

# **The Anti-Corruption Law and the Employer's Legal Liabilities**

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## **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 27<sup>th</sup> place out of 37 OECD countries.<sup>1</sup> 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.<sup>2</sup> In particular, this Act contains joint penal provisions that can be used to punish a company when an employee violates this law regarding improper solicitation or provision of financial or other advantages, and so all companies should implement thorough precautions for the purpose of ensuring the avoidance of any joint punishment.

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

## **II. The Anti-corruption Act**

### **1. Concept and scope of application**

(1) Concept: The purpose of this Act is to ensure that civil servants and relevant persons fulfill their duties in an upright manner and to secure the public's

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<sup>1</sup> Document issued by the Anti-Corruption and Civil Rights Commission in 2016.

<sup>2</sup> 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)

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,<sup>3</sup> ③ public institutions, ④ schools of various levels and educational corporations, and ⑤ media 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<sup>4</sup>

(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

<sup>3</sup> 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.).

<sup>4</sup> 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

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<sup>5</sup>

<sup>5</sup> 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	Imprisonment for not more than three years or a fine not

(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

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	exceeding KRW 30 million
· A civil servant receives a financial or other advantage not exceeding KRW 1 million in connection with his or her duties, regardless of whether such offer is given in exchange for favors · A civil servant does not report such financial or other advantage received by his or her spouse · A person provides a financial or other advantage to a civil servant or his or her spouse.	Fine for negligence of two to five times the received amount
· A civil servant receives an honorarium exceeding the allowable limit for an outside lecture	Fine for negligence not exceeding KRW 5 million

which a senior civil servant or relevant person offers to his or her subordinates to either raise their morale or console, encourage, or reward them;

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

- Meals are allowed to a value of not exceeding KRW 30,000;

- Gifts are allowed to a value of not exceeding KRW 50,000 (however, up to 100,000 won for agricultural and fishing gifts);

- Congratulatory and condolence payments are allowed to a value of not exceeding KRW 50,000 (However, up to 100,000 won for congratulatory and condolence floor;

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

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

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

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

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

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

### **III. Joint Penal Provisions and the Employer's Obligations**

#### **1. Concept**

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

negligent in giving due attention and supervision concerning the relevant duties so as to prevent such violation.”

The Supreme Court ruled, concerning the reasons for the employer to be exempted from liability, that whether the employer has been negligent in giving due attention and supervision shall be determined by considering the following items collectively: ① the violation and its relevant situation, such as the purpose for enacting that law, the severity of damages coming from infringing rights due to violation of the relevant law, and the purpose for introducing the joint penal provisions in that law; ② the concrete details of the violation and actual damage caused by the violation of this law; and ③ the size of the business, along with the degree of command and supervision by the employer; and ④ the company’s efforts to prevent violations.<sup>6</sup>

## 2. Related cases<sup>7</sup>

### 1) Improper solicitation

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

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

### 2) Accepting financial or other advantages

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

Case 2: In a situation where employees X and Y of a construction company invited newspaper reporters A, B, C, D to a work-related dinner and spent KRW 120,000

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<sup>6</sup> Supreme Court ruling on February 25, 2010 (2009do5824), on September 9, 2010 (2008do7834), etc.

<sup>7</sup> Document issued by the Anti-Corruption and Civil Rights Commission in 2016.

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  $\rightarrow (120,000/6 \text{ persons}) + (240,000/6 \text{ persons}) = \text{KRW } 60,000$ .

### 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.