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Selection of Employee Representatives & Effects[1]

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I. Purpose

The Labor Standards Act requires written agreement from or consultation with the employee representative for matters such as changes in working hours, managerial dismissals, etc. “This employee representative refers to the labor union, where there is an organized labor union representing more than half the employees at a business or workplace; or this shall refer to a person who represents more than half the employees, where there is no such organized labor union.” (Article 24 (3) of the LSA) However, this article does not explain the entire scope of “employee” covered by employee representation, the selected unit or method used in selecting the employee representative, manner of representation, effect of the written agreement, etc. Here, I would like to bring attention to clear administrative guidance and judicial rulings concerning these matters to better understand related laws and operations.

<Items requiring written agreement of or consultations with employee representative>

LSA	Written Agreement or Consent Required
Article 51	Three-month flexible working hour system
Article 52	Selective working hour system
Article 57	System of using leave as compensation
Article 58 (2)	Hours deemed working hours for “those ordinarily required to carry out duty”
Article 58 (3)	Discretionary working hours
Article 59	Exceptions in applying working and recess hours for such particulars as transportation
Article 62	Substitution of paid leave
	Consultation Required
Article 24 (3)	Managerial dismissals
Article 70 (3)	Night and holiday work for minors and pregnant employees, or female employees with children under one year of age

[1] This article is based upon the Administrative Guide: Kungi 68207-735 (97.6.5) including related administrative guidance and judicial rulings.

II. The Scope of "Employee" and the Unit Selected for Employee Representation

1. The Scope of "Employee"

The following criterion is used to evaluate whether or not there is an organized labor union representing more than half the employees. The scope of employees participating in voting for the employee representative is calculated as follows:

The scope of employees covered by employee representation = Employees under LSA Guidelines (Article 2 (1)) – Employers under LSA Guidelines (Article 2 (2))

The term "employer" under the LSA means 1) a business owner, or 2) a person responsible for management of a business or 3) a person who works on behalf of a business owner with respect to matters relating to employees. Here, 'a person who works on behalf of a business owner with respect to matters relating to employees' is an employee who has the dual position of employee and employer, and so shall be excluded from employees covered by employee representation. Although he/she is considered an employee to whom agreements apply, he/she acts specifically in the interest of the employer in the course of making written agreements.

2. Unit Selected for Employee Representation

The employee representative shall be selected from a unit of a business or workplace. Accordingly, in cases where one business is composed of several workplaces, if the company wants to introduce new working hour systems to the business unit, the employee representative shall be selected from that business unit, or if the company wants to introduce items to some designated workplace, the employee representative shall be selected from employees at those workplaces.

Concerning managerial dismissals, "in cases where target employees are defined by particular occupations or positions, the employee representative shall be one who represents these targeted employees. Accordingly, if these particular targeted employees are not entitled to union membership, it would be pointless to consult with the labor union concerning the managerial reduction of these targeted employees. In a hospital where the employer intends to reduce employees of 4th rank or higher, consulting with the labor union as an employee representative of 5th rank and lower would be unacceptable as the employer has not consulted in good faith with an appropriate employee representative."(Appellate Court 2004nu4613, Mar 25, 2005)

III. Method of Employee Representative Selection

1. Where there is an organized labor union representing more than half the employees

Whether the labor union represents more than half the employees shall be estimated in the unit of the business where the employer wants to select an employee representative; and shall be estimated in a unit of the workplace for the unit of the workplace. If the labor union represents more than half the employees, it is taken for granted that the labor union becomes the union representative of the labor union or the person (e.g. the chairman of the union branch) who has been authorized to represent the labor union.

2. Where there is no organized labor union representing more than half the employees

Where there is no organized labor union representing more than half the employees, an employee representative shall be selected. In this case, there are no particular restrictions to the method of selection, but in situations where the employees are informed that an employee representative would be authorized to represent them in introduction of a working hour system, it is acceptable to receive employee opinions. Accordingly, direct voting is not always necessary; it is also possible to choose multiple representatives. In cases where a Labor-Management Council has been established by the Act Concerning the Promotion of Worker Participation and Cooperation (the Labor-Management Council Act) in a business or workplace to introduce a new working hour system, the employee members can be regarded as employee representatives.

For dismissals for managerial reasons, “the employee representative for the purpose of consulting with the employer shall be selected by independent and voluntary decision-making by the employees after they are informed of the reason for choosing employee representation. It is also acceptable to choose the employee representative through employees’ general meeting or individual signatures on circulating representative lists. If an employer asks the employees to choose an employee representative, the employees autonomously determine procedures and methods of selection without intervention by the employer, and select someone (even though some employees could not participate) that represents more than half of the employees, the person shall be regarded as the employee representative. (Administrative Guide 68207-1472, Nov 13, 2003)

3. Invalid employee representatives

Agreement from or consultation with an employee who does not justifiably represent the employees is not legally valid.

(1) Even though an employer had explained the deterioration of business to the team leaders in manager-level plenary meetings and asked them for their opinions in selection of target employees for managerial dismissal, this is not company consultations with an acceptable employee representative. (Seoul Administrative Court, 2006guhap25285, Sep 6, 2009)

(2) Consultation with an employee not legally justified to be a representative according to the Labor-Management Council Act, is unacceptable as consultation in good faith. Therefore, managerial dismissal of this employee is unfair. (NLC 2009buhae487, Aug 6, 2009)

(3) In cases where a company does not receive written agreement from the employee representative in introducing a three month or less flexible working hour schedule, but instead receives individual written agreements from more than half the employees, this is a violation of related labor laws. (Administrative Guide 1167, Apr 29, 2008)

(4) Because the company did not comply with substantial conditions in the course of managerial dismissal, and furthermore, consulted with an arbitrary organization and not an employee representative, this dismissal for managerial reasons is unfair. (Administrative Court, 99gu12679, Dec 24, 1999)

(5) Article 3 of the rules for implementation of the Labor-Management Council Act stipulates that the employee representative shall be selected by direct and secret vote, but this does not include the method of voting. Vote counting is frequently computerized according to laws related to elections, but electronic voting has not yet been stipulated and related technical matters were not yet officially verified, and so it is difficult to accept its official use in reality. (Administrative Guide 68107-335, Nov 12, 1998)

IV. Method of Representation by the Employee Representative

1. In cases where the labor union performs Representation

The union chairman or the person commissioned for the purpose is authorized to represent employees. The union representative can conclude a supplementary agreement related to the collective agreement, or other written agreements separate from the collective agreement.

2. In cases where the employee representative of the Labor-Management Council performs representation

The procedures for obtaining written agreement can follow the representation method stipulated by the Labor-Management Council's Rules of Operation. It is possible to 1) select one representative, 2) commission a specific employee to represent employees

for one particular matter, 3) establish a separate decision-making method (e.g. a majority of all members present and the affirmative vote of two-thirds of members present), 4) have all employee representatives participate in the written agreement. Accordingly, an employer unilaterally making a written agreement with some employees is not acceptable.

3. In cases where a new employee representative is selected

In cases where a new employee representative is selected, the representative is authorized to represent the employees. In cases where multiple employee representatives are selected, they shall have the same authority to represent employees as have the employee representatives of the Labor-Management Council.

V. Effect of Written Agreements

When a written agreement is concluded between the employer and the employee representative, the company does not need individual employee agreement. The effects of signing the written agreement differ as follows:

1. In cases where a written agreement is made as a supplement to the collective agreement

In cases where the employer makes a supplementary agreement to the collective agreement with the union chairman or the person commissioned to be the employee representative, the agreement can affect the collective agreement.

2. In cases here a written agreement is made with an employee representative of the Labor-Management Council

Since a written agreement cannot change the existing collective agreement, if such agreement is incompatible with the current collective agreement, separate procedures to revise the collective agreement shall be taken so as to apply to the employees under the collective agreement. Employees to whom the collective agreement does not apply can be included in the written agreement. This written agreement can be applicable without revising the existing Rules of Employment. However, it is very desirable to revise the existing Rules of Employment in order to maintain consistency in working conditions. When revising the Rules of Employment in accordance with the written agreement, the employer does not have to again hear the opinion of or obtain agreement from the employee representative or other employees.

3. In cases where a written agreement is made with a new employee representative

The effectiveness is considered to be the same as a written agreement with the employee representative of the Labor-Management Council.