Employment Insurance Act, Equal Employment Act

Enacted and revised by the National Assembly (Aug 2, 2019)

Employment Insurance Act

〈1〉 Increased Unemployment Benefits and Extended Beneficiary Period (In effect from October 1, 2019)

○ To facilitate reemployment activities through support for the unemployed, unemployment benefits will increase from 50% to 60% of average wage from October 1 this year.

○ The beneficiary period will also be extended from the current 90-240 days to 120-270 days depending on the age of the unemployed and the period of employment insurance coverage. The lower limit on unemployment benefits is adjusted from 90% to 80% of minimum wage, taking into account the level of unemployment benefits and the extension of beneficiary periods.

<Wage Unemployment Beneficiary Period (Unit: Day)>

Current

Years	Beneficiary period				
	< 1	1~<3	3~<5	5~<10	10 or more
Under 30 years of age	90	90	120	150	180
30~49 years of age	90	120	150	180	210
50+ or disabled	90	150	180	210	240

Implemented from October 1, 2019

Years	Beneficiary period				
	<1	1~<3	3~<5	5~<10	10 or more
Under 50 years of age	120	150	180	210	240
50+ or disabled	120	180	210	240	270

〈2〉 Changes to Criteria for Unemployment Benefits to Part-time Workers Employed for Extremely Short Periods (In effect from October 1, 2019)

○ Currently, unemployment benefits require at least 180 days of paid work within 18 months before employment is terminated. Part-time workers who work two days or less or less than 15 hours per week have not been eligible for benefits as they work only a maximum of 156 days in an 18-month period. From October 1, 2019, however, such part-time workers will gain eligibility for unemployment benefits if they worked at least 180 days in the 24 months prior to termination of employment.

Equal Employment Act

〈1〉 Paternity Leave Extension (In effect from October 1, 2019)

○ leave under current law is three to five days (with the first three days paid), but the amended law extends this to ten days paid from the date of effect.
○ To reduce the burden on SMEs of this extended period of paid leave, the government will pay for 5 days of those paternity leave benefits (100% of normal wages, up to 2 million won per month) for SME workers.
○ The eligible time within which to claim this leave will be extended from the current 30 days to 90 days after the date of delivery. Paternity leave will also be usable on two separate periods if desired.

Division	Current	Revised
Period of use	3~5 days (3 days paid + 2 days unpaid)	10 paid days
Government subsidy	None	For SME workers, 5 days at 100% of ordinary wage (up to KRW 2 million/month)
Eligible period	Within 30 days from the date of birth	Within 90 days from the date of birth
Divided use	In principle, no, unless there is labor-management agreement to do so	Yes

〈2〉 Shortened Working Hours for Childcare Period (Enforcement: October 1, 2019)

○ Currently, parents of children 8 years or younger or up to the second grade of elementary school are eligible for up to one year of childcare leave in combination with shorter working hours. From October 1, 2019, however,

workers who have already used one year of childcare leave are eligible to work reduced hours for an additional one year for childcare. If childcare leave has not been taken, the worker is eligible for up to two years of reduced working hours.

* (Example) ① 1 year of childcare leave + 1 year of reduced working hours, ② 6 months of childcare leave + 18 months of reduced working hours, ③ No childcare leave + 2 years reduced working hours

○ In addition, working days can currently be shortened to 2-5 hours a day (working hours after reduction: 15-30 hours a week), but from October 1, 2019, 1-5 hours a day will be possible (working hours after reduction: 15-35 hours a week). This represents one hour less per day that needs to be worked during the reduced working hours period.

* Increased government subsidy for the additional 1-hour-per-day reduction in working hours (reduced salary for childcare period) (In effect from October 1, 2019). This will increase from the current 80% to 100% of ordinary wage, with a limit of between 1.5 and 2 million won per month.

□ (Extension of childcare hours) Extends the allowed leave period from 1 year to 2 years, allows an additional one-hour-per-day reduction of working hours, and increases the number of times over which the childcare leave can be used (minimum period of 3 months).

* Increased subsidy for additional 1-hour-per-day reduction in working hours (from 80% to 100% of ordinary wage)

Division	Current	Revised
Reduced working hours	2 to 5 hours per day (10 to 25 hours per week)	1 to 5 hours per day (5 to 25 hours per week)
Government subsidy	80% of ordinary wage (up to KRW 1.5 million) x the rate of reduced working hours	- (Only additional 1 hour reduction) 100% of ordinary wage (up to KRW 2 million per month) x the rate of reduced working hours - (Other parts) same as current
Available period	Maternity leave + reduced working hours = maximum one year	Maternity leave + reduced working hours = maximum 2 years * Working hour reduction can be used for more than one year
Divided use	Childcare leave and reduced working hours can be used at one time, in combination.	- Childcare leave can be divided and used at two different times. - Working hour reduction can be used at separate times, with a minimum 3 months each time.

Equal Employment Act

〈3〉 Family Care Leave of Absence and Family Care Leave Introduced (In effect from January 1, 2020)

○ Currently, it is necessary to use at least 30 days family care leave at a time * (up to 90 days per year), but from next year, 10 of those 90 days a year can be used as separate days.

* Workers can apply for childcare leave if they need to care for a family member due to illness, accident or old age.

- Due to the greater flexibility afforded for family care leave, it can soon be used for short-term family care or to attend school events.

In addition, the scope of persons whose care can be included has expanded to include grandparents and grandchildren, in addition to parents, parents-in-law, spouse, and children.

Current	Revised
Family Care Leave of Absence System	Family Care Leave of Absence Plus Holiday
Allowed only to care for illness in the family, accidents, and old age	Allowed for current family care + raising children
90 days over one year, to be used in 30-day units	10 of the 90 days can be used for 1-day needs

〈4〉 Reduced Working Hours for Family Care Introduced

○ Currently, reduced working hours are only allowed for pregnancy and childcare. With the amendment, working hours can be reduced for an additional 4 reasons: to care for family members, recover from an illness or accident, make retirement preparations (55 years old or over), and study.

Division	Details
Reasons for request	① Care of a family member, ② Recover from an illness or accident, ③ Make retirement preparations, ④ Take time out for study
Period	1 year (2 years for justifiable reasons), no extension for study
Reduced time	Reduced to 15-30 hours a week
Reasons for rejection	① It is impossible to hire a substitute, ② Leave will cause serious obstacles to business operations, ③ Other reasons prescribed by Presidential Decree
Protection of rights	① No disadvantageous treatment to be given to relevant workers, such as dismissal, ② Duty to return relevant worker to the same job at the end of reduced working hours, ③ No adverse working conditions, ④ Relevant worker cannot request to work overtime, ⑤ Excluded from period for calculation of average wage
Date of effect	- January 1, 2020: public institutions, businesses or workplaces with more than 300 workers at all times - January 1, 2021: businesses or workplaces with 30 to fewer than 300 workers. - January 1, 2022: Businesses or workplaces with fewer than 30 workers.

The Employer's Obligations in the Recruitment Process

I. Introduction

Recruitment of workers is in principle the employer's prerogative, and for years there was no law to regulate it. While the employment documents and recruitment review costs required by employers when hiring employees are a great burden to job seekers, there have been rare instances where the employer has returned the employment documents voluntarily or has returned them when requested by the

job seeker. In addition, there have been irregularities in the recruitment process, such as retaining business suggestions of job seekers, and posting false recruitment advertisements for the purpose of promoting companies.[1] As a result, the Act on the Fairness of the Recruitment Procedures (hereinafter referred to as the "Recruitment Procedure Act" or "the RPA") was enacted in 2014, and employers who ordinarily employ more than 30 workers fall under this Act, which limits their rights in the recruitment process (Article 3).

Numerous recruiting scandals have occurred recently in both public and private companies, and so a need was perceived for systematic supplementation in order to guarantee the fairness of the recruitment process.[2] On July 17, 2019, the Recruitment Procedure Act was partially amended and implemented. The RPA prohibits anyone from illegally asking, pressuring, or forcing hiring practices in violation of the law (Article 4-2, Paragraph 1), and also prohibits the act of giving or receiving goods, entertainment, or property regarding recruitment (Article 402, Paragraph 2). In addition, a penal clause (Article 17) has been newly-established in case of violation, which implements effective sanctions measures.

In this article, I will look closely at how strictly unfair employment practices can be sanctioned and the employers' obligations in the process of hiring. This should help you understand the employer's obligations in the recruitment process.

II. Sanctions on Unfair Practices in Hiring Procedures

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

Employers shall not put out a false recruitment advertisement for purposes such as collecting ideas or publicizing the workplace under the pretense of recruitment. Any employer who puts out a false recruitment advertisement in violation of this Act shall be punished by imprisonment of up to five years or a fine not exceeding KRW 20 million (Article 16 of the Act). This Article was designed to protect the interests of job applicants and to prevent the occurrence of social costs and damages.[3]

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

2) Kwonchul Shin, "Fairness in recruiting – focused on employment irregularities" 「Labor Law Studies」(67), August 2018, Korea Labor Law Society, pp. 95-96.

3) Ministry of Employment and Labor, "Practical Manual for Fair Recruitment Procedures", 2015, pages

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

This implies that a change in the type of job, type of employment and/or working conditions proposed in the recruitment advertisement by the employer violates the principle of good faith, and shall not be allowed in consideration of the need to protect the trust of jobseekers in the job announcement. The prohibition against changing the working conditions as presented in the recruitment advertisement is intended to protect the interests of the job seeker by prohibiting an unfavorable change of working conditions, considering the fact that the job seeker is inferior to the employer. In addition, the copyright and intellectual property rights of the jobseekers are protected by related laws such as the "Copyright Act" and "Intellectual Property Basic Law", but because of the lack of substantive protection, the introduction of such restrictions in the Recruitment Procedure Act will enlarge the scope of direct protection.[4)]

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

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

Although the existing penalties for unfair employment apply to business obstruction of the Criminal Law, there are limits to the application for criminal offenses. Therefore, the Recruitment Procedure Act introduced this new content and can now punish unfair recruitment practices as a labor law. In order to establish a business obstruction in Article 314[5)] of the Criminal Act in the case of

23-25.

4) Ministry of Employment and Labor, above manual, page 37.

5) Article 314 (Interference with Business)

unfair recruitment, it is necessary to have an illegal act in the form of hierarchy or power information-processing, and the action must interfere with human affairs; that is, the work of others. However, there is a legal limit applying this Criminal Act because the person who engages in illegal recruitment is usually the decision-maker of the company, and the recruitment work corresponds to his original work and does not correspond to the 'other person's work'.[6] Therefore, it is meaningful that we can now partially supplement the vacancy in the punishment of unfair recruitment practices in the Criminal Act by introducing the prohibition of unfair recruitment practices in the Recruitment Procedure Act.[7]

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

The employer is not allowed to require that the applicant include personal information in the Basic Recruitment Form that is not required for the performance of his/her job, or to collect it as evidence material. Such restricted personal information shall be collected and processed only in accordance with the following conditions: (i) the physical condition of the applicant's appearance, height, weight, etc., (ii) the area of origin of the applicant, marital status and property; (iii) education, occupation, and property. In case of violation, a penalty of up to KRW 5 million will be imposed. However, in the legislative process, the attachment of an identification photo to the employment documents was excluded from the collection restrictions. The reason for this is that ID photos are considered a necessary part of the applicant's identity verification in both the recruitment review and the interview.[8]

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

The employer shall not incur any monetary cost (recruitment review fee) for the job seeker other than the cost of submitting the job application document to the

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

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

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

8) Reporter Younghee Kwak, "Although the recruitment procedure law has been passed, it is still possible to request an 'ID photo'", monthly magazine 「Labor Law」, May 2019, Jongankyungjae

applicant. However, if there is an unavoidable circumstance due to the specific nature of the workplace or occupation, it may be approved by the Minister of Employment and Labor to have a job seeker pay a portion of the recruitment review fee. In case of violation of this, a penalty of up to KRW 3 million is imposed.

Here, the recruitment review costs are directly related to the recruitment, such as the cost of planning and preparing the recruitment, the cost of the recruitment ad, etc., and the cost of recruiting applicants, which refers to any indirect costs. The employer shall be fully liable for this cost in accordance with the principle of beneficiary burden.[9)]

III. The Employer' s Obligation in the Recruitment Process

1. Notification obligations

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

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

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

Since the employer requires various types of qualifications and proofs when recruiting workers, to identify a job seeker's ability , job seekers are required to pay an average of KRW 150,000 per application, and so the average cost for a job

9) Ministry of Employment and Labor, above manual, pages 64-65.
10) Specific items employers need to tell job seekers (I) the fact that the job seeker may claim the return of the hiring document; (ii) the type and scope of the hiring document to be returned; Implementation period, (v) return method and cost burden, (vi) retention period and destruction of employment documents.

seeker to get a job is KRW 449,500 (when applying 29 times).[11] If a job seeker receives a return of the employment documents, the cost of finding a job can be reduced.

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

3. Storing and deleting documents

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

The employment documents contain the personal information of the job seeker, and as the need for privacy is paramount, the documents should be destroyed after a certain period of time. If the requesting period of return expires or if the employment documents are not returned, the employment documents must be destroyed in accordance with the "Personal Information Protection Act" (Article 11, Paragraph 4).[12] In this case, the destruction of the employment documents should

11) Kyeryun Shin, a lawmaker who got the search result after asking the recruiting company, 'Human', Feb 3, 2013.

12) Article 21 (Destruction of Personal Information) (1) A personal information controller shall destroy personal information without delay when the personal information becomes unnecessary owing to the expiry of the retention period, attainment of the purpose of processing the personal information, etc.:

be made without delay (within 5 days) as stated in the Personal Information Protection Act.[13] The method of destroying personal information is as follows: ① For electronic files: permanent deletion in a way that cannot be restored; ② For recorded, printed, written or other recording mediums: crushed or incinerated (Article 16 of the Enforcement Decree of the Personal Information Protection Act).

IV. Conclusion

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

Extension of Working Age for Manual Workers and the Related Legal Impact

I. Introduction

On February 21, 2019, the Supreme Court issued a ruling that extends the working age of ordinary manual workers from the current 60 to 65. [14] The working

Provided, that this shall not apply where the retention of such personal information is mandatory under other statutes.

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

14) Working age means the maximum age someone is available for employment. The court determines the working age not only after considering social and economic conditions such as the average age of the nation, the economy, and employment conditions, etc., but also after examining a variety of other conditions such as the number of workers in each age group, the employment rate and the labor participation rate (Supreme Court Decision on April 13, 2012, 2009 da 77198, 77204).

age of manual workers went from 55 to 60 through another Supreme Court decision in 1989 and has remained there for the past 30 years. This most recent Supreme Court ruling in February 2019 will bring many changes to society.

In the immediate term, this change will use 65 years of age for calculating civil damage compensation for people who are not salaried workers such as the unemployed, minors, students, full-time housewives and general manual workers. However, considering that the working age of manual workers goes together with the statutory retirement age prescribed by the Elderly Employment Act[15], which was set at 60 years in 2013, extension of the working age for manual workers to 65 years will influence society in a great number of ways, in terms of not only changing compensation for damages, but also lending momentum to further extending the statutory retirement age. It is especially related to the low birth rate and societal aging in Korea. The proportion of the population aged 65 or older in Korea reached 14.3% in 2018, which makes the nation an "aged" society, and will reach 20% in 2025, when it will be considered a "super-aged" society. [16]

II. Details of the Court Ruling regarding the Extended Working Age of Manual Workers

First of all, let us concretely examine the details of the Supreme Court's decision to extend working age for manual workers. [17]

1. Facts

On August 9, 2015, a 5-year-old boy drowned in a swimming pool. The parents claimed compensation for civil damages for violation of the pool owner's and safety manager's obligation of care. When calculating compensation for damages in first and appellate trials, the courts applied the wages of city daily workers from the

15) To accelerate employment of retirement-aged people, the Act on the Employment Promotion of the Elderly was enacted on December 31, 1991. This Act became the Act on the Prohibition of Age Discrimination in Employment and the Elderly Employment Promotion on March 21, 2008 (hereinafter referred to as "the Elderly Employment Act").

16) According to the United Nations, if the number of those aged 65 or older reaches 7% of a nation's total population, that nation is considered an aging society; if 14%, it is an aged society; and if 20%, it is a super-aged society; Ha Kaprae, 「Labor Standards Act」, 28th ed., Joongang kyungjae, p. 603; National Statistical Office, 「Future Population Special Estimation 2017-2067」, March 2019, p. 12.

17) Supreme Court ruling on February 21, 2019.

time their military service ended for 21 months after the victim would have become an adult, to the age of 60. However, after a public hearing on November 28, 2018, the Supreme Court ruled on February 21, 2019, that it was unable to maintain the case rulings that the working age of manual workers had been accepted until the age of 60, in terms of the actual practices of physical labor, and instead extended the working age of those who provide physical labor to 65 years.

2. Extension of working age for manual workers: effect on society

The Supreme Court's ruling considers the changes in social and economic conditions in Korea, increased natural longevity, and institutional changes. In general, the decision on the maximum working age for a manual worker is determined by considering three things[18]:

(i) biologically possible physical working age
(ii) the age at which manual labor is desired to work, and
(ii) to what extent a society can accept physical labor.

Using these standards, the Supreme Court specified the following seven items.

① At the time of the previous Supreme Court ruling (1989), the average life expectancy in the nation was 67.0 years for men and 75.3 years for women. In 2017, the average life expectancy for men was 79.7 years, and 85.7 years for women.

② At the time of the previous ruling (1989), the per capita GDP of Korea was USD 6,516, and had reached USD 30,000 by 2018.

③ At the time of the 1989 ruling, retirement age for railway, civil engineering, construction, and machine workers was mainly 58, but in 2013, this had been extended to 60 for most civil servants (including functional). In the private sector, the mandatory retirement age for all workers was set at 60 on January 1, 2017. According to a press release from the Ministry of Employment and Labor, the average retirement age of workplaces operating retirement age systems as of 2016 was 60.4 years.

④ According to OECD data, the actual retirement age is higher than the official retirement age in Korea. From 2011 to 2016, actual average retirement age was 72.0 years for men and 72.2 years for women, while the average among OECD members was 65.1 years for men and 63.6 years for women. Korea has the highest actual retirement age of all OECD member states.

18) Do, Jaehyung, "Working age of general manual workers, 「Labor Review 」, April 2019 (vol. 169)

⑤ The Employment Insurance Act applied to newly-hired persons under the age of 60 at the time of enactment on December 27, 1993, but also applies to those who have been employed or began self-employment at up to 60 years of age since its revision on June 4, 2013, while excluding those who are newly employed or began self-employment after reaching 60 years of age.

〈Age-related Social Changes〉[19)]

Division	Previous	Now
Life expectancy	(1989) Men 67.0 years, women 75.3 years	(2017) Men 79.7 years, women 85.7 years
GDP per capita	(1989) USD 6,516	(2018) USD 30,000
Working age of manual workers	(before 2013) 55 years	(after 2013) 60 years (from 2019) 65 years
Legal retirement		Government employees (2013) 60 years of age; All workers (2017) 60 years of age
Actual retirement age		(2011-2016) Men 72 years, women 72.2 years (OECD average for the same period) Men 65.1 years, women 63.6 years
Employment insurance, unemployment benefits	(before 2013) under 60 years of age	(2013 on) up to 65 years of age
National pension benefits	National pension benefits (before 2013) - General old age pension: 60 years of age - Early old age pension: 55 years of age	(2013-2017) 61 years of age (2018-2022) 62 years of age (2023-2027) 63 years of age (2028-2032) 64 years of age (After 2033) 65 years of age
Rate of Elderly population		13.8% in 2017, 20% expected in 2025, 30% expected in 2036

19) Supreme Court ruling 2018da248909; National Statistical Office, 「Future Population Special Estimation 2017-2067」, March 2019, p. 12.

⑥ The age at which subscribers will receive national pension payments is gradually extending: to 61 years between 2013 and 2017, 62 years between 2018 and 2022, 63 years between 2023 and 2027, 64 years between 2028 and 2032, and 65 from 2033. As for government employees and teachers and staff at private schools, pension receiving age is 60 years until 2021, 61 years in 2022, 62 years in 2024, 63 years in 2027, 64 years in 2030 and 65 years in 2033.

⑦ Under the various social security laws, the age at which the nation must actively guarantee a livelihood is 65 years of age and older.

3. Supreme Court decision

The Supreme Court dismissed the existing view that the working age of persons who do ordinary manual labor or those who mainly use manual labor for their livelihood is 55 years old in the case of an experienced person[20] in the Supreme Court (99daka16867). Since then, courts have maintained the view that the working life of physical labor must be 60 years old by the rule of law. However, as the socio-economic structure and living conditions of our country improved rapidly and the legal system improved, the basic views became more difficult to maintain because the circumstances that formed the basis for the above-mentioned empirical rules changed significantly. Now, as long as there are no special circumstances otherwise, it is reasonable to see that it is possible to work up to age 65.

III. Changes in the Legal Environment due to Extension of Working Age for Manual Workers

Damage caused by illegal acts includes direct damages, indirect damages and consolation money[21]. Direct damage refers to illegal activities that result in medical expenses, nursing care costs, funeral expenses, repair of damaged vehicles, and other expenses for the victim. Indirect damages refer to gains that could have been realized if the illegal act had not been committed. These include lost earnings during the working period and lost severance pay. [22] In this regard, compensation

20) Here, the empirical rule is that the proof of the facts in civil litigation is not a natural scientific proof that there is no doubt, but if there is no special circumstances, that the judgment is that it is necessary to be convinced of the truth that there is no doubt if it is an ordinary person (Supreme Court ruling on February 21, 2018 da 248909).

21) The Seoul Central District Court has set a benchmark of 100 million won for the deaths as the consolation money for mental compensation for victims of traffic accidents and occupational accidents that occurred after March 1, 2015, without any fault of the victim.

for higher automobile insurance premiums and compensation for civil damages due to work accidents are directly affected.

1. Automobile insurance damages

On May 1, 2019, the age limit for calculating compensation for damages was raised from 60 to 65 years. The contents of this report are as follows: (1) extended working age for death and disability, (2) consolation money calculation for death and disability, and (3) suspension allowance due to injuries.

For example, if a 35-year-old daily worker is killed in a traffic accident, he would theoretically have had 25 more years of work until his 60th birthday, losses of 277 million won would have to be compensated. However, in the future it will be 30 years, and 320 million won would have to be compensated. The loss of work due to an injury for a 62-year-old worker has been 0 won, but according to the revised law, it will be worth 14.5 million won.

〈Example of increased lost earnings due to extended working ages in auto insurance compensation[23]〉

Division	Victim	Present 60 years	Changed 65 years	Difference
Death	35 years	277 million won	320 million wo	250 million won
Injuries	62 years	0 won	145 million won	145 million won

2. Estimated civil damages for industrial workers

In the event that an employee dies from an industrial accident, the company refers compensation to industrial accident compensation insurance. However, if the company is deemed partly liable, such as for failing to have sufficient safety measures in place, which resulted in the death of the worker, the company shall be liable for civil damages in addition to industrial accident compensation for the surviving family. The extent of the civil damages shall be the loss of the victim whose death has a significant causal relationship with the company's negligence,

22) "Damage Claims Law", Judicial Research and Training Institute, 2008, page 108
23) Supreme Court ruling on November 28, 2018: 2018da248909; A data at the public hearing from the Compensation Insurance Association.

while the scope of damages recognized are categorized as direct damage, indirect damage and mental damage. In general, if a worker dies, compensation shall cover the sum of medical expenses, hospital expenses, negative expenses, lost work income (loss incurred from the time of death to the point of retirement) and a one-time retirement allowance (severance pay due to early retirement), and mental damage. Lost Labor earnings have used to be calculated up to the age of 60, but now will be calculated up to 65 years, which increases the amount of civil damage compensation.

IV. Conclusion

As the working age of manual workers is raised to 65 years, insurance premiums are expected to increase along with the various compensation amounts, and discussions on extension of the statutory retirement age are expected to take off. Japan introduced a statutory retirement age to 60 in 1994, and 20 years later introduced a statutory retirement age to 65.[24] In 2013, Korea introduced a retirement age of 60 through the Elderly Employment Act. Nevertheless, when national pension payments are gradually extending to 65 years and when the age of mandatory enrollment in employment insurance will also extend to 65 years, the extension of the statutory retirement age in Korea will be inevitable in the near future. Therefore, companies should abolish the seniority-based salary system, which is a factor in rising labor costs, and introduce job-based wage systems or wage peak systems that reflect the extended retirement period as a way to prepare for the extension of statutory retirement age.

Reasons for Disqualification of a Labor Union

I. Introduction

Workers are free to establish and join a labor union according to their basic rights guaranteed by the Constitution. However, the Trade Union and Labor Relations Adjustment Act (hereinafter referred to as the "Trade Union Act") stipulates that a "union" that allows the employer or persons acting on behalf of

24) Lee Jung, "Retirement Age 65 Years in Japan," "Labor Law," May 2013, Joongang Economy

the employer to become members, that association shall be disqualified from being declared a labor union. The restriction that a labor union shall not allow membership for the employer also extends to representatives of the employer's interests. The Trade Union Act restricts the scope of union membership in this way to i) protect the independence of the union by preventing someone directly representing the employer from joining it and controlling or intervening in its operations and ii) maintain the balance of bargaining power between labor and management by preventing the leakage of employer-related confidential information to the union.[25] For this reason, if a worker who is prohibited from joining a labor union joins such a union, that union becomes disqualified as it can no longer serve to protect labor rights under the Trade Union Act.

Recently, more than 100 office workers in a public corporation formed a labor union and received a Certificate of Union Establishment from the Ministry of Employment and Labor (MOEL). However, the employer claimed that some of the union members included workers who are prohibited from joining a labor union under the Trade Union Act, and filed a complaint with the MOEL so as to disqualify the Office Workers' Labor Union. Herein, I would like to examine whether these workers are prohibited from joining a labor union according to the Trade Union Act.

II. Criteria for Determining for Disqualification

1. Requirements for establishing a labor union

Article 2, Paragraph 4 of the Trade Union Act regulates, "The term "labor union" means an organization or associated organization of workers which is formed in a voluntary and collective manner upon the workers' initiative for the purpose of maintaining and improving working conditions, or improving the economic and social status of workers", which is the "substantive requirement". Article 10, paragraph 1 of the same Act stipulates that a Report on Establishment shall be submitted to the MOEL, which is the "formal requirement". The Trade Union Act explains that in order for such a labor union to be legitimate, it must meet both substantive and formal requirements.

The substantive requirement is designed to assess whether a union has identity, independence, purpose and collective nature,[26] in which case it is not regarded as a

25) MOEL Guidelines: Nojo 01254-665, Jun. 28, 1996.

labor union under the Trade Union Act if an employer or other persons who always act in their employer's interests are allowed to join the organization; in cases where most of the expenditures are provided for by the employer; where those who are not workers are allowed to join the organization, etc. The union's identity, independence, purpose and collective nature must be protected.

The formal requirement is for the labor union to report its establishment to and receive a Confirmation of Registration letter from the MOEL. A person who intends to establish a labor union shall prepare a report with the union constitution attached, which describe the union's democratic and independent operations (Article 10 (1) of the Act). The MOEL shall return any report filed by a labor union to which any item in Article 12(3) apply (related to disqualification). The purpose of requiring such a report regarding the establishment of a labor union is to ensure it can survive as an independent, democratic organization through effective maintenance and management of the administrative organization.[27]

2. Labor unions that remain unregistered due to their disqualification from establishment

Once the MOEL has received a Report on Establishment, it shall issue a Confirmation of Registration letter within three days[28], except when i) supplementation is required or ii) when it is necessary to reject the report on establishment. Since unions are established under a registration system rather than a permit system, once a Confirmation of Registration letter is issued, the union shall be considered to have been established as of the date of receipt of the Report on Establishment by the MOEL.

i) Supplementation is required if some problem is detected in the Report on Establishment. If a report does not have the union constitution attached or if the union constitution was not enacted by direct, secret and anonymous ballot, an order for supplementation shall be issued, to be fulfilled within 20 days.

ii) On the other hand, if the reasons for disqualification are related to the establishment of the union, the MOEL may reject the Report on Establishment.

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26) Jongyul Lim, 「Labor Law」 17th ed., Parkyoungsa, 2019, p. 60.
27) Supreme Court ruling on Oct. 14, 1997, 96 nu 9829.
28) Article 19, Paragraph 1 of the Act on the Handling of Civil Complaints: "If the period for processing a complaint is set to 5 days or less, it shall be calculated in hours from the time of receipt of the complaint, but holidays and Saturdays shall not be counted. In this case, one day shall consist of eight working hours."

> If it sends an order for correction, then correction shall be made by the applying union within 30 days. If it fails to do so within that period, it shall be regarded as an unregistered union.[29]

Notwithstanding the principles of free registration for labor unions, the MOEL shall issue a Confirmation of Registration only to unions that meet certain requirements. Labor unions that are not established in accordance with the Trade Union Act cannot be protected by that Act because they are unregistered. There are three types of unregistered unions: ① No attempt at registration was made, ② The union's Report on Establishment was rejected, or ③ A previously-registered union was disqualified.

If a labor union becomes unregistered, it does not have the following benefits: (1) Immunity from civil and criminal liability (Articles 3 and 4), ② Legal status (Article 6), ③ The right to apply for adjustment in labor disputes, or to apply to the Labor Relations Commission for remedy against unfair labor practices (Articles 7 (1) and 82), ④ The right to use a labor union name (Article 7), ⑤ Tax-exempt status (Article 8), ⑥ Authority to engage in collective bargaining and conclude collective agreements (Article 29) ⑦ The right to participate in the procedure for determining a bargaining representative union (Article 29-2), ⑧ The right to engage in collective action during disputes, which is normally afforded to labor unions (Article 37), ⑨ The right to designate workers for essential maintenance services (Article 42-6), ⑩ The right to be excluded from participating in a special mediation committee (Article 72), and ⑪ The right to apply for redress of unfair labor practices (Art0icle 81).

III. Reviews of the Related Cases

The MOEL office will order corrective action if there is a reason to disqualify from registration an existing union or a union that has submitted a Report on Establishment. If the corrective action is not taken, then a Certificate of Registration will not be issued to the reporting union, or registration will be canceled for an already existing union. There are two main reasons for disqualification. First, the union allowed membership for an employer or those working directly for the employer's interests. Second, the labor union's constitution contains content that is undemocratic or violates its independence or the Trade Union Act.

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[29] Trade Union Act: Article 12(2), (3)-1 ho; Enforcement Decree to the Trade Union Act: Article 9(2)

1. In cases where a member is the employer or someone working directly for the employer's interest

Relevant MOEL guidelines explain that those who act on behalf of the employer in matters relating to workers under Article 2 (2) of the Trade Union Act are

(i) those who are engaged in determination of working conditions such as personnel, salary, welfare, labor management, etc.;

(ii) those who have been given a certain authority and responsibility by the employer over matters such as ordering, supervision, etc.;

(iii) and those in charge of management of personnel and labor such as recruitment, dismissal, and job transfer;

(iv) Those in charge of determining wages, working hours, breaks and other working conditions and confidentiality of labor relations; and

(v) those with authority or direct involvement in internal and external regulations and other policy decisions. This includes employees and directors in charge of human resources and labor, and employees and managers in charge of management planning. In addition, those who act on behalf of the employer's interests in Article 2 (4) of the Trade Union Act refer to those acting on behalf of the employer with respect to the workers of the business, such as the employer's assistants, employees in supervisory positions, and employees and directors in charge of accounting in the company, directors' drivers, and security personnel engaged in surveillance, patrols and other policing duties. [30]

However, authority and responsibility for determining working conditions such as personnel, salary, welfare, and labor, or for ordering or supervising work should be considered in terms of specific facts such as the degree of involvement in the job and in workers' affairs, rather than only the formal title or status. This should be also judged in consideration of whether this authority has been granted by the employer or the manager in charge of the business and the degree of involvement in matters related to workers. Other details to be reviewed comprehensively are whether the persons in question have access to the employer's confidential information related to plans and policies.[31]

2. Cancellation of a labor union's registration due to its constitution violating the Act on the Establishment, Operation, Etc. of Trade Unions for Teachers (hereinafter, the "Teacher's Union Act"): Korea Teachers' Labor Union (KTU)

30) MOEL Guidelines: nojo 01254-665, Jun. 28, 1996.
31) MOEL Guidelines: nojo 01254-383, May 24, 1999; nojo 01254-665, Jun. 28, 1966

The KTU is a representative case of disqualification because its constitution violated the Trade Union Act.

(1) Background to the KTU's disqualification[32)]

The KTU was founded in May 1989, and is a nationwide unit labor union that covers elementary and secondary school teachers, consisting of about 50,000 members in 2015. The KTU has been contributing to true education by working against bribery, prohibiting corporal punishment, eradicating private school corruptions, but has also been criticized for opposing the teacher evaluation system and for teaching political ideology

On June 27, 1999, when the KTU was legalized, it established an additional clause (Article 5) in its Constitution to be able to allow 9 laid-off teachers to join, but this registration report did not include this article when reporting to the MOEL. In other words, in 1999, when the KTU reported its registration form, the provision that allowed it to retain dismissed teachers as members was hidden.

In 2010, the MOEL received a complaint from a conservative NGO that the KTU was keeping the 9 dismissed teachers as members. As a result, it was discovered that the union's constitution violated the Trade Union Act[33)] and the Teachers' Union Act.[34)] So, in May 2010, the MOEL issued an order to the KTU to correct its constitution. The reason given was that dismissed teachers cannot become union members in accordance with Article 2 of the Teachers' Union Act and Article 2 (4) of the Trade Union Act, and any union with non-employee members is subject to disqualification. In accordance with Article 9 (2) of the Enforcement Decree to the Trade Union Act, the union was disqualified for failing to follow the correction order from the MOEL.

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32) Internet Encyclopedia: Wikipedia / Wooden Wiki, "Search: National Teachers' Union of Korea," accessed on August 18, 2019.

33) Trade Union Act – Article 2 (4ho) Disqualification item (4) D. Where those who are not workers are allowed to join the organization, Provided that a dismissed person shall not be regarded as a person who is not a worker, until a review decision is made by the National Labor Relations Commission when he/she has made an application to the Labor Relations Commission for remedy against unfair labor practices.

34) Teachers Union Act: Article 2. The term "teacher" in this Act refers to a person prescribed in Article 19 (1) of the Elementary and Secondary Education Act: Provided that any dismissed persons who have requested remedy for unfair labor practices to the Labor Relations Commission under Article 82 (1) of the Trade Union and Labor Relations Adjustment Act shall be regarded as teachers until a review decision is made by the National Labor Relations Commission under Article 2 of the Labor Relations Commission Act.

(2) The KTU challenges the judgement as unconstitutional[35]

The KTU challenged the constitutionality of the judgment with the following arguments: (1) The Trade Union Act and Teachers Union Act violate the constitutional right to organize, as they do not allow dismissed workers to join a labor union; (2) Rules not entrusted under legislation enacted by the National Assembly is a violation of legal principle: Article 9 (2) of the Enforcement Decree to the Trade Union Act (which the MOEL used to disqualify the KTU), was enacted by the MOEL, and cannot be implemented without the actual Article stipulated in the Trade Union Act, passed in the National Assembly by lawmakers.

(3) Decision of the Constitutional Court[36]

The Constitutional Court dismissed the KTU's constitutional challenge on May 28, 2015. "Even if some of the non-teachers are members of the teacher union, it is up to the discretion of the MOEL to decide whether to qualify or disqualify the labor union. In addition, the discretionary judgment of the MOEL on the disqualification of the KTU as it includes some persons who are no longer teachers is based on the number of unqualified members who are active in the union activities, the effect of such members on the KTU activities, and the union activities of such unqualified members. This decision to disqualify the KTU is within the legal discretion of the MOEL."

In addition, the Constitutional Court stated, "Adoption of the principle of reporting in relation to the establishment of a labor union allows the relevant union to survive as an independent, democratic organization through efficient maintenance and management of the organizational structure of a labor union. It is the purpose of labor policy considerations to protect, foster, and thoroughly guide and supervise."[37] In particular, since the teachers' union is made up of unit labor unions under one nationwide organization, allowing non-teachers into membership is a reason for disqualification of its establishment under Article 2 (4) of the Trade Union Act.

35) Seoul High Court ruling on Sep. 19, 2014: 2014ah413.
36) Constitutional Court decision on May 28, 2015, 2014 hunma 671, 2014 hunma 21.
37) Constitutional Court decision on July 31, 2008, 2004 hunba 9.

IV. Conclusion

If an employer places control over a union by becoming a member himself or having someone directly representing his interests become a member, this amounts to a violation of the union's identity and independence. On the other hand, when a large number of workers directly representing the employer's interest join the union, the company essentially falls under the control of the labor union, as confidentiality of the company's business will be impossible to maintain. This upsets the balance of power between labor and management. Therefore, to maintain this balance, the administrative office needs to be involved in the reasons for disqualification of a labor union from establishment.

In the same way, it should be judged as a disqualified labor union as the Office Workers Union in this case includes the employer's managers and the representatives representing the employer's interests. Accordingly, the administrative office shall check the actual status of the union in accordance with Article 9 (2) of the Enforcement Decree to the Trade Union Act, and order corrections within 30 days if reason exists to disqualify the union.

Criteria for Determining "Employee" Status

I. Introduction

Nowadays, there are many kinds of jobs becoming available and people working under service or freelance contracts, but those who are engaged in such jobs are not recognized as employees to whom labor laws apply. In one particular case[38], a large private institute (hagwon) hired instructors under contracts for 'teaching services', and treated them as independent business owners with freelancer status, a determination which led to serious labor disputes later on. In cases where an instructor works as an independent business owner and not as an employee, he is ineligible for various protections under labor law such as regulations regarding wages and annual leave, protection from unfair dismissal, and compensation from social security insurances for work-related accidents. However, in cases where an

38) Supreme Court ruling on June 11, 2015, 2014da88161: CDI's unpaid severance pay case.

instructor has been determined as an employee, all labor law protections apply. Therefore, instructors look for coverage under labor law, while institute owners seek to avoid employee status for their instructors, due to the additional expenses and the risk of collective action by those instructors.

For these reasons, a clear determination of employee status can resolve labor disputes, and so hereby I would like to review the criteria for determining employee status in terms of legal provisions, expert opinions, and judicial rulings.

II. Judgment of Employee Status

1. Concept

Article 2 (1) of the Labor Standards Act stipulates that the term "worker" in this Act refers to a person who offers work to a business or workplace to earn wages, regardless of the kind(s) of job he/she is engaged in. The concept of "employee" includes the following factors: 1) it is not determined by the kind(s) of job he/she is engaged in; 2) the person works at a business or workplace; 3) the person offers work to earn wages. In understanding this concept, wage is put at the center, while the key point to be considered is whether a subordinate relationship exists between the work provider and the work user. That is, "employee" means "a person who offers work to earn money through a subordinate relationship". [39]

A subordinate relationship is one where a person hired by the employer provides work to the employer, and under the employer's direction and orders, carries out the tasks the employer wants done. So, an employee who offers work to earn wages can be translated as "a person offering work under a subordinate relationship with an employer."[40] The views of "subordinate relationship" by scholars can be classified into two groups: 1) interpretational and 2) law-based.

2. Scholarly views

(1) Interpretational

This view claims that the current judicial ruling regarding the criteria for determination of employee status has some difficulty in understanding because its

39) Jongryul Lim, 「Labor Law」, 13th edition, 2015, Parkyoung sa, page 32.
40) Kaprae Ha, 「Labor Law」, 27th edition, 2015, Joongang Economy, page 102.

criteria are enumerated with factual evidence in parallel order. To overcome this problem, the criteria should be categorized into substantial signs and formal signs from which employee status can be determined as existing or not. [41] Such substantial signs include whether there is command and control, the relationship between the work offered and the current business, and the work provider's situation. The formal signs refer to items whose existence depends on the employer's decisions, which include whether income tax and social security insurance premiums are paid, whether personnel evaluations for the person are performed, and whether the person has a contractual duty to receive permission before getting a second job.[42] That is, this view holds that employee status can be determined through the substantial signs, and formal signs can be excluded from the factors that determine a subordinate relationship.

(2) Law-based[43]

This view holds that the concept of 'employee' should be interpreted in accordance with the related legal provisions. Korean labor law has the definition of employee in Article 2(1) of the Labor Standards Act ("the LSA"), and any judgment of employee status should begin with the interpretation of this provision. The LSA definition of 'employee' contains four determining factors; ① the status can be determined "regardless of the kind of job"; ② the person offers work "to earn wages"; ③ the person offers work "at a business or workplace"; and ④ "the person offers work". Of these four factors, "status can be determined regardless of the kind of job" is not directly related to establishing employee status, and so will not be included for consideration.

First, the employee provides work to earn wages. "The term 'wages' in the Labor Standards 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." (Article 2(5) of the LSA) Therefore, it is sufficient to prove that wages are paid in return for work, but there is no limit on how such payments are termed. Therefore, even though wages were paid per unit of work performance, without considering the unit for the number of working hours, as long as they are paid in return for labor service, such payment can be regarded as wages.

41) Sungtae Kang, "Different types of employment, and judgment of employee status under the Labor Standards Act",『Labor Law Study』No. 11 ho, 2000, p. 35
42) Sungjae Yoo, 『Legal arrangement according to the variety of employment types: employee status in non-traditional employment』, Korea Legislation Research Institute, 2003.
43) Jonghee Park, "Employee concept according to the Labor Standards Act", 『Labor Law Study』, No. 16 ho, 2003, pp. 74-76

Second, "at a business or workplace" means that the employee provides work on the employer's business premises or workplace. Even though there are no particular instructions regarding working hours, place, and method of work, the person is assigned to the labor area with tangible work duties.

Third, "the person offers work" means that the employee provides work to the employer, which is known to be a subordinate position. The employer's instructions can include instructions regarding time, place, and type of work provided. In determining employee status, all three of these factors do not have to be present, but whether the employee was supervised and under the employer's instructions or not must consider all of them.

3. Judicial ruling

(1) Criteria of the judicial ruling

The Supreme Court gave clear criteria for determination of employee status in a lawsuit case involving a full-time instructor at a private institute: first, employee status may exist regardless of the type of contract; second, the criteria for determination of a subordinate relationship are enumerated to 12 items; third, the conditions suggested as signs of employee status shall be determined as decisive or not by considering whether the employer can unilaterally decide whether those conditions exist. These criteria are used to determine employee status, and they are stipulated in the following paragraph.

The Supreme Court[44] ruled, "Whether a person is considered an employee under the Labor Standards Act shall be determined by whether, in actual practice, that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages, regardless of the contract type such as an employment contract or a service contract. Whether or not a subordinate relationship with the employer exists shall be determined by collectively considering:

① whether the rules of employment or other service regulations apply to a person;
② whether that person's duties are decided by the employer, and
③ whether the person has been significantly supervised or directed during his/her work performance by the employer;
④ whether his/her working hours and workplaces were designated and restricted by the employer;
⑤ who owns the equipment, raw materials or working tools;
⑥ whether the person can be substituted by a third party hired by the person;

44) Supreme Court ruling 2004da29736, on December 7, 2006: Full-time instructors' employee status

⑦ whether the person's service is directly related to business profit or loss as is the case in one's own business;
⑧ whether payment is remuneration for work performed or
⑨ whether a basic or fixed wage is determined in advance;
⑩ whether income tax is deducted for withholding purposes;
⑪ whether work provision is continuous and exclusive to the employer;
⑫ whether the person is registered as an employee by the Social Security Insurance Act or other laws, and the economic and social conditions of both sides. Provided, that as whether basic wage or fixed wage is determined, whether income tax is deducted for withholding, and whether the person is registered for social security insurances could be determined at the employer's discretion by taking advantage of his/her superior position, the characteristics of employee cannot be denied because of the absence of these mentioned items."

"The above criteria are not applied formally or uniformly, but in the event facts equivalent to the above items exist, it should be determined after reviewing whether these facts were decided by the employer's superior position or required naturally by such job characteristics."[45)]

(2) Understanding the judicial judgment

In reviewing the court's criteria for determining employee status, three key items need to be explained. First, when determining whether employee status exists, the judicial ruling is decided by the definition provision of Article 2 (Paragraph 1) of the Labor Standards Act. "In determining employee status under the Labor Standards Act, this shall be determined by whether the person has provided work to the employer through a subordinate relationship for the purpose of earning wages at the employer's business or workplace." This judicial ruling includes a definition of the term, 'employee', which means a person providing work in return for wages through a subordinate relationship with the employer.

Second, the court ruled, "Whether a person is considered an employee under the Labor Standards Act shall be determined by whether, in actual practice, that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages, regardless of the contract type, such as an employment contract or a service contract." This judicial ruling shows that employee status shall be recognized not based upon the formal type of contract

45) Supreme Court ruling on May 11, 2006, 2005da20910: Ready-mix truck driver case.

made between two parties, but by the substantial relationship in actual practice.

Third, the judicial ruling shows that status as an employee under the Labor Standards Act shall be determined by whether the person provides work through a subordinate relationship or not, and in order to confirm such subordinate relations, several signs are listed and estimated collectively. In particular, these signs can be divided into 12 items, which can be compared and analyzed for similarity to employee characteristics and for similarity to employer characteristics. After reviewing which characteristics are more evident in the relationship in question, determination of whether employee status exists shall be made.

III. Conclusion

The scholarly view and judicial view are consistent in the following criteria: 1) In employment relations, employee status shall be determined by whether there is a subordinate relationship between the parties or not (judgment by subordinate relations); 2) whether there is a subordinate relationship between the parties or not shall not be determined by the type of contract or title, but by actual facts of the labor provision relations (judgment based upon actual relations); and 3) the actual facts of the labor provision relations shall be determined in consideration of an overall collective evaluation of all items (overall consideration). Accordingly, employee status according to subordinate relations shall be determined after considering practical facts of the employment and reviewing them overall. Judicial ruling states that the criteria for ruling on employee status shall not be determined by the format of employment relations, and shall not consider as important in judgment whether the person paid corporate tax or was registered for the social security insurances, which can easily be decided by the employer due to his/her superior position. These points emphasize that employee status shall be determined by employment relations in actuality.

Freelancers and Employees

I. Whether or not a Freelancer is considered an Employee (A Recent Case)

A Freelance Contract (or Service Contract) refers to an agreement where one party (the service recipient) entrusts another party (the service provider) with particular work, and the service provider accepts it (Commission: Article 680 of Civil Law). Unlike an employment contract where an employee is responsible to provide work under direction and supervision of an employer, a Freelance Contract shows that the service provider (freelancer) has been commissioned to provide a specific service, and will work independently. As a freelancer, an individual contractor independently disposes the work assigned to him or her by the service recipient, receives limited directions and is under no supervision. The service provider, therefore, is excluded from the application (and protection) of Labor Law.

On February 22, 2011, 17 native English teachers who had worked for Hagwon C, one of the biggest language institutes in the country, filed a petition with the Kangnam Labor Office against Hagwon C for unpaid wages of 350 million won for severance pay, etc. Hagwon C claimed that as these teachers were freelancers and had signed an 'Agreement for Teaching Services', they were not entitled to severance pay as normally required under Labor Law. However, the 17 teachers claimed that even though their contracts were Freelance Contracts, they had **a)** provided labor service under Hagwon C's direction and supervision and even under its strict control, **b)** their workplace and working hours had been restricted, and **c)** they had received fixed hourly wages. The major issue in this labor case was whether the teachers were Hagwon C employees to which the Labor Standards Act applied, or whether they were freelancers (service providers under Civil Law). In the following pages, I would like to concretely clarify the issue, based upon related judicial rulings and administrative guidance on whether these 17 teachers of Hagwon C should be considered to have employee status.

II. Labor Cases Denying Employee Status to Freelancers

(1) A substitute driver is not an employee under the Labor Standards Act

"The substitute driver cannot be an employee when considering the following items collectively: The company provided the substitute driver with customer information from someone requesting a substitute driver. The substitute driver purchased a mobile phone privately in order to receive this information and also paid the mobile phone bills himself. In addition, he purchased car insurance privately to deal with possible car accidents while doing such work. The substitute driver was able to come and go to the office freely, and received payment according to work done. He did not receive fixed pay. The company could not

punish him for negligence or disobedience because company service regulations did not apply to him." (Daegu Court 2007 gadan 108286)

(2) If a director performs his work duties independently and at his own discretion without specific directions or supervision over his work performance, such a director is not considered to be an employee.

"The director cannot be an employee when considering the following items collectively: The person was registered as a director in the corporate register. He had carried out his duties independently at his own discretion. He had paid his expenses with the company credit card, used the company car independently, and had not received any directions or supervision of his work performance from the company, but simply reported to the representative director." (Court 2005 guhap 36158)

(3) Even though the person has provided labor service, if he was not in an employment relationship, he cannot be regarded as an employee under the Labor Standards Act.

"The person cannot be an employee when considering the following items collectively: Even though the employee's place of work was restricted to company premises and the company could not substitute him with other employees, the service provider was not limited to specific working hours when his coming to and leaving the office was controlled. The company did not have any authority to discipline the person for violation of service regulations, even though the company exercised some rights to direct and supervise in the course of work performance. His earnings were not remuneration for his labor service, and he did not receive fixed or basic pay. The establishment or termination of the labor service contract was up to the service provider." (Busan District Court Ruling on May 17, 2006, 2005 gudan 1293)

(4) A private tutor who receives a commission due to results for the number of commissioned duties performed is not an employee.

"A private tutor cannot be an employee when considering the following items collectively: The private tutor did not receive substantial or direct orders nor was supervised by the company in the process of performing the required duties. Unlike a regular employee of the company, the private tutor was hired by a branch office, and had not had his/her work hours controlled, was free to have duplicate

employment, and could terminate the service contract at anytime. Payment was paid regardless of the contents of the labor provided, or the time that the private tutor worked. Rather, payment and amount were decided by the results of the commissioned duties performed. It is therefore difficult to deem the payment as remuneration paid in return for work."(Court 2003 guhap 21411)

(5) A golf caddie cannot be considered as an employee of the Labor Standards Act.

"A caddie cannot be an employee when considering the following items collectively: the caddies in question did not receive any monetary remuneration from the company except for service fees. They were assigned to work in a specific order, but did not have their working hours regulated, and so whenever they finished their work, they could leave the golf course immediately. In the process of work performance, they did not receive any substantial or direct orders or supervision from the company, but simply provided their labor service according to the needs or direction of the golf players." (Seoul Admin. Court 2001 gu 33013)

III. Concrete Criteria for Determining "Employee" Status

"Whether a person is considered an employee under the LSA shall be decided by whether that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages in actual practice, regardless of whether the type of contract is an employment contract or service agreement under Civil Law." (Supreme Court 2008 da 27035)

The Ministry of Labor determines whether the contractor has employee or freelancer status when considering collectively the seven items suggested below by the aforementioned Supreme Court ruling.

(1) Whether the Rules of Employment or service regulations apply to a person whose duties are decided by the employer, and whether the person has been supervised or directed during his/her work performance specifically and individually by the employer:

Supervision and direction mean that the person implements the work that the employer wants him/her to do under the employer's direction and command. There are various criteria for determining "under the direction and supervision of the employer", but this shall be determined by considering the following criteria collectively.

① Whether such things as employment, training, retirement, etc. apply to said person;
② Whether said person can decide what work he/she will do, or whether said person has freedom to obey or reject work instructions.

(2) Whether his/her working hours, working days and workplaces are designated and restricted by the employer:

① Whether his/her working hours or working days are designated: falls under "Restrictions in working hours";
② Whether his/her workplaces are designated or the times determined when said person shall provide labor service in the directed workplaces: falls under "Restrictions in workplaces."

(3) Whether a third party hired by said person can be a substitute for him/her:

The inability to substitute someone for oneself to do the labor service is not a basic criterion in determining whether a subordinate relationship exists or not, but when a substitute is possible, this becomes a significant indicator that a relationship of direction and supervision may not exist.

(4) Whether said person owns the equipment, raw material, or working tools he/she uses:

If the machine or tools owned by the work performer are very expensive, and if the person shall be responsible for his/her own workplace injuries, he/she is closer to being a business owner who judges and takes on risk at his/her own discretion, and indications that he/she is an employee are weak.

(5) Whether payment is remuneration for work and whether a basic wage or fixed wage is determined in advance:

① If remuneration is a fixed amount regardless of work performance and paid at a fixed rate for work, and if the fixed amount is designed to provide a living for the person, this can be described as characteristics of being an employee;
② If the person's level of remuneration is remarkably higher than other employees who do the same or a similar job in a corresponding company, this can be remuneration for a business assignment with individual responsibility and risk and not a characteristic of being an employee.

(6) Whether work provision is continuous and exclusive to the employer:

If the person is restricted from simultaneous employment with another company

by company regulations, or if the person cannot work for two or more companies at the same time due to his/her unavailability in reality, said person's provision of labor service can be regarded as exclusive to the employer.

(7) Whether the person is registered as an employee under the Social Security Insurance Acts or other laws:

In cases where the person pays income tax on his/her remuneration, this is a supplementary fact that can be positively determined as an employee characteristic. However, simply because remuneration has not been subject to income tax is not a clear indication that this remuneration isn't a wage.

IV. Judgment on Employee Status of Hagwon Teachers (Conclusion)

The English teachers of Hagwon C in the above-mentioned labor case were judged by the Labor Office to be employees providing labor service for the purpose of earning wages. It was confirmed that what they claimed were unpaid wages (such as severance pay, paid weekly allowance, and annual paid leave allowance) were actually unpaid wages guaranteed by the Labor Standards Act. As the decision of the Labor Office has not been made public, I assume that the judgment can be understood through the following labor case.

"Teachers are considered employees who provide labor service under employment relations and are entitled to severance pay." (Suwon Court 2007 godan 5596)

1) The Hagwon determined what subjects teachers would teach, and stipulated teaching hours and work places for the teachers.
2) The Hagwon repeatedly delivered letters to encourage teachers to improve quality and content of their classes, and sometimes sent out general rules regarding its operations. In reality, teachers had generally been directed and supervised in many ways.

3) The Hagwon owned all furnishings, materials, and equipment that teachers used, with the exception of lesson materials.

4) Teachers could not be substituted by a third party in reality, except for very exceptional cases such as illness or unexpected tragedy.

5) Teachers received remuneration calculated by multiplying a fixed hourly amount by the number of working hours. The remuneration was paid in return for work

itself, and the Hagwon's earnings did not affect individual teachers' level of remuneration.

6) On the other hand, some teachers had taught at other hagwons while working for the employer, which may be problematic to being declared "exclusive to the employer", but in reality, such teachers' classes at this Hagwon were relatively smaller.

7) Even though the Hagwon had two systems of employment for staff and teachers, did not apply the Rules of Employment to teachers, did not charge income tax, and let teachers insure themselves through the individual National Health Insurance outside of the company's National Health Insurance, these conditions are secondary in evaluating employee status as the employer can determine these conditions due to his/her superior position in employment relations.

Representative Directors of Foreign Company Subsidiaries

I. Introduction

In general, labor law does not apply to a representative director because he has a delegated contractual relationship with his employer. This means that he is not entitled to retirement benefits, compensation for industrial accidents, unemployment benefits, legal protection from unfair dismissal, or other things that ordinary employees enjoy. A representative director does not have employee status because he is an ultimate decision maker who represents the company externally and has the right to decide personnel, operations and funding. However, if a representative director is employed by an actual employer and registered on the corporate register, even if simply for the sake of formality, as a representative for external activities, and if his work is performed under considerable supervision from the employer, he is recognized as an employee under the Labor Standards Act.

When a multinational corporation establishes a company in Korea, a local person is commonly hired as the representative director for efficiency and effectiveness. In this case, regardless of his legal status as a registered director, the representative

director or the head of the company in Korea often does not have the authority of an employer. In this regard, I would like to examine specifically the distinction between employee and employer, some characteristics of foreign company subsidiaries, and the criteria for determining whether a representative director is also an employee.

II. The Distinction between Employee and Employer

1. The concept of employer

The term "employer" means a business owner, or a person responsible for management of a business or a person who works on behalf of a business owner with respect to matters relating to employees (Article 2(1-2) of the Labor Standards Act, or LSA). Here, the term "employer" means a person who operates a business through employees (Article 2 of the Wage Claim Guarantee Act). The person responsible for management of a business means a person who is responsible for general business management and is entrusted with comprehensive delegation authority from the employer for management of all or part of the business and is able to represent or delegate the business externally. This includes representative directors, registered directors and others. Regardless of whether the position includes "representative" or "director" in the name, the person who actually exercises the management rights of the company is the manager. [46]

The representative director or director is a person with rights to represent the company, holds executive power according to the company's articles of incorporation, is entrusted with certain administrative powers by the company, and is not an employee under the Labor Standards Act. However, if a representative director is employed by an actual employer and registered on the corporate register, even if simply for the sake of formality, as a representative for external activities, and if his work is performed under considerable supervision from the employer, he may be the employee stipulated by the Labor Standards Act. [47]

2. The concept of employee

The term "employee" means a person who offers work to a business or workplace to earn wages, regardless of the kind of job he/she is engaged in (Article 2 (1-1)

46) Supreme Court ruling on May 11, 2006, 2005do 8364; Jongryul Lim, 『Labor Law』, 14th edition, 2016, Parkyoungsa, p. 40.
47) Supreme Court ruling on Sep. 26, 2003, 2002da64681.

of the LSA). Whether or not a person has employee status depends on whether or not that person has provided work to an employer, in a subordinate relationship, that is performed to earn a wage, regardless of the type of contract. [48] Because of his authority to represent the company externally and enforce the business of the company internally, a representative director has employer status. However, if the representative director position is only formal or nominal, if his management is considerably under the direction and supervision of the actual employer, and if he is paid wages in return for the work, the person in that representative director position is an employee according to the Labor Standards Act.[49]

III. Characteristics of a Representative Director of a Foreign Company Subsidiary

1. Representative directors of foreign company subsidiaries

If a domestic foreign office established by a multinational corporation manages its business independently with a certain authority and the representative director is delegated with the right to independently manage the local business within a certain scope, that representative director retains employer status.

In this regard, a judicial ruling states that, "Generally, multinational corporations are a group of several corporations of different nationalities, and legally separated. A multinational corporation as a business group is not comparable to a group of constituent companies but to a parent company which is the ruling supervisory head and is at the top of its subsidiaries, collectively deciding all matters concerning the multinational corporation. Subsidiaries are under the control of the parent company, and there is a controlling subsidiary relationship between the parent company and its subsidiaries. Accordingly, there is a certain supervisory relationship between the parent company's executives and the subsidiary company's executives due to the business connections between the parent and subsidiary. This is similar to the subordinate relationship between an employer and company employees, but differs in that it is a subordinate relationship that occurs only in the interindustry relationship between a parent and a subsidiary. As a result, as there is a certain directive and supervisory relationship between executives of a controlling parent company and executives of a subsidiary company, directors with executive powers in the subsidiary cannot be regarded as employees of the

48) Supreme Court ruling on Sep. 26, 2013, 2012do6537.
49) Supreme Court ruling May 29, 2014, 2012da98720.

subsidiary." [50] Nevertheless, if the representative director of a subsidiary of a foreign company receives directions and is supervised by the parent country during the carrying out of his duties, and is essentially an intermediate manager with almost no independence, he is not an employer but an employee.

2. Determining employee status of a representative director

Whether or not the person is an "employee under the Labor Standards Act" shall be determined by whether he has provided work to the employer in a business or workplace for the purpose of earning wage, [51] and not on whether the representative director is registered as such on the corporate register. [52] In actuality, a representative director is not an employee because he represents the company externally and has the authority to execute the affairs of the company internally. However, if he is registered as a representative director of the corporation, but does not have the right to execute the internal affairs of the company or handle its external affairs, his title is simply formal and nominal while there is another manager who actually makes the decisions, and if he is provided wages not for his performance in management or work, but according to the nature of the work itself, he is an employee in actuality. [53]

Therefore, the two most important factors affecting the determination of whether a representative director of a foreign company subsidiary is an employee or not are: (i) the existence of significant supervision over the representative director, and (ii) whether the person has been registered as the representative director on the corporate register.

(1) Existence of significant supervision over the representative director

"In the course of job performance, whether the employee has been supervised and controlled by the employer substantially and individually or not" was quoted in a lawsuit in 1996 regarding a part-time instructor's employee status at a private institute.[54] However, in a lawsuit in 2006 regarding the employee status of a full-time instructor[55], the above supervision was reduced to "considerably supervised and controlled by the employer". For a representative director, whether he is an

50) Seoul High Court ruling on Dec. 21, 2012, 2012na52795.
51) Supreme Court ruling on Feb. 24, 1999, 98doo2201; Supreme Court ruling on Feb 9, 2001, 2000da57498.
52) Supreme Court ruling on Sep. 4, 2002, 2002da4429.
53) Supreme Court ruling on Aug. 20, 2009, 2009doo1440.
54) Supreme Court ruling on Jul. 30, 1996, 96do732.
55) Supreme Court ruling on Dec. 7, 2006, 2004da29736.

employee or not depends on whether his work has been considerably supervised and controlled by the employer. This change is due to the diversification of occupations, from the simple structure of production and office employees to the complex service industry. [56]

(2) Whether the person has been registered as the representative director on the corporate register

An executive director's status as employee is often recognized by whether he was registered as a director on the corporate register. In general, registered directors are denied employee status, but this is not the case if his duties are performed under considerable supervision and control. On the other hand, an unregistered director is recognized as an employee in principle, but denied employee status if his own decision-making authority or exclusive right to execute the work is clear.[57]

IV. Criteria for Judicial Ruling and Application

1. Criteria for determining employee status

The Supreme Court issued clear criteria for determining employee status in a lawsuit involving a full-time instructor at a private institute in 2006. These criteria can also be used to determine employee status for the representative director of a foreign company: first, employee status may exist regardless of the type of contract; second, the criteria for determination of a subordinate relationship are enumerated as the 9 items in the paragraph below; third, the existence of conditions suggested as signs of employee status shall be determined by considering whether the employer can unilaterally decide whether these conditions exist.

In this case, the Supreme Court[58] ruled, "Whether a person is considered an employee under the Labor Standards Act shall be determined by whether, in actual practice, that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages, regardless of the contract type,

56) Donghee Bae, "A Study on Employee Status Based on Review of Court Rulings", Korea University Ph.D thesis, 2016, p. 59; Bongsoo Jung, "A Study on the Employee Status of Native English Teachers", Korea University MA thesis, 2013, p. 32.
57) Taesik Ahn, "A Criteria for Determining Employee Status for Registered Directors", 「Law and Policy」, Vol. 22, Korea Policy Association, June 2014, p. 624.
58) Supreme Court ruling 2004da29736, on Dec. 7, 2006: Full-time instructors' employee status.

such as an employment contract or a service contract. Whether or not a subordinate relationship with the employer exists shall be determined by collectively considering:

① whether the rules of employment or other service regulations apply to a person; whether that person's duties are decided by the employer, and whether the person has been significantly supervised or directed during his/her work performance by the employer;

② whether his/her working hours and workplaces were designated and restricted by the employer;

③ who owns the equipment, raw materials or working tools;

④ whether the person can be substituted by a third party hired by the person;

⑤ whether the person's service is directly related to business profit or loss as is the case in one's own business;

⑥ whether payment is remuneration for work performed or

⑦ whether a basic or fixed wage is determined in advance;

⑧ whether income tax is deducted for withholding purposes; whether the person is registered as an employee by the Social Security Insurance Act or other laws;

⑨ whether work provision is continuous and exclusive to the employer; and the economic and social conditions of both sides. Provided, that as whether basic wage or fixed wage is determined, whether income tax is deducted for withholding, and whether the person is registered for social security insurances could be determined at the employer's discretion by taking advantage of his/her superior position, the characteristics of employee cannot be denied because of the absence of these mentioned items." [59]

"The above criteria are not applied formally or uniformly, but in the event facts equivalent to the above items exist, Employment status should be determined after reviewing whether these facts were decided by the employer's superior position or required naturally by such job characteristics."[60]

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59) Supreme Court ruling on Dec. 7, 2006, 2004da29736.
60) Supreme Court ruling on May 11, 2006, 2005da20910: Ready-mix truck driver case.

Representative Directors of Foreign Company Subsidiaries

2. Determining Employee Status[61]

Supreme Court Ruling (9 items: details for judgment)		Factual Grounds for the Representative Director	Judgment	
			Employee	Employer
1) Employer's direction & supervision	① Application of Rules of Employment; type of contract	Whether the Rules of Employment were applied; type of contract (Employment contract or service contract)	X	●
	② Right to manage personnel	Rights to hire, dismiss, and discipline employees	●	X
	③ Arrival/departure from work, annual leave	No control over arrival/departure time, no annual leave granted		
	④ Exclusive right to execute work and financial authority	Exclusive work performance, considerable supervision during work performance; right to determine how corporate money is spent		
2) Working hours and work places	⑤ Working hours	Whether working hours are controlled		
	⑥ Work place	Whether the workplace is mandated		
3) Equipment, working tools, expenses	⑦ Ownership of equipment, working tools	Who owns equipment, tools, etc.; whether damage claims are possible or not		
	⑧ Expenses	Whether operating costs are subsidized, expenses reimbursed, corporate credit card, etc.		
4) Substitution	⑨ Substitution with a 3rd party	Whether work is exclusive or person can be substituted in the event of absence		
5) Earning	⑩ Pursuit of profit	Whether pursuit of profit through individual effort is possible		
	⑪ Independent business	Whether independent business is possible		
	⑫ Liabilities for damage	Whether the director is responsible for losses		
6) Characteristics of wage	⑬ Remuneration for labor	Whether wage is decided by evaluation of total sales, or paid at a fixed amount in return for work provided		
	⑭ Independent business	Whether the individual can create his own profit		
7) Basic pay	⑮ Whether basic pay is fixed	Majority of pay is based on basic wage or incentive pay		
8) Income tax, etc.	⑯ Income tax and social security insurances	Whether corporate tax or income tax is deducted whether premiums for social security insurances are deducted		
9) Continuous service, etc.	⑰ Continuous work	Work is continuous		
	⑱ Exclusive work	Whether the director can work for another company during employment		
Review/Evaluation		<Describe the above items, which are particularly strong>	total	total

61) Bongsoo Jung, "A Study on the Employee Status of Native English Teachers", p. 79: adjusted to evaluate a representative director's employee status.

* In the review, weighting is divided into two stages: employee status and employer status. The more checkup signs are calculated in the total sums, the stronger status is considered.

V. Conclusion

In judging the employment status of a representative director of a foreign company subsidiary, there is a tendency to simply decide by considering whether he has been registered as a director, whether the executive has written a commission contract, and whether he has been given the title of "representative director".

It is common for multinational corporations to have a controlling and dominant relationship with their foreign subsidiaries, which means the directors of those subsidiaries in Korea must report business details to their parent companies and receive instructions in turn. It can be difficult to distinguish between normal corporate relations and whether a director is an employee or not.

The representative director of a foreign company subsidiary is generally comprehensively instructed and supervised by the head office of the multinational company on company operations and does not have the right to manage personnel, has limited executive authority and limited decision-making powers on the use of funds. Even department managers should report their business practices to the department directors at the parent company.

In such cases, the representative director of a foreign company subsidiary may be judged to be an employee. Therefore, when judging the employment status of a representative director of a foreign company subsidiary, it is necessary to look comprehensively at the director's exclusive rights to execute work, the right to manage personnel, and the right to spend company money at his own discretion, not by whether he has formally been registered as a representative director, his Korean title, or has signed a service contract.

Manager of a Luxury Brand Store: Not an Employee

I. Summary (Store managers' claim for severance pay, etc.[62])

Two store managers whose contracts were unsatisfactorily terminated at the Korean branch of a luxury brand company in July 2012 filed a petition with the Labor Office in October 2012 for non-payment of severance pay, annual paid leave allowance, etc. In this labor case of unpaid wages, the company claimed that the store managers were not entitled to severance pay in accordance with the Labor Standards Act as they were independent sales service contractors, while the store managers claimed that they were employees providing labor for wages under the employer's supervision and receiving fixed basic pay and incentives, and requested about 80 million won for severance pay and other legal allowances. The labor inspector in charge of this case recommended the company accept an adjusted settlement at the beginning of this investigation, seeming to suggest the store managers' claim was reasonable. However, the company would not accept any settlement with the two store managers, as 16 other store managers may then have made similar claims against the company. Labor cases are usually handled within two months by the Labor Office, but this case took 7 months, finally concluding in April 2013. In the end, the labor inspector rejected the store managers' claim, determining the store managers were not employees but independent contractors. I would like to look into the details of this case: factual grounds, points of dispute, the claims of both parties, related Supreme Court ruling, and the labor inspector's decision.

II. Factual Grounds and Point of Dispute

1. Factual grounds

○ The company entered into an outsourcing contract for sales service with store

62) Labor Attorney Bongsoo Jung handled this case at the Gangnam Labor Office from October 2012 to April 2013.

managers who preferred a sales service contract to an employment contract. Many other similar luxury brand companies have used store managers as independent contractors.

○ Store manager A began working as the manager of the Chungdam branch under a service contract in September 2008. When ordered to work as manager of another store due to renewal construction at her store, store manager A terminated the service contract. Store manager B was hired as an employee in September 2010 and worked as a store manager. When offered a commission-based contract, store manager B terminated the employment contract and signed a sales service contract to work as an independent selling contractor. The company later chose not to renew the service contract with this store manager due to her poor sales performance.

○ The store managers' monthly pay was 2 million won plus 4% of normal total sales and 2% of total sales during discount sales periods. The contract period was 6 months and could be renewed if there was no termination notice one month in advance.

○ There were no particular rules of employment or other regulations applicable to the store managers.

○ The store managers attended a sales meeting once a month, but there were no daily or weekly reports. An employee at each store reported sales on a daily basis through the computer system.

○ Each store has one store manager and two to four employees. Employees (excluding the store manager) received management and supervision from the head office, and their annual paid leave was controlled.

○ The store managers' workplace was fixed, but their working hours were discretionary, with their arrival and departure not controlled by the company.

○ The store managers did not own the equipment, products, uniforms, etc., necessary to sell the products, and used the items provided by the company. However, the store managers bore the expenses necessary in the store such as telephone bills, clothing repair costs, etc. It was not possible for the company to

replace the store manager's position with a third person.

○ The store manager could hire part-timers as they wished, with their wages paid by the company.

○ The store manager treated VIP customers to meals, entertained them with golf, and distributed leaflets at his/her own cost. Sometimes the store managers further discounted the standard discounts of the company to increase sales.

○ The company has never punished or disciplined its store managers. The company could only refuse to renew their service contracts.

○ Store managers paid corporate income tax instead of labor income tax, and were not registered for social security insurances.

2. Points of dispute

A major point of dispute was that although the store manager was an independent contractor with the sales service outsourcing contract, he/she claimed severance pay under the Labor Standards Act, and so whether there was a relation of supervision between the company and the store manager needed to be determined. According to the sales service outsourcing contract, the company didn't outsource the entire store, but made an individual, independent contract only with the store manager while keeping employment relations with all other employees working at that store. Is it legal to consider the store manager alone as an individually contracted service provider?

III. The company' s claim

1. Judgment of whether the store managers had subordinate relations with the employer

The company claimed that the store managers were not employees under the Labor Standards Act, were not entitled to severance pay, annual paid leave, or other legal allowances. Details can be found in the table.

Manager of a Luxury Brand Store: Not an Employee

Supreme Court Ruling (9 items: details for judgment)		Factual Grounds	Judgment	
			Employee	Contractor
1)Employer's direction & supervision	① Rules of Employment	Rules of Employment were not applied.	X	●
	② Employment contract	Sales outsourcing contract was made.	X	●
	③ Arrival/departure from work, annual leave, disciplinary action	No control of arrival/departure time, or annual leave. No disciplinary action.	X	●
	④ Work instructions	No work reports made or instructions given.	X	●
2)Restricted working hours and work places	⑤ Working hours	No control of working hours.	X	●
	⑥ Work place	Work place was restricted.	●	X
3)Equipment, working tools, expenses	⑦ Ownership of equipment, working tools	The employer owns equipment, tools, etc.	●	X
	⑧ Expenses	The store manager bears cost of repairs and telephone bills.	X	●
4)Replacement	⑨ Replacement with a 3rd party	As the work is assigned exclusively to the particular person, it is not possible to substitute the store manager with a 3rd party.	●	X
5)Earning through sales	⑩ Pursuit of profit	Pursuit of profit-earning by individual effort is possible. Store managers entertained customers with golf during working hours.	X	●
	⑪ Independent business	Independent business possible.		●
	⑫ Liabilities for damage	Company, not store managers, responsible for losses.	●	X
6)Characteristics of wage	⑬ Reward of labor	Income is decided by evaluation of total sales.	X	●
	⑭ Independent business	Individual can create own profit.	X	●
7)Basic pay	⑮ Whether basic pay is fixed	Basic wage: 2 million won + Commission (4%).	●	X
8)Income tax, etc.	⑯ Income tax and social security insurances	Corporate tax applied, social security insurances not.	X	●
9)Continuous service, etc.	⑰ Continuous work	Work is continuous.	●	X
	⑱ Exclusive work	Work is assigned exclusively to the contractor during the contract period.	●	X
Evaluation		**There are more characteristics for sales outsourcing than employment relations.**	7	11

Manager of a Luxury Brand Store: Not an Employee

2. Summary of the company's claims

As described in the above table, the store managers 1) entered into a sales service contract, not an employment contract, and worked as contractors on an equal footing with the company; 2) made efforts to increase their own sales-based income as independent contractors; and 3) worked without employer's direction or supervision at work, but were engaged in sales activities using their own time and money. The company did not reimburse them for any expenses related to business or sales activities, but paid out commissions based upon the store's total sales. Accordingly, there were no subordinate relations between the two store managers and the company.

IV. Related Supreme Court Ruling and Labor Inspector' s Criteria for Judgment

1. Related Supreme Court ruling

The Supreme Court explains the criteria for evaluating whether the person is an employee or not in 9 categories, compares and analyzes between the evidence of employee characteristics and evidence of employer characteristics in terms of those 9 categories, and determines whether the target person is an employee or not according to the results of comparison. The weight to determine the results can be assigned on the basis of: 1) whether the employer supervises or not; 2) whether income is remunerated in return for labor service; and 3) consideration of the character and content of the labor service. However, wages and registration for the four social security insurances, which are usually decided by the employer, cannot be an important factor in determining employee characteristics. Whether the store manager is considered an employee according to labor law shall follow the criteria of the Supreme Court ruling:

"Whether a person is considered an employee under the LSA shall be decided by whether that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages in actual practice, regardless of whether the type of contract is an employment contract or service agreement under Civil Law. Whether a subordinate relationship with the employer exists or not shall be determined by collectively considering:

1) whether the Rules of Employment or service regulations apply to a person whose duties are decided by the employer, and whether the person has been supervised or directed during his/her work performance specifically and individually by the employer;
2) whether his/her working hours and workplaces were designated and restricted by the employer;
3) who owns the equipment, raw material, or working tools;
4) whether his/her position can be substituted by a third party hired by the person;
5) whether his/her service is related to creating profit or causing loss like one's own damages;
6) whether payment is remuneration for work and whether basic wage or fixed wage is determined in advance;
7) whether income tax is deducted for withholding;
8) whether work provision is continuous and exclusive to the employer;
9) whether the person is registered as an employee by the Social Security Insurance Acts and other laws, and the economic and social conditions of both sides. Provided, that as whether basic wage or fixed wage is determined, whether income tax is deducted for withholding, and whether the person is registered for social security insurances could be determined at the employer's discretion by taking advantage of his/her superior position, the characteristics of employee cannot be denied because of the absence of these mentioned items. (Supreme Court ruling 2004 da 29736, December 7th, 2007)

2. Labor inspector's criteria for judgment

It was expressed during the proceedings that the labor inspector responsible for this case had a very difficult time determining whether the two store managers should be regarded as employees. Store manager B's case was especially difficult, because although her status changed from employee to independent contractor, she continued to work a similar job at the same store, and could be interpreted as an employee. However, after looking at the criteria for employee characteristics, he judged that the characteristics as an independent contractor outweighed those for an employee.

"Those characteristics as non-employee include: 1) the store managers chose to sign a sales service contract because it had much better working conditions than the employment contract; 2) the store managers made efforts to increase their

income through increased sales, and spent their own money to do so; and 3) the employer had not supervised the store's business and so the store manager operated the store independently. In considering the aforementioned facts, it was found that there were no subordinate relations between the employer and the store managers."

V. Conclusion: Company's measures

Store managers A and B were determined to be independent contractors by the Ministry of Labor in the process of investigation for unpaid wages, but as many employee characteristics were identified, it is necessary for employers to take action if they wish to prevent similar labor cases in the near future. Accordingly, companies need to: 1) make a clear decision on whether the store manager shall be treated as an employee or an independent contractor; 2) when entering into a sales service contract for store managers, increase sales commissions and abolish fixed wages to increase the independence of the store manager; 3) introduce a full-coverage outsourcing for branch stores so that the independent contractor has exclusive control of his/her store.

Is a Telemarketer an Employee?

I. Introduction

"Specially hired service providers" refer to those who provide labor service on a regular basis in a specific workplace, but who are not yet recognized as employees. Typical jobs include golf-club caddies, home-study teachers, cement truck drivers, and telemarketers. They are not generally recognized as employees because they are not in a subordinate relationship with the employer due to their job characteristics, and also do not provide exclusive services to the employer. However, in recent judicial rulings, if a person is exclusively attached to one workplace, and if there is a considerable subordinate relationship with the employer, such a person can be considered an employee. Previous judgment criteria depended on whether the base

pay was given, whether the four social security insurances were subscribed to, and whether income tax was paid, but these things can be determined arbitrarily by the employer, given his or her economically superior position, and so determining whether someone is an employee must now be through determining whether an actual subordinate relationship to the employer has existed or not.

Whether a telemarketer who is a "specially hired service provider" is an employee or not is decided by how much of a subordinate relationship exists between the employer and the at-home telemarketer at the place of work. Telemarketers are usually engaged in business such as selling insurance, selling targeted real estate, distance sales, etc. Unlike a person working at a call-center, his/her main earnings are determined by their individual sales performance, so it is not entirely accurate to call such a person an employee. I would like to look into the employee characteristics of an at-home telemarketer and some typical related labor cases.

II. Criteria for Determining "Employee" Status

1. The Ministry of Labor guidelines and judicial rulings use the same criteria for determining "employee status" for a telemarketer. That is, whether or not someone is an employee shall be estimated by whether a subordinate relationship with the employer exists for the person providing the labor service. Some difference is that the administrative guidelines are inclined to consider related factors (refer to the 9 categories of judicial rulings) with equal weight, while the judicial rulings tend to focus on the actual subordinate relationship in work details rather than related factors, in light of the employer's economically superior status.

2. Judicial rulings on the criteria to determine employee status is based upon the following judgment principle.[63] "Whether a person is considered an employee under the Labor Standards Act shall be decided by whether that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages in actual practice, regardless of whether the type of contract is an employment contract or service agreement under Civil Law. Whether a subordinate relationship with the employer exists or not shall be determined by collectively considering:

63) Supreme Court ruling on Sep 7, 2007, 2006 do 777

① whether the Rules of Employment or service regulations apply to a person whose duties are decided by the employer, and whether the person has been supervised or directed during his/her work performance specifically and individually by the employer;
② whether his/her working hours and workplaces were designated and restricted by the employer;
③ who owns the equipment, raw material, or working tools;
④ whether the person can hire a third party to replace him/her and operate his/her own business independently,
⑤ whether the person is willing to take the opportunity and risk to earn money or lose it;
⑥ whether payment is remuneration for work and
⑦ whether basic wage or fixed wage is determined in advance;
⑧ whether the person pays income tax or not (including subscription to the four social security insurances) and
⑨ whether work provision is continuous and exclusive to the employer. However, whether basic wage or fixed wage is determined in advance, whether income tax is withheld, and whether the person is recognized as an employee eligible for social security insurance are factors that could be determined arbitrarily by the employer's superior economic status. Therefore, just because those mentioned factors were rejected, it is hard to deny that employee characteristics exist."

III. A Case Where "Employee Status" was Determined to Exist (Dismissal of a Distance Sale Telemarketer) [64)]

1. Summary

A Social Welfare Corporation (hereinafter referred to as "the company") employed 30 people and used them as telemarketers for distance sale operations. Since November 11, 2003, the applicant had worked as a telemarketer. The company had proposed a new 'commission agreement' to the applicant, and when she refused to sign the agreement, the company terminated her employment on October 19, 2006. The applicant then applied for remedy from the Labor Commission, but it was rejected after she was determined not to be an employee, and therefore ineligible. Her appeal with the National Labor Commission was also rejected. The applicant then appealed to the Administrative Court.

64) Seoul Administrative Court ruling on Mar 21, 2008, 2007guhap19539

is a telemarketer an employee?

2. Job Description

(1) The telemarketers the applicant worked with had sold, over the phone, a monthly magazine published by the company.

(2) The applicant worked from 10 am to 5 pm during the workweek at a partitioned booth in the company's telemarketing room, and received 22% of each total sale as commission, in addition to an "attendance allowance" of 10,000 won per day, plus 100,000 won per month if they were never absent during each month. This was in lieu of a monthly wage.

(3) The company provided a desk, telephone, and other office items necessary to do business, supervised the telemarketers and decided in advance the contents of the letters to be sent to sponsors.

(4) The company proposed a minimum requirement of 1000 phone calls per month and urged telemarketers to reach that goal, but did not discipline those who did not.

(5) The company had all telemarketers report in writing the details of their consultations with potential subscribers and their contact information before leaving the office every day.

(6) The company gave the telemarketers new instructions and other necessary information at regular monthly meetings, as well as irregular meetings presided over by the operational manager.

(7) The company kept attendance records, and treated two instances of leaving the office early as one day's absence.

3. Administrative Court Judgment

(1) The company stipulated most of the working methods by providing personal information regarding potential sponsors, defining working methods, and supervising and controlling the content of the letters, but did not make concrete calling targets or dictate the content of the calls.

(2) The working conditions defined in the Rules of Employment did not apply to the applicant, but application of the company's Rules of Employment can be determined arbitrarily and entirely at the employer's discretion, from a position of superior status.

(3) The company informed the applicant of work-related directions and information and provided training on working methods through frequent meetings, and received concrete work performance results from the applicant.

(4) The company determined the applicant's working hours and workplace, and monitored total working hours by keeping attendance and giving allowances for that attendance.

(5) The company provided the applicant basic office items necessary for work, including payment of the telephone bills.
(6) As the company always paid 400,000 won in attendance allowances every month, this reflects the characteristics of a basic salary.
(7) The applicant did not pay personal income tax, but did pay corporate tax, and was not subscribed to the social security insurances, something unilaterally determined by the company from its superior status.
(8) As the employee had worked for three years as a telemarketer for the company, this provision of work by the applicant can be considered as provision of continuous and exclusive labor service for the company.
(9) Accordingly, the applicant falls under the status of "employee" according to the Labor Standards Act, and termination of this employment shall be considered a unilateral cancellation of employment by the employer.

IV. Cases Where "Employee" Status was Determined to Not Exist

1. Telemarketer Selling Insurance[65]

(1) Job description

① The telemarketer's job was to call and sell the company's insurance products to customers, and received training from the company manager on the products, selling techniques, and other matters necessary to sell successfully.
② The company's Rules of Employment did not apply to the telemarketer, but the company's service regulations related to sales had to be followed.
③ In the mornings, the telemarketer went to the office provided by the company, and every day carried out the assigned work according to the hours scheduled by the company, leaving the office after completing the assigned working hours in the afternoon.
④ There was no restriction on the telemarketer getting another job, but it was in reality impossible to carry out other business.
⑤ For the purposes of work, the telemarketer received a workspace, desk, computer, telephone, etc.
⑥ The company paid an activity allowance characteristic of a basic salary, and an incentive bonus in accordance with individual sales performance.
⑦ The telemarketer just paid corporate tax due to being considered self-employed, and so did not pay income tax or premiums for the four social security insurances.

65) Administrative Guideline: Nojo 68107-874, Aug 2, 2001

is a Telemarketer an Employee?

(2) Judgment of the Ministry of Labor

The matters considered not to be characteristics of an employee were:

① The contract that the company made with the telemarketer was not an employment contract, but a "commission contract" under Article 689 of the Civil Act.

② Even though the telemarketer used the communication equipment provided by the company in carrying out commissioned work for insurance sales, the telemarketer sold insurance simply at his own discretion and according to his capabilities.

③ There was no allowance without generation of business, and even the activity allowance (600,000 won per month) claimed as a basic salary by the telemarketer was only paid in cases where the telemarketer sold at least 10 insurance contracts per month. All insurances and incentive bonuses were paid according to individual performance.

④ Company regulations such as the Rules of Employment were not applicable, and no disciplinary action (such as reducing allowances) was taken for arriving late, leaving early, or being absent.

⑤ The telemarketer does not have to call the list of customers provided by the company, and no disciplinary action is taken if they are not called. In consideration of the above-mentioned items, this insurance sales telemarketer cannot be considered an employee.

2. Targeted Real Estate Telemarketer[66)]

(1) Job description

① The job is to sell real estate for the company to random people over the phone or after consultation at the designated workplace.

② The monthly fixed income that the telemarketer received from the company was 800,000 to 1.2 million won, with 50,000 won deducted for each day of absence.

③ The telemarketer was responsible for consulting with potential customers, carrying out on-site surveys, and concluding contracts. A commission of 8 to 10% of the sale was given.

④ The telemarketer worked five days per week and 8 hours per day at a specified location.

(2) Judgment of the Ministry of Labor

The telemarketer for the targeted real estate company sold land over the phone or through consultations.

① Even though the workplace and working hours were stipulated, this was

66) Administrative Guideline: Application-6107, Dec 12, 2006

designed to promote effective sales in accordance with different requirements of telemarketing.

② The telemarketer dealt with people at his own discretion, from attracting potential buyers to completing the contract, and did not receive any concrete or individual supervision or control by the company.

③ What the telemarketer received as a fixed allowance is a kind of sales activity allowance.

④ Income tax was reported.

⑤ The main income was the very high commission received in return for selling the real estate. It is therefore estimated that the telemarketer cannot be regarded as an employee providing labor service under an employer's supervision and direction.

IV. Conclusion

According to the changing business structures, companies use telemarketers for various fields. In the beginning, telemarketers were handled as outsourced or commissioned labor, and no real problems existed. However, companies have gradually been using telemarketers to directly increase operational profit. In this process the company comes to supervise the telemarketer directly, which affects the telemarketer's status as a commissioned service provider under the Civil Act to that more like an employee to which the labor laws apply. As the telemarketer's status changes this way, employers need to handle dismissals carefully, deal with severance pay, annual leave, social security insurances, and other protections granted by Korean Labor Law. Accordingly, employers need to recognize that telemarketers' status can change from commissioned service provider (under the Civil Law) to an employee (under Labor Law) according to the degree of employer involvement in the telemarketer's work. When using telemarketers, it is necessary to consider in advance whether the telemarketer shall be considered self-employed or an employee exclusively supervised and directed.