

## Contractual Working Hours and the Inclusive Wage System

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

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

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

### I. Contractual Working Hours

#### 1. Regulations on contractual working hours

The contractual working hours shall be determined between the worker and employer in the range of working hours pursuant to Article 50 (Legal Working Hours) of the Labor Standards Act, Article 69 (Working Hours for Minors) or Article 46 (Hazardous and Dangerous Work) of the Industrial Safety and Health Act. This means that the contractual working hours must be set within the statutory working hours. Article 17 of the Labor Standards Act requires wages, contractual working hours and

<sup>1</sup> Lim, Jongyul, 「Labor Law」 17<sup>th</sup> edition, Park Young Sa, 2019, p. 470.

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

## **2. Reasons for limiting work hours**

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

The inclusive wage system refers to a wage system that does not calculate basic wages in advance for a given working time, but rather stipulates that daily or monthly wages shall include the total amount of statutory working hours plus additional working hours.<sup>2</sup> Since the LSA stipulates that basic wages and contractual working hours shall be defined in the employment contract, the inclusive wage system is in effect in violation of that Act.

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<sup>2</sup> Lee, Seunggil, "A Study on Judicial Principles and Benefits of the Inclusive Wage System", 「Labor Law Studies Collection」 29<sup>th</sup> ed., Korean Comparative Labor Law Study Association, December 2012, p. 575.

## II. Changes in Court Rulings Regarding the Inclusive Wage System

### 1. Court rulings – details of changes

Related rulings can be divided into those before and those after July 2007. Before July 2007, the courts did not specifically determine contractual working hours because employment contracts were not required to stipulate wage, working time or other conditions. In other words, even if the basic wage was not calculated in advance, but the inclusive wage equaled the sum of applicable allowances plus the monthly wage in a way that was not disadvantageous to the employee, it was considered valid. As a result, it was possible to accept the inclusive wage system for both jobs where the working hours were difficult to calculate, and jobs where the working hours were not difficult to calculate, but the system was conducive to convenient management.

In 2010, however, the Supreme Court ruled that the difficulty of calculating working hours would determine whether an inclusive wage system was justified and that such a system was not acceptable if the working hours could be calculated.<sup>3</sup> This case is considered to set a related precedent because the employment contract specifies contractual working hours in accordance with Article 17 of the LSA. In other words, the basic wage should be determined on the basis of the contractual working hours when concluding an employment contract, and in principle, the inclusive wage system cannot be introduced when working time can be calculated. Thus, the inclusive wage system is acceptable for workers with supervisory and intermittent duties that make it difficult to calculate working time, but not easily for workers whose working time can be calculated.

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

Before revision (prior to July 1, 2007)	After revision: The Labor Standards Act [Enforcement 2007.7.1]
The Supreme Court concluded that if an employer receives the consent of the employee as a means of encouraging the convenience of calculating working hours and promoting employee willingness, and it is not disadvantageous to the employee in light of collective agreements and rules of employment, the inclusive wage agreement in a collective wage system is valid". <sup>4</sup>	In 2010, the Supreme Court distinguished between cases where it was difficult to calculate working time and cases where it was not. ① In cases where it is deemed difficult to calculate working hours such as surveillance work, even if a so-called inclusive wage contract is concluded, it is valid if it is not disadvantageous to the employee and is recognized as justified in light of various circumstances. ② If there is little difficulty in calculating working hours, the principle of wage payment according to working hours in the Labor Standards Act shall apply unless there are special circumstances in which it is impossible to apply the provisions of the Labor Standards Act. <sup>5</sup>

<sup>3</sup> Lim, Dongchae, Cho, Younggil, Kim, Junkeun, "A Study on the Court Ruling of the Navy Welfare Corporation regarding the Effect of the Inclusive Wage System", 「Kangwon Law Study」 25<sup>th</sup> ed., February 2019, Gangwon University Comparative Law Study Center, p. 453.

<sup>4</sup> Supreme Court ruling on Oct 25, 1993, 83do1050; Supreme Court ruling on April 25, 1997, 95da4056; Supreme Court ruling on March 24, 2019, 96da24699; Supreme Court ruling on May 28, 1999, 99da2881; Supreme Court ruling on June 11, 1999, 98da26385.

<sup>5</sup> Supreme Court ruling on May 13, 2010, 2008da6052 (Cares regarding Navy Welfare Corporation)

## **2. Trends in rulings on the current inclusive wage system**

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

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

## **3. When it is difficult to calculate working hours**

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

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

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

(3) Discretionary work: The discretionary work in Article 58 (3) of the Labor Standards Act refers to tasks where it is difficult to calculate working time because of the characteristics or performance

rather than the amount of work. Written consent is required from the employee representative in order to qualify the work as within the contractual working hours. Specific tasks include designing and analyzing research and development and information processing systems, organizing articles for newspapers and broadcasts, designing and designing-related job, and producing and supervising broadcasting and film production (Article 58, Clause 3).

### **III. Case Studies on Introducing an Inclusive Wage System**

#### **1. Inclusive wage agreement for workers in a restaurant business**

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

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

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

#### **2. Inclusive salary for white-collar workers**

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

(2) Judging whether the inclusive wage system is violated: There have been two judicial precedents for determining whether an inclusive wage system is possible for white-collar workers. The first involved a white collar worker employed by a foreign life insurance company. In this case, the court deemed it difficult to calculate working hours, unlike production workers, because the business culture common to this company

centered on performance tasks due to the nature of the company's insurance sales work. In such cases, the inclusive wage system is recognized.<sup>6</sup> The second involved white-collar workers who concluded an inclusive wage contract by signing a collective agreement offering a fixed overtime allowance of 10 hours per week for 40 hours of work per week. Workers did not receive any extended allowance for up to 10 hours a week even if overtime was performed that week. The Supreme Court concluded that such a wage system cannot be regarded as monthly remuneration based on an hourly wage or as a legitimate inclusive wage system in light of the fact that workers can calculate their hours easily.<sup>7</sup>

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

#### **IV. Conclusion**

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

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<sup>6</sup> Seoul Central District Court ruling on February 13, 2018

<sup>7</sup> Supreme Court ruling on December 10, 2009



# Extinctive prescription system under the Labor Standards Act

## I. Introduction

The extinctive prescription system recognizes the status of rights or claims that have not been exercised for a certain period of time, even if that status does not conform to a true rights relationship.<sup>8</sup> In other words, if people do not exercise specific rights for a certain period of time, they can no longer exercise those rights due to extinctive prescription. The reason for this is to limit rights that have not been exercised, and to promote the establishment of legal security and expedite claims or the use of rights. The Labor Standards Act (LSA) also attaches extinctive prescription to non-performance of rights to promote their exercise and thereby protect workers.

Since the extinctive prescription for deferred wages kicks in after only three years, the amount of claimable wages is gradually reduced as the period before extinctive prescription passes. In particular, at the stage of petitions and accusations filed with the Ministry of Employment and Labor, suspensions of the extinctive prescription on deferred wages are not allowed, and so action in a civil court is required. In other words, as labor inspectors handle investigations of complaints regarding deferred wages, and determine the facts behind the delay by examining the workers affected and their employers, these legal actions have no effect on the extinctive prescription. On the other hand, claims for compensation for occupational accidents are recognized as filing for work compensation with the court. The extinctive prescription is suspended and claims for industrial accident compensation can be extended to 5 years.

Since they are both special laws designed to protect workers, the LSA and the Industrial Accident Compensation Insurance Act (IACI) differ from other laws in terms of suspensions and duration before the extinctive prescription kicks in. I will look into the overall extinctive prescriptions in the LSA.

## II. Extinctive Prescription

### 1. Concept

‘Extinctive prescription’ refers to expiration of a right that has not been exercised. The principle is that the law does not protect those who ‘sleep’ on it. This means that if people have a right they can exercise but do not for a certain period of time, they will not be able to exercise it, so that the state of legal tranquility already established will be maintained. Most extinctive prescriptions in labor law start at three years. A concept similar to the extinctive prescription under the LSA is ‘exclusive period.’ After expiration of an exclusive period, no further legal appeal can be made. Since it aims at the rapid establishment of legal relations, exclusive period differs from extinctive prescription.<sup>9</sup>

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<sup>8</sup> Oh, Young-hwan, Lee, Ro-moon, 「General Provisions of the Civil Code」, 2009, MJ Media, p. 350.

<sup>9</sup> Supreme Court ruling on Sep 20, 1996 96da25371

## 2. Details of extinctive prescription

### (1) Wage bonds under the Labor Standards Act

Wage bonds will expire unless the claims for deferred wages are exercised within three years (Article 49 of the LSA). Wage bonds can be categorized as monthly salary, retirement allowance, unused annual allowance and so on. Monthly wages (base salary, overtime allowance, holiday work allowance, etc.) are paid on the salary payment date and rights can be exercised from the time when they are not paid, so salary calculation will begin from the regular payment date. Bonuses shall be calculated when the right to receive the bonus is incurred, while severance pay shall be calculated from the date of retirement due to the obligation to pay the employee on that day.

Annual paid leave is calculated from the date of conversion to a wage claim after using one year for granted annual leave.<sup>10</sup> In other words, if annual paid leave is managed on a yearly basis, if an employee enters 2018, his annual paid leave from January 1, 2019 to December 31, 2019 will be granted on the first day of 2020 15 days' annual leave if he works at 80 percent or more for the period. During 2020, annual leave shall be used. , The starting point for a claim for unused annual leave shall be 2021, and this right shall exist for three years (Article 36, Article 60 of the LSA).

### (2) Benefits under the Industrial Accident Compensation Insurance Act (IACI Act)

Rights protected by the IACI Act shall extinguish unless they are exercised within 3 years of when the right to claim compensation for a work injury or disease begins. However, the right to receive disability benefits, survivor benefits, funeral expenses benefit, compensation pensions for pneumoconiosis, and survivor's pensions for pneumoconiosis will expire within five years if not exercised (enacted Dec. 13, 2018, Law No. 15665). The insurance benefits of the IACI Act can be divided into the following three categories: ① Claims for continuous insurance benefits, ② Claims for lump sum insurance benefits, and ③ Claims for pension benefits. Each type of pension insurance benefit has a different point when the extinctive prescription kicks in.

① Claims of continuous insurance benefits include claims to medical care benefits and work suspension benefits. Medical care benefits are paid when a worker is injured or becomes sick in relation to work, and in principle is paid as reimbursement of actual medical expenses (Article 40 of the IACI Act). That is, the period before the extinctive prescription for the right to claim this insurance benefit kicks in begins the day after the cost of medical treatment is paid, not when a worker's occupational injury or illness first occurs.<sup>11</sup> Since the work suspension benefit is paid for a period that a worker who has been injured or sick cannot work, the extinctive prescription begins the day after the worker first becomes unable to work so they can receive medical treatment (Article 52 of the IACI Act).

② Claims for lump-sum insurance benefits include claims to lump sum payments of disability compensation, survivor compensation, or an allowance of some sort. A lump sum disability compensation payment shall be paid to a worker who has been injured on the job or suffered from a work-related illness, and whose disability continues after recovery. A disability benefit is provided when a worker has completed his/her treatment and the disability is fixed (Article 57 of the IACI Act). Survivors' compensation is paid in the form of a pension in principle, but if there is no legal

<sup>10</sup> Supreme Court ruling on Sep 14, 1992 92da17754

<sup>11</sup> Hwang, Won-hee, "Calculating when the extinctive prescription occurs for work-related accident benefits", *Labor Law Review*, 27, Apr 2013, Korean Comparative Labor Law Association, p. 382; Supreme Court ruling on Dec. 17, 2008, 2006da35865



beneficiary, a lump sum compensation is possible. The period before the extinctive prescription kicks in begins on the day after the relevant worker has died (Article 62 of the IACI Act). Funeral expenses are only paid when they have actually occurred (Article 71 of the IACI Act).

③ Pension insurance benefits include pensions for disabilities and survivors, with payment beginning the first month after the month in which the reason for payment occurred.

In the case of noise-induced hearing loss, the Labor Welfare Corporation's Guidelines for Work Disabilities previously claimed that the 3 years' limitation begins "when leaving the noisy workplace," but the court ruled that it could be considered to have begun at the time of "healing" instead.<sup>12</sup> As a result, in 2016, the Ministry of Employment and Labor changed the extinctive prescription for noise-induced hearing loss so that the calculation date begins from diagnosis. Therefore, in recent cases, the court has ruled that "the extinctive prescription for a person diagnosed with noise-induced hearing loss after a long absence from the noisy workplace cannot be considered to have come into effect even if he/she has applied for a disability benefit after three years have passed from the time of diagnosis." <sup>13</sup>

### **3. The extinctive prescription for wage bonds and the extinctive prescription for prosecution**

Extinctive prescription refers to expiration of the period during which an employee who has the right to receive compensation may exercise a claim against the employer in the event of a delay in the payment of wages or severance pay. The extinctive prescription for prosecution refers to expiration of the period when prosecution can occur for violating labor law, such as delaying the payment of wages, and begins either on the date the violation occurred or the date a continuing violation ends.

The period before the extinctive prescription kicks in for prosecution of violation of labor-related Acts in terms of delayed payment of wages was extended from 3 years to 5 years in 2007 (Article 249, Paragraph 1, Item 5 of the Criminal Procedure Act). The period before the extinctive prescription for prosecution kicks in shall be deemed to have started 14 days from the date the wages should have been paid or the date the violations terminate (Article 252 of the Criminal Procedure Act). According to Article 49 of the LSA, the extinctive prescription for a wage bond kicks in after three years. However, since the extinctive prescription for prosecution is now 5 years, prosecution for delayed payment of wages will continue to be possible.<sup>14</sup> Thus, an employee may file a claim for unpaid wages for a period of five years.

## **III. Suspension of the Extinctive Prescription**

### **1. Concept**

Termination of the extinctive prescription is the occurrence of the factual condition on which the extinctive prescription is based. The reasons for termination of the extinctive prescription are: (i) A request for trial (Article 170 of the Civil Act); ② Participation in bankruptcy proceedings (Article

<sup>12</sup> Supreme Court ruling Sep 4, 2014: 2014doo7374; Park, Jong-Tae, "Review of Standards for Recognition of Occupational Hearing Impairment," *Monthly Labor Law*, May 2017.

<sup>13</sup> Seoul Administrative Court ruling on Apr 20, 2017: 2017goodan 50655.

<sup>14</sup> Labor Ministry Guide, 「Guide on handling unpaid wages」, 2016, pp. 31-32.

171); ③ Issuance of a payment order from the court (Article 172); ④ A summons for reconciliation (Article 173); ⑤ Unilateral attendance at the court (Article 173); ⑥ Notification by registered mail (Article 174): claim for money in the case of monetary bonds, if the request is made based upon the registered mail, it is only valid for 6 months if a court filing or application for bankruptcy was not made; ⑦ Foreclosures, provisional attachment, provisional dispositions (Article 176) ⑧ Approval (Article 177): meaning that the debtor has confirmed a debt to the creditor.

## 2. Details

### (1) Details of reasons for suspension

Since wage bonds have a 3-year extinctive prescription, if an employee has not filed a claim during the 3-year period leading up to extinctive prescription, the claim can no longer be made. However, in the event of a trial claim, seizure of the wage bond, or provisional attachment, if the employer agrees to the wage bond, extinctive prescription shall not occur. If the employer writes a memorandum on the unpaid wages and pays part of those unpaid wages, extinctive prescription shall be suspended.<sup>15</sup>

If the worker informs his/her employer of the unpaid wages by means of registered mail, this shall be the reason for a six-month suspension of extinctive prescription (Article 174 of the Civil Act). However, the notification letter shall have the effect of ceasing the extinctive prescription for six months, unless the worker requests a trial, participates in bankruptcy proceedings, responses to reconciliation, has seizure or accepts a provisional disposition.<sup>16</sup>

### (2) Relationship to delayed payment of wages

1) Whether an employee's claim for unpaid wages can be a reason for suspending the extinctive prescription: A criminal or civil complaint filed against a judicial authority, such as a labor inspector, is not accepted as a trial claim.<sup>17</sup> However, in the event of unfair dismissal, when the related workers are involved in the administrative court's proceedings as auxiliary participants while the National Labor Relations Commission is working as the defendant, the extinctive prescription is suspended.<sup>18</sup>

2) Whether issuance of a labor supervisor's confirmation of unpaid wages can be an termination of the extinctive prescription: In cases where a worker who has taken a petition for unpaid wages to the Ministry of Employment and Labor, if the employer simply confirms the amount of unpaid wages, this will not be regarded as extinctive prescription. However, if the employer has made a written confirmation of payment of the delayed wages, this can be regarded as a suspension of the extinctive prescription.<sup>19</sup>

### (3) Relationship to the IACI Act

In accordance with the IACI Act, a worker's filing of a claim that he/she has an occupational injury or illness can terminate the extinctive prescription, which will affect all claims related to industrial accident compensation insurance benefits (Article 113 of the IACI Act). In general, submitting a

<sup>15</sup> Supreme Court ruling on Jun 10, 2010: 2010da8266.

<sup>16</sup> Ha, Kap-rae, 「Labor Standards Act」, 28<sup>th</sup> edition, 2016, Jongang Kyungjaesa, p. 315.

<sup>17</sup> Supreme Court ruling on Mar 12, 1999: 98da 18214, Kumho construction company

<sup>18</sup> Supreme Court ruling on Feb 9, 2012: 2011da20034

<sup>19</sup> Kang, Ji-hyeon, "Issues Regarding Extinctive Prescription on Wage Bonds", 「Attorneys」 Volume 49, 2016, P. 216; Seoul District Court ruling on Jan 21, 2016: 2015na42147

complaint to the Ministry of Employment and Labor regarding unpaid wages will not be considered a trial claim. However, if an industrial accident application is filed with the Labor Welfare Corporation, it shall be regarded as a trial claim which can terminate extinctive prescription. As a precedent, a worker filed an application for occupational accident compensation benefits, but was rejected. Then after he did not apply for review within 90 days after the rejection, the corporation dismissed his late claims due to extinctive prescription. However, the Supreme Court recognized that the claim for insurance benefits pursuant to Article 36 (1) of the IACI Act as a reason for termination of extinctive prescription, separate from the reason for the extinctive prescription under the Civil Act.<sup>20</sup>

## V. Conclusion

The extinctive prescription system promotes legal stability and quick remedy for violation of rights. In industrial accident compensation, it is moving toward better protection of workers by extending the period prior to extinctive prescription or terminating it. However, for claim for deferred wages, a lawsuit should be filed with a civil court because the payment of those wages or the filing of a complaint with the Labor Office will not be regarded as a suspension of extinctive prescription. In other words, unpaid wages would be reduced gradually due to the completion of extinctive prescription as the time would pass by while complaining to the labor office for unpaid wages. Therefore, it is necessary to improve the extinctive prescription system against delayed payment of wages. First of all, it is necessary to suspend the extinctive prescription just like the claims to the court when a worker takes a petition or complaint to the labor office over unpaid wages. Secondly, the extinctive prescription for prosecution was extended from three years to five years in 2007, which has caused some confusion in applications for remedy against late payment of wages. Therefore, in terms of protecting workers, the extinctive prescription for wage bonds should be extended from 3 years to 5 years as well.

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<sup>20</sup> Supreme Court ruling on June 15, 2018: 2017da9119

## <Case Study> Dismissal after Signing Employment Contract but before Official Start of Work

### I. Introduction

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

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

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

### II. Related Laws and Court Rulings

#### 1. Related Laws (the Labor Standards Act)

##### **Article 15 (Labor Contract Contrary to This Act)**

(1) A labor contract which establishes working conditions that do not meet the standards provided for in this Act shall be null and void to that extent.

(2) Those conditions invalidated in accordance with the provisions of paragraph (1) shall be governed by the standards provided in this Act.

##### **Article 23 (Restriction on Dismissal, etc.)**

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

##### **Article 28 (Application for Remedy for Unfair Dismissal, and Related Acts)**

(1) If an employer dismisses a worker unfairly, the worker may apply to the Labor Relations Commission for remedy.

(2) The application for remedy under paragraph (1) shall be made within three months from the date on which the unfair dismissal, and related acts, took place.

##### **Article 33 (Enforcement Levy)**

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

**Article 111 (Penal Provisions)**

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

## **2. Related Court Rulings**

### **1. Where an employer canceled the employment contract before the employee started to work**

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

The employer notified the applicants at the end of November 1997 of the final decision to hire them, and asked them to submit the related employment documents, such as a confidentiality agreement in December 1997. The employer told them that new employees would start working on March 1, 1998. The employer delayed assigning them any jobs, and finally notified the new employees on June 18, 1998 that their employment had been cancelled. The employer's notice of cancelling the employment amounts to a dismissal, which was rendered null and void as there were no justifiable reasons for cancellation.<sup>21</sup>

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

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

On the other hand, the hired applicants were informed of the company's intention to hire them but were not notified of a specific start date. The hired applicants should have continuously inquired for clear information about the formal start date or what they should do in the event of cancelation of their employment, but the hired applicants had neglected to make any such efforts, which was taken into consideration in calculating the amount of compensation to be given. For this reason, the hired applicants were held partly responsible for their lost opportunities, and should also be willing to take 50% less in calculated compensation. The company was responsible for providing the remaining 50% of calculated compensation.<sup>22</sup>

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

In this case, the employees were informed in November 1997 that they would be hired by the company, and they were supposed to start working on April 6, 1998. But the company delayed their start date without explaining the reason. Due to the delay, the employees took legal action. The Court concluded that the company had to pay their salaries from the date the decision was made to hire them to the date their employment was canceled (June 30, 1999).<sup>23</sup>

<sup>21</sup> Seoul District Court ruling on April 30, 1999, 99gahap20043.

<sup>22</sup> Seoul District Court ruling August 27, 2003.

<sup>23</sup> Seoul High Court ruling on April 28, 2000, 99na41468.

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

Supreme Court ruling on June 23, 2000, 98Da54940: Where an employee is found to have falsified or concealed his education and experience, the company might choose not to hire him/her (if discovered at the point of recruitment) or might choose not to provide the same working conditions (if discovered either at the point of recruitment or during the course of his/her service to the company). This assumption justifies taking appropriate disciplinary dismissal action.<sup>24</sup>

**3. Court rulings related to the employment status of a Korean branch manager:****(1) Executive officials are not employees as defined in the Labor Standards Act (LSA).**

Executive officials, including directors, are mandated by their employer to deal with a certain scope of business management. In general, they are not in an employment relationship that requires them to provide a given type of work under the supervision and control of the employer and receive a given amount of wages in return. In this sense, executive officials shall not be considered employees under the LSA, unless under some exceptional circumstances.<sup>25</sup>

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

Whether it is appropriate to regard a director as an employee defined by the Labor Standards Act has nothing to do with the manner in which the contract is made but whether the director was paid to provide a service that requires him to be subordinate to another. Such a director can be regarded as an employee regardless of whether he/she is holding the position or title of a company director or auditor, in the real sense or just in name, as long as he/she receives remuneration as compensation for providing a specific labor service under the direction and supervision of the employer or he/she receives remuneration as compensation for taking charge of a specific labor service under the direction and supervision of persons such as the representative director in addition to the duties assigned to him/her by the company.<sup>26</sup>

**III. Answers to Questions on the Issue**

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

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

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

However, the level of justification differs according to timing<sup>27</sup>:

- 1) From the time the employment contract is signed to actually starting work  
➔ Low-level justification required. If the employer has reasons to cancel then, this is the best time.
- 2) From actually starting work at the workplace to the end of the first 3 months  
➔ Mid-level justification required. To terminate employment, the employer should verify

<sup>24</sup> Supreme Court ruling on June 23, 2000, 98Da54940.

<sup>25</sup> Supreme Court ruling on Dec. 22, 1992, 92Da28228.

<sup>26</sup> Supreme Court ruling on Sept. 26, 2003, 2002Da64681.

<sup>27</sup> Lim, Jongyul, 「Labor Law」 17<sup>th</sup> edition, Park Young Sa, 2019, p. 406.



why the employee is not suitable for the work. However, this 3 month period is still a time when more weight is allowed for the employer's judgment.

3) From the fourth month of employment

→ The criteria for justifiable termination are much stricter.

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

As long as an employment contract has been made, the employer cannot dismiss the Employee without a justifiable reason. If the Employee is dismissed, the Employee can apply to the Labor Relations Commission (LRC) for remedy. The LRC may determine that the employer must reinstate the dismissed employee and pay back pay. If there is a justifiable reason for the Company deciding not to hire him, it would be a justifiable termination. Review of dismissal cases related to the cancellation of employment contracts before employees start to work reveals that some companies have delayed for long periods of time the start date for hired employees, which resulted in significant cost to the employees in terms of lost time and lost opportunities. Most cases ended with the companies having to pay salary during the waiting period.

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

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

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

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

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

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

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

- ① Applicant → Regional Labor Relations Commission (3 months required in legal process)
- ② Appealing Applicant → National LRC (3 months required in legal process)
- ③ Appealing Applicant → Administrative Court (one year or longer) → High Court (one year or longer) → Supreme Court (one year or longer)

④ Applicant → Civil Court (more than one year) → High Court (more than one year) → Supreme Court (more than one year)

In 2017, about 10,995 dismissal cases were processed in the LRC and the National LRC.<sup>28</sup> Civil suits take more time and money and are more difficult. The LRC provides many advantages in this legal remedy process. No fees are required, and a decision is made within three months.

#### **IV. Opinion**

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

1. If the employment contract is signed directly between the CEO of the UK multinational and the Employee, and if the actual work has not started at the workplace, it is like a normal contract between party A and party B. Also, the Employee was supposed to work as a country manager in charge of the Korean branch office. This means his status is more like a commissioned contractor than an employee protected under the Labor Standards Act. In this case, Party A can cancel the contract in accordance with what is stipulated in the employment agreement, of which Section 1 states the Company may terminate the employment relationship at any time without prior notice or for no reason at all.

2. The employment contract is more likely to be subject to Korean labor law, as it describes that it would be subject to Korean labor law. In this case, the Employee may file an application with the Labor Relations Commission (LRC) for remedy against unfair dismissal. If the Employee does so, the Company will need to appoint a legal representative to respond. In order to prevent such action, it is reasonable to offer compensation of one month's salary. The Employee's demand for 12 months' wages is beyond consideration, and likely comes simply from his desire to receive more than what is offered.

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<sup>28</sup> Ministry of Labor & Employment, 「2018 Employment & Labor White Paper」 p. 227

## **Guidelines for Calculating Working Hours**

Working hours refer to the actual working hours which the employee provides labor service prescribed by the employment contract under the employer's direction and supervision. Article 50 of the Labor Standards Act regulates that working hours shall not exceed 8 hours per day and 40 hours per week, excluding recess hours. The employer shall additionally pay fifty percent (50%) of the ordinary wages for extended working hours exceeding the legal standard working hours. Working hours are usually implemented within contractual working hours that the employer and the employee have agreed upon, but there have been some disputes in recognizing working hours in cases where the employee conducted work before or after contractual working hours, or in cases of waiting time for work, training hours, traveling hours, company events, etc. So, I would like to clarify the criteria for judging working hours and review concrete examples regarding working hours.

### **I. Criteria for judging working hours**

#### **1. Whether working hours are stipulated in the labor contract, rules of employment or collective agreement**

The working hours shall be calculated by the total working hours from when the employee starts to provide contractual work to the employer to when the employee finishes his/her work, excluding recess hours. The Labor Standards Act regulates that the employment contract shall consist of the starting and finishing time of work, and the rules of employment shall contain statutory items to be surely included. (Article 17 and 93 of the Labor Standards Act)

#### **2. Whether the employee is under the employer's direction and supervision**

Working hours mean the time at which the employee provides labor service described by the employment contract under the employer's direction and supervision. Even though waiting time or recess and sleeping time are times that the employee is not engaged in actual work in the middle of working hours, if those times are not allowed to be used freely by employees, but are, in practice, under the employer's direction and supervision, those times surely belong to working hours. (Supreme court Mar 9, 93 92da22770)

Whether the subsidiary time required in actual working hours belongs to working hours or not shall be judged by whether those times are implemented under the employer's direction and supervision. Such subsidiary times include the time needed to change into the work uniform and gather necessary tools, waiting time, conferences prior to work, shift-changes, wash-up time after finishing the work day, organizing things for the next day's work after finishing the work day, travel time during business trips, etc. (Supreme Court Mar 9, 93, 92da22770)

#### **3. Whether work characteristics under the employment contract are acceptable or not**

The type of work described under the employment contract is not limited to the work tasks themselves, but actual working hours shall include those times essentially required to prepare for work and to arrange things after finishing the work day in relation to actual work performance. It is

regarded as working hours in cases where those activities besides actual working hours are stipulated as the employee's mandatory duties according to related laws, collective agreements, rules of employment, labor practices, and employment contracts, or in cases where non-implementation charges disadvantage the employees concerned.

## **II. Concrete Judgment for Working Hours**

### **1. Time worked before the work starts**

(1) In cases where the employee arrives at the workplace earlier than the official starting hour

Whether the company shall pay wages for working hours when the employee comes earlier to the company to ensure normal operations shall be dependent upon the following: 1) If the employee did not come to work earlier than the official starting hour, his wages could be reduced or he might be punished for a violation of service regulations. If this situation does not exist, then the time before the official starting hour does not belong to working hours. (Aug 30, 1988, kungi 01254-13305)

(2) Conferences held before working hours

Conferences held before working hours deal with safety training for underground mine workers, work directions and organization of working groups. These meetings shall be held essentially for the purpose of underground shift work and be implemented under the employer's direction and supervision. So, these meetings shall be included in actual working hours. (Supreme Court, Sep 28, 93, 93da3363)

### **2. Time worked after the work day finishes**

The end of the work day is the time for the employee to be free from the employer's direction and supervision. When the employee continues to be under the employer's direction and supervision after he finishes his regular work time, actual working hours end when the employee is actually free from the employer's direction and supervision. Such examples of the end of the workday not being the end of actual working hours are workplace repairs, examinations, organization and cleaning, conducted after completing work under the employer's direction and supervision. (Supreme Court Mar 9, 93, 92da2270)

### **3. Waiting time**

Recess hours under the Labor Standards Act mean the time that employees can use freely, away from the employer's direction and supervision, regardless of the name given for such times, such as recess hours, waiting time, etc. In this case, unlike the working structure stipulated by the rules of employment, under the employer's implied agreement, the employees work every two hours in repeated practices and off-time employees take recess hours, playing chess or baduk, or watching TV. There is a clear division of waiting time and working hours. The employees cannot go out of the workplace during this waiting time, but they can use it freely, away from the employer's direction and supervision. In this case, the waiting time shall be recognized as recess hours. (Oct 25, 00, kungi 68207-3298)

In cases where an employee drives a company car as necessary from time to time, just like a regular driver of a company car, if the employee cannot use the waiting time freely, this shall be regarded as working hours, but if such time is free for the employee to use as he/she wishes, it is

considered part of recess hours and cannot be included in working hours. (Supreme Court July 28, 92, 92da14007)

#### **4. Education and training time**

It is working hours when the employer implements job training during working hours in relation to work, concerning work safety and work efficiency to improve productivity, and it is also working hours when the employer gives compulsory training after working hours or during a holiday. However, it is not working hours when the employee shall attend compulsory individual training like driver's education, regardless of the company's business, or when moral or safety training etc., is recommended to employees, and provided by the nation due to major national policies after working hours or during a holiday. (Sep 29, 88, gungi 01254-14835)

#### **5. Company picnics or events**

In cases where the company hosts a picnic party, athletic event, etc., if the employee shall attend the picnic party, athletic event, etc., the participating time shall be deemed as working hours. Conversely, if the employer hosts a picnic party, athletic event, etc. for the purpose of welfare, and if employees are free to participate in the event at their own discretion, it shall not be deemed as working hours even though employees attend such an event. (Jan 10, 89, gungi 01254-554)

If the company hosts a picnic party on a working day according to the company's operation rules, the wages for that day shall be paid accordingly. If the picnic party was held on a holiday, the wages payable on that holiday and ordinary wages to compensate for holiday work (the picnic party) shall be paid. (Jul 12, 79, gungi 1455-7105)

#### **6. Business travel**

##### **(1) Travel time between employee accommodations and the appointed workplace**

In calculating working hours for business travel, travel time to the workplace shall be included in working hours in principle, but when the workplace is on the way to the regular office, such travel time can be excluded from working hours. However, for long-distance business travel, travel time from the company's location to the workplace on business travel shall be included into working hours. (Jun 14, '01, gungi 68207-1909)

##### **(2) When the employee shall engage in business travel at night or during a holiday by order of the employer, such time shall be regarded as night time and holiday work.**

In cases where the employee carries out his duty in whole or in part outside the workplace for business travel or for other reasons, the calculation of working hours shall follow Paragraphs 1 and 2, Article 57 of the Labor Standards Act. In consideration of the concept of the same Article, if it is evident that the employee conducts business travel at night or during holidays by order of the employer, the night work and holiday work shall be considered as working hours. However, if the employee only travels to the workplace during the night or holiday, and does not engage in any business, it is hard to deem such travel time as night time work or holiday work. (Aug 5, 02, gungi 68207-2650)

## Working Conditions of Part-time Workers

In 2014, IKEA, a Swedish furniture company, entered Korea and recruited most of its field workers as part-timers working four hours a day, which shocked our society. This company was able to maintain better productivity than was normal in Korea while using part-time workers. It is very rare for Korean companies to use part-time workers as regular workers, mainly because they are employed as Alba, temporary or part-time low-wage workers in small businesses within the service sector. The proportion of part-time workers in Korea was only 10.8% in 2014, while it was 37.2% in the Netherlands, 27% in Japan, 24.9% in Britain, and 22.1% in Germany in the same period.<sup>29</sup> There are no differences in Korean labor laws compared to foreign labor laws regarding part-time workers: The working hours of part-time workers are shorter than those of regular workers, while their working conditions are similar to that of full-time workers.<sup>30</sup>

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

### I. Concept of the Part-time Worker

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

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

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

(ii) The number of contractual working hours per day for part-time workers is the number of hours divided by the number of days for a full-time worker for that period.<sup>31</sup> In other words, the calculation may vary depending on the total number of days worked by a full-time worker over a four-week period. Contractual working hours is defined as the working hours determined between the worker and the employer within the range of legal working hours, so the contractual working hours should be equal to or less than the legal working hours (Article 2 of the LSA).<sup>32</sup>

<sup>29</sup> Labor Ministry and Korea Labor Foundation, 「Introduction and Operational Guide of Time Selection System」, 2013.

<sup>30</sup> Hyungbae Kim, 「Labor Law」, 24<sup>th</sup> edition, Parkyoungsa, 2015, page 1287.

<sup>31</sup> The LSA Enforcement Rule, Article 9 [Attachment No.2]

<sup>32</sup> The LSA: Article 50 – 40 hours per week and 8 hours per day; Article 69 (Working hours for minors) 7 hours per day and 40 hours per week; Article 46 of the Occupational Safety and Health Act (Harmful and dangerous work) 6 hours per day and 34 hours per week.



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

(iii) The standard for full-time workers is defined as "full-time workers engaged in the same kind of job in the same workplace" in Article 2 of the "Act on the Protection etc. of the Fixed-Term and Part-Time Workers" (FPA). The court explained that whether or not the work of the employee selected as a comparable worker corresponds to the work of the same or similar type as the work of a part-time worker is not based on the work content as specified in the rules of employment or the employment contract, but on the basis of the work actually performed by full-time workers. However, even if the tasks they perform are not completely in agreement with one another and there are some variances in the scope, responsibilities and authority of the tasks, they are considered to engage in similar tasks unless there is a substantive difference in the content of the main task."<sup>33</sup>

## II. Legal Working Conditions of Part-time Workers

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

That is, even part-time workers are subject to all the provisions of the Labor Standards Act, but for statutory holidays and leaves, the principle of proportional working hours of ordinary workers is applied.<sup>34</sup>

### 1. Employment contracts and Rules of Employment

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

(ii) Rules of Employment (ROE): The employer may create Rules of Employment that apply to part-time workers separately from those that apply to full-time workers. If an employer wants to make or change the rules of employment, the employer shall seek consultation of the majority of the part-time workers to whom the ROE will apply. However, if the ROE are to be modified in a manner that is unfavorable to the part-time workers, the employer must obtain the consent of the majority of the part-time workers (Article 94 of the LSA). The purpose for this is to prevent the employer

<sup>33</sup> Supreme Court ruling on October 25, 2012: 2011do7045.

<sup>34</sup> For details, related information is in the Labor Standards Act and Article 9 of the LSA Implementation Rule attached, table number 2, the FPA, the Minimum Wage Act, etc.

from unilaterally lowering the working conditions of part-time workers.<sup>35</sup>

## **2. Wages**

(i) The wage calculation unit for a part-time worker is based on the hourly wage. If hourly wage is calculated as daily ordinary wage, the number of hours worked per day is multiplied by the hourly wage. (ii) The wage shall be paid in full to the worker directly in Korean currency, and shall be paid at least once per month on a fixed date (Article 43 of the LSA). (iii) For part-time workers, the average wage of 30 days or more for one year of continuous work shall be paid as severance pay. In this case, if the average wage is less than the ordinary wage, the ordinary wage must be paid as severance pay (Article 2 of the LSA). Also, in establishing a severance pay system for part-time workers, there should be no difference from that of the severance pay system for full-time workers. (iv) Even if there is no comparable full-time worker, the minimum wage under the Minimum Wage Act must be paid.

## **3. Working hours**

(i) The contractual working hours of part-time workers are strictly protected. The employer must obtain the consent of the part-time worker in cases of having the part-time worker work beyond the contractual working hours, and in instances such as this the Act (FPA) also stipulates that the part-time worker shall not work more than 12 additional hours from the contractual working time of one week. The employer shall pay part-time workers at least 50/100 of the ordinary wage for overtime work exceeding the contractual working hours within the legal working hours (8 hours per day, 40 hours per week). Under the Labor Standards Act, an additional wage of 50% or more of ordinary wage is paid only for overtime work exceeding legal working hours, but for part-time workers, payment of additional wages is prescribed even if the contractual working hours are exceeded within the legal working hours (Article 6 of the FPA). (ii) Part-time workers are also paid an additional 50% for holiday work as specified in the rules of employment, and 100% for holiday work exceeding 8 hours (Article 56 of the LSA). (iii) If a part-time worker performs night work between 10 pm and 6 am on the following day, the employer shall pay wages with an additional allowance equivalent to 50/100 (Article 56 of the LSA).

## **4. Holidays and annual paid leave**

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

(i) Holidays: An average of one paid holiday per week worked shall be guaranteed, for which the contractual working hours of one day must be paid. When calculating wages according to hourly wage, the employer shall pay an additional weekly holiday allowance. However, in the case of a part-time worker who has been employed for weekend or holiday work, the weekly holiday should be given as a paid holiday on a non-weekend day.

① Calculating 6 hours per day from Monday to Friday, 5 days' work per week for full-time workers and payment of KRW 10,000 per hour:  $[(30 \text{ hours} \times 4 \text{ weeks}) / (5 \text{ days} \times 4 \text{ weeks}) = 6 \text{ hours}]$ , results

<sup>35</sup> Supreme Court ruling on May 28, 1990: 90da19647.

in [6 hours x KRW 10,000 = KRW 60,000]. ② However, if full-time workers are working for 6 days a week: [(30 hours x 4 weeks)/(6 days x 4 weeks) = 5 hours], the result is [5 hours x KRW 10,000 = KRW 50,000].

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

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

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

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

### III. Prohibition of Discriminatory Treatment and the Exception of Applications

#### 1. Prohibition of discriminatory treatment

An employer shall not give discriminatory treatment to any part-time employee on the grounds of his/her employment status compared to full-time workers engaged in the same or similar kinds of work in the business or workplace concerned. It is necessary to pay various allowances etc. in accordance with the Rules of Employment and employment contracts, and not discriminate against ordinary workers. The subjects of discriminatory treatment are ① Wages<sup>36</sup>; ② Regular bonuses, holiday bonuses, etc. and bonuses paid regularly; ③ Incentives according to business performance; ④ Other matters concerning working conditions and benefits, etc. (Article 2 of the FPA) If a part-time employee has received discriminatory treatment, he/she may file a request for correction with the Labor Relations Commission; this shall not apply if six months have passed since such

<sup>36</sup> Article 2 of the LSA: The term "wages" in this Act means wages, salaries and any other money and valuable goods an employer pays to a worker for his/her work, regardless of how such payments are termed.

discriminatory treatment occurred (or since such treatment ended in cases of continuous discriminatory treatment). The procedures for this are the same as those for remedy application of an unfair dismissal case (Articles 8, 10 to 15 of the FPA). The employer shall not discriminate against the part-time worker for the reason that he has applied for correction of discrimination (Article 16 of the FPA). If the employer fails to perform the correctional order of the Labor Relations Commission without just cause, he shall be subject to a fine of up to KRW 100 million (Article 24 of the FPA)

## **2. Exceptions of applications for part-time workers**

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

If the employer sets the contractual working hours of one week to 14 hours, and concludes the employment contract by adding an additional 2 hours of fixed overtime work every day (for 5 days), the Ministry of Labor has decided that the total working hours, including fixed extended working hours, are defined as working hours actually taken, as long as there is no reason to believe otherwise. In such case, part-time workers are subject to severance pay. However, it is possible to exclude from fixed working hours if it is not fixed overtime work but extension work due to an agreement with the company at that time.<sup>37</sup>

## **IV. Conclusion**

The reason part-time workers have been subjected to relatively poor working conditions is that it is difficult to find the same kind of workers working in the same workplace, to be able to compare for discriminatory treatment. To protect against discriminatory treatment of part-time workers, it is necessary to expand the scope of full-time workers for comparison.<sup>38</sup> In addition, in the case of workplaces with fewer than 5 employees, legal correction for discriminatory treatment is not possible, as these workers are excluded from the protection of the labor laws, which is a blind spot in the labor law because it does not apply to overtime, night work or holiday work. Therefore, for the active use of part-time workers, it is necessary to gradually expand the scope of full-time workers to be compared and to apply the Labor Standards Act to workplaces with fewer than 5 workers, to reduce discriminatory treatment.

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<sup>37</sup> Labor Ministry Guidelines: Working Standards-5085, December 1, 2009..

<sup>38</sup> Park, Kyui-chun, "Legal Issues on Part-time Workers", 「Labor Review」, February 2008, Korea Labor Institute, page 25.

## **Driver of Director Paid Less than Statutory Allowances**

### **I. Introduction<sup>39</sup>**

The exclusive driver of a director (hereinafter referred to as “the Employee”) of Company A (hereinafter referred to as “the Company”) resigned after serving approximately 6 six years, and filed a petition to the Ministry of Employment & Labor for severance pay owed him, as well as statutory allowances for overtime, night, and holiday work, which were significantly different than what he received from the Company.

The Employee was hired by the Company on September 29, 2005 as a temporary employee and driver of the director’s car. He renewed his employment contract every year for four years, after which the Company made him a dispatched employee of another company due to the limitations on continued employment of fixed-term employees, and had him continue doing the same duties. The Employee resigned on August 13, 2011, after working two additional years. The reason the Employee filed the petition is because the Company just paid a fixed allowance for overtime exceeding the fixed overtime and holiday work. These fixed allowances were much lower than the allowances calculated by the Labor Standards Act, and the same situation existed for his severance pay.

The legal issues in this labor case were 1) overtime and holiday work allowances for an intermittent worker, 2) method used in calculation of overtime, night, and holiday work, 3) who was the employer responsible for payment of overtime for him as a dispatched employee, 4) Statute of Limitations regarding unpaid wages, and 5) method used in calculating average wages for severance pay.

### **II. Details of the Petition**

#### **1. The company’s fixed allowance and statutory requirement**

As the director’s exclusive driver, the Employee’s working hours were according to the director’s work schedule. While employed, the Employee constantly worked overtime hours exceeding the contractual working hours of 8 hours per day and 40 hours per week, as stipulated in the employment contract. Working hours were stipulated as between 9 am and 6 pm, with a one hour recess during that time. Wages included basic pay and a certain allowance which was set to cover a fixed overtime of two hours every day. For overtime, night, and holiday work, a fixed allowance was paid of a minimum ₩5,000 (for daily overtime exceeding 2 hours) and a maximum ₩80,000 (for holiday work exceeding 8 hours).

The calculation of statutory allowance according to the Labor Standards Act is not to pay a fixed allowance stipulated in the employment contract, but to multiply the number of overtime and holiday working hours with ordinary hourly wages, and then add 50% additional statutory allowance.

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<sup>39</sup> Mr. Park Kyuhee of KangNam Labor Law Firm handled this petition case from Nov 2011 to Feb 2012.

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**The Employee's employment contract: Article 2 (wages)**

① Wage details

Basic pay	₩2,086,000
Fixed OT allowance	₩783,000
Total	₩2,869,000 / month

② Overtime allowance for hours before 8 pm is replaced with the fixed OT allowance in ① above.

③ ₩5,000 for overtime beyond 8 pm, but before 10 pm;

₩10,000 for overtime beyond 10 pm, but before 12 am;

₩20,000 for overtime past 12 am.

④ ₩40,000 for holiday work of 4 hours or more; ₩80,000 for holiday work of 8 hours or more. (However, no pay will be given for fewer than 4 hours.)

**Related examples follow:**<sup>40</sup>

**1) Regular work day:** Arrived at 6 am on Wednesday, Nov 19, 2008. Started driving and finished at 2 am the following day for a total of 11 hours overtime and 4 hours night work.

→ Payment from the Company: ₩20,000 fixed overtime allowance.

→ Statutory allowance: 150% of 9 hours excluding 2 hours already included in the fixed OT allowance, plus 50% of 4 hours for night work. That is, 13.5 hours for overtime and 2 hours for night work equal 15.5 hours. Ordinary hourly wages of ₩9,980 x 15.5 hours = ₩154,690. As ₩20,000 was already paid, ₩134,690 is the amount due.

**2) Saturday work**<sup>41</sup>: Arrived at 7:30 am on Saturday, May 30, 2009, and finished working 12:20 am that night for a total of 16 hours overtime and 2.5 hours for night work.

→ Payment from the Company: Regarded as holiday work exceeding 8 hours, so

₩80,000 was paid as a fixed allowance.

→ Statutory allowance: 150% of 16 hours, plus 50% of 2.5 hours for night work. That is, 24 regular hours for the overtime and 1.25 (1¼) hours for night work equals 25.25 hours. Ordinary hourly wages of ₩9,980 x 25.25 hours = ₩251,995. As ₩80,000 was already paid, ₩171,995 is due.

**3) Sunday work:** Arrived at 5:30 am on Sunday, September 20, 2009, and finished working at 10:30 pm for a total of 16 hours holiday work, 8 hours for overtime and 30 minutes for night work.

→ Payment from the Company: ₩80,000 in fixed holiday allowance.

→ Statutory allowance: 150% of 16 hours for holiday work, 50% of 8 hours for overtime, and 50% of 0.5 hours for night work. That is, 24 regular hours for holiday work, 4 hours for overtime, and 0.25 hours for night work for a total of 28.25 hours. Ordinary hourly wages of ₩9,980 x 28.25 hours = ₩281,935. As ₩80,000 was already paid, ₩201,935 is the amount due.

<sup>40</sup> Working details were recorded in "car operation details" and calculated by the Company.

<sup>41</sup> Calculation of ordinary hourly wages: Monthly ordinary wage (₩ 2,086,000) / Monthly contractual working hours (209) = ₩9,980



## 2. Calculation of average wages to calculate severance pay

The Employee's employment contract stipulates, "30 days' average wages as severance pay are payable to employees who serve one year or more, upon contract expiry." In calculating average wages, the Company included only the basic pay and fixed OT allowance into the total amount of wages received for the three months prior to the date of resignation, excluding other allowances. In addition, the Company also paid his severance pay every year when his employment contract was renewed. The average wages calculated under the Labor Standards Act shall include not only basic pay and fixed OT allowance, but also meal and statutory allowances like overtime, night work, and holiday work. The Employee requested that the excluded allowances be calculated as part of his severance pay.

## 3. Details of unpaid wages

(1) Unpaid statutory allowances: ~~₩93,961,874~~

	Employment	Actual Payment	Statutory Allowance	Difference
Company A (Employment: Sep '05 ~ Sep '09)	<b>Application<sup>42</sup>: Dec '08~Sep '09</b>	₩15,064,200	₩27,547,762	₩12,483,562
Dispatch Co B	Sep 09~Aug 11	₩18,900,000	₩100,378,312	₩81,478,312

(2) Unpaid severance pay: ~~₩10,946,582~~

	Employment	Daily Average Wages	Severance Pay	Difference
Company A (Employment: Sep '05 ~ Sep '09)	<b>Application<sup>43</sup>: Aug '08~Sep '09</b>	₩80,928 (actual: ₩186,374)	Paid: ₩2,382,837 (actual: ₩5,591,234)	₩3,208,397
Dispatched to Company B	09.09~11.08	₩102,933 (actual: ₩257,078)	Paid: ₩5,841,880 (actual: ₩13,580,065)	₩7,738,185

(3) Total amount claimed: ~~₩104,908,456~~

## III. Major Issues

### 1. Overtime and holiday work allowances for an intermittent worker

Generally, drivers of directors have long working hours, with the majority of these hours spent waiting, so it is not really fair to consider a driver's working hours as equal to a regular employee's working hours. Due to this, companies who receive permission, can be exempt from paying additional overtime and holiday work allowances. However, the Company in this case did not receive exemption from the

<sup>42</sup> Due to the three year Statute of Limitations, the Employee only claimed what was due for the applicable period.

<sup>43</sup> As the employment contract was renewed each year, severance pay was paid yearly, so severance pay for the previous three years has been claimed."

## Driver of Director Paid Less than Statutory Allowances

Minister of Employment & Labor, so statutory allowances cannot be excluded, and the driver's allowances shall be recalculated according to the Labor Standards Act.

**【The Labor Standards Act】 Article 63 (Exceptions to Application)**

The provisions as to working hours, recess, and holidays shall not be applicable to workers who are engaged in any of the work described in the following subparagraphs: 3. surveillance or intermittent work, for which the employer has obtained the approval of the Minister of Employment & Labor.

**【Administrative Guideline】** Kungi 68207-1215, Oct 2, 2003

Even though the work characteristic is surveillance or intermittent work, if the employer has not obtained approval from the Minister of Labor, provisions in the Labor Standards Act concerning working hours, recess, and holiday shall apply.

## 2. Method of calculation for overtime, night work, and holiday work

The Company paid fixed allowances for the driver's overtime, night and holiday work. However, until obtaining approval for exemption "for a surveillance or intermittent worker", the Company shall pay additional statutory allowances for overtime, night and holiday work exceeding the legal standard working hours just like it would for ordinary workers. In cases where the Company pays fixed allowances for overtime, night and holiday work, if the fixed allowances exceed the statutory allowances, it is allowed. However, if the fixed amount is lower than statutory allowances, the Company shall pay the additional amount.

## 3. Employer responsible for payment of overtime for dispatched employees

Article 34 of "The Act Relating to Protection, etc. for Dispatched Workers" (Special cases relating to application of the Labor Standards Act) regulates that the sending employer is regarded as the employer responsible for matters concerning employment and wages, and that the using employer is regarded as the employer for matters concerning working hours. Accordingly, the sending employer directly determined and paid such wages as monthly salary, meal allowances and the fixed overtime allowance stipulated in the Employee's employment contract, but the using employer paid the Employee additional variable overtime allowances exceeding the fixed overtime allowance, as decided by the Company's regulations (according to its car operation records). Therefore, the using employer shall be responsible for statutory allowances for additional work performed as requested by the Company.

## 4. Status of Limitations regarding unpaid

According to Article 49 of the Labor Standards Act (Prescription of Wages), as the statute of limitation to exercise a claim for wages is three years, the Employee can claim his unpaid statutory allowances and severance pay for the past three years, and not the past six.

## 5. Method of calculating average wages for severance pay

Severance pay is calculated based upon average wages, and upon the total amounts paid in meal, overtime, night work, and holiday work allowances, but the Company intentionally excluded these.

- 1) As long as the meal allowance is paid periodically and uniformly, this cannot be pure welfare or a bonus expressing favor, but shall be regarded as money characteristic of wages paid as remuneration for labor service. (Supreme Court, 2001do1186, May 15, 2001)
- 2) As the total wages calculated for average wages are any money and valuable goods an employer pays to a worker for his/her work, what the worker receives continuously and regularly, and what the employer has to pay according to the collective agreement and Rules of Employment, regardless of how such payments are termed, the holiday work allowance shall be included [in calculation of severance pay]. (Supreme Court 91da5587, April 14, 1992)
- 3) As the overtime allowance is not money paid under friendly and favorable conditions, but rather, is the remuneration that the employer has to pay for an employee's work, regardless of its label, the overtime allowance shall be included into average wages when calculating severance pay. (Seoul District Court 2005na175, May 26, 2005)

## IV. Conclusion

This petition case for unpaid allowances is a case of wages that were unpaid due to the HR manager's ignorance of labor law and lack of work-related preparation. The Company concluded this case by paying the difference between what they had already paid in fixed amounts and the statutory allowances occurring due to actual work. Through this case, the Company learned to recognize the fact that wages remained unpaid from a neglect to follow the procedural rules and calculation methods under labor law, even though the company paid enough regular wages.

This case happened because the Company was used to paying fixed allowances for overtime, night and holiday work over a long period of time, due to the convenience of calculation. 1) If the Company had adjusted its wages by reducing the basic pay and increasing fixed allowances, or 2) if the Company had previously submitted to the Labor Office "an application for exemption for surveillance and intermittent workers" and received the necessary approval while keeping the current wage system, there would have been no problem related to unpaid wages. Accordingly, companies are required to understand the wage rules in the Labor Standards Act first, before establishing their wage systems.

## Petition for Unpaid Weekly Holiday Allowance

### 1. Summary

On Sep 21, 2009, a Korean cook (hereinafter referred to as “the employee”) who worked at a US Army restaurant based in Korea applied to the Seoul Regional Labor Office for his unpaid weekly holiday allowance. The employee claimed that his monthly salary was calculated by multiplying his actual working hours by an hourly wage rate and then allowances, like bonuses, were included, but he did not receive anything called a weekly holiday allowance. He therefore asked that the company pay him the unpaid weekly holiday allowance from the previous three years until the present time. The Labor Inspector investigated the claims of both parties related to the case and concluded on Jan 12, 2010, that the company did not violate any related laws.

### 2. The Employee’s Claim

According to his employment contract, the restaurant employee received an hourly wage, paid every month, in the amount calculated by multiplying the actual working hours by the hourly wage rate, plus an amount reflecting the Welfare Benefit allowance & PIK allowance, as well as a monthly bonus calculated by dividing 700% of the annual bonus by 12. The employee has not received anything called a weekly holiday allowance in his salary. Monthly wages have been always variable according to the hours worked each month because the wage structure was not a monthly wage system but an hourly wage system. Accordingly, as the company has not paid a fixed monthly wage, but paid different wages every month according to the number of hours worked, the company should also pay a weekly holiday allowance.

### 3. The Employer’s Claim

When paying wages in an hourly wage system, the company calculated the wages as (working hours × hourly wage rate) and, instead of adding a weekly holiday allowance, included a fixed monthly ‘benefit allowance’ and ‘PIK’ allowance, which was an amount exceeding the weekly holiday allowance. Given that this is the case, how would it be possible for the company to pay 700% of the annual bonus (divided into 12 months), as well as subsidize middle and high school students’ tuition while neglecting to pay the statutory weekly holiday allowance? As the company has paid an amount equivalent to the weekly holiday allowance each month, even though the company did not call it a weekly holiday allowance, this amount can replace the weekly holiday allowance.

### 4. Related Administrative Guidelines

#### (1) Inclusion or non-inclusion of paid weekly holiday (Jul 8, 2008; kunrokijun-2455)

If an employer pays employees according to a monthly wage system, the monthly wage shall be considered to include a paid weekly allowance, if there are no exceptional situations (Supreme Court ruling 93 da 32514). If the employee receives fixed allowances along with basic hourly wages every month in a monthly wage system, such fixed allowances shall be interpreted to have similar characteristics as wages for paid weekly holiday allowance (Supreme Court ruling 97 da 28421).

**(2) The weekly holiday does not normally apply to daily workers, but if a daily worker works for six consecutive days, a paid weekly holiday shall be provided. (Apr 2, 1997, Gungi 68207-424)**

Weekly holiday allowance under the Labor Standards Act shall be given to a worker who fulfills his/her weekly contractual working hours. However, in principle, the weekly holiday shall not be given to daily workers because it is not possible to calculate weekly contractual working hours for daily workers, as they engage in daily employment contracts.

The purpose for providing a weekly holiday is to reduce the accumulated fatigue on workers after one week's work, thereby helping to protect their health, and to provide time to participate in social and cultural activities. If a daily worker works for 6 consecutive days per week without absence, actual working days, and not contractual working days, shall be applied and weekly holiday shall be granted. The employer shall pay weekly holiday allowance separately from wages for daily workers, unless the affected worker agrees to receive the weekly holiday allowance in advance, with their daily wages.

**5. Judgment on the Case**

The labor inspector in charge of this case concluded that the company has paid weekly holiday allowance to the employee as the company paid monthly wages based on the hourly wage system and added a regular allowance for each month, which was an equivalent amount to the weekly holiday allowance. If, in this case, the company had paid wages by multiplying the actual working hours by the hourly wage rate without a monthly regular allowance, only adding a monthly bonus calculated for the annual 700% bonus, the company would have to pay all employees, including the employee in this case, all unpaid weekly holiday allowances for the past three years.

## Contractual Holidays and Contractual Leave

An important question every company needs to have an answer to is whether it is required to provide paid off-days on public holidays and paid leave in cases where an employee was absent due to sickness caused by non-occupational activities. In short, if the public holidays are statutory holidays, and if sick leave is statutory leave, the answer is “Yes”. In some cases, it is left to the company’s discretion, or the requirements of the collective agreement or Rules of Employment. That is, in cases where these days are stipulated as paid off-days according to labor law, they become statutory holidays and statutory leaves. However, if they are not so stipulated, whether to pay or not is the company’s decision, upon which they would be considered contractual holidays and contractual leaves. Only Labor Day and the weekly holiday are legally considered statutory holidays. All other public holidays are contractual holidays, along with any other holidays approved by the company. “Statutory leave” refers to annual paid holidays, maternity leave, and paternity leave, etc., while “contractual leave” consists of congratulatory and condolence leave, sick leave, and summer leave, etc. I’d like to look into this in more detail, as well as examples of application.

	Statutory	Contractual
Holiday	1) Weekly Holidays (Article 55) 2) Labor Day (Establishment of Labor Day on May 1st)	1) Public holidays 2) Company holidays (e.g. Company foundation day)
Leave	1) Annual paid leave (Article 60) 2) Maternity/paternity leave (Article 74)	1) Congratulatory/condolence leave; 2) Sick leave; 3) Summer leave
Remarks	1) Obligated by law 2) Wage is paid	1) Based upon collective agreement, Rules of Employment, etc. 2) Issue of payment depends on mutual agreement

### I. Contractual holidays

#### 1. Concept

Unlike statutory holidays, contractual holidays must be stipulated in the Rules of Employment or collective agreement in order to be legally recognized as paid or unpaid holidays. Statutory holidays shall be granted on particular dates and if work is done on those days, the company shall pay an additional holiday work allowance. Statutory holidays consist of a weekly holiday (Article 55 of the LSA: An employer shall allow a worker on the average one or more paid holidays per week) and Labor Day (Act Concerning Establishment of Labor Day: The day of May 1<sup>st</sup> shall be proclaimed as Labor Day and is a paid holiday as determined by the National Labor Relations Commission.) However, contractual holidays are determined exclusively by the employer regarding particular dates and whether the holidays are paid or unpaid. If an employee works on a holiday stipulated as paid, the company shall pay an additional overtime allowance.



## **2. Types of contractual holidays**

### **(1) Public holidays**

Public holidays refer to off-days for public workplaces as designated by Regulations Regarding Off-days for Public Offices. Accordingly, public holidays apply only to government employees in principle, and cannot be taken for granted as paid off-days for private sector employees as they are not stipulated as holidays according to labor law, unless they are stipulated as such in the collective agreement and the Rules of Employment. Public holidays, according to Regulations Regarding Off-days for Public Offices (Presidential Decree 24273, Dec 28, 2012) include: Sunday; Independence Movement Day, National Liberation Day, National Foundation Day, Hangeul Proclamation Day, New Year's Day (Jan 1<sup>st</sup>); Lunar New Year's Day (Dec 31~Jan 2 according to the lunar calendar), Thanksgiving Day (Aug 14~16 according to the lunar calendar); Buddha's Birthday (Apr 8 according to the lunar calendar), Christmas Day (Dec 25), Children's Day (May 5), Memorial Day (Jun 6), and Election Day (designed to elect new officials due to expiration of their term in accordance with the Public Official Election Act), and other particular days specified by the Government.

### **(2) Corporate holidays (Company Foundation Day, etc.)**

Corporate holidays refer to paid off-days, such as Company Foundation Day, Labor Union Day, etc., that the company has designated in the collective agreement and the Rules of Employment.

## **3. Relationship between labor law and contractual holidays**

(1) It is generally accepted that public holidays shall be considered paid off-days as statutory holidays, but as mentioned earlier, legally-recognized statutory holidays are only Labor Day and weekly holidays. In fact, many companies stipulate public holidays as paid off-days and most employees view them as paid holidays, but it is not a violation of labor laws should companies stipulate these public holidays as unpaid off-days or use annual paid leave for off-days on these public holidays.

(2) In cases where contractual holidays are settled as paid off-days, employees are exempted from provision of labor, and if employees had to work on contractual holidays like paid public holidays, they are entitled to paid wages (100%), which are already included in monthly wages, and additional holiday work allowance (150%) (Article 56 of the LSA: Additional Allowances).

## **II. Contractual Leave**

### **1. Concept**

Contractual leave refers to paid vacation, free of labor provision in accordance with employer approval, a collective agreement or the Rules of Employment. Such leaves include congratulatory and condolence leave, sick leave, summer vacation, and other special leave, etc. Contractual leaves are not statutory like annual paid leave, or maternity/paternity leave, but are introduced to maintain traditional Korean values and improve employee well-being, and can be stipulated as paid,

## Contractual Holidays and Contractual Leave

partially paid, or unpaid leaves. A company that does not stipulate these contractual leaves is not in violation of the Labor Standards Act.

## 2. Types of contractual leave

### (1) Congratulatory and condolence leave

Many companies provide congratulatory and condolence leaves for wedding and funeral services in accordance with traditional Korean rituals. Although the coverage and number of leaves vary from company to company, these leaves are granted as an addition to annual paid leaves. A maximum of five leave days are given for an employee's wedding as congratulatory leave, a maximum of five days are given as condolence leave in the event of the death of an employee's direct family member, and one day is given for a parent's 60<sup>th</sup> birthday.

### (2) Sick leave

Should an employee be unable to carry out his/her duties due to non-occupational injury or illness, the employee shall use annual paid leave to receive medical treatment and shall bear the medical expenses him/herself as there is no statutory sick leave. Government employees can use up to 60 days per year sick leave according to Article 18 of the Government Employee Service Regulations (Sick Leave). In the private sector, if an employee has used up all his/her annual leave days, he/she may request unpaid leave to take care of illness or injury. If the employee has to continually be absent in order to receive treatment for his/her illness or injury, the company can dismiss the employee for reasons attributable to the employee. Many companies have some restricted types of sick leave, such as follows.

Type 1	No regulation for sick leave days. Annual paid leave shall be used instead.
Type 2	"The company may grant unpaid sick leave of up to 90 days per calendar year.
Type 3	"If an employee requires an extended time of absence due to accident or illness unrelated to his/her duties, he/she may request to use paid leave. The period shall not exceed 14 calendar days, provided that the accrued annual leave has been used up already."
Type 4	"In case of a leave of absence due to non-work related injury or illness, 90% of monthly ordinary wage shall be paid for the first month, 70% of monthly ordinary wage for the second month and 50% of monthly ordinary wage for the third to sixth months."

### (3) Summer vacation

Summer vacation refers to contractual leave granted of a maximum one week besides annual paid leave during the heat of the summer in order to promote employee morale. This summer leave is used collectively by production companies, while smaller companies generally use annual paid leave days as summer vacation.

## 3. Relationship between labor law and contractual leave

### **(1) It is impossible to change the date for congratulatory or condolence leave or to apply for it retroactively** (Gungi 68207-1452, Sep 14, 1994)

Congratulatory and condolence leave refers to paid leaves granted on particular days or for a particular period to the corresponding employee in accordance with the collective agreement or Rules of Employment so that the employee can participate in congratulatory or condolence events. It is not possible to change the period of leave nor retroactively apply for them.

**(2) Congratulatory and condolence leave not granted during labor strikes** (Gungi 68207-883, Dec 15, 1999)

According to the Labor Standards Act (LSA), “holiday” refers to a day when the employee is exempted from the provision of labor for the employer, while “leave” refers to days exempted from the obligation to provide work even though the employer is available to receive the labor service. While contractual holidays or contractual leaves stipulated by a collective agreement or Rules of Employment are not statutory holidays exempted from work provision according to the Labor Standards Act (LSA), they are to be exempted from work provision on working days due to special agreement between employer and employee. Accordingly, if there is a certain condition where the employer, in reality, could neither receive the employee’s labor nor exempt him/her from providing labor, then the contractual holiday or contractual leave cannot occur. However, for those who did not participate in strikes during labor disputes, whether a contractual holiday or contractual leave occurred should be judged according to whether the employer could receive the employee’s labor or not.

**(3) Calculation of average wages during periods of leave** (Retirement Pension Dept-518, Oct 21, 2008)

“Average wages” where an employee came to resign after a period of leave from work that the employee took with approval from the employer due to non-occupational injury, illness or other reason shall be calculated as follows: “average wages” to calculate severance pay refer to the amount calculated by dividing the total amount of wages paid to the relevant employee during three calendar months prior to the date of calculation by the total number of calendar days during those three calendar months (Article 2 of the LSA). If the amount calculated by this method is lower than the ordinary wages of the employee concerned, the amount of the ordinary wages shall be deemed as average wages. In cases where the period of calculating average wages includes the period falling under a period of leave from work with approval from the employer caused by non-occupational injury, illness, or other reason, the period and wages paid for that period shall be deducted respectively from a basis period for the calculation of average wages and the total amount of average wage (Article 2 of Enforcement Decree of the LSA). Therefore, in cases where an employee took a leave of absence for non-occupational injury, illness or other reason in accordance with Article 2 (8) of the Enforcement Decree of the LSA (with approval from the employer), the remaining period and wages excluding the period mentioned above shall be used for the calculation of average wages. If the leave of absence exceeds three months, the first day of the leave of absence shall be the date for calculating average wages based on the previous three months. In any case, if the amount calculated above is lower than the ordinary wages of the employee concerned, the amount of the ordinary wages shall be deemed as average wages.

**(4) In cases where change of contractual leave is considered a disadvantageous Rule of Employment** (Working Conditions Inspection Team-1774, Mar 25, 2009)

A particular company has provided 5 to 10 days of ‘health vacation’ per year according to rank and length of service, but did not set any restrictions on the time of use. If it were to later decide to allow its use only after annual paid leave is used up, this would be restricting free use of the contractual leave, and so would be acceptable and applicable after consent is received according to the appropriate procedures (Article 94 of the LSA).

## **<Case Study>**

# **Managing Director's Overtime Work Allowance and Unused Annual Leave**

In the Seoul office of a foreign company (hereinafter referred to as “the Company”) that hired about 300 employees and is engaged in the apparel business, a labor case has occurred due to escalating disputes between directors in April 2015. With two departments of the Company combining into one department, the executive managing director told the managing director that it would be not desirable to have two directors in one department, and told the managing director that she needed to resign from the Company. The managing director (hereinafter referred to as “the Employee”) told the Company that she would sue it for violating the Labor Standards Act and would also report additional claims of other employees unless the Company paid her a severance bonus of two years’ annual wages. The Company responded that it did not order the Employee to resign, rejected her demand for a severance bonus, and explained that the Company had not violated the Labor Standards Act. Just after that, the Employee began a lawsuit against the Company and visited the Gangnam Labor Office to claim the Company had violated the Labor Standards Act, and had not paid annual leave allowance for unused leave or additional allowance for her overtime work.

There are two main items in these accusations: First, the Company has regulated in the Rules of Employment that it would not compensate for unused annual leave and instead would promote the use of annual leave, which the Company did through individual emails to all personnel. Where the promotion of using annual leave has been done through email, the main point is whether or not the Company must give financial compensation for unused leave. Second, as the Employee’s job title as the managing director placed her in the “directors” group, the question is whether or not this high position is included in ‘persons to be excluded from the application of working hours, recess and holidays’ stipulated by the Labor Standards Act. Herein, I would like to look substantially into these two main points of dispute to confirm whether or not the Company had violated the Labor Standards Act.

## **I. Measures for Promoting the Use of Annual Leave**

### **1. Current situations**

The Company regulated in the Rules of Employment that it would not compensate for unused leave, and had informed personnel of the number of available annual leave days in the early part of the year, and sent similar emails again after six months to the Employees to actively promote the use of annual leave. And then in October it notified each individual employee by email that he or she needed to use his/her remaining annual leave days by the end of the year, and if they did not, there would be no financial compensation for unused leave. In reality, the Company has not paid any allowance for unused annual leave so far.

## 2. Related law and guideline regarding measures for promoting use of annual leave

### (1) Regulation of the Labor Standards Act (LSA)

The current LSA regulates the provision of 'promoting the use of annual paid leave' in relation with 'annual paid leave'.<sup>44</sup>

### (2) Related guideline

The 'written document' mentioned in Article 61 of the LSA refers to a paper document. Electronic documents are only possible in exceptional cases where the company has handled every operation by means of electronic documents in the process of its drafting, obtaining approval and implementing through equipped electronic work-processing systems (Guideline Gunjung-1128, Feb. 7, 2012). Accordingly, informing by email in the course of promoting the use of annual leave cannot be regarded as the notification by written document (Guideline Gujung-6488, Nov 1, 2013).

If the employee has submitted a vacation plan with stipulated dates of leave after the employer has promoted the use of annual leave, the stipulated dates of leave shall be regarded as the employee's declaration of intention to use his/her annual leave. Provided, in cases where the employee comes to work on the stipulated date of leave, if the employer received the employee's labor and did not express a rejection of his/her coming in to work, it shall be regarded that the employer has approved the labor service on the expected date of leave, and so the employer shall pay an unused leave allowance (Guideline Limjang-285, Oct 21, 2005).

## 3. The Employer's countermeasures

The Company has promoted the use of annual leave through email, but has not done so through written documents. Also, the Company did not evidentially reject the provision of the employee's labor when the employee provided work on dates expected to be used as annual leave. Based upon these facts, the employer recognized that it had not taken measures promoting the use of leave as

<sup>44</sup> **Article 60 (Annual Paid Leave)** (1) An employer shall grant 15 days' paid leave to a worker who has registered not less than 80 percent of attendance during one year.

(2) An employer shall grant one day's paid leave per month to a worker whose consecutive service period is shorter than one year or whose attendance is less than 80 percent, if the worker has offered work without absence throughout a month.

(3) In case an employer grants a worker paid leave for the first one year of his/her service, the number of leave days shall be 15 including the leave prescribed in paragraph (2), and if the worker has already used the leave prescribed in paragraph (2), the number of used leave days shall be deducted from the 15 days of leave.

(4) After the first year of service, an employer shall grant one day's paid leave for each two years of consecutive service in addition to the leave prescribed in paragraph (1) to a worker who has worked consecutively for 3 years or more. In this case, the total number of leave days including the additional leave shall not exceed 25.

(7) The leave referred to in paragraphs (1) through (4) shall be forfeited if not used within one year. However, this shall not apply in cases where the worker concerned has been prevented from using the leave due to any cause attributable to the employer.

**Article 61 (Promoting the Use of Annual Paid Leave)** If a worker's leave has been forfeited for non-use pursuant to Article 60 (7) despite the fact that the employer has taken measures described in any of the following subparagraphs to promote the use of paid leave prescribed in Article 60 (1), (3) and (4), the employer shall have no obligation to compensate the worker for the unused leave, and shall not be deemed to have caused the non-use through reasons attributable to the employer's action(s) under the proviso of Article 60 (7):

1. Within the first 10 days of the six months before unused leave is to be forfeited pursuant to Article 60 (7), an employer shall notify each worker of the number of his/her unused leave days and urge them **in writing** to decide when they will use the leave and to inform the employer of the decided leave period; and

2. If a worker, despite the urging prescribed in subparagraph (1), has failed to decide when he/she will use whole or part of the unused leave and to inform the employer of the decided leave period within 10 days after they were urged, an employer shall decide when the worker uses the unused leave and **notify the worker of the decided leave period in writing** no later than 2 months before the unused leave is to be forfeited pursuant to Article 60 (7).

stipulated by the LSA, and then paid unused annual leave allowance for the past three years in the salary payment for June 2015.

## **II. Overtime Work Allowance for Managerial and Supervisory Positions**

### **1. Current situation**

The Employee claimed that she had never received any additional allowance for overtime or holiday work during her service period, and that she was entitled to additional allowances for overtime and holiday work for the past three years. The Employee requested the information of her office PC's "on-and-off" data to check her working time as she had not recorded it in the related documents.

The Company responded that the Employee is not entitled to overtime work allowance or holiday work allowance due to her high position as the managing director, putting her in a managerial and supervisory position according to Article 63 of the LSA.

### **2. Related law, guideline and judicial ruling regarding overtime work allowance for personnel in managerial and supervisory positions**

#### **(1) Regulation of the LSA**

Article 63 (Exceptions to Application) of the LSA regulates that the provisions regarding working hours, recess and holiday shall not apply to managerial and supervisory positions.<sup>45</sup>

#### **(2) Related guideline**

'The provisions of Chapter 4 and Chapter 5 as to working hours, recess, and holidays shall not apply to persons engaged in management and supervision' (Article 63 (4ho) of the LSA and Article 34 of its Enforcement Decree). Here, 'persons engaged in management and supervision' refers to those in managerial positions in the decision-making process of working conditions. This position shall be determined collectively in consideration of whether the person participates in deciding labor management or has authority for supervision and control in labor management regardless of his/her formal designation, whether the person's working hours are strictly regulated (such as time to arrive at and leave the workplace), whether the person receives a special allowance due to the position, etc.

Administrative guidelines explain, for those in the position of 'section manager' who are authorized to plan and implement general duties and detailed job assignments for their subordinates, and control their business trips, overtime, and vacations, even though the section manager did not receive a special allowance in accordance with that position, if the section manager has not been strictly regulated in time of arrival at and leaving the workplace, the section

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<sup>45</sup> **Article 63 (Exceptions to Application)** The provisions of this Chapter and Chapter V as to working hours, recess, and holidays shall not apply to workers engaged in any of tasks described in the following subparagraphs:

1. cultivation of arable land, reclamation work, seeding and planting, gathering or picking-up or other agricultural and forestry work;
2. livestock breeding, catch of marine animals and plants, cultivation of marine products or other cattle-breeding, sericulture and fishery business;
3. surveillance or intermittent work, for which the employer has obtained the approval of the Minister of Employment and Labor;
4. any other work prescribed in Presidential Decree. [Implementation Decree (Article 34) - "Work provided for in Presidential Decree" means **managerial and supervisory work** and work of handling confidential information, irrespective of the type of business.]



manager shall be considered as a person who is in line with the employer in determining working conditions and other forms of labor management (Guideline Kunjung-41, Mar 3, 2011).

**(3) Judicial ruling**

The Supreme Court (February 28, 1989, 88daka2974) ruled that working hours, recess and holidays stipulated by the Labor Standards Act do not apply to persons in a managerial and supervisory position in terms of deciding subordinates' working conditions, and does not have their times of arrival at and leaving the workplace strictly regulated, and is managing his/her own working hours flexibly. Persons in this position cannot receive additional allowance for overtime work exceeding contractual working hours or holiday work according to the Labor Standards Act.

**3. The Employer's countermeasures**

Even though the 'managing director' for the foreign company in this case has a considerably high position, it is not clear whether this high ranking person is working just as a manager, and not a department head which would place her in a managerial and supervisory position.

The Employee in this case is not a department head due to the combination of two departments, but has received the high salary of a director, twice the incentives of other employees, and her time of arrival at and leaving the workplace has not been strictly controlled as it has been for other employees. In consideration of these facts, the Gangnam Labor Office in charge of this case concluded that the Employee in this case is in a managerial and supervisory position and can be excluded from the provisions on working hours, recess and holiday provisions in Article 63 of the Labor Standards Act. In the end, as the Employee recognized that she could not receive a severance bonus from the Company, she withdrew the lawsuit and instead of resigning, took childcare leave.

## Annual Paid Leave

- **When an employment contract expires before the employee uses their Annual Paid Leave, how much can he/she receive as Annual Paid Leave allowance? (May 27, 2005, Supreme court, section 3, 2003da 48549, 2003da 48556)**

The right to use Annual Leave as paid days off is acquired definitely as remuneration for labor when the employee has worked for a one-year period. As soon as the employee acquired the right of Annual Paid Leave, his employment was terminated due to retirement, etc. before using his Annual Paid Leave. In this case, while the right to use Annual Leave requires continuous labor service, this cannot be granted due to retirement. However, the right to request Annual Leave allowance does not require continuous labor service and so shall be compensated as a paid allowance. Accordingly, the employee can request the Annual Leave allowance equivalent to the whole number of Annual Leave days unused up to the employment termination date.

**Guides related to the right for Annual Paid Leave, allowance, and allowance for unused leave**

《Wage & working-hours policy team, September 21, 2006》

### I . Background for the guides

There were differing opinions between an existing Administrative Interpretation and a Supreme Court ruling (Supreme Court ruling 2004 da 48549, 48556, May 27, '06) about the payment of Annual Paid Leave in the event that the employee quit without using all of the Annual Paid Leave. The judicial ruling stated that the employer shall pay the Annual Paid Leave allowance recognized as paid leave, even though there was no period available for using the leave due to his retirement. On the other hand, the administrative interpretation explained that the employer does not have to pay the leave if there was no period available to use the leave. This administrative interpretation was revised to agree with the judicial ruling. However, the allowance for unused Annual Paid Leave occurred due to retirement shall not be included in the "basic salary items required for calculating severance pay".

### II . Concept

#### 1. Right to request Annual Paid Leave

Annual Paid Leave is designed to maintain an efficient labor force and provide a civilized life through the spiritual and physical rest of employees who attended fully during the preceding year. Accordingly, an employer shall grant 15 days of paid leave to an employee who has an attendance rate of 80 percent or higher in the preceding year. (Article 60 (1) of the Labor

Standards Act). An employee is granted the right of Annual Paid Leave according to the attendance rate of the preceding year.

## **2. Right to request unused Annual Paid Leave allowance**

The right to request unused Annual Paid Leave allowance is the right to ask for allowance of unused Annual Paid Leave for the number of unused Annual Paid Leave days, if the employee provided labor service without using Annual Paid Leave accrued as remuneration for work for the previous year. This right occurs after the right to request Annual Paid Leave expires. There is also the right to ask for an allowance of unused Annual Paid Leave for the number of unused Annual Paid Leave days due to the termination of an employment contract, for example, with retirement. However, when the employer takes measures to promote the use of Annual Paid Leave, the right to request unused Annual Paid Leave allowance expires. (Article of 60 of the LSA).

### **※ Employer measures to promote the use of Annual Paid Leave (Article of 61 of the LSA)**

1. Within the first 10 days of the six months before unused leave is forfeited, the employer shall notify each worker of the number of his/her unused leave days and urge them in writing to decide when they would prefer to claim the leave and to inform the employer of the decided leave period; and
2. Notwithstanding the notification prescribed in Subparagraph (1), if a worker fails to decide when to use the whole or part of the unused leaves, the employer shall decide for the worker when to use the unused leave and notify the worker of the decided leave period in writing no later than 2 months before the unused leave is forfeited.

## **III. Payment and scope of (unused) Annual Paid Leave allowance**

### **1. Annual Paid Leave allowance**

When the employee uses Annual Paid Leave, the employer shall grant paid leave with ordinary wages or average wages during the period of leave in accordance with employment rules or other regulations. (Article 60 (5) of the LSA).

### **2. Unused Annual Paid Leave allowance**

The right to request unused Annual Paid Leave allowance occurs on the day after the right to request Annual Paid Leave expires, if the employee provided labor without using Annual Paid Leave accruing as remuneration for work for the previous year. In this case, the employer shall grant ordinary wages or average wages for the unused leave days of Annual Paid Leave during the previous year in accordance with employment rules or other regulations.

It cannot be seen as a violation of the Labor Standards Act when the company in the Rules of Employment regulates that unused Annual Paid Leave allowance is paid on the first payment day since the right to request Annual Paid Leave expires.

In case of an employee who retires, the right to request Annual Paid Leave occurs in the retired year (e.g., in 2006) according to the attendance rate of the year before the retired year (e.g., in 2005) and expires because of termination of the employment. In this case, the employer shall pay ordinary wages or average wages stipulated by the employment rules or other regulations for the unused days of Annual Paid Leave within 14 days of retirement, even though there is no period left to use Annual Paid Leave.

◆ Annual Paid Leave shall be calculated from the starting day of actual labor service, such as the employment date, in principle, but can be provided in a collective manner during the fiscal year in order to promote convenience in labor management according to the Rules of Employment or the Collective Bargaining Agreement. In this case, the right to request unused Annual Paid Leave allowance occurs on the first day of the year after the current year available to use Annual Paid Leave.

#### **IV. Whether to include Annual Paid Leave allowance into average wages to calculate severance pay**

##### **1. Unused Annual Paid Leave allowance already occurred before retirement**

By the criteria of the attendance rate during the year prior to the retired year, 3/12 of the unused Annual Paid Leave allowance among Annual Paid Leave occurring the year prior to the retired year shall be included into “the basic wage items to calculate average wage for severance pay”.

##### **2. Unused Annual Paid Leave allowance occurred just because of retirement**

The unused Annual Paid Leave allowance that the employee is granted just because of retirement in the retired year according to the attendance rate of the year before the retired year shall not be included into “the basic wage items to calculate average wage for severance pay”, because the unused Annual Paid Leave allowance is not wages paid during the calculation of the average wage.

#### **V. Substitution of Annual Paid Leave**

The employer may, by a written agreement with the labor representative, have employees take a paid leave on a particular working day in substitution for an Annual Paid Leave. (Article 60 of the LSA). The particular working day means a particular day among contractual working days required for labor duty. Accordingly, the employer cannot substitute a paid leave pursuant to Article 60 of the LSA with contractual holiday and leave as well as statutory holiday and leave.

## VI. Other implementation matters

The administrative interpretations in violation of this guide shall be abolished at the time of implementation of this guide. When the employer trusted the previous administrative interpretations and did not pay the retired employee the related wage, he will not be responsible for his violation of Article 42 (Payment of Wages) and Article 36 (Payment of Money or Valuables) of the Labor Standards Act.

### 【Relevant Q & As】

#### <Example #1>

**In the case of an employee who joined on January 1, 2000, and quit on January 10, 2006.**

- ◆ The employee was granted 17 days of Annual Paid Leave for use in the year before the retiring year based on an attendance rate of 80 percent or more for the two years before the retired year. Six days were used and 11 days of Annual Paid Leave were unused. The employee was also granted 17 days for use in this year based on an attendance rate of 80 percent or more for the preceding year (2005). If the employee worked up to January 10, 2006, and retired, how much will unused Annual Paid Leave allowance be available?
- The employer should pay 11 days of unused Annual Paid Leave allowance equivalent to the unused days among Annual Paid Leave accrued in (2005) the year before the retired year based on an attendance rate of 80 percent or more in 2004. In this case, 3/12 of the unused Annual Paid Leave allowance shall be included into “the basic wage items to calculate average wages for severance pay”.
- If the employee did not use 17 days of Annual Paid Leave accruing in the retired year (in 2006) based on an attendance rate of 80 percent or more in 2005, the employer shall pay 17 days of unused Annual Paid Leave allowance within 14 days from the day of retirement, even though no period was available to use paid leave in the retired year. In this case, the unused Annual Paid Leave allowance shall not be included into “the basic wage items to calculate average wage for severance pay”.

#### <Example #2>

**In the case of an employee who joined on January 1, 2005 and quit on January 1, 2006.**

- ◆ The employee was granted 17 days of Annual Paid Leave for use in the retiring year (2006) based on an attendance rate of 80 percent or more for (2005) the year before retired year. If the employee retired on January 1, 2006, how much will unused Annual Paid Leave allowance be available?
- If the employee did not use the total number of days (15 days) of Annual Paid Leave accruing in the retired year (in 2006) based on an attendance rate of 80 percent or more in 2005, the employer shall pay 15 days of unused Annual Paid Leave allowance within 14 days from the day of retirement, even though there is no period available to use the paid leave in the retired year. In this case, the unused Annual Paid Leave allowance shall not be included in “the basic wage items to calculate average wage for severance pay”.

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**Generally, the absence means that the employee did not provide labor arbitrarily on the contractual working day as decided by both labor and management. (August 18, 2004, Labor Standard-4336).**

There is no regulation concerning ‘absence’ stipulated in the Labor Standards Act, but in general absence means that the employee did not provide labor arbitrarily on the contractual working day

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on which both labor and management decided to provide labor. However, the day or period to be excluded in the calculation of the contractual working days, or deemed as attendance, shall not be deemed an absence pursuant to the following: (Labor Standard 68207-709, May 30, 1997, 'Criteria for the evaluation of contractual working days and attendance')

**A. Statutory or contractual holidays (excluded from the calculation of contractual working days)**

- Weekly holidays under the Labor Standards Act
- Labor Day under the Act concerning the establishment of Labor Day
- Contractual holidays under the Collective Bargaining Agreement or the Rules of Employment
- Holidays or periods regarded as the equivalent to the above

**B. Day or period suspended for work duty due to special reasons (excluded from the calculation of contractual working days)**

- A period of shutdown due to a cause attributable to the employer
- A period of justifiable strike
- A period of childcare leave due to the Equal Employment Act
- Day or period regarded as the equivalent to the above

**C. Day or period deemed as attendance by the laws or its characteristics**

- A period of suspension of work due to industrial accident and a period of maternity leave
- A period of training in the Reserve Forces
- A period of training in the Civil Defense or a period of mobilization
- Days off to exercise civil rights
- Annual and Monthly Paid Leave and Menstruation Leave
- Other days or periods regarded as the equivalent to the above

**Providing Annual Paid Leave based on a fiscal year calculation shall not be disadvantageous compared to the standard of employment date (May 23, 2003, Labor standard 68207-620)**

The initial day to calculate the period of attendance rate for granting Annual Paid Leave under Article 59 of the LSA shall be designated by the individual employee's employment date in principle, and can be provided in a collective manner during the fiscal year (Jan 1 ~ Dec 31) by the Collective Bargaining Agreement or the Rules of Employment in order to promote convenience in labor management. In such a case, there must be no disadvantage to an employee who joined during the fiscal year.

In the case of calculating Annual Paid Leave based on the fiscal year without disadvantaging employees who joined during the fiscal year, the employer shall provide Annual Paid Leave in proportion to the service period to employees who served less than one year in the following year. After the following year, the employer can provide Annual Paid Leave according to the fiscal year standard. However, if the employee's calculation of Annual Paid Leave based upon the fiscal year is shorter than the number of the leave days calculated by the employment date at the time of retirement, then the employer shall compensate for the difference.



**Providing Annual and Monthly Paid Leave to part-time employees****(Labor standard, December 17, 2002)**

Annual and Monthly Paid Leave for part-time employees by Presidential Decree (Table 1-2) of the LSA shall be calculated by hourly units (1 hour deemed for periods shorter than 1 hour) by the following method:

Number of Annual & Monthly Leave for full-time employee x (Part-time employee's contractual working hours / Full-time employee's contractual working hours) x 8 hours

Contractual working hours of short-term employees or full-time employees shall be the contractual working hours per week. (However, if a part-time employee's contractual working hours are not regular, the contractual working hours shall be averaged for contractual working hours of 4 weeks.)

Annual Paid Leave shall be granted as a one day unit, and so shall be considered to be used as much as the same amount of contractual working hours.

**Example)****① Part-time employee who works 4 hours per day and 6 days per week**

- Annual Leave (hours): Number of Annual Leave for full-time employee (10 days) x [Part-time employee's contractual working hours (24 hours) / Full-time employee's contractual working hours (44 hours)] x 8 hours = 43.6 hours ≒ 44 hours
- If the employee used three consecutive days on Monday, Tuesday and Wednesday, 12 hours are used and 32 hours are left after deducting 12 hours from 44 hours.

**② Part-time employee who works 8 hours per day and 3 days (Monday, Wednesday and Friday) per week**

- Annual Leave (hours) are the same as ①.
- If the employee used two days on Monday and Wednesday, 16 hours are used and 28 hours are left after deducting 16 hours from 44 hours.

**<Monthly Paid Leave granted as "one day unit">**

- If Monthly Paid Leave hours are shorter than the contractual working hours for the day of leave (e.g., in above ②, Monthly Paid Leave hours: 4 hours; contractual working hours: 8 hours), they can be granted in hourly units, or be given as one day units in an accumulative manner.
- If Monthly Paid Leave hours are longer than the contractual working hours for the day of leave, one day of Monthly Paid Leave can be granted and the remaining leave hours can be paid as unused Monthly Paid Leave allowance without providing off-hours.
- Unused Annual and Monthly Paid Leave hours (including remaining leave hours left after using them in "one day units") shall be paid unused Annual and Monthly Paid Leave allowance calculated based upon hourly wage (Unused leave hours x hourly wage).

## Granting Annual Leave

The 'annual paid leave' in the current Labor Standards Act refers to paid vacations that employees receive in return for their work. It was originally designed to provide physical and spiritual rest to employees tired from hard work, to maintain the continuity of the labor force, and to secure a balance in people's lives. However, Human Resources (HR) managers are often confused about how to best allow for annual leave and continually ask questions on this subject. According to the Labor Standards Act (LSA), annual leave is to be calculated and provided based on the individual employee's start date. However, for companies with many employees, individual management of annual leave is not easy to calculate due to the different starting dates, and it is also not easy to take advantage of related laws promoting the use of annual paid leave.

Although the rules of employment and collective agreements may stipulate that annual leave will follow the LSA, many companies, for the sake of convenient labor management, provide uniformity in annual leave for employees based upon a 'calendar year' period, and then recalculate the annual leave based upon individual start dates at the time when employment is ended. The number of annual leave days can differ in accordance to the various annual leave-provision methods, and individual companies follow different types depending on their HR policy.<sup>46</sup>

In this issue, I would like to review, in detail, the various ways in which annual leave can be calculated:

### I. Legal Bases for Calculating Annual Leave

#### 1. The Labor Standards Act – Start date

Article 60 of the LSA stipulates that annual leave shall be calculated on the basis of the start date of each individual employee.

##### Article 60 (Annual Paid Leave)

(1) An employer shall grant 15 days' paid leave to a worker who has registered not less than 80 percent of scheduled attendance in a one year period.

(2) An employer shall provide one day's paid leave per month to a worker whose consecutive service period is shorter than one year or whose attendance is less than 80 percent, if the worker has worked without absence for a full month.

(3) <deleted on November 28, 2017> - This is valid in six months after this deletion.

(4) After the first year of service, an employer shall provide one day's paid leave for each two years of consecutive service in addition to the leave prescribed in paragraph (1) to a worker who has worked consecutively for 3 years or more. In this case, the total number of leave days including the additional leave shall not exceed 25.

<sup>46</sup> Bongsoo Jung, 「The Korean Labor Law Bible」5<sup>th</sup> edition, June 17, 2016, page 168.

## 2. Government Guidelines – Calendar year

Government guidelines allow for the management of annual leave based on a calendar year, with the detailed method as follows<sup>47</sup>:

The period for calculation of the attendance rate in order to provide for annual paid leave under Article 60 of the Labor Standards Act shall follow the individual employee's annual service period in principle, but for the sake of efficient labor management, the calculation period may follow a calendar year period (Jan 1 ~ Dec 31) according to the rules of employment and the collective agreement where applicable. In order not to be disadvantageous to new employees when applying a calendar year-based calculation of annual leave, it is required that in the following year the paid leave be calculated in proportion to the start date of the first year for those who have worked for less than one year, after which the company can then provide annual leave on the calendar year basis. Provided, if the total number of annual leave days calculated based upon the calendar year is less than the number of annual leave days calculated by the actual start date, the company shall provide the lesser number of additional annual leave days.

## 3. Rules of Employment or Collective Agreement (sample): Start Date or Calendar year

The provision of annual leave stipulated in the rules of employment is usually provided as follows:

### (1) Where annual leave is calculated by the individual employee's start date

#### **Article 00 (Annual Paid Leave)**

- (1) Each employee shall be granted 15 days for a minimum of 80% attendance during the previous one (1) full year;
- (2) With respect to an employee who has worked for less than one year or an employee who has an attendance rate of less than 80% in one year, the company shall allow one day of paid leave for perfect attendance for one month; and
- (3) Each employee who has been employed for 3 years or longer shall be allowed one additional day for every two years exceeding the first one year of continuous employment in addition to the days of leave mentioned in Item a. above. However, the total paid leave including the additional days shall not be more than 25 days.

### (2) Where annual leave is managed on a calendar year basis

#### **Rules of Employment: Article 00 Annual Leave**

*Note - Subparagraphs (1), (2), and (3), have the same content as the above ROE.*

- (4) The calculation period for annual paid leave shall start January 1 of each year and finish on December 31 of that same year.
- (5) As for an employee who started work in the middle of year, the company shall allow on January 1 of the next year, the number of annual leave days calculated in proportion to the employment period of the first year, and beginning the following year, annual leave will be adjusted and provided on a calendar year basis.
- (6) At the end of employment, if the number of annual leave days calculated on the calendar year basis is less or more than the number of annual leave days calculated by the individual's start date, the company will provide the annual paid leave allowance for the correct number of annual leave days recalculated based upon his/her joining date.

<sup>47</sup> Labor Ministry Guideline: Labor Improvement Team-5352, issued on Dec. 19, 2011

Annual Paid Leave and Granting Annual Leave

**(3) Where annual leave is managed on a calendar year basis**

**Rules of Employment: Article XX (Annual Leave)**

*Note - Subparagraphs (1), (2), and (3), have the same content as the above ROE.*

(4) The calculation period for annual paid leave shall start January 1st of each year and finish on December 31st of that same year.

(5) As for an employee who started work in the middle of year, the company shall provide one monthly paid leave each month until the first day of the following year in addition to monthly leave days of the above paragraph (2). On January 1st of the next year, the company provides 15 days of annual paid leave in advance.

(6) At the end of the term of employment (or when resigning), the number of annual leave days that occurs on January 1st of the year in which the employee resigns will be adjusted and settled in proportion to the date of resignation for the period from January 1 to the resigning date.

## II. Methods for Calculating Annual Leave

### 1. Methods Available (Employees joining before June 2017)

The details of granting annual leave, as stipulated in the Labor Standards Act or the Rules of Employment, are generally similar, but the actual calculation for that leave varies greatly by company. Four types are shown: A, B, and C, and a company may use one of them.

**※ Annual Leave for a Period of 5 Years and 10 Months, from May 15, 2013 to March 31, 2019**

Type A: Based on Employee's Start Date	Type B: Start Date + Calendar year-based	Type C: Prior Payment + <u>Prorated</u>
5-15-2013 started  5-15-2014 → 15 days 5-15-2015 → 15 days 5-15-2016 → 16 days 5-15-2017 → 16 days 5-15-2018 → 17 days 3-31-2019 → resigned	5-15-2013 started 1-01-2009 → 10 days (prorated based on start date) 1-01-2014 → 15 days 1-01-2015 → 15 days 1-01-2016 → 16 days 1-01-2017 → 16 days 1-01-2018 → 17 days 3-31-2018 → resigned (10 days deducted -adjusted according to start date)	5-15-2013 started (7 days granted as monthly leave in advance) 1-01-2014 → 15 days 1-01-2015 → 15 days 1-01-2016 → 16 days 1-01-2017 → 16 days 1-01-2018 → 17 days 1-01-2019 → 17 days 3-31-2014 → resigned (17 days x 3/12 = 13 days adjusted according to finish date)
79 days	79 days (10 days deducted)	90 days (11 more days paid more)

Annual Paid Leave and Granting Annual Leave

**※Annual Leave for a Period of 6 Years and 5 Months, from May 15, 2013 to October 31, 2019**

Type A: Based on Employee's Start Date	Type B: Start Date + Calendar year-based	Type C: Prior Payment + Prorated
5-15-2013 started  5-15-2014 → 15 days 5-15-2015 → 15 days 5-15-2016 → 16 days 5-15-2017 → 16 days 5-15-2018 → 17 days 5-15-2019 → 17 days 10-31-2019 → resigned	5-15-2013 started 1-01-2014 → 10 days (prorated based on start date) 1-01-2015 → 15 days 1-01-2016 → 15 days 1-01-2017 → 16 days 1-01-2018 → 16 days 1-01-2019 → 17 days 10-31-2019 → resigned (7 days added - adjusted according to start date)	5-15-2013 started (7 days granted as monthly leave in advance) 1-01-2014 → 15 days 1-01-2015 → 15 days 1-01-2016 → 16 days 1-01-2017 → 16 days 1-01-2018 → 17 days 1-01-2019 → 17 days 10-31-2019 → resigned (3 days deducted -prorated according to resigned date)
96 days	96 days (7 more days allowed)	100 days (4 more days allowed)

**2. Methods Available (Employees joining after June 2017)**

Since the guaranteed paid leave for employees working less than two years is insufficient (15 days granted for the entire two-year period), Article 60 paragraph (3) of the Labor Standards Act was deleted in an amendment of the LSA to provide additional paid leave days. It now guarantees 11 annual paid leave days for the first year for employees working for less than two years. Thus, a total of 26 paid days are granted over that two-year period: 11 days in the first year and 15 days in the second. Therefore, in calculation of annual leave by fiscal year, an additional 11 days shall be added, to maintain the annual management system.

**※Annual Leave for a Period of 2 Years and 10 Months, from June 1, 2017 to March 31, 2020**

Type A: Based on Employee's Start Date	Type B: Start Date + Calendar year-based	Type C: Prior Payment + <u>Prorated</u>
6-01-2017 started  6-01-2018 → Monthly Leave 11 days 6-01-2018 → 15 days 6-01-2019 → 15 days 6-01-2020 → resigned	6-01-2017 started 6-01-2019 → Monthly Leave 11 days 1-01-2018 → 9 days (prorated based on start date) 1-01-2019 → 15 days 1-01-2020 → 15 days 3-31-2020 → -8 days deducted (recalculated based on starting date)	6-01-2017 started → 7 days (Granting 7 days monthly leave ahead) 6-01-2019 → Monthly Leave 11 days 1-01-2018 → 15 days 1-01-2019 → 15 days <del>1-01-2020 → 16 days</del> 3-31-2020 → 13 days (=16*3/12 → prorated as of resigned on day
41 days	41 days (8 days deducted)	52 days (extra 11 days)

Annual Paid Leave and Granting Annual Leave

**※Annual Leave for a Period of 3 Years and 5 Months, from June 1, 2017 to October 31, 2020**

Type A: Based on Employee's Start Date	Type B: Start Date + Calendar year-based	Type C: Prior Payment + <u>Prorated</u>
6-01-2017 started 6-01-2018 → Monthly Leave 11 days 6-01-2018 → 15 days 6-01-2019 → 15 days 6-01-2020 → 16 days 10-31-2020 → resigned	6-01-2017 started 6-01-2018 → Monthly Leave 11 days 1-01-2018 → 9 days (prorated based on start date) 1-01-2019 → 15 days 1-01-2020 → 15 days 10-31-2020 → +7 days (recalculated based on starting date: paid for allowance equivalent to 7 days additionally)	6-01-2017 started → 7 days (Granting 7 days monthly leave ahead) 6-01-2018 → Monthly Leave 11 days 2018-01-01 → 15 개 2019-01-01 → 15 개 2020-01-01 → 16 개 2020-10-31 → 13 개 (=16*10/12 → prorated as of resigned on day)
57 days	57 days (7 days added)	61 days (extra 4 days)

**3. Advantages & Disadvantages for each Method of Calculating Annual Leave**

**(1) Type A- (based on employee's start date):**

The advantage of this method is that annual leave can be accurately calculated in accordance with the Labor Standards Act.

However, the disadvantage is that: 1) this method requires a lot of time and effort to manage the annual leave for all employees as the company needs to calculate each individual employee's annual leave separately; 2) it would be difficult to take measures to promote the use of collective annual leave; and 3), an employee who intends to leave may try to find the best time for resignation to maximize their annual leave days.

**(2) Type B - (start date + calendar year-based):** This method is a way of providing annual leave based on calculating 15 days in proportion to the working period of the first year, on January 1 of the following year, and then to deem January 1 of the following year as the start date for calculating annual leave for that year. When employment comes to an end, the number of annual leave days calculated based on the calendar year shall be compared with the number of annual leave days calculated based on the start date. If the number of annual leave days based on the calendar year is more than the number calculated by the start-date, it would be preferable to stipulate such a reduction of annual leave in the rules of employment.

The advantage of Type B is that a company can easily manage annual leave, effectively use the method to promote the collective use of annual leave, and be able to calculate annual leave very accurately while still adhering to the Labor Standards Act.

The disadvantage of Type B is that the company needs more time to re-calculate individual annual leave. As well, the employee may try to select a finishing date which allows for more annual leave days.

**(3) Type C - (prior payment + prorated):** This method provides monthly leave for each attendance month for the first year of employment, and then allows 15 days of annual leave in advance on January 1 of the following year, which is then continuously granted in advance based upon the



calendar year. For the month when employment is ended, the annual leave will be adjusted up to the last working day on a prorated basis.

The advantage of Type C is that: 1) the company can effectively use the measure to promote the use of collective annual leave; 2) the company can adjust annual leave easily as it is calculated on a prorated basis; 3) the method can be seen as beneficial in that the employees receive their annual leave ahead of its actual occurrence; and 4) that an employee will not derive any preference for a finishing date because the annual leave is based upon the actual service period calculated on a prorated basis.

Type C's disadvantage is that the company will always grant more annual leave than what would be provided by the start-date based calculation.

#### **4. Review of the Annual Leave Calculation Methods**

Companies generally use Type B or C, which are all calendar year-based, when managing their annual leave. Type B (start date + calendar year) takes a recalculation procedure by matching annual leave calculated according to a calendar year with annual leave based on the employee's start date. Type C (calendar year-based) is a method whereby the company provides more annual leave, calculated by a calendar year-based adjustment, and will also additionally compensate for the lower number of annual leave days based on the calendar year. However, this type will also give employees reason to look for the most suitable termination date, so the company may end up providing more annual leave days than intended.

Accordingly, in my opinion, the most suitable is Type C (prior payment + prorated). This type provides monthly leave for each attendance month for the first year of employment, then allows for 15 days of advance annual leave the following year, and in the month when employment is ended, allows for an adjusted annual leave prorated according to the last working day. In particular, Type C can be the most desirable method because it takes full advantage of the convenient calculation of annual leave as well as the benefits of calendar year-based management.

### **III. Conclusion**

Annual leave is designed to provide an opportunity for exhausted employees to recharge through the provision of a paid vacation; this should not be considered as an expense, but rather as an investment in securing a constant workforce. Employers should also consider some basic principles when applying a method for calculating annual leave. Firstly, the employee should be able to understand and anticipate his or her annual leave and the available number of days that can be used in the near future. Secondly, the company should provide for collective annual leave so it can easily manage the annual leave for all employees and also promote the use of annual leave. Thirdly, when employment is terminated, the company can easily calculate the annual leave and the employee has no reason to consider the date of termination in the expectation of more annual leave. That is to say, the final annual leave can be easily adjusted based upon the termination date.