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

I. Introduction

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

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

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

---

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

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

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

1. Concept of fatal accident

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

2. The scope of application and responsibilities of employers

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

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

---

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

project (Article 2 (7) of the FAA).

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

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

3. Employer's obligations

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

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

Under the OSH Act, when a fatal accident occurs, the employer must immediately stop the related work and take steps necessary to protect the safety and health of other workers, such as evacuating the workplace. In addition, the employer must immediately report to the Minister of Employment and Labor when he/she becomes aware that a fatal accident has occurred (Article

54 of the OSHA). When a fatal accident occurs, the Minister of Employment and Labor can order all work to stop in relation to ① the job in which the fatal accident occurred, ② the job(s) corresponding to the job in which the fatal accident occurred, if it is determined that there is an imminent risk of recurrence at that workplace. Upon request of the employer whose work has been suspended, the Minister of Employment and Labor shall lift the suspension of work after decision by a deliberation committee composed of experts on cancellations of work suspensions (Article 55 of the OSH Act). In accordance with the revised OSH Act (January 2020), the Minister of Employment and Labor shall issue an order to suspend work to a workplace where a fatal accident has occurred. Work can be resumed at the workplace only after a considerable period of time has elapsed, which places a significant burden on the company.

III. Penalties and Employer's Responsibilities

1. Penalties for employer and head of operations

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

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

2. Joint penal provisions

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

3. Punitive damage compensation

The Fatal Accidents Act introduces a punitive damage compensation system that is not found in the OSH Act. In the event that an employer or head of operations intentionally or by gross negligence violates the obligation to take measures to protect safety and health and this results in a fatal accident, the relevant employer or corporation shall be held liable for compensation not exceeding 5 times the damage suffered by the injured person, or the survivors. However, this does not apply if the accident occurs despite the corporation having given considerable attention and supervision of the relevant risks and hazards (Article 15 of the FAA). The courts shall decide the amount of punitive damage compensation in consideration of the following seven items: ① the severity of intentional or unintentional negligence, ② the type and details of the violation of the obligation to protect, ③ the scale of the damage caused by violation of the obligation to protect, ④ the economic benefit obtained by the employer or the corporation due to violation of the obligation to protect, ⑤ the duration and number of violations, ⑥ the corporation's property holdings, and ⑦ the extent of the corporation's efforts to mitigate the damage and prevent recurrence.

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

alimony is included in mental damage.

In the future, it will be possible to request up to 5 times the amount of compensation for existing damages available under he Civil Act when industrial accidents result in death. As a result, the bereaved family and the company will need to engage in a prolonged period of determination of compensation for the bereaved due to disputes over whether an employer was negligent or not, which will act as a considerable burden on the company's ability to quickly handle the aftermath of fatal accidents.[4)]

IV. Implementation Date and Application

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

Fatal accidents are classified in the FAA as fatal industrial accidents and fatal civil accidents. Major industrial accidents are handled by Ministry of Employment and Labor inspectors, who investigate the situation for workers and contractors who are directed and supervised by the employer concerned. Since a fatal civil accident involves members of the public who are using a facility or public mode of transportation, the Ministry of Justice, through police officers, has jurisdiction. Therefore, since the two different ministries have jurisdiction over fatal accidents separately, differences in interpretation and disposition of the law are expected in its enforcement, leading to some confusion.[5)]

V. Conclusion

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

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

serious incidents. In addition, with enactment of the Fatal Accidents Act, employers and heads of operations in each workplace should strengthen the safety and health protections in place for workers in advance, and faithfully fulfill their duty of care and supervision, to avoid criminal liability in the event of a fatal accident.

Procedures for Wage Adjustments (Increases, Reductions, Freezes, Returns) and Related Cases

I. Introduction

Labor and management together can freely determine and adjust wages through labor contracts, employment rules, and collective agreements. So far, wage adjustment has been used to mean "wage increase" as wages have been increased every year due to inflation. However, as the coronavirus epidemic over the past year has caused enormous damage to all industries, many companies have overcome difficulties through other forms of wage adjustment, such as wage cuts, freezes, and returns. An employer unilaterally cutting wages has no effect. Reductions, freezes, or wage returns are unfavorable changes to working conditions, so legal procedures must be adhered to by the labor and management before taking such steps.

Wage cuts refer to reducing wages lower than existing levels for the same job and require collective consent of the affected workers. Wage freezes have the same effect as wage reductions when annual wage increases or service allowances are currently in place, and therefore require collective consent. However, deciding to keep the same wage as before without increasing wages does not require collective consent. Regarding wage returns, since wages are accrued in return for work already performed, those wages belong to individual workers, so the employer must obtain the consent of that individual worker. If the company deducts wages based only on collective consent, not individual consent, those deducted wages will be considered unpaid wages. The table below provides a brief summary of wage reductions, freezes and returns. In the next sections, I will review the related principles and related labor cases in detail.[6)]

6) Ha, Gap-Rae, 「Labor Law」 , 33rd ed., Joongang Economy, 2020, pp. 311-316; Labor Ministry Guidelines: Labor Standards Division-797, Mar. 26, 2009.

<Comparison of Wage Reductions, Freezes and Returns>

	Wage Reductions/Freezes	Wage returns
Target wage	Future wage	Wages already accrued
Method of implementation	Collective consent	Individual worker consent
Scope of effectiveness	All workers in same category	Individual workers with consent
Base wages for calculation of average wages	Wages paid after reduction or freeze	Wages paid before return

II. Wage Increases and Wage Reductions

Wage increases are decided through collective bargaining if there is a labor union. Wages have generally been raised every year through collective bargaining between labor and management, and if negotiations do not result in wage increases, the labor union increases the pressure through strikes. Employers generally increase their workers' wages to the minimum extent acceptable to the labor union. Wages can also be reduced through collective bargaining if the economy is bad or the company is in trouble. In this case, if the union consists of a majority of the workers concerned, non-union members are also affected by the wage adjustment concluded by the labor union due to the general binding force of the workplace (Article 35 of the Labor Union Act). In workplaces without a labor union, wage increases are determined unilaterally by the company within an appropriate range through changes to the employment rules or labor contract. However, since wage reductions are regarded as an unfavorable change working conditions, an agreement between labor and management is necessary.

Wage reductions refer to a lower wage than before being paid at a certain point in the future. The total wages paid is lowered by reducing or abolishing the basic wage and/or various allowances, with the process carried out in a manner decided in collective decision-making. If there is a majority union, this is done through a collective agreement, but if there is no majority union, it is necessary to go through the procedures required to make unfavorable changes to the employment rules. Even if labor and management have agreed, wages cannot be reduced below the minimum

wage level, and additional rates or legal allowances (such as overtime/night/holiday work allowances, weekly holiday allowance, annual paid allowance, etc.) are not subject to reductions, in accordance with the Labor Standards Act.[7] Also, the reduced wage is not included in the calculation of average wage. Wage reductions are judged differently for each case. Here are some of these individual cases.

(1) Even if individual workers agree on a wage reduction, this cannot replace collective consent. Wage reductions involve paying less in the future for the same work that is currently provided, which makes them an unfavorable change to working conditions. In order for consent to a reduction in wages obtained from individual workers to be considered valid, the collective agreement must be changed according to required procedures.[8]

(2) In order to overcome a management crisis, a company significantly reduced its workforce and unilaterally stopped paying bonuses to workers who were retained. The fact that workers who were retained have continued to work without objection to the unilateral cessation of bonuses, does not mean that those workers have given up their right to claim future bonuses.[9]

(3) In accordance with the general binding force of Article 35 of the Labor Union Act, the effect of an agreement on wage reductions with a majority labor union also extends to non-union workers in the same kind of job in a workplace. However, if a separate contract for wages is signed for each worker, such as an annual salary contract, the individual worker's consent for a wage reduction is also required.[10] On the other hand, if the number of workers who were in the labor union at the time of the labor-management agreement on wage reduction did not reach a majority of the workers, the general binding force of Article 35 of the Labor Union Act cannot be granted.[11]

---

7) Ministry Guidelines: Labor Standards Team-797, Mar. 26, 2009.
8) Incheon District Court ruling on June 25, 2010: 2009 gahop 14735.
Supreme Court ruling on June 11, 1999: 98da22185.
10) Labor Ministry Guidelines: Industrial Relations Team-1112, Nov. 18, 2008.

(4) In changing the shift work system, reducing the shift from 4 groups/3 shifts to 3 groups/3 shifts is an unfavorable change for workers. Conversely, if the increase is from 3 groups/3 shifts to 4 groups/3 shifts, unless the contractual working hours are shortened or wages are reduced, it is not regarded as a disadvantageous change to working conditions, even though related wages or allowances are reduced due to the reduction in overtime work.[12)]

(5) A change in the pay system can also lead to a reduction in wages. In cases where the amount of wages decreases from a reduction in the proportion of basic salary and an increase in the proportion of performance salary, the court considers it as a disadvantageous change in working conditions even though only some employees' wages decrease while the wages of most employees increase.[13)]

(6) If the wage peak system is introduced within the statutory retirement age, it is a disadvantageous change in working conditions because it results in a reduction in wages for workers at that time.[14)] In this case, if there is a labor union organized by a majority of workers, the consent of that labor union is required. Here, a union organized by a majority of workers refers to a union organized by a majority of all workers who are subject to the existing employment rules, regardless of the scope of union membership.[15)]

III. Wage Freezes

Freezing wages refers to keeping wages the same for future work as was paid for past work of the same type. In cases where a company regularly increases regular wage, ceasing or additionally restricting this regular increase in wage is an unfavorable change to working conditions. The company can freeze wages through amendment of the collective agreement or following the procedures for changing the employment rules disadvantageously. However, it is not a disadvantageous change to working conditions if wages are frozen when there is no regular salary increase.

---

11) Supreme Court ruling on May 12, 2005: 2003da 52456.
12) Labor Ministry Guidelines: Labor Standards Team 68207-1732, Nov. 4, 1994.
13) Supreme Court ruling on June 28, 2912: 2010da 17468.
14) Suwon District Court ruling on June 23, 2017: 2016gadan 115485.
15) Supreme Court ruling on February 29, 2008: 2007da 85997.

(1) If the personnel regulations stipulate that regular increases occur on January 1st and July 1st of each year, and if the annual increase in salary has been carried out regularly and uniformly, this is considered to be a habitual wage practice. In this case, if the employer unilaterally freezes the regular increase without engaging with workers in the collective decision-making method, is the courts have deemed that the amount of regular increase that remains unpaid by the regular payment date each month as unpaid wages.[16)]

(2) A certain school had financial difficulties, and the principal explained the situation to teachers at a school affairs meeting, suggested that the basic salary increase for general school teachers be frozen that year. The teachers present did not object at the time to this. However, this lack of objection at the meeting with the teachers cannot be considered the same as obtaining collective consent.[17)]

IV. Wage Returns

Wage returns refer to the return of wage bonds (wages, bonuses, etc.) already incurred for previous work based on the free-will consent of the individual worker. Due to the waiver of the right to claim wages that occurred legally, wages can only be returned through due process. Since a unilaterally-determined wage deduction by the employer violates the principle of paying full wages, individual workers' written consent is required.[18)] However, even in this case, any waiver of the right to claim severance pay is invalid because it violates the Labor Standards Act.[19)]

For procedures to be deemed reasonable, individual workers' consent is required. Since the return of wages is effective only if it is the individual workers' voluntary decision, individual workers must recognize the purpose of wage returns and sign a return consent form in their own name.[20)] While the court holds that it is desirable to

16) Labor Ministry Guideline: Wage 68200-649, December 5, 2000
17) Supreme Court ruling on June 9, 2005: 2005do 1089.
18) Article 43 of the Labor Standards Act (Wage Payment) and Supreme Court ruling June 11, 1996: 98da22185 Waiver of wage claims is recognized as a clear expression of the employee's intention.
19) Supreme Court ruling July 26, 2002: 2000da27671.
20) Labor Ministry Guidelines: Labor Standards Team 68207-843, Dec. 13, 1999.

obtain consent for each individual worker when returning wages, it is also possible to obtain individual consent by having workers sign a name list of workers if the company has sufficiently explained the difficult situation to the workers.[21] An agreement to return wages in the collective agreement has no effect. This is because the return of wages involves wages that already belong to individual workers, and the union cannot be forced to abandon individual member property rights. Wages returned by workers come from the workers' income and are returned voluntarily, and the employer is not obligated to return them again to the worker.[22] Returned wages are included in the calculation of average wages as they are wage bonds that were given to the employee and then returned to the employer by the employee.[23] Examples of cases where a return of wages was not recognized:

(1) To waive unpaid wages for which individual workers have the right to claim payment due to the arrival of the payment period, a collective agreement with the labor union is not enough for the workers to be deemed to have agreed to waive the unpaid wages. It can only be done to the extent that the company has received individual and explicit consent from the workers in advance to waive their right to the unpaid wages. Even if a labor union agrees to give up some worker wages in the collective agreement or through labor-management consultations, this has no effect on labor union members who have not individually consented.[24]

(2) Even if wages and bonuses are returned in accordance with a revised collective agreement, if a worker does not individually consent to the return of wages and bonuses incurred by his/her previous work, that worker shall not have their wages returned. If the workers who did not agree to the return of wages and bonuses later resigned after those wages/bonuses were deducted without their individual consent, those returned wages will be considered unpaid wages.[25]

---

21) Supreme Court ruling on Sep. 29, 2000: 99da67536.
22) Seoul District Court ruling on Apr. 16, 2003: 2002na 20291.
23) Supreme Court ruling on Apr. 10, 2001: 99da39531.
24) Jeonju District Court ruling on Apr. 26, 2000: 99na5708.
25) Labor Ministry Guidelines: Unemployment 68430-84, Oct. 21, 1999.

(3) Daegu 00 Company gave a donation to help Daegu citizens suffering from the corona pandemic in April 2020 by resolution of its labor-management council. It then informed the employees of the council's decision, and deducted KRW 10,000 from each individual. In response, the new labor union filed a complaint with the Daegu Labor Office for violation of Article 43 (Wage Payment) of the Labor Standards Act as these wages were deducted without the individual consent of the workers. The company then requested individual consent from all the workers, but only 50% agreed, so the deducted wages had to be returned to those workers who did not submit individual consent forms.[26)]

(4) If each worker agrees to return the allowance for unused annual leave that has occurred, it cannot be considered a violation of the law if the employer does not pay an allowance within the agreed range for unused annual leave. However, if the return of unused annual leave allowance agreed upon by the worker also applies to leave that will occur in the future, procedures must be followed that allow a collective agreement or the employment rules to be changed disadvantageously.[27)]

V. Conclusion

To overcome difficulties due to the COVID-19 pandemic, company management is increasingly working with labor to have wages returned or have them reduced or frozen. In such cases, it is necessary to understand and prepare in advance because the legal outcomes vary. The return of bonuses or other allowances is to return the wages vested to the worker for previous work and requires written consent from the individual worker. If the company handles a wage return through the labor union, the problem of delayed payment of wages arises. Wage reductions mean less in wages in the future, so even if management comes to an agreement with individual workers, wage cuts are invalid unless procedures are followed to make a disadvantageous change to the employment rules or collective agreement. Therefore, for wages to be reduced, employment rules and collective agreements must be changed through collective consent rather than individual worker consent. And in particular, according to the principle of favorable conditions, unexpected problems may arise, so it is necessary

26) Daegu Labor Office decided this deduction was illegal. Related Labor Ministry Guidelines: Labor Standards-68207-843, Dec. 13, 1999.
27) Labor Ministry Guidelines: Labor Standards 684207-871, Mar. 23, 2000.

to change both the labor contract and the employment rules to prevent future disputes.

Criteria for Judging whether a Non-Compete Agreement is Valid

I. Introduction

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

The non-compete agreement seeks to prevent workers with knowledge of the company's unique trade secrets or important information related to business from transferring to that employer's competitors and damaging the employer. This non-compete agreement is of limited effect due to the fact that it may violate the right to work and freedom of occupation, which are the basic rights of the people under the constitution. Since the employer's unique trade secrets are valuable and worth protecting, the non-compete agreement is valid when certain requirements are met: the company's expertise, production method, or business activities must be trade secrets with protective value, and the company must have made sufficient efforts to keep them secret. When these conditions are satisfied, a company's technology is recognized as a trade secret, and the non-compete agreement with the employee remains legitimate.[28)]

In this article, I would like to explain the requirements for a non-compete agreement to be effective, the details of related laws and standard guides, and related labor cases.

---

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

II. Protection of Trade Secrets and Non-Compete Agreement

1. Protection of trade secrets

The Unfair Competition Prevention and Trade Secret Protection Act (hereinafter the "Unfair Competition Prevention Act"), defines company trade secrets and also regulates compensation for damages from workers who have acquired trade secrets with protective value and transferred them to competitors. In other words, the term "trade secret" is a product that is not publicly known and has independent economic value, and refers to production methods, sales methods, and other technical or management information useful for business activities and into which considerable effort is made to keep them confidential (Article 2). The company may ask the court to prohibit or prevent employment of former workers if they have transferred or are likely to transfer the company's trade secrets (Article 10). In the event of damage due to such transfer, the company may request compensation (Article 11). In practice, when a resigned worker is employed by a competitor, action is taken by the previous employer in the form of a provisional disposition for violating the prohibition against employment with a competitor or a lawsuit for damages.

2. Standard precedent on non-compete agreements

The Supreme Court has stated, "If the non-compete agreement between employers and workers excessively restricts workers' freedom of occupation and work rights, etc., guaranteed by the constitution, or excessively restricts free competition, the good morals and social order set forth in Article 103 of the Civil Act, it is invalid as an act that runs contrary to law. To be deemed in effect, such a non-compete agreement must include the following: ① the interests of the employer worthy of protection, ② the employee's position and job description before resignation, ③ the period and place of the restriction on changing jobs, ④ the presence or absence of compensation for the worker, ⑤ the reasons for resignation, and ⑥ public interests and other circumstances must be comprehensively considered. The term "employer's interests worth protecting" as referred to herein is not only a "trade secret" defined in Article 2 of the Unfair Competition Prevention Act, but also knowledge or information owned only by the relevant employer even if it has not reached the level of trade secret. A non-compete agreement is a pledge not to divulge such secret to third parties, or to maintain customer relations or business credit."[29)]

---

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

This precedent explains that the non-compete agreement must be interpreted strictly as it may infringe on the basic rights of workers guaranteed by the constitution, and is effective only when certain requirements are met. Therefore, determining whether or not a non-compete agreement is effective is based on which value is more important: the benefit of the employer who protects trade secrets or the right of the worker to change jobs.[30] In order to compare the weight of these two rights, it is necessary to make a comprehensive and detailed judgment based on the following six considerations suggested by precedents.

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

1. Trade secrets worth protecting

In order for a trade secret to be deemed the interest of an employer that deserves protection, the secret must: ① not be widely known in the same industry and have an independent economic value, and ② be mentioned in a security pledge with the worker as to what is not to be transferred to a third party. Customer information, client company information, and know-how are also employer interests worth protecting if they meet the above requirements. However, even if the worker later uses technical or management information acquired during the time of employment with a previous employer, if the information was known to some extent throughout the industry, and even if some specific information was unknown, if it would not be very expensive to obtain it, it is judged to not constitute an interest worth protecting as it did not require significant effort to obtain it.[31]

In some cases, it is difficult to say that each item of information obtained by a worker in the course of business activities or personal relations between a salesperson and a business partner is an interest worth protecting through a non-compete agreement, or that the protective value is significant.[32]

At the time the non-compete agreement is signed, the employer's legal protection interests were within the scope of the employer's legal protection interests, but currently, if the employer's legal protection interests are said to have lapsed due to changes in business type, region, or trade secret, it can be considered that the resigned worker's obligation to adhere to the non-compete agreement has also lapsed.[33]

---

30) Lim, Jong-ryul, 「The Labor Law」, 18th ed. Parkyoungsa, 2020, p. 361; Jung, Young-Hoon, "Workers' Obligation to Non-Competition", 「100 Labor Cases」, Parkyoungsa, 2015, pp. 44-45.
31) Supreme Court ruling on Mar. 11, 2010: 2009Da82244.
32) Seoul Eastern District Court ruling on Nov. 11, 2010: 2010 Gahap 10588.
33) Kwon, Doo-Seop, "Part of the Labor Contract", 「Annotation of the Labor Standards Act」, 2020, Parkyoungsa, p. 187.

2. Worker's position and job description before resignation

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

A worker was employed as a semiconductor-related researcher in 1998 by a certain company. In 2017, he resigned for health reasons after many years in research and development. Just three months after his resignation, he was hired by a competing company for a higher annual salary. This was considered a violation of the non-compete obligation.[34)]

As a sales manager for a pharmaceutical company, another worker imported and sold peritoneal dialysis solution. Information such as cost analysis data for products acquired by workers during their work, agency margins, discount rates, prices, and new product development plans are important trade secrets. If he was employed by a competing pharmaceutical company that sells similar products, he would be in violation of the obligation to not work for a competitor.[35)]

3. Period and place of non-compete restrictions

The period of non-compete restrictions is an important factor in determining the validity of a non-compete agreement. The period of non-compete restriction should be reasonable because it can be directly linked to the right to live and freedom of job choice, and yet remains necessary to protect the employer's trade secrets. In general, if the period is short, it is generally legally recognized, while if the period is long, it can be deemed a violation of rights. The courts may limit the prohibition period to a suitable range if the contracted non-compete period is excessive,[36)] and may specifically limit it to 1 to 2 years.

When an employee of a semiconductor company worked in R&D for a long period of time and then was hired by a competitor for the same job 3 months after resigning (due to health reasons), the court ruled that a two-year prohibition period is an appropriate time for trade secrets to be protected.[37)]

---

34) Seoul High Court ruling on July 8, 2019: 2019 Ra 20390.
35) Seoul Central District Court ruling on June 17, 1997: 97 Kahab 758.
36) Supreme Court ruling on Mar. 29, 2007: 2006 ma 1303.
37) Seoul High Court ruling on July 8, 2019: 2019 Ra 20390.

A worker was employed by a software development company but was hired by a competing company after one year. At the time the labor contract was signed with the employer, the worker signed an agreement prohibiting him from moving to a competitor for one year after resignation. The court ruled that the agreement under which workers were obligated to adhere to a non-compete provision for one year after resignation was valid.[38)]

Even considering the importance of the protective value to company profits, technology in the mobile phone market changes rapidly, outdating technologies older than a year. In this reality, prohibiting workers long term for working for a competitor excessively limits their freedom of occupation. A two-year prohibition period stipulated in a non-compete agreement in another case was deemed somewhat excessive for the related employee, and the court ruled that the obligation to adhere to a the non-compete agreement for “two years from the resignation date” was unfair.[39)]

Some other plaintiffs worked as academy instructors at Daechi-dong Academy for one year, and signed a non-compete agreement, which stipulated, "You cannot engage in the same kind of work without consent within 5 km from Daechi-dong Academy for one year after your employment with Daechi-dong Academy ends." This was ruled as invalid because the restriction was beyond reasonable, and unfairly restricted the freedom of occupation and threatened livelihood.[40)]

4. Whether compensation is provided to workers

Whether or not workers have been paid to adhere to the non-compete agreement is an important factor in determining its validity. There are many court precedents showing that if money is paid in exchange for a non-compete agreement, the worker is obligated to avoid reemployment in the same industry during a reasonable period after employment with the signing employer ends. However, even if there is no compensation made for the non-compete agreement, if the item in question is deemed a company trade secret, the obligation remains.

In the case involving the worker finding employment with a competing semiconductor company after signing a non-compete agreement with the previous semiconductor company, which also paid special incentives in exchange for adherence to the non-compete obligation, the two-year ban against working for a competitor company was deemed reasonable.[41)]

---

38) Seoul High Court ruling on May 16, 2012: 2011 ra 1853.
39) Seoul Central District Court ruling on Apr. 29, 2013: 2013 Kahab 231.
40) Seoul Central District Court ruling on Jan. 10, 2008: 2007 Gahap 86803.
41) Seoul High Court ruling on July 8, 2019: 2019 Ra 20390.

A worker who was employed at a software development company signed a non-compete agreement for one year. In exchange for complying with this non-compete obligation, a certain amount of bonus was paid. As the company paid such a bonus, the worker going on to work for a competing company within one year after resignation from the signing company was ruled by the court as the employee violating the non-compete obligation.[42)]

A certain defendant worked as a trade manager for a company that manufactures and sells nail clippers. The company had the trade manager sign a non-compete agreement in the labor contract, prohibiting employment with competing companies for two years. In a lawsuit in which the defendant established his own company and entered into a competitive relationship with the company, the court dismissed the non-compete agreement as the period was too long (two years after resignation) and no compensation had been paid for this non-compete period. Here, whether or not the company had provided additional payment to compensate for this non-compete period became an important item in the ruling on this non-compete agreement.[43)]

5. Workers' reasons for resignation

The non-compete agreement is a document designed to protect the employer's trade secrets when a worker leaves the company and is rehired by a competitor. However, when a resignation is due to reasons attributable to the employer such as overdue wages, unfair dismissal, or layoff, the obligation to prohibit change of employment cannot be enforced even if the employee moves to a competitor.[44)] Therefore, the non-compete agreement is effective only if the reason for resignation is the employee's voluntary decision.

6. Specific and comprehensive review

In order for a non-compete agreement to take effect, the five detailed considerations mentioned above must be reviewed comprehensively and in detail. It is particularly necessary to evaluate the weighting of the secrets in terms of profits by examining specific cases where worker rights to choice of occupation are weighed against the need to protect employer trade secrets through a non-compete agreement. It is also

---

42) Seoul High Court ruling on May 16, 2012: 2011 Ra 1853.
43) Supreme Court ruling on Mar. 11, 2010: 2009Da82244.
44) Kwon, Doo-Seop, "Part of the Labor Contract", 「Annotation of the Labor Standards Act」, 2020, Parkyoungsa, p. 185.

essential to review, before any action in court, which of the company's trade secrets are worth protecting, whether the period of the non-compete agreement is reasonable, whether the company has paid anything to compensate the worker for protecting the trade secrets, and the worker's reasons for resignation.[45)]

IV. Conclusion

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

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

Understanding the Police and Prosecutor's Investigation regarding Labor Case (Attorney at Law, Sangyung Park)

1. Importance of the police investigation in a labor case

The police and the prosecution investigate the accuser's situation in relation to unpaid wages, collective bargaining between labor and management, assault, intimidation, damage to property, and disruption of work in the course of collective action. Generally, the police investigate the situation surrounding the accuser as the victim and the accused as the

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

offender. In this case, how the case proceeds and how to prove one's side in the investigation process is very important to resolution.

Investigations and criminal proceedings investigate the evidence and determine whether the accused is guilty or not, but in reality, whether or not the accused is prosecuted depends on that party's ability to prove its claims.

How employers and workers deal with accusations of management abusing its superior position, or sexual abuse, sexual harassment, and fatalities or injuries related to workplace accidents is very important.

How should one respond to searches and seizures by investigating agencies in their search for evidence? How does one respond to a summons? How does one deal with warrants for arrest? There has thus far been no manual on how to prove the facts during the investigation and trial process.

Recently, the spreading of stories that have not been confirmed but run through traditional and social media anyways has damaged not only the image of the parties involved but also the image of entire organizations, which can bankrupt companies due to related reputation damage.

Until an accused is declared guilty of misconduct by a court of law, he should be treated according to the principle in the Constitution of presumed innocent. Unfortunately, there has been no punishment for those who reveal the identity of the accused to the public, although penalty provisions exist. Even if the company's confidential information is leaked inside the organization, and a claim made regarding the related civil damages, assistance is absolutely necessary from the investigating agencies (i.e., the police and prosecutors) who have the right to search and seize to secure evidence.

Therefore, before filing a civil lawsuit, it is possible to request the police and the prosecution that investigated the complaint or petition for the investigation or other documents to use them as evidence: this is often done by the Civil Court when these

documents should be submitted to the relevant investigating agency.

In other words, it is difficult for either party to prove the illegal acts which resulted in damage, mostly due to the fact that individuals have no powers similar to the investigative agencies to investigate. This is why an accuser takes the accused to the police for a criminal claim, and then files a civil lawsuit based on the evidence they are able to obtain from the criminal investigation. This is why the outcome of the civil case depends on the outcome of the criminal case. Therefore, criminal proceedings are very important.

For collective bargaining and collective action, companies often claim that the labor union interrupted normal operations with violence, while the labor union insists that the company engaged in unfair labor practices by interfering with legitimate labor activities.

The police frequently ask the National Institute of Scientific Investigation to conduct a large-scale search and seizure to investigate the facts and reveal any concealment of related accidents or incidents, and identify who caused an accident/incident such as an explosion, gas leak, a fall or damage to property or persons.

In addition, labor laws, such as the Occupational Safety and Health Act, have joint penal provisions that punish business owners and their representatives. These provisions also require the company president to attend the investigation hearing. How to deal with such cases is as important as civil disputes related to labor cases, as administrative sanctions are also part and parcel to the findings of criminal cases. These sanctions can include suspension of business, suspension of construction, and restrictions on bidding.

Appointing a lawyer can greatly assist the parties to these criminal lawsuits, but legal fees vary greatly from lawyer to lawyer, and the outcome of the case may depend on the integrity and professionalism of the lawyer.

2. How are labor case investigations conducted?

In cases of unpaid wages, sexual harassment or accidents, an investigation will be

initiated by a worker's complaint or report. Investigations can be carried out by the police, prosecutors or the local Ministry of Employment and Labor (MOEL) office, but in most cases the investigation is undertaken by the police.

The question is whether a victim should file a complaint with the police or the Prosecutor's Office.

According to the "Instructions for Investigation Disposal", the victim is required to complain/sue to the police department with jurisdiction over the offender's place of residence, the place of occurrence, and the victim's place of residence. The victim usually takes criminal complaints to the police department with jurisdiction over the offender's place of residence for its investigation, whereas civil litigation usually involves filing a complaint with the creditor and the court with jurisdiction over the victim's residence.

In some cases, the lawsuit is filed with the public prosecution office. Even if this occurs, the case is handed over to the police, unless the lawsuit is well known to the public. Complaints can also be made orally, but are usually made in writing (filed as written complaints that include the accuser's personal information, the purpose and details of the complaint, and verifying documents). The accusation can be filed with the Anti-corruption and Civil Rights Commission, the Board of Audit and Inspection, or even the Blue House, but most cases are handed over to the police. Complaints can also be filed by mail. A receipt will be issued at the police department's Public Service Center.

When a complaint is filed, a department and person in charge will be appointed, usually within five days of receipt. If the accuser submits a complaint to the police station directly and expresses the desire to have investigation begin that day, this will be done.

According to the nature of the case, if the accusation is related to unpaid wages, the

Financial Team will be in charge, while if the case involves a labor dispute resulting in interruption of business operations, the Intelligence Team is responsible. If the case is related to safety, the Special Detective Team takes the lead, while for alleged sexual abuse or sexual harassment, the case will be assigned to the Female and Youth Investigation Team as most victims are female.

3. Investigations begin with an interview of the accuser.

All investigations begin by interviewing the accuser, who is the victim. The investigator will first analyze the complaint. Investigation will determine which charges are to be filed, whether the legal requirements for such charges have been properly met, and whether there is sufficient relevant evidence.

If the complaint is prepared in detail with the assistance of an attorney and it is determined that the accuser is present and the details and circumstances of the complaint do not need to be investigated, the accuser does not need to be part of any supplementary investigation. In most cases, however, the investigation begins with such a supplementary investigation. In that case, the accuser will schedule an interview in consultation with the police investigator.

The investigator will usually contact the accuser with a proposed schedule for the interview, but this can be rescheduled if the accuser needs.

If the accuser is a company representative director, if attending the interview at the police station is difficult due to business activities, such as being on a business trip, the accuser can appoint someone to go in his/her place (a legal team or the relevant labor team for example), fill out power of attorney documents and submit them to the police station, and the representative will attend in his/her stead. If attendance is difficult due to work, times may be chosen when that investigator is on evening, weekend or holiday duty.

Preparing a list of questions the investigator will likely ask and the related answers will help keep the interview process shorter. Once this interview is undertaken, how long it takes will depend on the investigator's ability to investigate and understand the case. In some cases, three hours or more may be required, but sometimes it takes less than one hour.

The answers should be simple and answer the investigator's questions directly. The investigator may ask Yes/No questions, but often “Yes” or “No” is insufficient.

If a question doesn't make sense, the accuser may ask for explanation as to the intent of the question. Occasionally, the accuser or the accused can attend an investigation hearing along with a lawyer for legal support.

The final question in the interview will be: “Do you have anything else to say?” Although it is not usual, it is easy to complete the interview by submitting a written summary of the key points of the case and requesting key items for the investigator to look into. The process is then repeated for the accused.

After the interview, the investigator asks the accuser or the accused to verify that their statements are true and correct. At this time, do not look at the spelling or other superficial things, but ensure what has been explained is written down accurately.

After the interview, the accuser/accused can ask the investigator to attach any submitted evidential documents to the investigation document. After the interview, it is wise to ask if you can copy the investigation report that you have written and read. If the accuser/accused request the police Public Service Center for disclosure of such information, the Center will make a copy of the investigation report.

If the accuser/accused can go home with a copy of the investigation report, he/she can reconfirm the accuracy of the statements. If the information received is different from the facts, he/she may ask for correction and submission of a personal statement

correcting that information.

Usually, as the investigator asks questions based on past facts, it may be hard to remember every detail. In such cases, the accuser/accused may reply that he/she does not know or does not remember. If the investigator presses you to remember, you should answer that you do not remember, but you can also explain why you think you do not remember.

In addition, if an investigator asks for legal opinions and thoughts or the opinions of individual investigators, it is necessary to make it clear that you will not respond to such requests for opinions. The investigator should ask for the facts and refrain from asking legal or other opinions. Nevertheless, if they continue doing so, make it clear that you will consult with your lawyer before answering.

4. The importance of obtaining evidence: how is this done?

Unlike civil litigation in which the plaintiff who files a lawsuit is generally liable for verification of their own damage from the defendant, in a criminal case, the onus of proof rests with the police and prosecutors. Therefore, proof of guilt must be provided by the investigating agency.

Problems occur when investigating agencies attempt to put this onus of proof on the victims without any effort to find out independently, on the grounds that they are busy.

In such cases, victims without compulsory investigative rights (such as the right to request attendance and seize and search financial accounts) will not be able to do so adequately. In this case, the victim needs to submit a statement of opinion on which the investigator should summon, search for and seize the place/item, and to which agency the fact-finding inquiry is made. In other words, a request is made to the investigating agency for verification.

Nevertheless, if the investigator does not make effort to follow the accuser's requests to gather evidence, the accuser may submit a complaint to the Prosecutor's Office that the investigation thus far has not been done in good faith.

In a case involving an assault, CCTV footage, vehicle camera footage, etc. may be requested in the event the accused denies anything happened. If you are the victim of the assault, and you have been identified as the accused, you need to ask for on-the-spot verification of the actual facts.

If the details of the injury diagnosis submitted by the parties do not correspond to the assault injury, the hospital that issued such medical certificate may be included in the investigation to find out why there is a discrepancy between the injury and the related medical certificate.

For a sexual abuse or sexual harassment case, it is necessary to prepare and submit a witness statement or a doctor's report (rather than a medical report).

For victims, the submission of a damage history and the relevant time-phased narration form also helps in verification. In particular, in recent cases, submission of relevant evidence using KakaoTalk, mobile phone text messages, and recorded files is increasing.

5. How is the investigation conducted on the accused?

In the case of a complaint, the accused will be investigated as the suspect. Therefore, the accused needs to check with the investigator what the accused has been accused when he should go to the police station. It is necessary to confirm in advance whether the accused is a suspect or a reference person before attending the interview.

This is because if the accused is a suspect, he/she may need to be advised by his/her lawyer and be interviewed in the lawyer's presence, and the interview schedule

decided in consultation with the lawyer.

If the suspect does not attend the scheduled interview three or more times without justifiable reason, an arrest warrant may be issued by the court and an investigation conducted with the suspect under arrest.

In case of investigation related to accusation, the accused is unconditionally investigated as the suspect.

However, if the charges listed in the complaint do not constitute a crime or the crimes are not serious, it is better to obtain a statement from the suspect rather than submit a letter of accusation. This is because if you are a witness, not a suspect, there is no legal obligation to go to the police station, thereby reducing the burden on the investigation. If you are being investigated as a suspect, you may need to contact the investigator to find out what the allegations are, and then submit a handwritten description of your response to the allegations in the form of a written statement. This is because the investigator's report basically answers only the questions of the investigator, but there is no opportunity to explain the details.

Therefore, it is necessary to prepare and submit a summary of the allegations, parts not recognized, and grounds for which they are not recognized. In addition, when preparing a fact-finding statement on the allegations, supporting information should be included as an appendix, with a title for the evidence and the purpose for the evidence included for clarity.

After all, the outcome will depend on how well the investigator understands. If the suspect is questioned during the investigation, he or she may take a break to discuss the direction of an answer with his/her lawyer.

It is also worth noting that interrogations beyond 10 pm cannot be conducted without the suspect's consent. The accused can also ask the police station to copy the

investigation document through a separate application for information disclosure.

If the accused feels the speech used by the investigator is coercive, or if the accused feels that a decision on his/her guilt has already been made, the accused may request that the investigator be replaced. This can be done at the police station or the Police Inspection Office. In such cases, however, it is necessary to convincingly describe the reason for the replacement.

An Airline Labor Union Improves Working Conditions

I. Introduction

As a labor attorney, I have usually represented companies on labor issues, but recently I was asked to provide some consulting by a labor union (hereinafter referred to as "the Union"). This particular union is composed of employees of a foreign airline (hereinafter referred to as "the Company") and was established in April 1989, surviving simply as an entity without a collective agreement for the past 25 years. As soon as the Union was established, the company had treated the Union chairman so disadvantageously (such as moving him from the Seoul office to a workplace at the airport) that he was obliged to resign. In addition, the Union was unable to carry out its duties due to the headquarters' continuous habit of disadvantaging all succeeding union officers. Although Union members' salary was superior to that of employees at other airlines in the beginning, their salary increases had not kept pace with their peers' at other airlines. Through 10 months of collective bargaining, the Union was able to improve its working conditions, including salaries, with the assistance of a professional (this labor attorney) through legal advisory consulting.

This article will describe how the Union concluded a successful collective agreement, and dealt with major issues.

II. Company Handling of the Union

1. Company refusal to recognize the Union

The Company refused to recognize the Union entity, and shut down attempts at collective bargaining by creating an atmosphere of insecurity for Union members and treating them unfavorably. Some of the details are listed below.

(1) When the Union was established in 1989, the Company moved its new Union chairman from the head office in Seoul to the airport branch office, without a promotion or salary increase, after which the Union chairman decided to resign.

(2) Between 2009 and 2012, the branch manager emailed Union members at "director" level (a Korean employment rank designation) and threatened them as pressure to withdraw their membership from the Union. This included public orders to withdraw their membership during wage bargaining meetings, which resulted in several directors withdrawing their union membership. As an explanatory side note, although their Korean title was "Director", they did not have any practical management authority over lower-ranking employees, and just worked as "persons in charge". Their English title was still "Employee": only those with the Korean rank of "Manager" could use their Korean titles in English, as they had actual management authority (Manager = Team leader = Department head). "Director" was simply a title given to recognize their age and their long service.

(3) The branch manager also included threats during labor-management council meetings or the wage bargaining table, saying repeatedly "My company's wage level is inferior. If you don't want to work for that wage, then quit." This prevented any effective bargaining with the employer.

(4) The company also constantly reminded employees through various department heads and the branch manager's secretary, of its intention to disadvantage any union members refusing to obey company policy.

Together, this kind of environment cowed the Union members against pursuing a collective agreement.

2. Disadvantageous changes in working conditions

(1) Wage cut: The Company unilaterally cut out almost 1/3 of its regular bonus in 2009 (normal bonuses equaled 650% of normal salary, but only 450% was paid out that year). Although the Company informed the Union chairman and Union officers in writing in February 2009, the Company designated a particular Union member to sign the agreement, completely ignoring the Union chairman, and used this "agreement" to make the unilateral cut in May of the same year.

(2) Unpaid incentive (in 2012): The Company paid incentive bonuses every year in the past when it reached its corporate targets. However, although the Company reached its 2012 targets, no incentive bonus was paid, nor any explanation given.

(3) Changing menstruation leave from paid to unpaid leave (from 2009): Prior to 2009, the Company had paid menstruation leave allowances to women, but changed this to unpaid leave without collective consent or Union agreement.

(4) Unilateral reduction of sales allowances for sales department employees: Sales employees had received 450,000 won in sales allowance every month, but in 2009, the Company reduced this sales allowance to 350,000 won without notification or explanation to the sales department. It was again unilaterally reduced to 250,000 won in 2012. Unilaterally changing a long-running sales allowance twice is a disadvantageous change of working conditions.

III. Details of Collective Bargaining

1. The Company's attempts to evade collective bargaining

The Union requested collective bargaining in January 2014, and at the first meeting on February 10, 2014, demanded a collective bargaining schedule. The Union also handed over a draft of the collective bargaining demands, without response from the Company. The Union sent two reminders in writing, but still no response. Then, suddenly, the Korean branch manager (a non-Korean) returned to his home country without notifying the Union of any bargaining schedule. It is assumed that this was

part of the Company's strategy to maintain the existing situation and avoid making a collective agreement.

2. Inducing the Company to engage in collective bargaining through Labor Ministry authority

When the branch manager returned to his home country in March 2014, the Union decided to exercise its rights guaranteed by the Constitution to force the Company to the bargaining table, and began lawsuit proceedings with the Ministry of Employment & Labor for the Company's unfair labor practices and violations of the Labor Standards Act.

The purpose of the suit was to retrieve the illegally reduced wages, and continue to work out collective bargaining with the Company. The Company's former branch managers were required to attend the Labor Office investigations, coming to realize the power of the Union for the first time. After two months of investigations, in July 2014 the Company had to return the unpaid wages, and also the additional 200% of the regular bonus that was deducted illegally. As the Union accepted the payment of the retroactive wages and trusted the Company's verbal promise to engage in collective bargaining, the Union withdrew the suit it had filed against the Company.

3. Concluding a collective agreement through the Labor Relations Commission

The Company appointed the Busan branch manager as its representative negotiator and began to negotiate a collective bargaining agreement with the Union in July 2014, meeting 8 times up to September 23. However, the Company continually rejected any other working conditions except those agreed on in the rules of employment, claiming that the collective bargaining draft contained so many articles that infringed on Company personnel and management rights. On top of this, the Company also pushed to lower the current working conditions in return for increasing salaries.

The Union decided that this kind of collective bargaining would yield nothing in the way of better working conditions, and on September 25, 2014, applied to the Labor Relations Commission for adjustment of labor disputes towards obtaining the official right to strike (case number: NLRC 2014 mediation 99).[46)]

---

46) **LABOR UNION AND LABOR RELATIONS ADJUSTMENT ACT.** **Article 45 (Mediation before Industrial Action)** (2) No industrial action shall be taken without first undergoing mediation procedures (excluding mediation procedures that come after the decision to end the mediation is made pursuant to Article 61-2) under the provisions of Sections Two to Four of Chapter V. This paragraph shall not apply when mediation procedures do not finish within the period prescribed in Article 54, or when the arbitration ruling is not

The Labor Relations Commission assigned this case to the Special Mediation Committee of the National Labor Relations Commission for 15 days, as the Company belonged to the public services industry as an aviation service and had workplaces in several cities (Seoul, Busan, Incheon etc.). The Special Mediation Committee held its first investigation meeting on September 29, 2014, and then held a preliminary mediation hearing for 4 hours on October 7. The Company had stubbornly rejected the Union's proposals, but displayed serious concerns at the present situation which could lead to a strike by the Union. Although the Company began negotiating more actively than previously, the parties could not reach agreement within the permitted mediation period of 15 days due to the wide gap in their viewpoints.

The Company and the Union agreed to extend the mediation period and an additional 15 days were permitted. The Union focused on obtaining Company recognition of itself and recovering the unfavorably-changed working conditions rather than striking. Labor and Management made the most of the mediation period, intensively negotiating a final agreement on changes related to 28 of the 60 articles in the first collective agreement draft. Both parties submitted the agreed draft to the Special Mediation Committee which in turn accepted it, making the collective agreement official.[47)]

This successful outcome was possible thanks to two distinctive factors: (1) the two parties were required to attend the compulsory mediation hearings held by the Labor Relations Commission; (2) three commissioners from the Special Mediation Committee worked hard with labor and management in the process of reaching agreement. If the commissioners had been unsuccessful in persuading the employer, concluding a collective agreement would have been impossible with a company that thought the Union was an organization to be under its control.

IV. Evaluation and Lessons

---

made within the period prescribed in Article 63.

Article 53 (Commencement of Mediation) (1) The Labor Relations Commission shall conduct the proceedings of mediation, without any delay, when one of the parties to labor relations submits a request for mediation to the Labor Relations Commission. The parties concerned shall undertake in good faith the proceedings of mediation.

47) **Article 54 (Period of Mediation) (1) Mediation shall be completed within ten days in the case of general businesses, and fifteen days in the case of public services, after the request is made for mediation pursuant to Article 53.**

(2) The parties concerned may agree to extend a period of mediation under paragraph (1) up to ten days in the case of general businesses, and fifteen days in the case of public services.

Article 61 (Effect of Mediation) (2) The contents of the mediated agreement shall have the same effect as a collective agreement.

1. Evaluation

One of the most significant outcomes for the Union was successful conclusion of a collective agreement, something it had not had in its 25 years of existence. Although the collective bargaining agreement contained only 28 of the original 60 articles, the Union was recognized as a real entity through the collective agreement, and obtained the legitimacy and power to negotiate with the Company as an equal bargaining party concerning the determination of terms and conditions of employment. The details of what was obtained in this collective bargaining include a Union office, paid time-off for full-time Union officers, and an equal number of labor and management representatives in the disciplinary action committee. The improved working conditions include restoration of the original sales allowances, restoration of the paid menstruation leave, and stipulations in the collective agreement protecting working conditions that had been previously obtained. As the structure for wage agreement and general collective agreement bargaining was also established in the first collective agreement, the Union is now equipped with knowledge and a recognition of its authority to negotiate improvements to working conditions.

2. Lessons

Article 32, Paragraph 3 of the Korean constitution stipulates, “Standards of working conditions shall be determined by Act in such a way as to guarantee human dignity.” Out of this article came the Labor Standards Act. Here, if the Labor Standards Act existed without the Labor Union Act, improving working conditions would be difficult as employers usually pursue profit over worker benefits. Enhancing working conditions is the reason why the Labor Union Act guarantees three rights for labor: association, collective bargaining, and collective action. Through exercise of these three rights guaranteed by the constitution real working conditions can be improved, based upon mutual determination of working conditions where labor and management can negotiate on equal footing.

V. Conclusion

The foreign airline’s labor union had simply existed without a collective agreement for 25 years, and was unable to represent its members effectively or act collectively towards improving their working conditions. However, through the process of concluding a collective agreement this time, they understood the importance of exercising their three rights of labor in the workplace, and also restored the Union’s real functions and at the same time achieved the power to protect their working conditions through a collective

agreement achieved by collective bargaining. It is my hope that this Union will maintain the solidarity that its members showed throughout the collective bargaining process and protect its members' job security, while also improving their relatively lower wage levels and working conditions when compared to other airlines.

An Evaluation of a Collective Bargaining Agreement between a Janitors' Labor Union and their University Employer

I. Introduction (Summary)

On May 27, 2014, a signing ceremony was held for a collective bargaining agreement between a certain university (hereinafter referred to as "the University") and the University janitors' labor union (hereinafter referred to as "the Labor Union"). As representatives of both the Labor Union and the University management signed the collective agreement, it marked an end to the labor disputes that had continued for more than a year and established a new employment relationship. In this article, I would like to review the content of the collective agreement, and the reasons why it took such a long time, in the anticipation of some lessons against making the same mistakes in the next collective bargaining sessions.

In July 2013 when the University had difficulty negotiating with the newly established Labor Union, it gave this labor attorney authority to negotiate on its behalf. The University janitorial staff were employed as regular employees from an outsourcing company on March 1, 2013. The University and the Labor Union began collective bargaining at the time, but this devolved into labor disputes that involved the Labor Commission until May, 2013. The University explained to this labor attorney that since there were no items the two parties could agree on, I could start the collective bargaining from the beginning. After drafting and obtaining University approval for a counter-proposal to the Labor Union's collective agreement proposal (80 articles), I was ready for collective bargaining.

The two parties' negotiating teams began their bargaining sessions on July 16, 2013. The Labor Union's negotiating team was composed of seven persons: two union officers from the umbrella union (the Seoul and Gyeonggi branch of the Korean Public & Social Services and Translation Workers' Union), three union officers from the janitor's union, and two observers from the building management team (outsourced

workers at that time). The University negotiating team consisted of three persons: this labor attorney as the chief negotiator, a team leader in charge of general affairs, and the staff member responsible for managing the cleaning services on campus. During the first negotiating session, when the University team submitted the counter-proposal to the Labor Union, the Labor Union showed in the collective bargaining minutes that the previous University bargaining representative had already agreed to 50 of the 80 items. The previous University representative who was in charge of cleaning services explained that he had just signed the meeting minutes without approval from his superiors as the Labor Union had assured him that the meeting minutes could change at a later time. This labor attorney then told the Labor Union that the meeting minutes that the previous University representative had signed were of agreements that the University could never accept, and any agreements made were mistakes by the staff member who had signed the minutes. I then requested that the meeting minutes be officially determined as void.

For this action, the Labor Union filed a complaint with the Labor Office against the University president, the general manager, a team leader in charge of general affairs, and the new chief negotiator (this labor attorney) for unfair labor practice in early August 2013. The Labor Union took several actions in protest including a press conference, a one-person picket of City Hall, a regular Wednesday sit-in protest at the University headquarters, and a slowdown of cleaning services. The chief Union negotiator took to tearing up the University's counter-proposal at the bargaining table, and throwing his hot coffee at the team leader in charge of general affairs for being late to one of the collective bargaining sessions.

In November, after investigation, the Labor Office found there to be no evidence of unfair labor practice by the University declaring the two meeting minutes void, and threw out the Labor Union's complaint. After this, the Labor Union demanded that there be no discrimination between the university labor unions, and that the University should allow this Labor Union's activities as it allowed other unions their activities. The University accepted some of the Labor Union's demands, and both parties managed to reach agreement on 20 items, including union activities.

In February 2014, major disputes moved on to job security, protection of union activities, and allowance of paid time off for one full-time union officer. In terms of job security, the Labor Union demanded extension of the retirement age to 70 (instead of the current 65 years of age), in light of over 20 union members expecting to have to retire at the end of the year if this was not done. When the University rejected the demand to extend retirement age to 70, the Labor Union began taking action on February 29, 2014, hanging up approximately 30 banners around the campus, and setting up a tent at a building near the main gate to engage in a sit-in strike at the tent.

By April 1, 2014, the number of union members had dropped to just half of the total janitorial staff. In this worsening situation, the Labor Union had to withdraw their demand for extension of the retirement age to 70, and instead accepted that the University would work to protect job security. As the Labor Union could not perform union activities for a long time without a collective agreement, it seems to have decided that the next best alternative was to accept realistic measures. The Labor Union then suggested to the University that a working level negotiating team be formed to draw up a collective agreement as soon as possible, which the University accepted. This working-level team consisted of three members of the Labor Union and three University representatives. The working level negotiating teams reached agreement on all remaining items and finalized the collective agreement.

II. Rejection of Meeting Minutes & Unfair Labor Practice

When a labor union was established for the janitorial workers and demanded a collective agreement, the University appointed the staff member in charge of cleaning services as its collective bargaining representative. This particular staff member had no experience negotiating with labor unions before, and as the Labor Union repeatedly asked him to sign the meeting minutes, he did so simply to confirm that he had negotiated with the Labor Union. When this labor attorney, in preparations for collective bargaining, reviewed the contents of the signed meeting minutes, there were many articles that the University must not accept in any situation. Some examples:

“Anyone engaging in unfair labor practice as defined in Article 81 of the Labor Union Act shall be subject to disciplinary action.”

“The Disciplinary Action Committee shall consist of 4 representatives from the Labor Union and 4 from the University. Half or more of the Disciplinary Action Committee shall be present, and consent from a majority of those present is required before disciplinary action can be taken.”

The University also disagreed with such requirements as it needing approval from the Labor Union when handling many different personnel issues.

For these reasons, the University could not accept the meeting minutes. In addition to filing a complaint against all negotiating team members of the University including the University president for unfair labor practice, the Labor Union also demanded the replacement of this labor attorney as University negotiating team representative.

The Labor Union delayed collective bargaining until the Labor Office determined there was insufficient evidence of unfair labor practice by the University, and dismissed the case on November 27, 2013.

III. Issue Related to Extension of the Retirement Age

When the janitorial workers were employed by the outsourcing company, there were no regulations regarding retirement age, but upon direct hiring by the University in March 2013, the University's retirement age regulations became applicable. Their wages also increased considerably because they received the service fees normally paid to the outsourcing company, and other working conditions like welfare benefits improved as well. However, as the retirement age had recently been set at 65 (although the University allowed application for two years' delay in mandatory retirement), 22 of the approximately 60 janitorial staff were due to retire at the end of 2014 in accordance with retirement regulations. The Labor Union demanded extension of the retirement age to 70, but as the University received a subsidy for janitors' wages from Seoul city government, this was impossible without the city government changing its policy. The Labor Union had to accept the fact that the University could not agree to any extension of the retirement age without the consent of the city government, and on April 1, 2014, withdrew this demand, accepting that the University would seek to provide job security.

IV. Articles Related to Personnel & Managerial Rights

Articles related to personnel and managerial rights refer to an employer's authority to make decisions affecting personnel, such as determining regulations on working hours, work place, work assignments, and disciplinary action, etc. It would be an infringement of its personnel and managerial rights if a company were to be required through inclusion in the collective agreement such conditions as needing prior agreement from or advance consultation with the labor union, or having to seek the labor union's opinion before making such decisions. When the Labor Union in question requested collective bargaining, many of the articles they presented infringed on these employer rights. However, at the end of the day, many of these demands were moderated.

Items in the Labor Union Proposal Affecting the Employer's Personnel & Managerial Rights	Negotiated Changes in Final Collective Agreement
(Establishing & abolishing rules) In order to establish or abolish any rules, the University shall receive advance agreement from the Labor Union.	In order to establish or revise any rules, the University shall receive the Labor Union's opinions. However, before revising the rules unfavorably, the University shall obtain the Labor Union's consent.

(Disciplinary or personnel issues for union officers) Regarding disciplinary or personnel issues for the full-time union officer or other union officers, the University shall receive advance agreement from the Labor Union.	Regarding personnel issues for the branch union chairman and branch union officers, the University shall receive the opinion of that person in advance.
(Personnel assignments) The University shall receive advance agreement from the Labor Union when assigning Labor Union members to certain positions.	Personnel assignments shall be implemented fairly and objectively, with the University assigning positions in consideration of the individual's opinion and previous work location.
(Composition of Disciplinary Action Committee) 1. The Disciplinary Action Committee shall be composed of 4 persons representing labor and 4 persons representing management. 2. The Disciplinary Action Committee shall occur with a majority of all members, and decisions shall require agreement by the majority of those present. If votes result in a tie, the motion shall be rejected. Dismissals shall require the consent of at least two-thirds of those present.	The Disciplinary Action Committee shall be composed of three persons appointed by the University, and one observer from the Labor Union shall be allowed to represent the Labor Union's views, and to be present during the entire Disciplinary Action Committee meeting. If the observer's presence is not permitted, any disciplinary action taken is null and void.
(Maintaining appropriate headcount) When deciding to reduce the workforce, the University shall receive advance agreement from the Labor Union.	The University shall strive to maintain the appropriate size of workforce in cooperation with the Labor Union.
(Revision of wage structure) When intending to revise wages or organization, the University shall receive advance agreement from the Labor Union.	When intending to revise wages or organization, the University shall receive the Labor Union's opinion in advance.
(Working hours) When intending to revise working hours, the University shall inform the Labor Union 30 days in advance, and shall not adjust them without agreement from the Labor Union.	When intending to revise working hours, the University shall discuss with the Labor Union before making the adjustments.

V. Conclusion (Evaluation of the Collective Bargaining Process)

Generally, collective bargaining with new labor unions results in many disputes, and the situation in this article was no exception. When beginning these particular collective bargaining sessions, I followed two principles: 1) the collective agreement shall not infringe on the employer's personnel and managerial rights; and 2) the collective agreement shall create an employment situation that is sustainable for the University later.

There were three major issues in the course of the collective bargaining. The first issue was that by signing the meeting minutes, the former University representative agreed on 50 of the proposed items from the Labor Union before this Labor Attorney came to represent the University as chief negotiator. This mistake by the previous representative resulted in extended conflict between labor and management when the original meeting minutes were rejected: the Labor Union filed a complaint against the responsible University managers for unfair labor practice, which also served to delay the collective bargaining process as both sides had to wait for a decision from the Labor Office. The second issue was the Labor Union demanding extension of the retirement age from 65 to 70. When this was refused, the Labor Union hung about 30 protest banners around the campus and staged a sit-in protest in a tent at one of the gates. Since any changes to the retirement age required city government approval, the University could not agree to this demand, even though it was understood that this demand arose from the fact that 20 of the 60 employees were supposed to retire by the end of 2014. The third issue was the infringement of the employer's personnel and managerial rights, which was the strategy the Labor Union used to protect jobs. In practice, when an employer allows such rights to be restricted in the collective agreement, labor disputes increase and rifts in labor-management relations arise.

Although a reasonable collective agreement between the University and the Labor Union was ultimately concluded, one major problem was the length of time it took: 15 months. There were two reasons for this. Firstly, the Labor Union involved the umbrella union at the bargaining table, resulting in the first draft proposal containing many items that infringed on the employer's personnel and managerial rights, and demands for working conditions and union activities beyond what the University could afford to accept. Secondly, the University had no specialized staff with the knowledge of labor laws necessary for dealing with a labor union. As the Labor Union received professional

support from its umbrella union, the University decided to hire an outside labor specialist for the professional legal support they lacked. Due to a failure to cooperate and compromise, the Labor Union and the University were unable to conclude a collective agreement except after labor disputes and a significant amount of time and effort.

Despite the aforementioned problems, the final collective agreement was accepted by both parties. The Labor Union was recognized as a labor union, receiving an office and workers' lounges, paid time-off for union activities, and additional off-days, etc. For its part, the University also views the outcome as a success, as it was able to protect its personnel and managerial rights as an employer, and sign a sustainable collective agreement. It is desirable that the resulting agreement, concluded after much struggle, will play a pivotal role in maintaining peace between labor and management, and allow both parties to base their labor relations on a win-win situation.

A Case of Recovery of Infringed Managerial Rights through Collective Bargaining

I. Major Outlines

A labor union of civilian employees employed by one local autonomous government (hereinafter referred to as "the employer") was established ten years, and has obtained the labor union's rights by involving into managerial rights and expanded paid union time though collective agreements. The employer could not operate manpower efficiently due to the labor union's involvements at managerial rights in reality, and the employer has also been obstructed at work performance gradually due to the excessive paid union time. Under these circumstances, since existing collective bargaining expired in April 2008, the labor union and the employer could not renew the collective agreement due to many differences despites ten collective bargain meetings. Then, the employer commissioned me with this collective bargaining authority in March 2009, demanding that I should delete infringed articles related to managerial rights and reduce the labor union's too much paid union time. This labor attorney has implemented 24 collective bargaining meetings very faithfully with the labor union from March 2009 to Oct 1st. Based upon sincere collective bargaining meetings, the employer recovered the infringed managerial rights from the collective agreement, and the employer also reduced the labor union's paid union time in half. Of course, in return for their compromises, the employer paid back to the labor union with improved working conditions such as extension of retirement age, increase of

health checkup subsidy, introduction of interim severance pay, etc. Finally, we concluded collective bargaining into the collective agreement, exchanging mutual gains.

II. Collective Bargaining Summary

1. The employer proposed the labor union for the employer's draft of collective agreement. (Feb 17, 2009)
2. 1~2nd collective bargaining meetings on Mar 11(Wed), 11th and Mar 19(Wed)
   - The labor union did not recognize the company's labor attorney as the employer's representative negotiator.
3. 3~7th collective bargaining meetings on Apr 1(Wed), Apr 15(Wed), Apr 24(Wed), and Apr 29(Wed)
   – The labor union did not respond to the employer's collective agreement draft at all, but instead requested for collective bargaining on wages first.
4. 8th collective bargaining on May 6(Wed)
   - The labor union unilaterally declared the status of industrial disputes, and the labor union held a press conference and announced a strike against the employer on May 13 (Wednesday morning).
5. **The employer informed the labor union of cancellation of the collective agreement on May 13, 2009 (in the afternoon): its effect will be available in 6 months on Nov 13.**
6. Application to the Labor Relations Commission for adjustment of industrial disputes and both sides rejected mediators' draft. (10 days from May 20 to May 29)
7. After a bargain broke down, the labor union held more than 50 demonstrations in front of city hall from May to October.
8. The labor union requested for a meeting with a mayor and had a meeting with the relevant director on Jun 10.
   - The both parties agreed on the resumption of practical collective bargaining.
9. 9th collective bargaining on Jun 17 (Wed) and held a sit-in strike demanding at least three collective bargaining meetings in a week.
10. 10th collective bargaining on Jun 24(Wed)
    - Both parties agreed on one collective bargaining meeting per week, and the labor union started to respond to the employer's draft.
11. 11 ~ 21st collective bargaining meetings (Jun 1(Wed) ~ Sep 24(Thu)
    - Agreed on most articles of the employer's draft excluding controversial issues concerning managerial rights, disciplinary actions, full-time union officials, etc.
12. 22 ~ 23rd collective meetings on Sep 30(Wed) and Oct 14(Wed)
    - The labor union proposed a greatly compromised collective agreement.
13. Both parties agreed on the new collective agreement and held a signing ceremony on Oct 28, 2009 (Wed).

III. Background of the Employer's Cancellation of the Collective Agreement

1. The labor union's perspective

(1) The existing collective agreement has a provision of an automatic extension for its effective period that the current collective agreement continues to be effective while the collective bargaining is going on even though the collective agreement expired, and there is also a provision of an automatic renewal if one party does not request for a revision at the current collective agreement. Therefore, due to aforementioned articles of the current collective agreement, the labor union does not have to negotiate with the employer's draft that is very disadvantageous compared to the existing collective agreement. This is why the labor union did not respond to the employer's draft.

(2) The labor union cannot give up the current collective agreement because it is the labor union's rights that they have acquired through their struggles against the employer for the last ten years.

2. The employer's perspective

(1) The collective agreement is effective for two years and when its period expired, the collective agreement is not valid.

(2) The employer explained that what the employer is pursuing in this collective bargaining is not to revise current working conditions unfavorably, but to recover infringed managerial rights, which are the employer's fundamental rights.

(3) Although the employer had held collective bargaining meetings with the labor union 8 times, the labor union did not respond to the employer's draft at all. So, the employer decided to cancel the collective agreement in order to start a practical negotiation on the employer's collective agreement draft.

IV. Contents Recovered from Infringed Managerial Rights

1. Revision of provisions requiring the labor union's agreement and consultation

(1) 'Establishment or revision of the regulation'

- Current: When the employer intends to establish, revise or abolish regulations and rules related to the labor union members including the rules of employment, the employer shall consult with the labor union in advance.
- Revised: This provision is replaced to Article 94 of the Labor Standards Act.

(2) 'Restriction of hiring irregular employees like daily worker'

- Current: When the employer intends to hire irregular employees, the employer shall consult with the labor union in advance concerning necessity of employment, employment period, numbers, and positions.
- Revised: It is a principle that the employer shall not use irregular employees like daily worker on the jobs that the labor union members are engaged in.

(3) 'Introduction of new technology'

- Current: The employer shall provide all information related to new technology to the labor union and shall introduce new technology under a consultation with the labor union.
- Revised: When the employer intends to introduce new technology or change current technology, the employer shall provide relevant information in advance to the labor union.

(4) 'Outsourcing or subcontracting'

- Current: The employer shall determine it through mutual negotiation with the labor union in advance.
- Revised: When there is a change in employment relations or working condition, the employer shall listen to the labor union's opinion.

2. Revision of disciplinary provisions

(1) Severity of disciplinary punishment

- Current: The types of disciplinary punishment were expressed based upon the number of misbehaviors. (For an example, disciplinary dismissal is only possible to a person who used violence to his/her superior three times.)

  → This means that the employer cannot dismiss the union employee until he/she used violence against his/her superior three times. So, this article infringed on the employer's justifiable disciplinary action.
- Revision: The type of disciplinary is determined by the severity of violation and the degree of negligence. The previous provision, 'the number of misbehaviors' was deleted.

(2) Composition of the disciplinary action committee

- Current: The disciplinary action committee shall consist of five members: three managers representing the employer and two persons representing the union members. The determination is made by the affirmative vote of a majority of the members present at a meeting where a majority of all members are present.
  → As it was hard to compose a disciplinary action committee to discipline a union member who violated rules, the employer could not implement it. I persuaded the labor union that what the labor union pursues honestly in the disciplinary provisions shall be a fair disciplinary process.
- Revised: The disciplinary action committee shall be composed of three persons designated by the employer, who shall provide an observer an opportunity to state his/her opinion, guarantee his/her presence at the disciplinary committee meeting until the final decision-making time. If the observer's presence was not allowed, its disciplinary decision is null and void.

3. Revision of other unreasonable provisions

(1) Reduction of the number of full-time union official and paid union time

- Current: Two full-time union officials (for 230 union members) and 4 hours per day (monthly 88 hours) allowed for paid union time for branch labor union representatives.
- Revised: Full-time union officials are reduced to one and branch union representatives' paid union time is reduced 8 hours per week.

(2) Deletion of labor-management council-related detailed provisions

- Current: There were separate provisions for the labor-management council in the collective agreement: [Labor-Management Council], [Matters to reported], [Matters subject o consultation], [Matters subject to council resolution], [Provision of business data], and [Effect of matters subject to council resolution]
  → As the detailed provisions of the labor-management council are stipulated in the collective bargaining, the labor union can request a collective bargaining every quarter and the company shall respond to the labor union's demand.
- Revised: all provisions of the labor-management council except one provision, [composition and operation of the labor-management council] are deleted out of the collective agreement.

(3) Obligation to respond to collective bargaining

- Current: 'When one party requests for a collective bargaining, the other party shall respond to that demand.'
  → Both parties shall keep peace duty during the effective period stipulated in the collective agreement, but this provision can nullify this provision.
- Revised: Added with 'in closing to the expiry date of the existing collective agreement'

V. Background of the Union's Compromise and Evaluation of Collective Bargaining

1. Background of the labor union's compromise

(1)The employer's consistency in collective bargaining purpose

The employer consistently explained that the purpose of this collective bargaining was not to worsen existing working conditions, but to recover infringed managerial rights from collective agreement. The labor union gradually tried to find compromised agreement, because the labor union would lose all contractual rights that the labor union has acquired if the collective agreement expired. Under circumstances where the existing collective agreement is about to expire by the employer's unilateral cancellation of the collective agreement six months ago, the labor union faced a big burden for its result and accepted most provisions of the employer's proposed draft just before termination of the collective agreement.

(2) The employer's reliability in the collective bargaining

The employer has maintained reliable attitude at weekly collective bargaining meetings in a good faith and sincerity rotating meeting places of both parties. Also, the labor union has not been interfered much during collective bargaining from its umbrella labor union thanks to long time confidence developed between the labor union and the employer.

(3) The labor union's weakened strike power

After adjustment of industrial disputes broke down, the labor union had staged protesting demonstrations more than 50 times in front of city hall, but the employer did not respond to their demands, keeping consistent attitude, and so the labor union's collective actions could not bring their expected effect.

2. Evaluation of collective bargaining

This collective bargaining was a remarkable case that has changed existing practices that the employer has unilaterally compromised to the labor union's demands so far. The employer recovered infringed managerial rights through negotiating sincerely with the labor union, and the labor union also acquired practical gains. Therefore, this collective bargaining has helped both parties throw away existing confrontational and combative relations and instead build up mutually complementary and cooperative relations.

Forced business closure as a result of a labor union' s abuse of its rights

I. Summary

This case is about a taxi company in Yeosu, South Jeolla Province, that actually had to shut down its business due to abuses by the labor union of its own rights. These same abuses resulted in the new employer, who purchased the taxi company, also having to shut down. The taxi company had been unable to increase the 'deposit money which taxi drivers have to turn over to the company out of their daily earnings' (hereby referred to as the "daily deposit") for its last ten years, which resulted in accumulated deficits over a long period of time. Furthermore, the company was not allowed to discipline any employees who violated company regulations over the last ten years either.

This company was the biggest taxi company in Yeosu about 10 years ago, with 80 taxis. The company and the labor union agreed on a daily deposit amount in their collective agreement in 1998. The daily deposit amount stipulated in the collective agreement was much lower than that of any of the other taxi companies, and so this helped to maintain peace between management and labor for some years. However, from 2000, the company started facing difficulty from operational deficits due to inflated prices, a rise in fuel costs, etc, and the company requested an increase in the daily deposit, but the labor union rejected, arguing that the company's explanation of the reasons for the monthly deficit could have been falsified. The employer then completely laid out the company's financial situation to the labor union in the hopes of being able to rescue the company, and desperately demanded the drivers' daily deposit be increased up to the minimum break-even point. However, this was impossible, as the labor union was unwilling to compromise. In the end, the employer had to sell the business in February of 2006, due to its accumulated debt.

A new employer purchased the taxi company with a verbal promise from the labor union that it would increase the daily deposit, but when the new employer purchased the company, the labor union allowed the increased daily deposit for only two months, after which the labor union returned to the previous daily deposit. When the new employer decided to stop subsidizing fuel in order to prevent another deficit, the union members submitted their daily deposit after deducting an amount equivalent to the fuel subsidy. The company, following the disciplinary procedures in company regulations, then dismissed several union officers who had led other union members to deduct the fuel subsidy from their daily deposit. However, the Labor Relations Commission ruled that the dismissals were unfair in that the company did not observe the expired

collective agreement's disciplinary process, which was that "the disciplinary action committee shall consist of an equal number of representatives from the company and the labor union, and its decisions shall be decided by a two-thirds majority of the committee members present." The new employer could not raise the taxi drivers' daily deposit amount, and was also told that the Labor Office had decided that the company's cessation of a fuel subsidy was illegal. Again, in the end, the new employer had to give up the business, due to the accumulated debt, only two years after purchasing the company.

II. Timeline of Major Events

1. 1979	The taxi company was established.
2. May 1, 1998	The drivers' daily deposit, 65,000 won, was stipulated in the collective agreement.
3. July 2004	A deficit of 10 million won per month started occurring, due to the rise in fuel costs. The company desperately demanded that the labor union accept a 5,000 won increase of the drivers' daily deposit, the minimum to break even, but the labor union refused.
4. Oct 29, 2004	The company notified the labor union of the cancellation of the existing collective agreement.
5. Apr. ~ May 2005	The labor union went on strike for two months to prevent the sale of the taxi company.
6. Dec 2005~Feb 2006	The taxi company suspended business for three months due to accumulated debt, and then was sold.
7. Mar ~ Apr 2006	A new employer purchased the company after obtaining a verbal promise from the labor union that they would raise the drivers' daily deposit by 9,000 won. However, the labor union returned to the previous daily deposit two months later.
8. May 2006	After two months, when the new employer continued to deduct the increased daily deposit, the employees sued the company for these deductions, and the Labor Office ordered the company to return these deductions to the employees.
9. May ~ Nov 2006	The new employer desperately demanded that the labor union raise the drivers' daily deposit so the company could stop running a deficit. Negotiations with the labor union were held more than twenty times, but the labor union rejected the increase to the end.
10. After Nov 2006	After sufficiently explaining the need to stop the fuel subsidy,

	the company stopped subsidizing fuel costs. The union members then reduced their daily deposit to 47,000 won, after deducting 18,000 won, equivalent to the fuel subsidy.
11. Nov 2006	The company dismissed key union officers who defied the company's decision to cease the fuel subsidy.
12. Dec 19, 2006	The Labor Relations Commission ruled that the dismissals were unfair because the company violated disciplinary procedures.
13. May 21, 2007	The employer appealed, but lost the case.
14. Aug 27, 2008	The new employer gave up the business due to the debt load.

III. Necessity for the increase in the taxi drivers' daily deposit and the labor union's objections

1. Necessity for the increase in the taxi drivers' daily deposit

When the company and the labor union determined the drivers' daily deposit of 65,000 won in the collective agreement in May 1998, the fuel was 222 won per liter, but in June 2006, it rose up to 737 won, a 330% increase. During this period, the base taxi fare was 1,300 won, and increased to 1,800 won. However, the taxi drivers' daily deduction did not increase due to the labor union's continuous objections.

2. A written statement from one of the former company presidents

My company had the best working conditions of all taxi companies in July 2004. Their average monthly income was 300,000 won more than their counterparts at other taxi companies, and thanks to this situation, we were awarded a prize by the Minister of Construction and Transportation in the field of labor-management relations. However, with the rise in fuel costs, the company could not share any profit with its stockholders, and even the company's invested capital was at risk, due to the accumulated debt. The company had been losing, on average, 10 million won every month.

At the emergency board meeting, I was elected the new representative director. Based on my three basic standards of company management like a principle of trust, win-win situations, and transparency, I started to negotiate with the labor union and laid out the company's financial situation for the labor union to see (the union inspected the company's business practices three times), but the labor union would not agree to an increase of their daily deposit. The company requested only 5,000 won more, the minimum to break even, explaining that the company would do business without profit for the time being so as to rescue the company, but the labor union refused the company

request, repeatedly claiming the company was not losing money. The board meeting concluded with the company still unable to recover from its accumulated fuel and other debts, and in the end, it was sold, with the entire amount from sale going to payment of company debts.

A considerable number of faithful union members suggested the daily deposit be increased an additional 10,000 won (even in this case, an employee could receive, on average, 100,000 won more per month than at other companies) demanding that the company suspend its sale, but their efforts availed nothing, due to threats and interference from a few militant union members.

3. Comparison of wages versus taxi drivers' daily deposit

– prepared by a certified public accountant (as of Nov 1, 2006)

1) Company income per driver (daily deposit): 65,000 won x 25 days = **1,625,000 won/month**
2) Labor costs (direct costs + indirect costs)➔ **1,976,609 won per driver per month**

- Direct labor costs: basic pay, long-term service allowance, car wash allowance, summer vacation allowance, tuition subsidy, severance pay reserve, insurance premiums for the four social security insurances, compensation for unused annual/monthly leave, paid leave allowance (5 days), gift expenses, fuel subsidy (26.7 liters) → 1,272,645 won
- Indirect labor costs: management staff labor costs, general expenses, car insurance, depreciation of car values, car repairs, dividends to stockholders → 703,963 won

3) Company income versus individual labor costs

1,625,000 won (company income) – 1,976,609 won (labor costs)
= **-351,609 won (deficit amount per individual per month)**

IV. Loss of the company's right to implement disciplinary action

Through negotiation with the labor union, the company introduced a disciplinary process in the collective agreement which stipulates, "the disciplinary action committee shall consist of an equal number of representatives from the company and the labor union, and its decision shall be decided by a two-thirds majority of the committee members present." The company gave up its right to unilaterally take disciplinary

action in order to include the labor union as a business partner and to cooperate in a win-win strategy. Unfortunately, the company was not able to take disciplinary action against even one union member over the company's last ten years on account of the requirements for taking disciplinary action within the disciplinary process. Consequently, sometimes union members cursed the employer and neglected to carry out their duties properly. Union members also frequently caused car accidents. As a result of the lack of disciplinary action, the company had to pay more in annual car insurance premiums than other companies: more than 2 million won per taxi, compared to about 1 million won per taxi for the company's competitors. This was as a direct result of the company's inability to maintain ethical standards through disciplinary action. What is worse, under this disciplinary process, the company couldn't even punish an employee who sued the employer without justifiable reason. This resulted in a collapse of order within the company, so manager directions were not adequately implemented.

V. Related judicial rulings and administrative interpretation

If a collective agreement expires, provisions concerning disciplinary process continue to be effective as normative sections. (Jan 25, 2007, Labor Relations-293)

Although the effective period of the collective agreement expires or the collective agreement is declared invalid by one party cancelling the agreement during the autonomous extension period, 'standards concerning working conditions and other matters concerning the treatment of employees' (namely, the normative section), as prescribed in the collective agreement, would still remain in effect as the working conditions of individual employees. If the employer wants to revise the normative section, he shall conclude a new collective agreement in accordance with legitimate procedures, or revise the Rules of Employment and obtain collective consent of the employees concerned. (Supreme Court Ruling, Jun 9, 2000, 98da13747)

In cases where the employer agrees with the labor union in the collective agreement that "when taking disciplinary action, the disciplinary action committee shall consist of an equal number of representatives from the company and the labor union, and its decision shall be decided by a two-thirds majority of committee members present," it is true that it is practically impossible to discipline employees who violate company regulations. Although this makes it difficult to take disciplinary action, the validity of the disciplinary process as stipulated in the collective agreement, will still hold.

VI. Conclusion

In this labor case, as in other cases where the employer gives up a certain range of

personnel and management rights in order to maintain peace with the labor union, the results are evident. The loss of managerial and personnel rights will lead to failure of the business, reducing competitiveness in the market and employee job security as well. Therefore, when an employer establishes autonomous agreement by collectively bargaining with the labor union, the employer should not forget that he or she should negotiate with the labor union within certain boundaries: fundamental employers' rights, namely, personnel and managerial rights, should not be given up in the collective agreement. If the employer hands over personnel and managerial rights to the labor union, it should be remembered that negative consequences will occur for the employer and the labor union in the long run.