in accordance with Article 23 (1) of the same Act. These conditions and procedures for managerial dismissal are: 1) there must be an urgent necessity in relation to the business; 2) the employer shall make every effort to avoid dismissal; 3) the employer shall follow reasonable and fair criteria for

78) Supreme Court ruling on February 27, 2004, 2003doo902.
79) Administrative Court ruling on April 18, 2006, 2005gookhap34015.
80) Supreme Court ruling on October 29, 1996, 96da22198.
81) Administrative Court ruling on July 19, 2005, 2004goohap39723.
82) Supreme Court ruling on July 9, 1991, 90da8087.

the selection of those persons subject to dismissal; and 4) the employer shall inform and consult in good faith with the labor union (where there is no such organized labor union, the employee representative) regarding the methods for avoiding dismissals and the criteria for dismissal at least 50 days before the intended date of dismissal. The above four conditions and procedures should be observed in order for managerial dismissals to be determined justifiable.

2. No need for procedures of dismissal

Ordinary dismissal does not become unfair if procedures required for disciplinary and managerial dismissals are not followed. In this review, ordinary dismissal plays a role in reducing the restrictions on dismissal, and is used when there are reasons attributable to the employee, unlike disciplinary and managerial dismissals. Related examples include:

① Ordinary dismissal does not require that disciplinary procedures be followed, such as holding a disciplinary committee meeting and providing opportunity for the employee to explain his opinions.[83)]

② An employee claimed that dismissal was unfair because the company did not follow the procedure to hold a personnel committee meeting and did not request submission of a doctor's medical certificate, as stipulated in the Collective Agreement. However, there were no rules stipulated in the company's Collective Agreement and the Rules of Employment that the company had to hold a personnel committee meeting for dismissals besides disciplinary dismissal. The company did not need to hold a personnel committee meeting to confirm there was a reason to dismiss the employee, so this dismissal is not simply illegal because the company did not follow the procedures for dismissal. [84)]

IV. Conditions for Justification of Ordinary Dismissal

1. Good faith principle

Where a reason for ordinary dismissal has not become serious enough to terminate the employment, dismissing the employee without sufficient consideration of the employee's situation according to the principle of good faith and sincerity will be determined unjustifiable and an abuse of the managerial rights by the employer. For example, in cases where the employer intends to dismiss an employee due to a physical disability, if the employee can be rehabilitated or otherwise recover from that disability in a relatively short time, it would be necessary to keep the employee for a certain period of time by way of assigning him to lighter work.

2. Observance of legal procedures

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83) Supreme Court ruling on September 24, 1991, 91da13533.
84) Supreme Court ruling on December 6, 1996, 95da45934.

Ordinary dismissal should be prepared for with legal procedures. As ordinary dismissal is a unilateral action by the employer to terminate the employment contract, the employer must follow the procedural requirements in the Labor Standards Act. If an employer intends to dismiss an employee, the employer shall notify the employee of the reason(s) for dismissal and the date of such dismissal in writing (Article 27 of the LSA). The employer shall give notice to the employee at least thirty days before the planned dismissal. If notice is not given thirty days before the planned dismissal, ordinary wages of at least thirty days shall be paid to the employee in lieu of the notice (Article 26 of the LSA). A written notification of dismissal is related to the justification for dismissal, but such advance notice of dismissal can be substituted with money.

According to judicial rulings, ordinary dismissal does not require the observation of procedural regulations for other forms of dismissal. If the employer does not have regulations in the Collective Agreement or Rules of Employment requiring a personnel committee meeting to be held for dismissals except disciplinary dismissal, dismissals without following the disciplinary dismissal procedures is also not illegal.[85] As the dismissal is an ordinary dismissal, the employer does not have to consider the procedures that involve holding a disciplinary committee meeting or provide the opportunity for the employee to explain his opinion. [86]

V. Conclusion

The two questions in this article's Introduction section are related to ordinary dismissal. Regarding the first question, in cases where an employee is unable to sufficiently fulfill his work duties due to a physical disability, the employer can dismiss him for reasons attributable to the employee. In the second question, the employee embezzled company money and had been absent from work for a long period of time, actions which are subject to both disciplinary dismissal and ordinary dismissal. This company's Rules of Employment regulate that, when intending to dismiss an employee, the employer must hold a disciplinary committee meeting and provide opportunity for the employee to explain his side. Since the employee had been absent for a long period of time, it was impossible to follow the procedures for disciplinary dismissal. Therefore, the absence would be justification for ordinary dismissal. Accordingly, in terms of personnel management, the employer can make the most of ordinary dismissal by using the legal principle of ordinary dismissal, such as ease of dismissal and no need of dismissal procedures.

85) Supreme Court ruling on December 6, 1996, 95da43934.
86) Supreme Court ruling on September 24, 1991, 91da13533.

인사관리 앱 개발 (Mobile App)

기본서 Basic Guides	1. 노동법전 2. 노동법 해설 3. 노동 사건 사례	1. Labor Law 2. Labor Law Guide 3. Labor Cases
동영상 (Video)	YouTube GO	Korean and English videos (each 20 categories)
매뉴얼 Manual	1. 구조조정 2. 해고 3. 외국인 고용과 비자 4. 노동조합 5. 임금 6. 근로시간, 휴일, 휴가, 7. 비정규직 근로자 8. 근로계약 9. 근로감독 준비 10. 산업재해보상보험 11. 고용보험 12. 노동위원회 13. 취업규칙 14. 남녀고용평등 15. 직장내 괴롭힘 방지 16. 노사협의회 17. 산업안전보건법 18. 부당노동행위 19. 국민연금, 국민건강보험 20. 근로감독 체크리스트	1. Workplace Restructuring 2. Dismissal 3. Foreign Employment and Visa 4. Labor Union 5. Wage 6. Working Hours, Holiday, Leave 7. Irregular Workers 8. Employment Contract 9. Labor Inspection Preparation 10. Industrial Accident Compensation Insurance 11. Employment Insurance 12. Labor Relations Commission 13. Rules of Employment 14. Equal Employment Act 15. Workplace Harassment Prevention 16. Labor Management Council 17. Industrial Safety and Health Act 18. Unfair Labor Practices 19. National Pension, Health Insurance 20. Labor Inspection Checklists
외국인 Foreigner	출입국관리법과 외국인 (기고글, 동영상, 비자36가지)	Immigration Laws and Foreigner Workers (Law, Articles, Video, Visa)
근로계약 Employmt Contract	근로계약 자동작성 (5가지 기본 틀을 가지고 작성) (정규직, 기간직, 시간제)	Making Employment Contracts based on 5 basic templates (Regular, fixed-term, and part-time)
자동계산 Automatic Calculation	1. 연차휴가, 2. 퇴직금 3. 4대보험, 4. 퇴직소득세 5. 산재보상 (장해보상, 유족보상)	1. Annual Leave, 2. Severance Pay 3. Social Insurance Premiums 4. Retirement(Severance) Income Tax 5. Industrial acc
Labor Auditing	1. 주요 질문/답변 2. 인사감사	1. FAQ 2. Labor Auditing

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