Freedom of Speech and Responsibility

I. Introduction

Freedom of speech is a fundamental right of democracy guaranteed by the Constitution, but abuse of that right has consequences. Employers can freely conduct business with ownership-based management rights, but when they attempt to dominate or intervene in the activities of a labor union, they are subject to punishment or legal remedies if a legal claim is raised against them of unfair labor practices. Workers are also liable for criminal charges and civil judgments, and are subject to disciplinary actions if they damage the employer's reputation while exercising their three labor rights (rights to establish a labor union, engage in collective bargaining, and take collective action). In this regard, Article 21 of the Constitution states, “Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.” In practice, there are many cases of conflict with the rules prohibiting domination and intervention that infringe on the employer's freedom of speech and expression guaranteed by the Constitution and the three labor rights guaranteed by the Trade Union and Labor Relations Adjustment Act (hereinafter, “Trade Union Act”). In this case, it is necessary to examine the criteria for determining wherein lies the balance and how these criteria are applied in actual cases.

II. Freedom of Speech

1. Criteria for Judging Freedom of Speech

Although employers are guaranteed freedom of speech, they must not dominate or interfere with the organization or operation of a labor union. The question here is whether the employer's expression of opinion came out of an intention to control or interfere in operation of the union. In response, the court has said, “Employers have the freedom to express their opinions. An employer may simply express a critical opinion of the union's activities or hold a collective briefing session for workers to explain the company's business situation and policy direction and seek understanding. It should not be judged that the employer has the intention to dominate or interfere in the organization, operation, and activities of the labor union just because they have taken such action. What is at issue is whether the threat of disadvantage such as disciplinary action or the promise of benefits is included. And whether there are factors that could undermine the independence of the union, such as the circumstances of other domination-interferences.”[1)]

1) Supreme Court ruling on Jan. 10 2013: 2011do15497.

2. Cases Recognizing Freedom of Speech

(1) In 2011, the Korea Railroad Corporation held a tour briefing session for workers just before a strike. The company expressed a critical opinion of the strike planned by the labor union from the employer's point of view, such as by explaining the overall status of the Korea Railroad Corporation and the impact the strike would have on the company, appealing for them to be cautious about participating in the strike. This was within the scope of the freedom of speech allowed on the employer's side.[2)]

(2) In 2006, during an interview with Christian media, a senior pastor emphasized the religious interrelationship between the church and its employees who are Christian believers from a religious standpoint. He expressed his conviction that it was not desirable that they participate in union activities. It is difficult to say that the senior pastor made such a statement with an intention to dominate and interfere with the labor union.[3)]

(3) In order to cover the living expenses of a dismissed union leader, the union delegates decided to increase the deduction for union membership fees from 1% to 1.5% of wages at the union representatives meeting, and asked the company to makes such deduction. However, when the company did not make the deduction since individual union members had not submitted their written consent, the union slandered the company through handouts. Accordingly, the company writing an article explaining the union's claims and posting it at various stores cannot be regarded as controlling or interfering in the union's activities.[4)]

(4) In judging whether the education provided by an employer to the workers amounts to unfair labor practice, even if the content of the education included some criticism of the union's activities or the union’s current status, it is not an unfair labor practice if there is no intention to control or interfere with union operations or activities.[5)]

(5) Even if documents distributed as a labor union activity are likely to damage or lower views of the character, credibility, or honor of others, and even if some of the facts stated in the document are false or somewhat exaggerated in their expression, if the purpose of distributing the document is not to violate the rights

2) Supreme Court ruling on Jan. 10, 2013: 2011do15497.
3) Seoul High Court ruling on Aug. 14, 2008: 2006nu18364.
4) National Labor Relations Commission decision on Aug. 20, 2001: 2001buno69.
5) Seoul High Court ruling on Aug. 20, 2014: 2013nu47452.

or interests of others, but for unity of union members or the maintenance and improvement of working conditions, and if the contents of the document are truthful as a whole, the act of distributing such documents falls within the scope of a labor union's legitimate activities.[6)]

III. The Employer's Freedom of Speech and Unfair Labor Practices

1. Criteria for Judging Labor Practices as Unfair and Amounting to Domination or Interference

Whether the employer's media dominates or interferes in operation of the union is judged by the following three factors. ① Subject: It must be an action by the employer. "Employer" means a business owner, a person responsible for management of a business or a person who acts on behalf of a business owner with regard to matters concerning workers in the business; ② Whether the three labor rights are violated: There must be an act of controlling the employer's labor union or interfering with its activities. However, it does not demand the consequences of violation of the three labor rights. ③ Intention to dominate or interfere: From an objective and comprehensive point of view, if the intention to control or interfere with the organization or activities of the union can be inferred, the action can be judged as an unfair labor practice.

2. Related Court Ruling

The criterion for judging unfair labor practices is whether an employer's anti-union speech or behavior is merely an opinion or criticism of the union, or actual attempt to dominate or interfere. The employer exercising his/her freedom of speech does not necessitate a judgment that the employer attempted to dominate or interfere with the union's activities. However, if the employer's remarks are intended to impede or interfere with workers' freedom to engage in labor union activities beyond the limits of simple remarks, unfair labor practices are established.[7)] In response to this, the court has stated, "If an employer expresses an opinion through a speech, company broadcast, bulletin board, or letter, the contents of the expressed opinion and the circumstances, time, place, and method in which it was made and how it affects the operation or activities of the labor union shall be considered. If the intention to dominate or interfere with the organization, operation, or activities of a labor union is recognized upon summing up the effects it has had or may have had, such speech amounts to an act related to the 'domination of or interference with the organization or operation of a workers labor union' according to Article 81 (4) of the Trade Union Act, and therefore constitutes an unfair labor practice. In addition, the establishment that an unfair labor practice took place in the form of domination/interference does not necessarily require that the workers' right to organize was violated in actual fact."[8)]

6) Supreme Court ruling on Dec. 28, 1993: 93da13544.
7) National Labor Relations Commission decision on Feb. 25, 1997: 96buno103.

3. Cases Deemed Unfair Labor Practice

(1) The president of a university called an employee leading the establishment of a union and said, "Don't form a union. Can a union mobilize opinions that represent all of our employees? A union will cause more conflict as a third party. We will create a general organization for employee meetings, and you can communicate there." And, "Unions level all kinds of charges through the media in order to create justification. I'm asking you to never form a union." This amounts to interfering with the organization or operation of a labor union.[9)]

(2) In an email on October 1, 2010, the head of a hospital said, "If staff go on strike and leave the hospital with no suitable facilities, equipment, or services, patients will turn their backs on us in an instant. We may not recover from that. Where do your salaries come from? Without patients, there will be no money for your salaries or mine." On October 4, 2010, the same head of the hospital stated his view that a vote for or against industrial action was a vote of confidence for or against himself, and said that if the union members chose to go on strike, he would step down from his position as head of the hospital.[10)] Such expression of opinion can be seen as originating from an intention to influence the judgment and actions of individual members beyond the level of simply expressing personal opinions on a vote for or against industrial action.

(3) Immediately after an employer realized a union was formed, he continued to make anti-union remarks to all employees. The employer's remarks were repeated several times and included statements of disadvantage towards participants in terms of future personnel management, etc., so it can be seen that the remarks were made with the employer intending to use their superior position to dominate and interfere with union activities. After the employer's remarks, the number of union members decreased significantly, with 12 submitting a letter of withdrawal from the union. Considering these points, this was an unfair labor practice by the employer for attempting to dominate the union and interfere with its operation.[11)]

IV. Other Liabilities Relating to Freedom of Speech

1. Defamation of Character and Related Liability

8) Supreme Court ruling on Jan. 10, 2013: 2011do15497.
9) Supreme Court ruling on Mar. 24, 2016: 2015do15146.
10) Seoul Administrative Court ruling on Sept. 22, 2011: 2011guhap16384.
11) National Labor Relations Commission ruling on Dec. 24, 2015: 2015buhae 1056.

Defamation of a person in relation to freedom of speech is subject to criminal punishment,[12] and amounts to an illegal civil act that requires compensation.[13] In addition, disciplinary punishment is possible on the basis of violating the rules of employment. The same shall also apply to cases where the employer's reputation has been damaged by postings on the Internet or postings within the company. Even if a person's name is not specified therein, it is equally defamatory if the name(s) can be inferred.[14] However, if it is recognized that the purpose is for the public interest, justification exists and punishment will not be levied under Article 310 of the Criminal Act.

2. Case Review

(1) Case 1: Defamation of a dismissed worker

Workers posted signs that read “Taxi workers, let’s work together to find our lost rights,” next to placards and signs that read “We condemn xx Company for unfair dismissal!” A driver working for the taxi company since 2009 had been dismissed in April 2014 for failing to comply with company instructions, such as failing to deal with his traffic accidents. In August 2014, the National Labor Relations Commission dismissed the driver’s application for remedy against unfair dismissal and unfair labor practices, and in March 2016, the Seoul Northern District Court rejected a lawsuit over the dismissal. The Supreme Court affirmed the lower court's judgment that the driver had sought to defame the taxi company and ordered him to pay a fine of 5 million won.[15]

(2) Case 2: Compensation Paid to C Newspaper Company

In 2003, when reporting on a labor dispute at H Motor Company, an article was published entitled, “Production workers of H Motor Company are receiving 50 million won in annual wages while enjoying 165 to 177 days off a year.” This article had been pushed by the media to target H Motor Company’s union as enjoying luxurious conditions. The facts in the article were distorted. The court established the facts as:

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12) Criminal Act:_Article 307 (Defamation)
(1) A person who defames another by publicly alleging facts shall be punished by imprisonment or imprisonment without prison labor for not more than two years or by a fine not exceeding five million won.
(2) A person who defames another by publicly alleging false facts shall be punished by imprisonment for not more than five years, suspension of qualifications for not more than ten years, or a fine not exceeding ten million won.
Article 310 (Justification)
If the facts alleged under Article 307 (1) are true and solely for the public interest, the act shall not be punishable.

13) Civil Act: Article 750 (Definition of Torts)
Any person who causes losses to or inflicts injury on another person by an unlawful act, willfully or negligently, shall be bound to make compensation for damages arising therefrom.
Article 751 (Compensation for Non-Economic Damages)
(1) A person who has injured the person, liberty or fame of another or has inflicted any mental anguish on another person shall be liable to make compensation for damages arising therefrom.

14) Supreme Court ruling on Nov. 14, 1089: 89do1744.

15) Supreme Court ruling on Apr. 25, 2019.

"After conclusion of the collective agreement in 2003, the average wage level of production workers serving the average 14.4 years, is 42.88 million won per year. This figure includes the basic wage plus weekday overtime work allowance, holiday overtime allowance, late night work allowance, and other annual leave allowances, etc. Once bonuses and incentives are added, wages are about 48.27 million won per year. The working hours to obtain the above wages are '10 hours a day for 302 days a year,' which includes 2 hours overtime work on every weekdays and 4 extra holiday work per month (10 hours each). There are only 63 total holiday days per year [including weekly holiday] (365 days - 302 days)." In response, union H sued for compensation against defamation, which the courts awarded.[16)]

Article 307 (Defamation) of the Criminal Act provides that a person who intends to defame another by publicly stating facts is subject to criminal punishment. However, for the media reporting general news, Article 310 of the Criminal Act (fragment of illegality) stipulates that "if the facts alleged under Article 307 (1) are true and solely for the public interest, the act shall not be punishable." C newspaper company was ordered to render compensation because the facts were wrong, even though the news was reported to be in the public interest.

V. Conclusion

Freedom of speech is guaranteed under the Constitution as long as it does not violate the rights of others. However, abuses are subject to criminal punishment, compensation for civil damages, and disciplinary action. Even in the guarantee of the three labor rights, legitimate union activities are exempt from civil and criminal liability. However, if a union or union member defames an employer with false statements, they shall be held legally responsible. Employers are also subject to punishment or orders for remedy for acts that violate the three labor rights. Therefore, it is necessary to seriously consider that despite our freedom of speech and expression, we are responsible for what we say.

Changes of Judicial Rulings Related to Annual Leave Compensation

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I. Introduction

The purpose of annual paid leave is to guarantee sufficient paid leave to workers

16) Seoul High Court ruling Oct. 18, 2005: 2004na84063.

who are exhausted from long-term work so they can recover their physical and mental health and enjoy a cultural life.[17] Monetary compensation is applied only in exceptional cases where annual leave is not available. As Supreme Court rulings have been made based on the purpose of such annual leave, existing rulings are currently being revised to reflect this.

The Supreme Court ruling on October 14, 2021 (2021 da 227100) ruled that the annual leave days for one-year fixed-term workers amounted to 11 days, not 26. Even in the case of retirees, the Supreme Court ruling on June 28, 2018 (2016 da 48297) ruled that, in cases where the calculation period of annual leave is from January 1 to December 31 of each year, if the retirement date is December 31, there was no annual leave allowance owing in the following year. Currently, the Ministry of Employment and Labor stipulates in its annual leave-related guideline "A fixed-term worker with a one-year employment contract must be granted up to 26 days of paid leave allowance when the contract period expires after meeting 80% or more of the attendance rate for one year."[18] This is a combination of 15 days of annual leave granted for employees who have worked 80 percent or more for one year according to Article 60 (1) of the Labor Standards Act, and up to 11 days of accumulated monthly leave for employees who have worked less than one year, according to Article 60 (2). Based on this, front-line labor inspectors penalize employers for violating the Labor Standards Act if the employer does not pay 26 annual leave days.

As a result of these court rulings, the current guidelines of the Ministry of Employment and Labor lose their effect. With this in mind, how is annual leave calculated for fixed-term workers and retirees? In addition to this issue, I would like to examine in detail the standards upon which the Ministry of Employment and Labor decisions were based.

II. Judgments of the Supreme Court Rulings in 2018 and 2021

1. A case related to annual leave of retirees[19]

Workers were hired by the Uijeongbu City Facility Management Corporation and retired as street cleaners. In the employment rules it is stipulated that retirement "shall be the last day of December of the year in which the person turns 61." In accordance with the provisions of the collective agreement, 20 days of special paid leave were used for those eligible for mandatory retirement, and the mandatory retirement was on December 31st. The workers said, "The last day of December of the year in which we turned 61 was a special leave period, so the actual retirement date should be considered as January 1 of the following year. The employer is obliged to pay the

17) Constitutional Court decision on May 28 2015: 2013 Honma 619; Kim Hong-Young, "Theory on System Improvement of Annual Leave for Guaranteed Rest," Labor Law Research, (40), Seoul National University Labor Law Research Society, March 2016, p. 161.

18) Ministry of Employment and Labor, "'Explanation on Revised Labor Standards Act' on the Expansion of Annual Leave Guarantee for Those who Work for Less Than One Year, etc.", May 2018.

19) Supreme Court ruling on June 28, 2018: 2006 da 48297.

workers the allowance for the unused annual leave due to their retirement on January 1st, since annual leave was accrued in the year they turned 61 years of age."

Regarding this, the first and second trials agreed to the workers' legal claims, but the Supreme Court ruled "The employment rules set the retirement age as the end of December when they turn 61. The retirement age is reached on December 31, when the person turns 61, and the employment relationship is naturally terminated. Therefore, workers cannot acquire the right to annual leave in return for work in the year in which they turn 61. Therefore, it cannot be seen that their retirement date is postponed to January 1 of the following year."

2. A case related to annual leave of fixed-term workers[20)]

A worker used 15 days of annual leave while working as a caregiver at an aged care welfare facility for one year from August 1, 2017 to July 31, 2018. On May 5, 2018, the Ministry of Employment and Labor distributed the guideline for the revised Labor Standards Act as it related to the expansion of the annual leave guarantee for workers with less than one year of employment. The guideline stated "If the contract period of a one-year fixed-term worker expires, an unused annual leave allowance of up to 26 days must be paid."

The worker submitted a complaint to the Chungbu Regional Labor Office stating that he had not been paid 11 days' annual leave allowance. With the guidance of the labor inspector, the employer paid 717,150 won to the worker as an annual leave allowance for 11 days.

Later, the employer stated that the information that up to 26 days of annual leave would be granted to workers who signed a one-year fixed-term employment contract was incorrect. Since the worker used all the annual leave granted to him, he could not receive annual leave pay. The employer claimed that the worker is obligated to return the overpaid allowance because the employer paid the additional 11 days' annual leave allowance based on the erroneous guidance of the labor inspector.

In response, the lower court (the second trial) recognized the claim of the employer and issued an order for the worker to pay back the overpaid amount. The worker then appealed to the Supreme Court. The Supreme Court ruled "The right to use annual leave or the right to claim annual leave allowance naturally arises when an employee provides work while meeting the attendance rate in the previous year, and is equivalent to the consideration for work for one year in the preceding year, not the year in which the annual leave is to be used. Paid annual leave as stipulated in Article 60 (1) of the Labor Standards Act is granted to workers who have worked at least 80% of one year, and the worker does not use annual leave within one year after acquiring the right to annual leave, or retires before one year has elapsed. In the event that annual leave can no longer be used due to reasons attributable to the employer, the worker can claim an annual leave allowance, which is a wage corresponding to the

20) Supreme Court ruling on October 14, 2021: 2021 da 227100.

number of days of annual leave.[21] However, the right to use a 2nd year's annual leave shall be deemed to occur on the day following completion of work for one year of the preceding year, unless otherwise specified. If the employment relationship is terminated due to retirement before then, no annual leave allowance may be claimed as compensation for the right to use annual leave."[22] Therefore, it was determined that workers who signed a one-year fixed-term employment contract were granted up to 11 days of annual leave.

III. Existing Standard Precedents on Annual Leave and Guidelines from the Ministry of Employment and Labor

1. Standards for judging annual leave compensation before 2005.

In the case of fixed-term workers or retirees before 2005, if they retire one day before the date of annual leave is granted, no annual leave allowance is paid, even if they have worked full time in the previous year. This is because the purpose of annual leave is to ensure continuous long-term employment through rest.

The Ministry of Employment and Labor makes this clear in the official Q&A guide. "Company A's annual leave period is one year from January 1 to December 31 of the current year, and annual leave compensation is paid for the number of days that annual leave is not taken." In this case, the following is the answer to the question of whether an employee can claim annual leave compensation if the retirement date is December 31. "Annual paid leave occurs according to the attendance rate in the period subject to vacation calculation. Annual paid leave is not granted if there is no day left to use the leave due to the termination of the employment relationship, even if the employee has worked or attended more than 90 percent of the time during the period subject to vacation calculation. There is no meaning in granting annual leave, and so there is no problem related to the payment of annual vacation pay for not using vacation."[23]

2. Annual leave compensation from 2005 to 2018

The Supreme Court ruled that the annual leave as compensation for work should be considered as the nature of compensation for work regardless of whether or not annual leave was available. In accordance with this decision, the Ministry of Employment and Labor also shifted to the position that fixed-term workers should be compensated for 15 days of annual leave, which are the subject of work, even if they retire due to the expiration of the contract period, according to the purpose of this precedent.

The stipulations are as follows: The Supreme Court ruled "The right to use annual

21) Supreme Court ruling on May 17, 2017: 2014 da 232296.
22) Supreme Court ruling on June 28, 2018: 2006 da 48297.
23) MOEL guidelines, July 15, 1999: Gungi 68207-1667.

leave with annual leave allowance is acquired by an employee as a result of completing a prescribed amount of work for one year. After an employee obtains the right to annual paid leave, if he/she retires before using the annual paid leave, the right to use the annual paid leave is terminated because the right to annual leave is available only during employment. An employee can claim from the employer an annual leave allowance equivalent to the number of unused annual leave days until the end of the employment relationship."[24] After this precedent, the Ministry of Employment and Labor held that if one year of full work (the requirement for annual leave) was met, annual leave would occur regardless of the termination of employment, and it obligated compensation for unused annual leave.

3. Compensation for annual leave from 2018 to 2021

The Labor Standards Act[9], which was amended by Act No. 15108 on November 28, 2017 and enforced on May 29, 2018, deleted Article 60 (3) which stipulated, "If an employer gives a worker paid leave for the first year of work, 15 days, including the leave under Paragraph 2, and if the employee has already used the leave under Paragraph 2, the number of days of leave used shall be subtracted from 15 days." [25] The reason for this amendment is to delete the rule that, when using paid leave for the first year of work, subtract it from the paid leave of the following year, so that a maximum of 11 days in the first year and 15 days in the second year can be received, respectively. This was designed to prevent annual leave from being reduced in the following year when it is used for the first year.[26]

However, the interpretation of the Ministry of Employment and Labor was different from the standard of precedent.[27] MOEL clarified with "How to pay unused allowance when a contract period expires after a fixed-term worker with a one-year employment contract after the enforcement of the revised law meets 80% or more of the attendance rate for one year." The precedent is that fixed-term workers who have a one-year labor contract have the right to claim 15 days' worth of annual leave compensation at the end of the contract period if the attendance rate for one year is 80% or more.[28] The Ministry of Employment and Labor explained in its administrative guidance: "According to the amendment of the law, paid leave that occurs one day for each month of work in the first year is recognized separately. After the amendment of the law, when the contract period of one year of fixed-term workers expires, up to 26 days of unused allowance must be paid." Therefore, as compensation for work of less

24) Supreme Court ruling on May 27, 2005: 2003 da 48549, 48556.

25) Article 60 (Annual Paid Leave) (1) Every employer shall grant any employee who has worked not less than 80 percent of one year a paid leave of 15 days.
(2) Every employer shall grant any employee who has continuously worked for less than one year or who has worked less than 80 percentage of one year one paid-leave day for each month during which he/she has continuously worked.

26) Supreme Court ruling on October 14, 2021: 2021 da 227100.

27) MOEL Guidelines "Guidelines for the revised Labor Standards Act related to the expansion of annual leave for workers less than one year, etc.", May 2018.

28) Supreme Court ruling on May 27, 2005: 2003 da 48549, 48556.

than one year is accrued as 11 days and 15 additional days in return for 1 year of work, a total of 26 annual paid leave days should be guaranteed.

4. After the precedent in 2021

Since the right to use annual leave shall be deemed to arise on the day following completion of work for one year of the preceding year, if the employment relationship is terminated due to retirement, no annual leave allowance may be claimed as compensation for the right to use annual leave.[29] Due to the logic of this precedent, the guideline of the Ministry of Employment and Labor has lost its effect. In the future, this regulation will be applied to all retirees and fixed-term workers with an expiration period of one or two years, so that they do not have the right to claim annual leave allowance.

IV. Excerpts From the Current Annual Leave and Suggestions for Improvement

Annual paid leave is a paid leave granted to recover bodies and minds which have been exhausted from long-term work and 15 days are granted to workers who have worked more than 80% of the year. In addition, one additional day is added every 3 years, and the maximum granted is up to 25 days. If an employee does not use annual leave within one year after acquiring the right to it, or retires before one year has elapsed, he/she may claim annual leave allowance (a wage equivalent to the number of days of annual leave) from the employer. According to the annual leave regulations of the Labor Standards Act which were changed in 2018, the amount of annual leave accrued for one year is 11 days, with one paid leave day per month. At the end of the first year, 15 days are generated on the premise of continuous service and will be used for one year.

If an employee works for one full year and quits the next day, he can claim 11 annual leave days and 15 annual leave days on the premise of the last full year of work. This may be somewhat of a violation of the principle of equity. There are differences in the paid allowance when an employee leaves the company on a specific day, because of annual paid leave that occurs based on the previous year's work. Therefore, it is often the case that a worker has determined his/her resignation date based upon the days of additional annual leave to be granted. As a way to solve this problem, a method of calculating the current annual leave system in proportion to the length of service may be proposed. For example, 11 days are granted for the first year of service, and 15 annual leave days accrued in the second year are guaranteed to be used continuously or in installments. However, if the employee resigns in the middle of the second year, quarterly deductions can be made proportionally. I think this would be helpful in improving the existing method of granting annual leave.

29) Supreme Court ruling on October 14, 2021: 2021 da 227100; Supreme Court ruling on June 28, 2018: 2006 da 48297.

V. Conclusion

I think that the precedent for the retirees in 2018 on annual leave and the precedent for the one-year fixed-term worker are reasonable judgments in line with the purpose of guaranteeing annual leave. I believe that the purpose of annual leave is to guarantee sufficient paid leave to recover bodies and minds exhausted from long-term work, but not as a simple monetary compensation.

Unfortunately however, the fact that the number of days of annual leave varies greatly may violate the principle of equity and may be a reason for workers to adjust their resignation date. Therefore, in improving annual leave, I think it would be better if paid leave were guaranteed in an equitable way in proportion to the length of the relative labor service, regardless of what actual point in time the individual resigns.

An Industrial Accident Case that Recognized Labor Union Officers' Unpaid Union Activities as Work Performance

I. Introduction

Although the working hours do not meet the standards for recognition of an industrial accident due to overwork, a ruling has been issued that recognizes the unofficial union activities of union officers as work on behalf of the company. In considering the court rulings and administrative judgments so far, only the union activities of paid full-time union officers have been recognized as the company's work, but the unpaid union activities have not been considered directly related to the union members work for the company. Therefore, this case of acknowledging work for unpaid union activities as part of the work for the company is a meaningful judgment that can be referenced in similar cases in the future. This means that union officers' union activities are recognized as a part of the company's internal HR management.

In this industrial accident case in which union officers' unpaid union activities were recognized as work performance, I would like to review the reasons why the Korea Labor Welfare Service (hereinafter referred to as the 'Welfare Agency') disapproved of the application for this industrial accident and how the court approved this application as work-related accident.

II. Details about the Recognized Industrial Accident Case[30)]

30) Seoul Administrative Court ruling on October 27, 2021: 2019guhap86761.

1. The Welfare Agency's reasons for disapproval

The victim joined Korea Railroad Corporation on December 11, 1990 and worked as a KTX train driver at the Seoul Office from January 2, 2006. The victim was found dead at his home on January 24, 2018 at 23:30. The cause of death was presumed to be a heart attack (acute cardiac death) as a result of an autopsy analysis conducted by the National Institute of Forensic Sciences on the corpse of the victim. His surviving family claimed that the death of the victim was an occupational accident in the application of its industrial accident to the Welfare Agency on July 2.

According to the Welfare Agency on February 1, 2019, the working hours of the victim were on average 38 hours and 56 minutes one week before death, 42 hours and 21 minutes per week for the 4 week period previous to death, and 36 hours and 28 minutes per week for the 12 week period before death. They did not meet the short-term and chronic overwork criteria of the Labor Ministry.[31] ② Shift work was performed, but shift work was scheduled one month in advance. ③ When the victim worked at night, he was given long holidays, such as two or three days off from the following day after the night shifts. ④ The surviving family's application for survivors' benefits and funeral expenses were rejected on the grounds of the deliberation result of the Occupational Disease Judgment Committee of the Welfare Agency because they stated that it was difficult to recognize a causal relationship between the work and death of the victim, as they could not find any sudden circumstances that could lead to death. .

2. Claims of the surviving family

The victim was a KTX train driver and performed irregular shift work according to the shift work schedule.[32] In addition, as the Vice Chairman of the Seoul KTX labor union branch and the union officer in charge of the occupational safety and health (hereafter referred to as the 'Safety Officer'), the victim additionally performed union duties. By the time of his death, it was not easy to review and confirm the shift work schedule due to the Lunar New Year holidays and the Pyeongchang Olympics. Also the victim had not suffered any special diseases before death. Taking these circumstances into account, it is reasonable to view that the victim had a heart attack due to work-related overwork and stress.

3. Judgment of the Seoul Administrative Court

(1) Working hours: The working hours of the victim are 38 hours 56 minutes in the week just before death, 42 hours 21 minutes on average per week in the previous 4 weeks, and 37 hours and 48 minutes per week in the 12 weeks previous to that, which falls short of the

31) Brain stroke and heart disease (Ministry of Employment and Labor Notice No. 2017-117, issued on Dec. 29, 2017)

32) The shift work is assigned on a six-day rotation, consisting of "day – day – night - night & morning work – off-day - holiday." As the working day is calculated as eight hours, when it is calculated for four weeks, drivers work 18 days, with an average of 36 hours per week.

standard of working hours for chronic overwork set by the Labor Ministry.[33] However, the working hours of the victim are somewhat higher than the working hours of their fellow train drivers, and in addition, it seems that the victim spent a considerable amount of time for union activities while performing his duties as the Vice Chairman of the union branch. In addition, the victim had many work-aggravating factors, such as irregular shift work and work with great mental stress due to the victims' additional responsibilities.

(2) Union activity hours: Although the time the victim has put into union activities as the Vice Chairman of the labor union was not included in the working hours recognized by the company, it must be taken into account in judging whether or not there is work-related overwork. The victim had participated in collective negotiations since November 2017, and had been in charge of negotiating the preparation of the shift work schedule for two years since mid-2016. Although the victim did not work on January 24 right before his death, he attended a labor union officers' workshop for two days and one night during January 23 to 24, 2018 to discuss pending issues such as the wage peak system. In particular, in the case of the work shift schedule preparation task, it was repeated every month, but it was very stressful work when adjusting the work by arranging night work hours and non-working days for about 230 train drivers, which had to be performed in addition to work hours. In this way, it seems that the victim was putting a considerable amount of time into union activities in addition to his own working hours. In fact, January 24, 2018, when the victim died, was a day off, but he handled work-related duties such as attending a workshop for union officers and reviewing the work shift schedule, and even after acknowledging the train delay accident, he called and persuaded the company's operation manager that the fellow train driver involved with the accident was not responsible.

(3) Work aggravating factors: According to the work shift schedule of the victim, there were factors that increased the burden of work prescribed by the Labor Ministry Guides, such as irregular arrival and departure, and leaving work in the following after working at night once or twice a week. In addition, the victim had to drive the KTX from the departure point to the destination by himself, there was no substitute man on the train in case of emergency, and the work of the victim had to meet the arrival time of the train even during long operation. In particular, since the review of the work shift schedule was directly related to the labor intensity and wages of the train driver, it was difficult to reconcile the interests of the train drivers within its deadline, which had caused considerable stress on the victim.

(4) Stress just before death: In addition to the above-mentioned heavy work, the victim received a message from another Union Executive/Employee, who was assisting with confirming and adjusting the work shift schedule on the day of death, that he

33) Brain stroke and heart disease (Ministry of Employment and Labor Notice No. 2017-117, issued on Dec. 29, 2017)

wanted to quit supporting the victim for the reviewing task of the work shift schedule. In the case of settling the work shift schedule for February, there were many considerations due to the opening of the Pyeongchang Winter Olympics, the opening of the Incheon Airport Terminal 2, the Lunar New Year holidays, and the dispatch of train drivers due to the opening of the Gyeonggang Train Line. Considering the circumstances in which the victim tried to protect the position of fellow worker to the company's operation manager in relation to the train delay accident, it can be seen that the victim was under work stress due to work and related union activities.

(5) Cause of death: Overwork or stress due to work and related union activities of the victim acts induced increasing heart beat and blood pressure, and might cause a heart attack to the persons with heart disease like the victim.

III. Court's Interpretation of the Welfare Agency's Rejection

1. Criteria for judging death from overwork of the Welfare Agency

The Welfare Agency judged whether the victim overworked based only on the standard of overworked deaths listed in the guidelines of the Labor Ministry. However, the court recognized the victim's union activities as work performance on behalf of the Company and recognized it as overwork. As the Vice Chairman of the Seoul High Speed Rail union branch and the union safety officer, the victim was engaged in a lot of overtime activities outside of his regular work. In particular, he participated in a two-day, one-night union workshop just before his death. As the labor union's safety manager, he acted on behalf of the fellow train driver in case of the train delay accident. Such union activities for workers were not recognized as work performance by the Welfare Agency.

2. The omission of facts by the Welfare Agency and non-reflection of facts

The court corrected the factual error of the Welfare Agency by requesting a fact inquiry on the workplace and the labor union, and supplemented the previous insufficient investigation.[34] In the 11th week prior to the death of the victim, the 16 hours spent for collective bargaining were omitted from working hours. In addition, the Welfare Agency said that the victim worked 6-day shifts and took a break for 2-3 days from the next day when working at night, but in reality the victim only could take 2 days off because of his leaving work in the late morning time after driving a train in the morning and working at night shift before the day.

The Welfare Agency said that no sudden circumstances leading to death were confirmed, but in reality, despite the fact that that day of the accident was off-day and even 4 hours before the death of the victim, he checked the shift schedule with a deadline, and persuaded a fellow worker who was engaged in supporting the victim for

34) Fact Confirmation Reports from the Seoul High Speed Railway Office and the Seoul High Speed Railway Labor Union branch.

reviewing the shift work schedule, when he told the victim and would quit his supporting task. In particular, one hour before his death, the victim received a delay accident of KTX trains the day before, understood the situation, and made a strong effort to explain that it was not the fault of a fellow train driver by calling the company's operations manager. The Welfare Agency did not confirm these sudden incidents.

3. The Welfare Agency's failures to reflect work aggravating factors

The Welfare Agency excluded the work aggravating factors on the grounds that the KTX train drivers carry out their work according to the shift work schedule normally prepared one month in advance. In response, the court judged that the work of the victim was a work with aggravating factors. The working hours on the work shift schedule were irregular with different starting and leaving times every day, and night shifts were performed once or twice a week. In addition, it was very stressful because the victim operated the KTX alone, had to match the train time even during long operation, and was held accountable for delayed operation.

IV. Criteria for Determining Whether Union Activities are Work Provided to the Employer

Injuries and diseases caused by union activities are not specified in the Industrial Accident Compensation Insurance Act. However, where union activities of full-time or part-time union officials are recognized as work according to criteria are limited to activities outlined in the collective agreement or activities approved by the employer. In addition, the court considers injury or disease during labor union activities as work-related in accordance with a wider application of the current criteria for work-related injuries.[35)]

The court has recognized as work-related accidents involving full-time and part-time union officials that occurred while such officials were engaged in union activities that met the following criteria. First, it involved full-time or part-time union officials using the paid time-off system. The fact that a full-time labor union official has been engaged in labor union activities without having to do the work originally outlined in the labor contract is due to a collective agreement or company consent. Labor union activities allow a full-time union official to engage in company labor management tasks, which can be seen as work provided to the company, instead of his original work. Thus, an illness or accident occurring to a full-time union official in the course of performing or its related labor union activities constitutes a work-related injury or disease.[36)]

35) Lim, Jongyul, Labor Law, 18th ed., 2020, p. 497.
36) Supreme Court ruling on Feb. 22, 1994: 92nu14502; Supreme Court ruling on Dec. 8, 1998: 98doo14006; Supreme Court ruling on Mar. 29, 2007: 2005doo11418; Supreme Court ruling on May 29, 2014: 2014doo35232.

Second, accidents that occur outside of working hours were work-related union activities. In the need to form smooth and stable labor-management relations, the full-time union official system allows union officials to take charge of labor union affairs instead of the work originally outlined in the labor contract, while still holding the status of employees. In order for a full-time union worker to be regarded as having a work-related accident under the IACI Act, the labor union activities performed by the full-time union official must be directly and specifically related to company labor management.[37)]

Third, the labor union's work was closely related to the company's labor management work, which means that employers allowed union officials to take charge of the work on behalf of their original work.[38)]

However, the following are union activities by full-time or part-time union officials that are not regarded as work: first, activities unrelated to the work of the company concerned by an umbrella union[39)]; second, illegal labor union activities; and third, confrontational labor-management relations over a period of time from the existence of a labor dispute to conclusion of a collective agreement.[40)] Third, activities outside of working hours that are not specifically related to the employers' labor management work.[41)]

V. Conclusion

In determining whether the death of the KTX driver was due to overwork, and therefore an occupational accident, the court ruled based upon not only whether the incident occurred during working hours but also the special working conditions of the victim and the union activities he was involved in as a union officer. The average working hours of the victim were only 42 hours per week over the previous 4 weeks, but they were just more than the normal high-speed train drivers' average of 36 hours per week over a similar 4 week period. There are also environmental factors such as the number of night or irregular shifts, and tension and noise in the driver's cab arising from the high-speed train's single-driver and high-speed operations. In particular, the Employee had attended a two-day union officials' workshop held according to a regular schedule on the day before the date of the incident. At the same time, on the day of the incident, the victim had carried out the work of preparing the work shift

37) Supreme Court ruling on July 14, 2015: 2005doo5246.
38) Supreme Court ruling on May 29, 2014: 2014doo35232.
39) Supreme Court ruling on July 14, 2005: 2005doo5246.
40) Supreme Court ruling on March 15, 2004: 2003doo923.
41) Supreme Court ruling on March 28, 1997: 96noo16170.

schedule for union members at his home, and also protested on behalf of the union member to company's operation manager about the delayed railway operations as the labor union's safety officer. In judging whether this case was related to overwork, the Seoul Administrative Court considered the union activities carried out by this union official as well as the Guidelines on Working Hours for Determining Overwork issued by the Ministry of Employment and Labor

Understanding the Police and Prosecutor's Investigation regarding Labor Case

17. What are the criteria for deeming certain activities as "violent" in a rally or demonstration and how should the necessary evidence be collected?
18. What preparations are needed if violence is expected at a rally or demonstration?
19. What can be expected if a labor case is prosecuted

17. What are the criteria for deeming certain activities as "violent" in a rally or demonstration and how should the necessary evidence be collected?

If a demonstration is held without it being reported to the police beforehand, or takes place outside the scope of reporting, it may be determined an illegal demonstration. Most people are penalized for demonstrating outside of a reported demonstration place, violating noise standards such as with loudspeakers, or carrying weapons or other dangerous goods outside the declared demonstration items.

Sometimes there is physical conflict in the process of a police officer or facility manager restraining persons violating the law. He or she can be accused of hindering the constitutional freedom of assembly while the accused will complain that the other is violating property rights and the right to free flow of traffic. In this case, the police will decide by evidence collected at the scene. Therefore, it is necessary to photograph the demonstration process using CCTV and/or mobile phone cameras.

In addition, it is necessary to secure onsite witnesses and submit a description of the demonstration process. When submitting photographs or video materials, it is also essential to include the photograph date and time, the photographer, etc., to help the investigator

better understand.

In general, a mobile camera installed outside the company building can be helpful in collecting evidence when protesters are expected to enter company premises while protesting outside.

In recent years, people who specialize in filming demonstrations often distribute videos through YouTube and in the form of edited live broadcasts intentionally, as the company tries to block the union's demonstrations.

18. What preparations are needed if violence is expected at a rally or demonstration?

A request must be made to the police for them to assist with protecting the facility. The employer should describe what types of losses might occur, such as from violence during the demonstration or from traffic disturbance, disruption of the company's business, installation of illegal facilities, road accidents, and damage to company property. For example, the employer can ask that the police send a patrol car, assist with protecting transportation and business, and help to ensure the demonstration does not get out of hand. If the reason for the demonstration is a labor dispute, a notification letter should be sent to the competent MOEL Office.

In addition, it is important to ensure the location of CCTVs around the site is conducive to filming illegal activities on company premises. If there is sufficient evidence of illegal occupation of roads and facilities, posting of placards that damage business or reputation (including distribution of such handouts), and dissemination of falsehoods about the company or a specific person through the Internet, the company can request an investigation.

Videos of demonstrations have recently been increasingly posted on YouTube, and if, thorough analysis leads to discovery of illegal acts during collective action, civil (claims for damages) and criminal charges (defamation of character for the purpose of intentional fraud under the Act on Promotion of Information and Communications Network Utilization and Information Protection) can be leveled.

19. What can be expected if a labor case is prosecuted?

Cases under investigation by the MOEL Office and the police are sent to the

prosecution, which analyzes the cases and decides whether they will be prosecuted or not. If the prosecution decides to dismiss a request for prosecution, the victim (the accuser) may file an appeal with the High Prosecution Office.

In this case, the accuser must first ask the Prosecution Office, which rejected the prosecution request, to make a copy of the reason for its rejection. In addition, through analysis of the reasons given, an appeal may be justifiable on the grounds of the investigation being incomplete, evidence being misinterpreted, or misjudgment of a legal principle. Whether the accuser who sued without falsified facts belongs to a charge on a false accusation or not can be established by the prosecution who has decided to dispose of the complaint.

In the event a decision is made to prosecute, it is possible for a related party to read and examine the investigation records of the police, the prosecution and the MOEL Office, which could not be read before the decision to prosecute. Therefore, when the accused has been indicted by the court, he or she should apply for a copy of the investigation records, which they should then analyze.

Victims (accusers) can also apply to the Court for a copy of the investigation records, but such a copy may be issued and read only to the extent that they apply to the victim.

In cases where there are many controversial issues in the case before the trial starts, the court takes preliminary procedures in advance, holding preparatory procedures for the issues. The expected trial proceedings and their scheduling are negotiated between the court and the parties without the accused in attendance.

If copies are not received of the investigation records, the details of the case cannot be known, and the content of the indictment cannot be acknowledged. The accused cannot answer approvals or disapprovals without verification of evidence.

Therefore, the trial can only proceed if it has been preceded by an inspection of the case records by the court. Regardless of whether or not a lawyer is appointed, the accused can closely examine the records of the case and of the investigation and express his/her opinion of the facts behind the criminal case listed in the lawsuit, and acknowledge, disagree with, or confirm the evidence in the evidence list. The accused must then prepare and submit to the court a statement of the part(s) of the prosecution's complaint he agrees

with, and evidence against the part(s) he does not.

If the prosecution disagrees with the use of evidence by the accused, the prosecution shall request that a witness give testimony. The accused may also apply for witnesses to prove his case through cross-examination of the prosecution's witnesses. Therefore, in the interest of such witness testimony being properly executed, it is necessary to carefully review and analyze each witness's written statement and interview reports.

For the lawyer, responses to the prosecutor's questions must be prepared after the prosecution's probable witness. However, it is advisable for the lawyer to prepare the written papers for presentation while presenting the relevant evidence and data in court, taking into account the fact that witnesses vary in their testimony from time to time.

Witness interviews should focus on presenting evidence and pursuing the facts rather than seeking answers to questions of legal opinion. The interviewer should stick to the facts of the side they support. After questioning a witness, the prosecutor will investigate the evidence documents that the prosecution intends to submit. The evidence examiner will explain the evidence in the court and listen to the accused in relation to his/her opinion of the evidence.

Occasionally, the accused may apply for a copy of the document records from the prosecution in consideration of the fact that the prosecutor will not present evidence in favor of the accused. In such cases, it will need to be clarified that these documents should be submitted to the court, despite the fact that the prosecution normally keeps them. If other related criminal cases are in progress in other courts, or being investigated by the police or prosecutors, it is necessary to submit a request to the court to send the necessary documents to those courts and agencies and to provide the court with the necessary evidence. Determining guilt or innocence depends on the evidence. Therefore, when the investigation of evidence is complete, it is necessary to analyze the opinions relevant to that evidence, the process of recognizing the facts through the evidence, and any legal use issues, and submit a written opinion to the court.

The Employer's Obligations regarding Rules of Employment

I. Legal duty to establish the Rules of Employment

Article 93 (Preparation and Submission of Rules of Employment)

An employer who ordinarily employs ten or more workers shall prepare the rules of employment regarding the matters under any of the following subparagraphs and submit such rules to the Minister of Labor. The same requirement also applies in cases where he amends such rules:

1. Matters pertaining to the start and end time of work, recess, holidays, leaves, and shifts;
2. Matters pertaining to how wages are determined, calculated and paid, the period for calculating wages, payment time for wages, and process of promoting to a higher wage;
3. Matters pertaining to the methods of calculation and payment of family allowances;
4. Matters pertaining to retirement;
5. Matters pertaining to retirement allowance, according to Article 8 of the 'Employee Retirement Benefit Security Act, bonuses and minimum wages;
6. Matters pertaining to workers' meal allowances, operational expenses, necessities and so forth;
7. Matters pertaining to educational facilities for workers;
8. Matters pertaining to female employees' maternal welfare such as maternity leave, childcare leave, etc.
9. Matters pertaining to safety and health;
10. Matters pertaining to assistance in the event of occupational and non-occupational accidents;
11. Matters pertaining to award and punishment; and
12. Other matters applicable to all workers within the business or workplace concerned.

Concept of the Rules of Employment (Supreme Court Dec. 29, 1997, 77 da 1378)

The employer with the managerial authority shall set up the Rules of Employment and formulate regulations for the employees' service and working conditions in a uniform and collective manner at the workplace. Under the subordinate labor relations, the Labor Standards Act seeks to protect and strengthen the status of employees in an unequal position. It also aims to secure and improve their fundamental living standards. So, the Rules of Employment shall be established as a compulsory duty for employers and at the same time have the characteristics of a legal benchmark.

Function of the Rules of Employment (Supreme Court July 26, 1997, 77 da 355)

Employers are not allowed to revise working conditions by amending the Rules of Employment in a one-sided manner that is unfavorable to the employees. This can violate the spirit behind the protection law under the Labor Standards Act (LSA), the principle of protecting vested right, and Article 3 (Establishment of Working

Conditions) of the LSA: The working conditions shall be freely established on the basis of equality, as agreed between workers and their employer.

'Ordinarily hired employees of 10 or more' means *an average of* 10 *or more* employees who *are subjected to the entire or part of the* Labor Standards Act (Dec. 17, 2002, Kungi 68207-3367)

The Rules of Employment refer to unified rules concerning working conditions and service regulations *applicable* to all employees of the corresponding workplace, regardless *of* their title. Article 96 of the Labor Standards Act regulates that an employer who ordinarily employs ten or more employees shall prepare the Rules of Employment and report to the labor office. Here, "the employer who ordinarily employs ten or more employees" means that the number of employees who are *subjected to the entire or part* of the Labor Standards Act is 10 or more on average. So, the employees *under the* "ordinarily hired employees of 10 or more" shall include temporary, regular, daily-*rated* and *outsourced* employees.

II. Procedures for Preparation and Amendment of Rules of Employment

Article 94 (Procedures for Preparation and Amendment of Rules of Employment)

(1) An employer shall, with regard to the preparation or alteration of the rules of employment, hear the opinion of a trade union if there is a trade union *comprising* the majority of the workers in the business or workplace concerned, or otherwise hear the opinion of the majority of the said workers; Provided that in case of amending the rules of employment unfavorable to workers, an employer shall obtain their consent.

(2) When an employer submits the rules of employment pursuant to Article 93, he shall attach a document containing the opinion as referred to in paragraph (1).

1. Authority to amend the Rules of Employment

The employer has full authority concerning the amendment of the Rules of Employment.

***If* an employer revised the Rules of Employment *to the disadvantage of a group of employees without their consent*, the revised Rules of Employment is still legally effective. However, *current* employees *whose vested interests are infringed upon* shall be *subjected* to previous Rules of Employment (Dec. 23, 1996, Supreme Court 95 da 32631).**

2. Advantageous amendment

If the amendment of the Rules of Employment is neither advantageous nor disadvantageous to the employees, the employer is not obliged to comply with, but

only hear the opinions of his/her employees.

3. Disadvantageous amendment

Procedures of disadvantageous amendment for the Rules of Employment (Mau 14, 2004, Supreme Court 2000 da 23185, 23192)

If an employer revises the existing working conditions unfavorably to employees by *amending* the Rules of Employment, it requires *the* agreement of the employees who are *subjected* to previous working conditions or previous Rules of Employment *through* their collective decision-making method. It cannot be effective to have the amendment of the Rules of Employment without this type of agreement. The method shall require an agreement from the majority of employees in *the form of a* conference in cases where there is no labor union. The agreement in the form of an employees' conference can be accepted in cases where employees exchange opinion *with* one another, sum up *the* pros and cons, and *come up with* the result *for the* organization or unit of the business or workplace without an employer's interference or intervention. Here, an employer's interference or intervention means that the employer *pressures employees* to accept the agreement in an expressed or implied method *that* obstructs employees' autonomous and collective decision making. However, if the employer explained about *the* revised contents of the Rules of Employment and publicized them, it is hard to regard it as the employer's interference or intervention.

If the company revises the wage regulation unfavorably to employees, even though the company went through the resolution process of the Board of Directors, but did not receive consent from employees via a decision-making method, the revised rules are not applicable to employees who were employed before the amendment of the rules (May 26, 2005, Daegu-Kimchun district court 2004 gadan 5538).

In cases where the employer revises the working conditions stipulated in the Rules of Employment unfavorably to employees, he *should* receive consent by a collective decision-making method from the employees who are *subjected* to the Rules of Employment. The consent shall be obtained from the labor union if there is *one* consisting of the majority of employees, and if there is not such a labor union, the consent means an agreement by majority of employees *obtained by way of integrating the employees' independent opinion*. Accordingly, if there is no consent in the above-mentioned method, the amendment of the Rules of Employment is not effective, and it *applies likewise* to individual employees who agreed to *the* revision of the Rules of Employment.

It is not effective in cases where the employer one-sidedly revised existing working conditions unfavorably to employees or applied the Rules of Employment of the new company that succeeded their previous working conditions disadvantageously (Feb. 12, 1998, Seoul District Court 96 Kagap 9363).

In the case where the existing working conditions were succeeded inclusively, existing status under the previous employment contract is succeeded and the employee's

working conditions according to previous employment relations are maintained identically in the succeeded company. In order that the employer can one-sidedly revise existing working conditions, or apply the working conditions that the company succeeded unfavorably from previous working conditions, he shall obtain an agreement by a collective decision-making method from the majority of employees who have maintained the status of previous employment contract. Accordingly, without such consent mentioned above, it is not effective in the cases where the employer one-sidedly revised existing working conditions unfavorably to employees or applied the Rules of Employment of the new company that succeeded their previous working conditions disadvantageously. In this case, employees who are working at a new company that succeeded the previous working conditions are *subjected continuously* to previous Rules of Employment. (Aug. 26, 1994, Supreme Court 93 da 58714)

4. Standard of judgment for disadvantageous amendment

The Rules of Employment are null and void when *their revision results in a clash of advantage and disadvantage among the employees* (Jan 23, 1997, Seoul District Court, 96 kagap 54787)

In case where there is *a clash of advantage and disadvantage among* employees due to the amendment of the Rules of Employment, this revision shall be considered as unfavorable to employees. Accordingly, it would be *made* null and void *as a result of violating* Article 95 of the Labor Standards Act if the employer did not receive consent from *all* the employees or the labor union consisting of *the* majority of employees.

III. The effect of the Rules of Employment

Article 96 (Observance of Collective Agreement)

(1) Rules of employment shall not conflict with any Act, subordinate statute, or a collective agreement applicable to the business or workplace concerned.

(2) The Minister of Labor may order *the modification of* any part of the rules of employment which conflicts with any Act, subordinate statute or the collective agreement.

Article 97 (Effect of Violation)

If a labor contract includes any part of working conditions which does not meet the standards provided in the rules of employment, such part shall be null and void. In this case, the invalidated part shall be governed by the standards provided in the rules of employment.

The difference between the collective agreement and the Rules of Employment (April 25, 1997, Supreme Court 96 nu 5421)

The collective agreement concerns working conditions and other standards on *the* treatment of employees, and should be in writing and signed by both parties, that is,

the employer and the employee representative. Besides, the collective agreement is, in principle, effective only to unionized employees for a limited period of time. By contrast, the Rules of Employment are drawn up unilaterally by the employer and contains general rules and regulations on the employees' service and working conditions applicable to all employees at the workplace.

The amendment of the Rules of Employment that infringed the collective agreement is ineffective, regardless of justifiable procedure in the amendment of the Rules of Employment (Mar 18, 2003, Seoul District Court 2002 guhap 31671)

As the Article 99 (1) of the Labor Standards Act regulates that "Rules of Employment shall not conflict with any Act, subordinate statute, or a collective agreement applicable to the business or workplace concerned", the amendment of the Rules of Employment that infringed the collective agreement is ineffective, regardless of justifiable procedure in the amendment of the Rules of Employment. Accordingly, it is *definitely* unfair dismissal *if* the employer notified the dismissal to the employee on the basis of the regulation of 'retirement age' *as* stipulated in the ineffective Rules of Employment.

It is not effective if there is no consent of the labor union in the disadvantageous revision of the Rules of Employment to employees (Jan 19, 2001, Seoul Administrative Court, 2000 gu 12156)

It is true that Paju Agricultural Bank received the later approval from 60 out of 64 union members about the amendment of the Rules of Employment, but in the case where there is a workplace with the labor union consisting of more than majority of employees, disadvantageous amendment of the Rules of Employment shall require the approval of the labor union itself, and so approval from individual employees belonging to the labor union cannot replace the labor union's approval. Therefore, as the revision of personnel regulation *does not apply* to employees, it is unfair for the disciplinary measure, an order to leave one's post and wait for further action, *to be* based upon this rule.

The revision procedure of the Rules of Employment concerning working conditions after the collective agreement became ineffective (Aug. 26, 2003, Gungi 68207-1087)

Although the collective agreement became ineffective, portions concerning working conditions among contents of void collective agreement have been continuously applied as before. *A revision procedure is required as* stipulated in Article 97 of the Labor Standards Act, in order to revise the Rules of Employment unfavorably to employees about portions related to working conditions. On the other hand, an employer shall, with regard to the disadvantageous amendment of the Rules of Employment, receive the consent of a labor union if there is a labor union composed of the majority of the workers in the business or workplace concerned, or otherwise obtain the consent of the majority of the said employees. Accordingly, the *sole* approval *of* the employee representative cannot be seen to implement the procedure of disadvantageous revision.

Changing Working Conditions

I. Introduction

With the Aged Employment Promotion Act[42] revised in 2013, along with implementation of the compulsory retirement system starting in 2016, workplaces with seniority-based wage systems are expecting a rapid increase in labor costs. Under these circumstances, it is debatable whether unilateral introduction of a wage peak system by employers seeking to cope with the new labor costs is simply disadvantageous to employees or socially acceptable rationality. For guidance, it is necessary to look at the legal criteria required in labor laws for changing working conditions, which is equivalent to changing the Rules of Employment. With labor issues appearing in this area, I would like to explain appropriate ways to make or change the Rules of Employment, obtain consent for unfavorably-changed rules and the legal principle of socially acceptable rationality.

II. The Rules of Employment: Concept & Making Changes

1. Concept

The Rules of Employment refer to the company regulations that an employer stipulates unilaterally regarding working conditions and service rules. The Labor Standards Act stipulates the employer's obligations for preparing and filing their rules (Article 93) and ways to compose and change the rules (Article 94). In particular, if a labor contract includes employment conditions which are below the standards stipulated

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42) Act on Prohibition of Age Discrimination in Employment & Aged Employment Promotion, May 22, 2013

Article 19 (Retirement Age)

① When an employer sets a retirement age, he/she shall set it at 60 years of age or older.

② Regardless of Subparagraph ①, in cases where the employer has previously set a retirement age at less than 60 years of age, his/her retirement age policy shall be regarded as having been set at 60 years of age.

Article 19-2 (Changing the Wage system, etc. due to Extension of the Retirement age)

①The employer of a business or workplace who extends the retirement age in accordance with Subparagraph ① of Article 19, and a labor union which is formed by the majority of all workers (or a person representing the majority of all workers) shall take the steps necessary to revise the wage system, etc. according to the conditions pertaining to the business or workplace concerned.

Addenda

This Act shall enter into force one year from the date of enforcement of its promulgation. Provided, that the revised rules of Article 19, Paragraph ① and of Article 19-2 shall enter into force in accordance with the following: 1. Businesses or workplaces with 300 or more full-time workers, public institutes in accordance with Article 4 of the Act on the Operation of Public Institutions, local public enterprises and local corporations under Articles 49 and 76 of the Local Public Enterprises Act: effective January 1, 2016;
2. Businesses or workplaces with fewer than 300 workers, national and local governments: effective January 1, 2017.

in the Rules of Employment, the nonconforming part of the labor contract is null and void (Article 97). Korean law stipulates that areas in which employment conditions have been invalidated shall be governed by the standards provided for in the Rules of Employment. The Rules of Employment are to put the employer and workers on equal footing, which shows that the employer can compose or revise the rules unilaterally when revising working conditions advantageously, but shall obtain collective consent from the majority of employees when revising them disadvantageously.

2. Making Changes to the Rules of Employment

(1) Advantageous changes

When preparing or revising the Rules of Employment, the employer should, as a rule, consider the views of the majority of employees. For favorable changes to working conditions, it is sufficient that the employer listens to the majority of employees, but there is no obligation to consult with or obtain consent from them.[43] Violations of the duty to consider employee opinions regarding changes to the Rules of Employment are subject to punitive action: the violation does not invalidate the change(s). Considering employee opinions serves as a way of protecting those employees by giving the employer opportunity to reflect their opinions in changes, but the failure to do so does not invalidate those changes.[44]

(2) Disadvantageous changes

When working conditions stipulated in the Rules of Employment are changed disadvantageously, existing employees will continue to work under the previous conditions if their consent was not received for the changes, but new employees hired after revision of the Rules of Employment will be subject to those changes.[45]

1) Changing the Rules of Employment unfavorably

The acceptable methods for receiving employee consent are as follows: ① If there is no labor union composed of the majority of employees, it is necessary to receive consent from the majority of employees by means of allowing them to hold their own conference. Here, 'obtaining consent through a conference' means that employees get together and exchange their opinions for and against particular issues at the division or department level of a workplace or business, without interference from or participation of the employer, and then gathering their collective opinions for delivery to the employer.[46] ② If there is a labor union composed of the majority of employees, the revised Rules of Employment upon the union's consent to the changes will also be in effect for non-union employees who have not had any input into the agreement.[47] ③ If working conditions are different for production and management divisions, and for

43) Jongryul Lim, 『Labor Law』, 13th edition, 2015, Parkyoung sa, page 353.
44) Hyungbae Kim, 『Labor Law』, 24th edition, 2015, Parkyoung sa, page 304.
45) Supreme Court ruling of June 24, 2011, 2009da58364.
46) Supreme Court ruling of May 14, 2004, 2002da23185. June 24, 2011, 2009da58364.
47) Supreme Court ruling of February 29, 2008, 2007da85997.

regular and non-regular employees, consent shall be received from those groups who will be affected by the revised working conditions. This means the employer does not have to receive consent from the majority of all employees if some of them will not be affected by the changes.[48] ④ At the time the Rules are changed, even though only a certain group of employees will be disadvantageously affected, if the revisions will affect other groups of employees, consent from these other groups shall also be required.[49]

2) Criteria for changed working conditions to be considered disadvantageous

Whether amendment of the Rules of Employment is disadvantageous or not shall be evaluated substantially by considering all factors such as reasons and procedures for the amendment, characteristics of the jobs, and the structure of each regulation of the Rules of Employment. Accordingly, even though one working condition has been revised disadvantageously, if other related factors were changed favorably or other favorable changes were made in return for the disadvantageous change, whether these revisions were disadvantageous or not should be determined after considering all the changes.[50]

Court rulings have showed: ① In cases where regulations on accumulating retirement payments were changed disadvantageously to non-accumulating retirement payments, if employee wages were increased and their working hours shortened, that change will not automatically be considered disadvantageous.[51] ② In cases where a wage regulation in the Rules of Employment was changed disadvantageously for some employees, but advantageously for other employees, such changes shall be considered as disadvantageous.[52] ③ Reducing or abolishing overtime work exceeding legal standard working hours cannot be regarded as a disadvantageous change to the Rules of Employment.[53] ④ In cases where working at night or on holidays in the working shift system, employees used to receive additional allowances. However after changing work shifts to day time only, night and holiday work allowances were no longer available. In this case, the reduced wages cannot be seen as disadvantageous.[54]

III. Disadvantageous Changes to the Rules of Employment and the Legal Principle of Socially Acceptable Rationality

1. Socially Acceptable Rationality

In cases where working conditions in the Rules of Employment were revised disadvantageously, if the Rules of Employment were revised without consent of the

48) Supreme Court ruling of December 7, 1990, 90da19647.
49) Supreme Court ruling of May 28, 2009, 2009du2238.
50) Supreme Court ruling of January 27, 2004, 2001da42301.
51) Supreme Court ruling of November 13, 1984, 84daka414.
52) Supreme Court ruling of May 14, 1993, 93da1893.
53) MOEL Guideline (Kungi 68207-286, March 13, 2003).
54) MOEL Guideline (Kungi 68207-691, June 11, 2003).

employee group, the changed rules will be invalid due to the unilateral nature of the change. However, if the revision of the Rules of Employment can be admitted as socially acceptable rationality, the change(s) may be considered legitimate. There are two opposing opinions regarding this issue: 1) As long as socially acceptable rationality is admitted, employer revisions to the Rules of Employment are effective (theory of affirmative recognition)[55], and 2) Disadvantageous employer revisions of the Rules of Employment are invalid (theory of negative recognition).[56]

The point of dispute is whether, when introducing the extension of mandatory retirement to age 60, the employer can introduce a wage peak system to employees under a seniority-based wage system without their consent. We will review disadvantageous revision of working conditions under the theory of socially acceptable rationality.

2. Criteria for Socially Acceptable Rationality

A judicial ruling regarding criteria for socially acceptable rationality stipulated, "It is not permitted to apply disadvantageous working conditions that deprive employees of their existing rights and interests through unilateral establishment or revision of Rules of Employment by the employer. However, in cases where there is sufficient socially acceptable rationality to recognize justification in terms of both necessity and the details of the establishment or revision, even when considering the degree of employee disadvantage, the effectiveness cannot be denied simply because there was no collective consent obtained from employees to whom the previous working conditions or Rules of Employment applied. Whether there is socially acceptable rationality or not shall be evaluated by collectively considering several items such as the degree of disadvantage the employees suffer under the changed Rules of Employment, the degree of employer necessity to change the ROE, efforts to replace or compensate for the changes to the ROE, negotiation situation with the Labor Union, and other general conditions in the domestic business. Provided, as changing the Rules of Employment disadvantageously for employees ignores the provision of the Labor Standards Act requiring their consent, this should be interpreted as necessary only a limited basis under stringent conditions.

3. Review

(1) Theory of affirmative recognition

The following points are used as support in the argument that unilaterally changing working conditions disadvantageously is rational to a degree that is socially acceptable: First, according to Paragraph 1 of Article 19-2 of the Aged Employment Promotion Act, "The employer of a business or workplace who extends the retirement age, and a labor union which is formed by the majority of all workers (or a person representing the majority of all workers) shall take the steps necessary to revise the wage system,

55) Chulsoo Lee, "It is possible for an employer to unilaterally implement a wage peak system!", 『Labor Law』, Jungang Economy, April 2015.

56) Kaprae Ha, "It is impossible for an employer to unilaterally implement a wage peak system!", 『Labor Law』, Jungang Economy, April 2015.

etc. according to the conditions pertaining to the business or workplace concerned." In a seniority-based wage system, this article can be regarded as necessary, as changing the wage system is unavoidable and socially acceptable rationality. Secondly, Paragraph 2 of Article 19-2 mentions, as the Employment Insurance Act outlines a system for subsidies related to implementation of the wage peak system in accordance with the retirement extension, such a change to working conditions would not be considered disadvantageous because there is no decreased wage in reality. Therefore, introducing a wage peak system along with extended retirement can be regarded socially acceptable rationality because of sufficient follow-up measures. In consideration of these arguments, this theory claims that employers can revise the ROE without consent of the employee group.[57)]

(2) Theory of negative recognition

The following points are used as support in the argument that unilaterally changing working conditions disadvantageously is not rational to a degree that is socially acceptable[58)]: Article 19 of the Aged Employment Promotion Act stipulates that introduction of the retirement age extension to 60 years is a normative provision, while Article 19-2 stipulates that the provision on introducing a wage peak system is a suggestive one and not legally binding. The related judicial ruling shows that the theory of socially acceptable rationality shall be strictly limited as this effectively ignores the provision in the Labor Standards Act requiring employee consent.[59)]

(3) Our interpretation

In introducing extended retirement, it will not be considered justifiable for an employer to introduce a unilaterally-determined wage peak system to cut wages as this violates the principle of labor and management having decision-making power over working conditions. Provided, if the employer extends retirement age beyond the mandatory retirement age while introducing a wage peak system, this revision can be regarded as socially acceptable rationality as it contains advantages for both labor and management.

VI. Conclusion

Revision of working conditions is possible at any time the employees and the employer agree. In cases where working conditions are revised advantageously, the employer does not need the consent of the employee group. However, if the revisions are disadvantageous, the employer needs to obtain consent from the employee group before the revision(s) shall be considered legally effective. Unilateral revision by employers violates the principle of labor and management determining working

57) Chulsoo Lee, "The wage peak system is possible to be implemented unilaterally by the employer!"
58) Kaprae Ha, "The wage peak system is impossible to be implemented unilaterally by the employer!"
59) Supreme Court ruling of January 28, 2010, 2009da32362.

conditions, and shall not be effective due to violating both the contractual characteristics of the Rules of Employment and its normative effect.[60] For this reason, socially acceptable rationality as a theory allowing the employer to revise working conditions unilaterally, shall be evaluated strictly on a case-by-case basis, after considering a fair comparison of the necessity of revising the Rules of Employment and the disadvantage created for affected employees in unfavorable revisions.

Selection of Employee Representatives & Effects

I. Purpose

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

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

The Labor Standards Act requires written agreement from or consultation with the employee representative for matters such as changes in working hours, managerial dismissals, etc. "This employee representative refers to the labor union, where there is an organized labor union representing more than half the employees at a business or workplace; or this shall refer to a person who represents more than half the

60) Jung Lee, "Whom to get consent for revising the Rules of Employment disadvantageously", 『Labor Law』, Jungang Economy, September 2009.

employees, where there is no such organized labor union." (Article 24 (3) of the LSA) However, this article does not explain the entire scope of "employee" covered by employee representation, the selected unit or method used in selecting the employee representative, manner of representation, effect of the written agreement, etc. Here, I would like to bring attention to clear administrative guidance and judicial rulings concerning these matters to better understand related laws and operations.[61)]

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

1. The Scope of "Employee"

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

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

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

2. Unit Selected for Employee Representation

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

Concerning managerial dismissals, "in cases where target employees are defined by particular occupations or positions, the employee representative shall be one who represents these targeted employees. Accordingly, if these particular targeted employees are not entitled to union membership, it would be pointless to consult with the labor union concerning the managerial reduction of these targeted employees. In a hospital where the employer intends to reduce employees of 4th rank or higher, consulting with

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

the labor union as an employee representative of 5th rank and lower would be unacceptable as the employer has not consulted in good faith with an appropriate employee representative."(Appellate Court 2004nu4613, Mar 25, 2005)

III. Method of Employee Representative Selection

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

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

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

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

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

3. Invalid employee representatives

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

(1) Even though an employer had explained the deterioration of business to the team leaders in manager-level plenary meetings and asked them for their opinions in selection of target employees for managerial dismissal, this is not company

consultations with an acceptable employee representative. (Seoul Administrative Court, 2006guhap25285, Sep 6, 2009)

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

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

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

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

IV. Method of Representation by the Employee Representative

1. In cases where the labor union performs Representation

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

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

The procedures for obtaining written agreement can follow the representation method stipulated by the Labor-Management Council's Rules of Operation. It is possible to 1) select one representative, 2) commission a specific employee to represent employees for one particular matter, 3) establish a separate decision-making method (e.g. a majority of all members present and the affirmative vote of two-thirds of members present), 4) have all employee representatives participate in the written agreement. Accordingly, an employer unilaterally making a written agreement with some employees is not acceptable.

3. In cases where a new employee representative is selected

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

employee representatives of the Labor-Management Council.

V. Effect of Written Agreements

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

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

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

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

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

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

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

Requirements for Unfavorable Changes to Employee Working Conditions to be Considered Reasonable according to Social Acceptability[62)]

1. The concept of “reasonable according to social acceptability”

The reason employers should obtain the consent of the employee group in changing the rules of employment unfavorably is to protect employee working conditions and prevent the employer from unilaterally revising the rules of employment disadvantageously. In cases where the employer changes the working conditions

62) Government Guidelines for Rules of Employment: The Ministry of Employment & Labor, January 22, 2016

unfavorably without the consent of the related employees, the changed rules are invalid in principle. However, this may not be the case 1) in situations where the employer deems it inevitable to change the rules of employment due to business necessity or other logical reasons, 2) in situations where the changes will not be unreasonable for the employees, and 3) in situations where the employer cannot run the business well due to severely restricted managerial rights. If the employer cannot adjust working conditions due to constant employee rejection of such changes, the company's competitiveness will deteriorate, as will employee job security.

In this case, judicial rulings explain that even though the rules of employment are changed unfavorably for the employees, if there is sufficient socially acceptable reason behind the need to make changes deemed justifiable, revision of employment rules without employee consent will not be invalidated (Supreme Court ruling on July 22, 2004, 200d da 57362). However, such determination should be done on a strictly limited basis due to the fact that this may circumvent the requirement, under the Labor Standards Act, to have employee consent when making unfavorable changes to working conditions (Supreme Court ruling on August 13, 2015, 2012 da 43522).

- Related rulings

1. Supreme Court ruling on July 22, 2004, 200d da 57362 (part of a larger judicial ruling): In cases where there is sufficient socially acceptable reason to recognize justifiability in terms of both necessity and the details of establishment or revision, even when considering the degree of employee disadvantage, the effectiveness cannot be denied simply because there was no collective consent obtained from the employees to whom the previous working conditions or Rules of Employment applied. Whether there is socially acceptable reason or not shall be determined by collectively considering several items such as ① the degree of disadvantage the employees suffer under the changed Rules of Employment (ROE), ② the degree of employer necessity to change the ROE, ③ Acceptability of the ROE revisions, ④ efforts to replace or compensate for the changes to the ROE, ⑤ negotiating situation with the Labor Union, and ⑥ other general conditions in a domestic business.

2. Supreme Court ruling on August 13, 2015, 2012 da 43522 (part of a larger judicial ruling): Provided, in consideration of the purpose of legislation that making changes to the Rules of Employment that are disadvantageous for employees requires the process of receiving the consent of the employees to whom those rules apply, in accordance with Article 94, Paragraph (1) of the Labor Standards Act, if it is evident that the rules of employment were changed in a way unfavorable to the employees in terms of the stipulations in the previous ROE, application of "reasonable according to social acceptability" should

be interpreted as necessary only on a limited basis and under stringent conditions.

2. Key items in recognizing changes as reasonable according to social acceptability

(1) Basic principles

In order to consider disadvantageous revision of employment rules as socially acceptable, the content shall not violate the purpose of the Labor Standards Act. Whether there exists socially acceptable reason or not shall be determined by collectively considering several items: ① the degree of disadvantage the employees suffer under the changed rules of employment, ② the degree of employer necessity to change the ROE, ③ acceptability of the ROE revisions, ④ efforts to replace or compensate for the changes to the ROE, ⑤ negotiating situation with the Labor Union, and ⑥ other general conditions in a domestic business. On the other hand, judicial precedent explains that changes shall be deemed reasonable according to social acceptability only on a limited basis under stringent conditions, and shall not be accepted automatically as done for socially acceptable reasons simply because it is necessary to revise the rules of employment.

(2) Criteria (6 items)

1) The degree of disadvantage the employees suffer under the changed rules of employment

In adjusting salary, severance pay and other such items, if such conditions do not seem remarkably disadvantageous for employees to accept, changes may be deemed reasonable according to social acceptability in collective consideration of the other five criteria.

2) The degree of employer necessity to change the ROE

In cases where the rules of employment revisions are unfavorable to employees, the revisions need to be necessary in terms of the company's business conditions or organizational operations. If the rules of employment are changed in order to unify the working conditions due to organizational changes in the company, such as merger or acquisition, necessity to revise the rules of employment may be recognized.

3) Acceptability of the ROE revisions

In collectively considering the sequence or content of the rules of employment revisions, it should, from a legal standpoint, be deemed necessary enough to adopt such revisions. When the company introduces interim measures before full implementation or can change the provisions in a reasonable manner in the light of changing circumstances, acceptability of the changes may be recognized.

4) Efforts to replace or compensate for the changes to the ROE

In cases where the company introduces supplementary measures to improve other working conditions as a reasonable balance to the unfavorable changes for the employees (i.e., employees are not simply disadvantaged), this is regarded as reasonable according to social acceptability.

5) Negotiating situation with the Labor Union

The employer shall sufficiently explain the necessity and details of the unfavorable changes to working conditions, and shall make every effort to obtain the consent of the labor union representing the majority of employees, or if there is no such labor union, consent from the majority of employees. It is difficult for the courts to accept that changes are necessary and reasonable according to social acceptability without the employer engaging in sincere negotiation with the labor force. If the revised rules of employment apply to all employees, an employer receiving consent from only part of the work force shall not be considered reasonable according to social acceptability.

6) Other general conditions in a domestic business.

Under the situation where the revised working conditions are not determined as particularly disadvantageous in comparison with those of a company's competitors, in cases where the employer cannot avoid changing working conditions unfavorably to overcome managerial difficulties, such changes should be deemed reasonable according to social acceptability upon consideration of other criteria collectively.

3. Application of the legal principle for "reasonable according to social acceptability": Introduction of peak wage systems

(1) Introduction of peak wage systems

As extending retirement age in accordance with the law and introducing a peak wage system will not be considered as a mutually-beneficial exchange or closely connected, the peak wage system shall be regarded as unfavorable if the employees' wages in the extended years of employment before retirement are less than their wages in the last year before reaching retirement age. Provided, the Old-Aged Employment Promotion Act stipulates that Labor and Management shall take the steps necessary to revise wage structures through a peak wage system, and so it is desirable that both parties come to an agreement through proactive negotiations to introduce the most suitable wage system to the business or workplace concerned.

In preparation for the extended statutory retirement age, employers should design their peak wage system in a way that wage increases are reasonable and allow the company to maintain job security for their middle-aged and older employees and increase employment of the youth. The employer shall also make efforts to follow the procedures for revisions to rules of employment as required by the LSA, such as obtaining consent from the majority of employees. Provided, in cases where the employer has sincerely tried to obtain employee consent, but ended up unilaterally changing the rules of employment without it due to repeated rejection of the employer's attempts to negotiate, judicial precedent shows that the legal principle of

"reasonable according to social acceptability" can be applied and the changes evaluated as to their validity.

(2) Determination as reasonable according to social acceptability (based on the above 6 criteria)

1) The degree of disadvantage the employees suffer under the changed rules of employment

Even though extending the retirement age provides the benefit of extending the employees' actual employment, timing of the wage reduction and the amount reduced are important items to consider in judging whether working conditions have been changed favorably or not. In cases where a company introduces a peak wage system after the company's previous retirement age due to the mandatory extension of retirement age, the wage reduction may violate the purpose of the Old-Aged Employment Promotion Act and could be deemed a disadvantageous revision of working conditions. In addition, in cases where a company introduces a peak wage system ahead of its retirement age, if the amount that the employee is supposed to receive in wages during the extended employment period is less than the amount reduced due to introduction of the peak wage system, it may be regarded as a very unfavorable change.

2) The degree of employer necessity to change the ROE

The revised Old-Aged Employment Promotion Act stipulates that Labor and Management shall take the steps necessary to revise wage structures through a peak wage system. If the only change in a company with a seniority-based wage structure[63] and a top-heavy personnel structure[64] is that retirement age is extended, labor costs will increase. The peak wage system is designed to prevent companies from withdrawing job security and decreasing their hiring of new employees. Accordingly, in cases where a wage structure, such as a peak wage system, is introduced and reduces wages in a reasonable manner, this can be deemed as a necessary revision to the rules of employment.

3) Acceptability of the ROE revisions

Besides whether changes to working conditions are unfavorable to employees, the acceptability of those changes should be estimated in consideration of several factors: interim measures, etc. introduced by the company to reduce disadvantage; the age when the peak wage system kicks in and the amount of wages those employees will receive after that and; the wages the same employees could reasonably expect from other companies of the same type. In particular, when the level of wages has been reduced gradually in stages from a certain time to minimize a decrease in living standards, this may be regarded as an acceptable revision to the rules of employment. In cases where average employee wages were reduced and severance pay is affected by introduction of the peak wage system or a wage reduction, a Defined Contribution (DC) Retirement Plan or other interim adjustment

63) 65.1% of companies employing 100 employees or more maintain seniority-based wage structures (The Ministry of Employment & Labor, Survey of Companies in 2015)

64) A structure where low-ranking employees are few while managerial employees exceed the target headcount for manager positions. This is due to seniority-based wage structures + automatic promotion systems + length of service for middle-aged and older employees + a reduction in hiring of youth by the company.

of severance pay can be introduced to avoid disadvantaging employees.

4) Efforts to replace or compensate for the changes to the ROE

When an employer has provided supplementary measures to improve other working conditions corresponding to introduction of a peak wage system, this shall be included in considering whether changes have resulted in overall advantage or disadvantage. Such measures can include adjustment of work volume, reduction of working hours, maintaining or improving the welfare system, and other working conditions.

5) Negotiating situation with the Labor Union

In revising the Rules of Employment, it is necessary to consider overall bargaining conditions and practical efforts for agreement, etc. In cases where the employer has authority to revise the rules of employment and unilaterally changes them in disregard of the purpose of the Old-Aged Employment Promotion Act or simply goes through the formality of consultations, such revisions will not be accepted as reasonable. In cases where an employer has tried to bargain with the Labor Union only a few times, or constantly requested consent without making any compromise reflecting suggestions by the labor union, it is unlikely the employer will be deemed to have made sufficient effort to negotiate with the labor union to reach an agreement. Moreover, the Old-Aged Employment Promotion Act stipulates that a labor union which is formed by the majority of all employees (or a person representing the majority of all employees if such a labor union does not exist) shall take the steps necessary to revise the wage system, etc. according to the conditions pertaining to the business or workplace concerned. In cases where the employer receives sufficient opinions from the employees and sincerely negotiates with the employee representative who has been granted the authority to consult by the majority of employees, this can be an important factor in recognition that changes were reasonable according to social acceptability.

On the other hand, in cases where an employer has made considerable effort to reach agreement with the employees or the labor union to revise the wage structure, but has received no response or substantial negotiations were impossible due to outright rejection of the company's proposal without a counter-proposal with reasonable alternatives, this can be regarded that the employer has taken sufficient action to seek an agreement with the employees or labor union.

6) Other general conditions in a domestic business.

Whether changes to the rules of employment in accordance with introduction of a peak wage system were reasonable according to social acceptability shall be judged by considering not only the individual company's situation, but also the rate of wage reductions compared to other companies in the region in the same or related field of business, supplementary measures, and patterns of negotiating agreements, etc.

Employment Contracts and the Principle of Priority on Favorable Conditions

I. Introduction

Recently, court rulings have emerged that have overturned existing practices, causing confusion in the workplace. Even if changing the rules of employment disadvantageously proceeds legally and with the consent of the majority of workers or consent of the union representing the majority, the labor contract with more favorable conditions continues to apply to workers who do not agree. In the past, when employers change rules of employment in a way that lowered working conditions to overcome internal and external difficulties, as long as they have gone through the procedures required to change the rules disadvantageously, the new rules apply to all workers in the entire company even if there are some opposed.[65] However, recent Supreme Court rulings have overturned this practice by ruling that a labor contract with more favorable terms for even a small number of workers who disagree with changes to the rules of employment continues to apply. The background to these precedents is the principle that workers and employers must decide working conditions freely and on equal terms (Article 4 of the Labor Standards Act, or LSA), and when there is disagreement regarding the new rules and labor contracts, the labor contract with the more favorable conditions takes priority (Article 97 of the LSA). These court rulings have caused some concerns on how to change rules of employment disadvantageously while conforming to the principles in these precedents. In this regard, I would like to review the relevant laws and recent court rulings on labor contracts and the principle of priority on favorable conditions, and look at ways to prepare desirable employment contracts.

II. The Principle of Favorable Conditions and Exceptions

1. Labor contracts that are disadvantageous when compared to the Labor Standards Act

Parts of labor contracts that set working conditions below the standards set by the Labor Standards Act are null and void. The invalidated sections are to comply with the Labor Standards Act (Article 15 of the LSA). The labor contract outlines working conditions freely determined by the worker and the employer, but if such working conditions do not meet the mandatory regulations set forth in the Labor

65) Kim, Hyung-Bae, "Changing Employment Rules Disadvantageously and Advantageous Contents of Labor Contracts", 「Labor Law Forum」 (29) Labor Law Theory Practical Society, Feb. 2020, P. 5; Park, Jong-hee, "Relationship between the Principle of Priority on Favorable Conditions between Employment Rules and Labor Contracts", 「Anam Law」 No. 56, Anam Law Society, 2018, p. 253.

Standards Act, they will be invalidated, and that section of the labor contract will be changed to comply with the Labor Standards Act. Therefore, the working conditions specified in a labor contract should be the same or better than those outlined in the Labor Standards Act.

2. Labor contracts that are disadvantageous when compared to the collective agreement

Any part of a labor contract that violates the working conditions and standards for treatment of workers stipulated in the collective agreement shall be invalid. The invalidated part(s) shall comply with the standards set by the collective agreement (Article 33 of the Trade Union Act: TUA). This regulation describes the normative effect of collective agreements, and explains that they have a compulsory and supplementary effect on the content of contracts. The compulsory effect is manifested by invalidating any part of a labor contract that violates the standards for working conditions and other treatment prescribed in the collective agreement. The supplementary effect is manifested by the fact that if there are no relevant provisions in the labor contract for handling a specific issue, the standards set in the collective agreement apply.[66] If a labor contract is more favorable than a collective agreement, the question arises as to whether the more favorable section(s) of the labor contract will apply in accordance with the principle of preferential conditions. This section has a normative effect because the working conditions specified in the collective agreement are the product of the determination of working conditions concluded on an equal basis by labor and management. Therefore, within the scope of the general binding force of collective bargaining, the favorable conditions specified in the labor contract are excluded and the contents of the collective agreement apply.[67]

3. Labor contracts that are more favorable than the rules of employment

Parts of labor contracts that set working conditions below the standards set by the rules of employment are invalid. Invalidated sections shall be changed so they comply with the rules of employment (Article 97 of the LSA). The labor contract should be maintained but with the same or more favorable conditions as the rules of employment. This also applies in the reverse situation. Therefore, if the rules of employment and the labor contract differ in terms of working conditions, the advantageous terms of the labor contract will apply first.[68] There are some related court rulings: (1) Even if the revised rules of employment no longer require that a full-time allowance be paid, which had been required under the labor contract, for

66) Labor Law Practical Research Society, 「Annotation of the Labor Standards Act (1)」, Park Youngsa, 2020, p. 391.
67) Lim, Jong-ryul, 「Labor Law」, Parkyoungsa, 2020, p. 162; Labor Law Practical Research Society, 「Annotation of the Labor Standards Act (1)」, Parkyoungsa, 2020, p. 393; Supreme Court ruling on Dec. 27, 2002, 2002Du9063.
68) Lim, Jong-ryul, 「Labor Law」, Parkyoungsa, 2020, p. 17.

individual workers who do not agree to the change, the advantageous parts of the labor contract take precedence over the revised rules of employment.[69] (2) In a case where a wage peak system was introduced as part of rules of employment that were revised with collective consent but after specifying the annual salary in an individual labor contract with a particular worker, the existing individual labor contract takes precedence over the rules of employment, despite the latter being revised with collective consent.[70] (3) Even if the rules of employment are changed through legitimate procedures, they do not take precedence over existing advantageous employment contracts unless special circumstances dictate otherwise, such as the employee agreeing to the relevant change in the rules of employment.[71]

III. Disadvantageous Changes in the Rules of Employment and Exceptions

1. Effect of disadvantageous changes to the rules of employment

When changing rules of employment in a way that is unfavorable to workers, consent from the labor union is required if there is a labor union organized by a majority of workers. If there is no such union, consent from the majority of workers is required (Article 94 of the LSA). If the employer unilaterally changes the rules of employment without obtaining such consent, the change(s) have no effect on workers who have been subject to the existing rules, and shall only apply to new workers hired after the rules were changed.[72] Even in court rulings, if the employer wishes to lower the existing working conditions for specific workers due to disadvantageous changes in the rules of employment, consent from the workers subject to the previous working conditions or rules is required. If such consent is not obtained, changes to the rules of employment are of no effect. If no such labor union exists, the consent of a majority of workers, according to meeting procedures for business or other units, is required. It is also acceptable to gather opinions of each worker in each department and then the workers discussing among themselves in a setting where there is no intervention or interference from the employer.[73]

In spite of previous court rulings changing the employment rules disadvantageously, recent court rulings have determined that the working conditions stated in the labor contract of a few workers who oppose the collective consent continue to apply in accordance with the principle of priority on favorable conditions.

2. Related cases

(1) Supreme Court ruling on Nov. 14, 2019 (2018 Da 200709)

69) Ulsan District Court ruling on June 14, 2017, 2016 Gahap 23102; Appellate Court ruling on Aug. 30, 2017, 2017 Na 53715; Supreme Court ruling on Dec. 13, 2017.
70) Supreme Court ruling on Nov. 14, 2019, 2018 Da 200709.
71) Supreme Court ruling on Apr. 9, 2020, 2019 Da 297083.
72) Supreme Court ruling on June 24, 2011, 2009 Da 58364.
73) Supreme Court ruling on May 14, 2004, 2002 Da 23185, 23192.

Background

An employer and worker signed a contract with a basic annual salary of 70,900,000 won in March 2014. The monthly salary was 5,908,330 won. On June 25, 2014, the employer introduced and announced a wage peak system as part of the rules of employment, with the consent of the labor union organized by a majority of the employees. This wage peak system stipulated that the basic salary in an annual salary contract would be 60% of the 'standard wage peak' for workers with less than two years before reaching retirement age, and 40% for workers with less than one year remaining. From October 1, 2014 to June 30, 2015, the employee in this case received 3,545,000 won per month, which is 60% of his monthly basic wage, because less than two years remained for the employee before the employee reached retirement age, while 40% of the monthly basic wage or 2,363,330 won would be paid for the final year before reaching retirement age When the employer in this case notified the employee of the details due to the application of the wage peak system on September 23, 2014, the employee expressed his objection to application of the wage peak system.

3. Summary of the court ruling

Article 97 of the Labor Standards Act protects workers, who are in subordinate positions, preventing them from being subject to working conditions that do not meet the standards set in the employment rules. If Article 97 of the Labor Standards Act is interpreted for opposite situations, taking into account the content of these regulations and their legislative purpose, individual labor contracts that stipulate working conditions more favorable than the standards stipulated in the rules of employment are valid and take priority over the standards stipulated in the rules, since the collective consent stipulated in Article 94 of the Labor Standards Act is only a requirement for effective change of the rules. Even if there is collective consent for unfavorable changes to the rules of employment, the principle of free determination of working conditions stipulated in Article 4 of the Labor Standards Act is still observed. Therefore, rules revised unfavorably cannot be regarded to take precedence over existing individual labor contracts that set more favorable working conditions even if collective consent is obtained. The labor contract details remain valid, and cannot be changed according to the revised rules of employment, without the worker’s individual consent.

(1) Supreme Court ruling on Dec. 13, 2017 (2017 Da 26138)

Background

An employer and employee signed a labor contract for a full-attendance allowance of 600,000 won when actual working days numbered at least 20 days per month. As the company's financial situation deteriorated, the employer held a labor-management council meeting on April 26, 2016 to decide on a "self-reliance plan." That same day, 144 (69.9%) of the 206 employees agreed that all contract allowances besides basic wage would be rescinded, to be effective from May 1, 2016. The employee in question received the self-reliance plan, but did not agree to the plans to rescind allowances, so did not sign or place his seal on the labor contract with working conditions that followed the self-reliance plan. The employer determined that it was not necessary to pay the contracted allowance to the worker since the majority of workers agreed to the rescinding, and the employee did not receive the full-time allowance in his original labor contract.

Summary of the court ruling[74)]

The standards in rules of employment invalidate the part(s) of labor contracts with poorer working conditions. However, better working conditions in a labor contract take precedence over the rules of employment. As long as rules of employment only set the workplace's minimum standards, if they have been changed unfavorably for the employees, even through legitimate procedures, they are not more applicable than the individually-signed employment contract.

IV. Considerations when Writing a Labor Contract

1. Application of the principle of priority on favorable conditions

In application of the legal source that determines working conditions, higher-level rules take precedence over lower ones. The principle of application means that the order of hierarchy of effectiveness begins with laws like the Labor Standards Act, then collective agreements, then rules of employment, then individual labor contracts. If a lower rule violates a higher rule, the lower rule is invalidated (Articles 15 and 97 of the LSA and Article 33 of the TUA). Nevertheless, the principle of priority on favorable conditions applies to rules of employment and labor contracts.

As stated in Article 97 of the Labor Standards Act, the principle of priority on

74) The original trial was in the Ulsan District Court, which ruled on June 14, 2017 (2016 Gahap 23102). The Appellate Court gave the same ruling, to which the employer appealed. The Supreme Court dismissed the employer's appeal without any additional review.

favorable conditions applies to rules of employment and labor contracts. In order to legally change rules of employment disadvantageously pursuant to Article 94 of the Labor Standards Act, the consent of a labor union representing a majority of workers, or if there is no such union, the consent of a majority of the workers, must be obtained. However, the employment contract of any workers who oppose the unfavorable rules of employment changes remains in effect even if the disadvantageous change to the rules is legal. In all the court rulings mentioned above, 1) a fixed annual salary was stated in the labor contract, and 2) a service allowance was specified. Even if the favorable working conditions described in the employment contract are changed disadvantageously through legal procedures, individual working conditions continue to be applicable.

2. Points to remember when writing an employment contract

Article 17 of the Labor Standards Act requires that labor contracts be in paper form and include specific information. When changing a contract, it must be reissued. Required items include (1) wages, (2) contractual working hours, (3) holidays under Article 55 of the LSA (4) annual paid leave under Article 60 of the LSA, and (4) other working conditions related to the workplace and work to be done.

In general, it is desirable that only items particular to the relevant worker are stipulated, and that overall working conditions that apply to all workers are in accordance with the rules of employment.

V. Conclusion

Even though the conditions for changing rules of employment disadvantageously are met, the principle of priority on favorable conditions in labor contracts is applicable and the working conditions of workers opposed to the change continue in effect. This is justified by the purpose of labor law to prevent the unilateral reduction of working conditions by employers, emphasizing the principle of mutually determining the working conditions in accordance with Article 4 of the Labor Standards Act. Employers wishing to adapt to changes in the business environment and maintain flexible employment relations will find it desirable to state in the labor contract that special matters for the worker are written therein and all other conditions are in the rules of employment.

1. The Employer's Obligations in the Recruitment Process

I. Introduction

Recruitment of workers is in principle the employer's prerogative, and for years there was no law to regulate it. While the employment documents and recruitment review costs required by employers when hiring employees are a great burden to job seekers, there have been rare instances where the employer has returned the employment documents voluntarily or has returned them when requested by the job seeker. In addition, there have been irregularities in the recruitment process, such as retaining business suggestions of job seekers, and posting false recruitment advertisements for the purpose of promoting companies.[75] As a result, the Act on the Fairness of the Recruitment Procedures (hereinafter referred to as the "Recruitment Procedure Act" or “the RPA”) was enacted in 2014, and employers who ordinarily employ more than 30 workers fall under this Act, which limits their rights in the recruitment process (Article 3).

Numerous recruiting scandals have occurred recently in both public and private companies, and so a need was perceived for systematic supplementation in order to guarantee the fairness of the recruitment process.[76] On July 17, 2019, the Recruitment Procedure Act was partially amended and implemented. The RPA prohibits anyone from illegally asking, pressuring, or forcing hiring practices in violation of the law (Article 4-2, Paragraph 1), and also prohibits the act of giving or receiving goods, entertainment, or property regarding recruitment (Article 402, Paragraph 2). In addition, a penal clause (Article 17) has been newly-established in case of violation, which implements effective sanctions measures.

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

II. Sanctions on Unfair Practices in Hiring Procedures

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

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

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

Employers shall not put out a false recruitment advertisement for purposes such as collecting ideas or publicizing the workplace under the pretense of recruitment. Any employer who puts out a false recruitment advertisement in violation of this Act shall be punished by imprisonment of up to five years or a fine not exceeding KRW 20 million (Article 16 of the Act). This Article was designed to protect the interests of job applicants and to prevent the occurrence of social costs and damages.[77)]

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

This implies that a change in the type of job, type of employment and/or working conditions proposed in the recruitment advertisement by the employer violates the principle of good faith, and shall not be allowed in consideration of the need to protect the trust of jobseekers in the job announcement. The prohibition against changing the working conditions as presented in the recruitment advertisement is intended to protect the interests of the job seeker by prohibiting an unfavorable change of working conditions, considering the fact that the job seeker is inferior to the employer. In addition, the copyright and intellectual property rights of the jobseekers are protected by related laws such as the "Copyright Act" and "Intellectual Property Basic Law", but because of the lack of substantive protection, the introduction of such restrictions in the Recruitment Procedure Act will enlarge the scope of direct protection.[78)]

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

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

Although the existing penalties for unfair employment apply to business obstruction of the Criminal Law, there are limits to the application for criminal offenses. Therefore, the Recruitment Procedure Act introduced this new content and can now punish unfair recruitment practices as a labor law. In order to establish a business obstruction in Article 314[79)] of the Criminal Act in the case of unfair recruitment, it is

77) Ministry of Employment and Labor, "Practical Manual for Fair Recruitment Procedures", 2015, pages 23-25.
78) Ministry of Employment and Labor, above manual, page 37.
79) Article 314 (Interference with Business)
(1) A person who interferes with the business of another by the method of Article 313 or by the threat of force, shall be punished by imprisonment for not more than five years or by a fine not exceeding fifteen

necessary to have an illegal act in the form of hierarchy or power information-processing, and the action must interfere with human affairs; that is, the work of others. However, there is a legal limit applying this Criminal Act because the person who engages in illegal recruitment is usually the decision-maker of the company, and the recruitment work corresponds to his original work and does not correspond to the 'other person's work'.[80] Therefore, it is meaningful that we can now partially supplement the vacancy in the punishment of unfair recruitment practices in the Criminal Act by introducing the prohibition of unfair recruitment practices in the Recruitment Procedure Act.[81]

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

The employer is not allowed to require that the applicant include personal information in the Basic Recruitment Form that is not required for the performance of his/her job, or to collect it as evidence material. Such restricted personal information shall be collected and processed only in accordance with the following conditions: (i) the physical condition of the applicant's appearance, height, weight, etc., (ii) the area of origin of the applicant, marital status and property; (iii) education, occupation, and property. In case of violation, a penalty of up to KRW 5 million will be imposed. However, in the legislative process, the attachment of an identification photo to the employment documents was excluded from the collection restrictions. The reason for this is that ID photos are considered a necessary part of the applicant's identity verification in both the recruitment review and the interview.[82]

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

The employer shall not incur any monetary cost (recruitment review fee) for the job seeker other than the cost of submitting the job application document to the applicant. However, if there is an unavoidable circumstance due to the specific nature of the workplace or occupation, it may be approved by the Minister of Employment and Labor to have a job seeker pay a portion of the recruitment review fee. In case of violation of this, a penalty of up to KRW 3 million is imposed.

Here, the recruitment review costs are directly related to the recruitment, such as the cost of planning and preparing the recruitment, the cost of the recruitment ad, etc., and

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million won.

(2) Any person who interferes with another person's business by damaging or destroying any data processor, such as a computer, or special media records, such as electromagnetic records, or inputting false information or improper order into a data processor, or making any impediment in processing any data by other way, shall also be subject to the same punishment as referred to in paragraph (1).

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

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

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

the cost of recruiting applicants, which refers to any indirect costs. The employer shall be fully liable for this cost in accordance with the principle of beneficiary burden.[83]

III. The Employer's Obligation in the Recruitment Process

1. Notification obligations

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

① Notice at the stage of receiving application documents: The acceptance of application documents (Article 7, Clause 2 of the Act);
② Notice of the stage of the recruitment process: recruitment schedule and recruitment process (Article 8);
③ Notice of the stage of recruiting: whether to be hired or not (Article 10);
④ Notice after employment status is confirmed: return of employment documents, etc. (Article 11, Paragraph 6).[84]

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

Since the employer requires various types of qualifications and proofs when recruiting workers, to identify a job seeker's ability , job seekers are required to pay an average of KRW 150,000 per application, and so the average cost for a job seeker to get a job is KRW 449,500 (when applying 29 times).[85] If a job seeker receives a return of the employment documents, the cost of finding a job can be reduced.

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

83) Ministry of Employment and Labor, above manual, pages 64-65.
84) Specific items employers need to tell job seekers (I) the fact that the job seeker may claim the return of the hiring document; (ii) the type and scope of the hiring document to be returned; Implementation period, (v) return method and cost burden, (vi) retention period and destruction of employment documents.
85) Kyeryun Shin, a lawmaker who got the search result after asking the recruiting company, 'Human', Feb 3, 2013.

fulfill its obligation to retain the employment documents, or if the company does not notify the job seeker, the employer will be subject to a penalty of up to KRW 3 million.

3. Storing and deleting documents

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

The employment documents contain the personal information of the job seeker, and as the need for privacy is paramount, the documents should be destroyed after a certain period of time. If the requesting period of return expires or if the employment documents are not returned, the employment documents must be destroyed in accordance with the "Personal Information Protection Act" (Article 11, Paragraph 4).[86] In this case, the destruction of the employment documents should be made without delay (within 5 days) as stated in the Personal Information Protection Act.[87] The method of destroying personal information is as follows: ① For electronic files: permanent deletion in a way that cannot be restored; ② For recorded, printed, written or other recording mediums: crushed or incinerated (Article 16 of the Enforcement Decree of the Personal Information Protection Act).

IV. Conclusion

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

86) Article 21 (Destruction of Personal Information) (1) A personal information controller shall destroy personal information without delay when the personal information becomes unnecessary owing to the expiry of the retention period, attainment of the purpose of processing the personal information, etc.: Provided, that this shall not apply where the retention of such personal information is mandatory under other statutes.

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

Civil and Criminal Liability for Deleting Company Documents

I. Question

The employee concerned (hereinafter referred to as "the Employee") was hired by an Employee Dispatch Company ("Company A"), signed a dispatch employment contract, and started to work for Company B, the Using Company, as the company president's secretary. During the month the Employee was working for Company B, she was scolded by her superior. The Employee voluntarily resigned on February 21, 2011, and on the following day, February 22, she did not come to work. Company B replaced her with another employee in the afternoon of February 22. When the new secretary started working, she discovered that the Employee had deleted from her computer all the data and files which had been kept by her predecessors over the last four years.

The Employee had deleted important computer files related to company work processes. Is she civilly or criminally liable for this?

II. Criminal Liability

1. Related articles in the Criminal Code

(1) Property damage (Article 366 of the Criminal Code)

Anyone who harms utility by damaging or concealing another person's property, documents or special recordings, such as electronic recordings, etc., shall be imprisoned up to three years or fined up to 7 million won.

(2) Obstruction of business (Article 314 of the Criminal Code)

① Anyone who obstructs another person's business by the method detailed in Article 313 (damage of trust) or by force, shall be imprisoned up to five years or fined up to 15 million won.

② Anyone who obstructs another person's business by damaging information processing devices like computers or special media recordings, like electronic recordings, by inputting falsified information or illegal commands, by causing errors in information processing, or using other methods shall be punished the same as in ① above.

2. Opinion

Property damage and obstruction of business are crimes. If the company is certain

that the Employee deleted all work-related documents accumulated over the last four years, this action by the Employee may be considered one of the above two crimes. In particular, as the Employee damaged useful company assets supporting business, proving her actions are crimes of property damage according to Article 366 should not be difficult. But this only applies if the company faced obstacles in its business or work performance due to the property damage.

The court may determine a sentence in consideration of qualitative aspects (the importance of the deleted documents or files), quantitative aspects (how much the Employee deleted), and the degree of the employee's self-reflection. Generally, the court does not give heavy penalty for either of these crimes, but determines the severity of the sentence by punishing the greater violation. As this labor law firm is not in a position to know how serious the damage or consequences were to the company, we are unable to give a concrete answer, but we have seen similar cases where employees were fined one million won.

On the other hand, there is also a possibility that the Employee will not be considered to have committed a crime. For example, in cases where the data that an employee deletes are preserved in original copy or in hard-copy, electronic recordings are indirect and subordinate means to preserving the documents. The deleted documents likely have an insignificant market value, so the employee wouldn't be considered to have inflicted property damage or obstructed business.

III. Civil Liability

1. Related articles in the Criminal Code

(1) Claims for illegal acts (Article 750 of the Civil Code)

Anyone who harms another person by an illegal act intentionally or by negligence shall be responsible for the damage and resulting compensation.

(2) Claims for default (Article 390 of the Civil Code)

In cases where the debtor cannot carry out repayment of the debt, the creditor can claim compensation for damage. However, in cases where the debtor unintentionally (and not due to negligence) does not carry out repayment, the creditor cannot claim compensation.

2. Opinion

In this case, the company can claim civil and criminal liability for damage, as well as compensation equivalent to the property value of the deleted documents. Civil

liability would include claims against illegal acts and claims against default at the same time. That is, if an employee under employment contract neglects his/her responsibility to keep or preserve work-related electronic records in good faith and return those records to the employer, the employer can claim compensation for damage.

However, as the employer is responsible for measuring the property value of the deleted documents and estimating how much, in monetary terms, the deletions cost the company, if the employer cannot do so adequately, there is a possibility that the claim will be refused for inability to prove damage.

IV. Legal Procedures

1. Criminal complaint procedures

Generally, the company submits a letter of complaint to the police with jurisdiction over the place where the incident happened, or the address of the employee. When complaining to the police, it is advantageous to include all applicable crimes, including obstruction of business and property damage, so that the law enforcement agency does not miss any. In any case, as the investigator estimates items to be prosecuted after completing investigation, the company does not have to make a detailed list of violations in advance.

Furthermore, as the police are an investigative agency, statements and documents they submit are not open to either party unless both parties agree on disclosure of their statements and submitted documents. This inevitably makes it very hard for one party to understand directly what documents the other party has submitted and what statements have been made.

2. Procedures for compensation claims

The company shall file claims for compensation with the District Court that has jurisdiction over where the incident occurred or where the employee lives. The company can make legal claims of liability for illegal actions and defaults at the same time. The advantage of lawsuits is that each party can directly see, hear, and receive all statements or documents submitted by the other party. Therefore, in cases where one party submits falsified documents or gives falsified statements in the court, the other party has procedural opportunity to refute in detail the other party's documents or statements.

However, since it is up to the employer to verify how much damage was done, and how compensation will be calculated, the employer first needs to review how much financial damage the deleted documents cost in terms of property value.

V. Overall Comments

The company may submit a criminal complaint to the police and file a civil lawsuit with the court at the same time. The general tendency these days is for one or the other. When both criminal and civil claims are made together, the police tend to view this as the company making a criminal complaint in order to take advantage of it for civil claim. Therefore, it is more effective to open one claim at a time, and if necessary, begin the second after seeing the results of the first. Common procedure is that criminal complaints are made first, and civil claims are filed after the results of the police investigation are known. However, the opposite order is also possible.

In conclusion, since in a case like this, it is hard to calculate damages after determining the property value of the deleted documents, there seems to be no benefit to making a civil claim. If the company is concerned about this point, it would do better to file a criminal complaint first and see the employee punished with a small fine. This conviction will then allow the employer to restore order to the company and return to pursuing profit with its business.

인사관리 앱 개발 (Mobile App)

기본서 Basic Guides	1. 노동법전 2. 노동법 해설 3. 노동 사건 사례	1. Labor Law 2. Labor Law Guide 3. Labor Cases
동영상 (Video)	YouTube	Korean and English videos (each 20 categories)
매뉴얼 Manual	1. 구조조정 2. 해고 3. 외국인 고용과 비자 4. 노동조합 5. 임금 6. 근로시간, 휴일, 휴가, 7. 비정규직 근로자 8. 근로계약 9. 근로감독 준비 10. 산업재해보상보험 11. 고용보험 12. 노동위원회 13. 취업규칙 14. 남녀고용평등 15. 직장내 괴롭힘 방지 16. 노사협의회 17. 산업안전보건법 18. 부당노동행위 19. 국민연금, 국민건강보험 20. 근로감독 체크리스트	1. Workplace Restructuring 2. Dismissal 3. Foreign Employment and Visa 4. Labor Union 5. Wage 6. Working Hours, Holiday, Leave 7. Irregular Workers 8. Employment Contract 9. Labor Inspection Preparation 10. Industrial Accident Compensation Insurance 11. Employment Insurance 12. Labor Relations Commission 13. Rules of Employment 14. Equal Employment Act 15. Workplace Harassment Prevention 16. Labor Management Council 17. Industrial Safety and Health Act 18. Unfair Labor Practices 19. National Pension, Health Insurance 20. Labor Inspection Checklists
외국인 Foreigner	출입국관리법과 외국인 (기고글, 동영상, 비자36가지)	Immigration Laws and Foreigner Workers (Law, Articles, Video, Visa)
근로계약 Employmt Contract	근로계약 자동작성 (5가지 기본 틀을 가지고 작성) (정규직, 기간직, 시간제)	Making Employment Contracts based on 5 basic templates (Regular, fixed-term, and part-time)
자동계산 Automatic Calculation	1. 연차휴가, 2. 퇴직금 3. 4대보험, 4. 퇴직소득세 5. 산재보상 (장해보상, 유족보상)	1. Annual Leave, 2. Severance Pay 3. Social Insurance Premiums 4. Retirement(Severance) Income Tax 5. Industrial acc
Labor Auditing	1. 주요 질문/답변 2. 인사감사	1. FAQ 2. Labor Auditing

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