Dismissal of Offline Employees due to Transferring of Business to the Internet

Ⅰ. Introduction

Since the beginning of 2020, the coronavirus pandemic has swept the world, causing enterprises to move their business online. As a result, offline work has reduced, requiring that company workforces restructure. I would like to introduce here a related case of dismissal. A multinational company, hereinafter referred to as “Company A”, provides maintenance and technical support for ERP programs for companies, such as Oracle and SAP operations. Company A established an office in the Republic of Korea in April 2017 and continued to expand, hiring 6 employees to carry out their business operations. However, the number of offline employees continued to decrease as work shifted online during the coronavirus pandemic. Company A finally dismissed the two remaining employees in February 2022.

After Company A let all their employees go, it only had an address in a shared office in Korea, but there were no employees at the address. Accounting processes such as tax invoices were entrusted to the accounting office, and sales were entrusted to an outsourced company. Company A is working online at its headquarters only on ERP program maintenance and technical support, which is its main business. This case has several issues that set it apart from normal dismissal. First, there are questions around whether an employee is eligible to seek remedy for unfair dismissal because there are no employees left in the Korean office while Company A carries out its business operations online. Second, Article 11 of the Labor Standards Act allows only employees at workplaces with 5 or more employees to seek legal remedy. However, Company A had a Korean branch with only two employees. Third, Company A abolished all offline work and conducts all its business online. Is this a justifiable reason to terminate all employees? I will review herein the arguments of the parties on the above three issues and look at how this case was resolved.

Ⅱ. Case Summary and Claims of the Parties

1. Summary

Company A notified the two remaining employees in Korea in mid-January 2022

that they had no choice but to withdraw from the business because of continued losses. At the end of January 2022, the company informed the two employees that it would pay severance pay, one month's performance bonus and 30 days' pay in lieu of advance notice of dismissal, and requested that they sign a letter of resignation. As both employees refused to sign, the company paid only severance pay and one month dismissal allowance on February 15 before dismissing them both.

On March 10, 2022, the labor attorney in charge of this case filed a remedy application for unfair dismissal and submitted it to the Labor Commission.[1] The Labor Commission sent documents related to the application to the address of Company A's Korean office. However, the documents from the Labor Commission were returned because there were no employees at Company A's Korean office address. The Labor Commission, after the official document related to the labor case was sent back twice, requested that this labor attorney correct the address, and informed him that the case would be dismissed if there was no one to receive the documents. Accordingly, the labor attorney sent out the document requesting public notification of the remedy claim document, and also provided the e-mails of the head office CEO, Asia director, and HR director at the head office. Accordingly, an official in charge in the Labor Commission sent an official notice of the case to the above three persons. Fortunately, the head office of Company A appointed a lawyer from a law firm in Korea as an agent and submitted a rebuttal document on April 1, 2022.

2. Claims of the parties

(1) Company A's claim

In response to remedy claim from the two employees for unfair dismissal, the company argued that the dismissal was justified for three reasons. First, the applicants were the finance director and sales director, who had exercised their independent authority as the head of finance and sales. The court had ruled in this regard, "For the former director who has been in charge of training and management for his employees as an unregistered managing director, if work is not provided in a subordinate relationship with the company for the purpose of wages in terms of working hours and work details, such director is not considered an employee under the Labor Standards Act." [2]

Second, it argued that Company A's Korean office was an independent company established in accordance with Korean commercial law, and had fewer than 5 full-time employees, so it was not subject to a remedy claim for unfair dismissal under the Labor

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1) Seoul Labor Commission, Unfair Dismissal Case Number: Seoul2022buhae, 000Korea
2) Supreme Court ruling on June 24, 2005, 2005du2667.

Standards Act. The court had ruled in this regard, “If the domestic branch of a multinational corporation (i) has an address in Korea as a corporation independent of the foreign head office, (ii) prepares financial statements separately from the head office, (iii) pays corporate tax, VAT tax, and income tax for their employees, the Labor Standards Act does not apply to this branch regarding a remedy claim for unfair dismissal as it is independent from the relationship with the head office and has fewer than 5 employees.”[3)]

Third, termination of the employment contracts in this case corresponded to a normal dismissal on the premise that the employer's entire business was abolished, so it was a fair dismissal. It was argued that the employer fired all Korean employees because the Korean branch was going to be abolished soon. Related precedents also showed, “Dismissal of employees in the process of liquidating the company for the purpose of discontinuing the business is not considered dismissal. It is because this closing of business falls under the freedom of business management, and so this dismissal is regarded as having a justifiable reason.” [4)]

Therefore, it was argued that the employer's dismissal of the employees was justified because each of these three criteria applied.

(2) Employees’ Claims

In response to the employer's claim of justifiable dismissal, the employees responded with actual content. First, the employer asserts that the applicants were not employees because their positions were as directors. However, the applicants were directors only in rank, and in reality did not have the relevant authority. The applicants’ employment contract included a probation period, and designated the direct superior at the head office, place of work, and working hours. Their wages consisted of fixed salary and bonuses based on work performance. In recent expenditures, they had to receive approval from their managers for KRW 300,000 for funeral flowers, KRW 50,000 for cell phone fees, and other basic fees. In addition, they were not registered as directors in the company's register, and they performed their duties while reporting their business operations and receiving instructions from their designated superiors.

Second, Company A claimed that it was a workplace with fewer than 5 employees. Since its establishment in April 2017, the Korean branch had employed 5 people in 2019, 6 in 2020, and 4 in 2021, but this had been reduced to 2 employees at the time of dismissal in 2022. The two employees at the Korean branch worked under the instructions of their superiors, and since there were no subordinates in the workplace, they never issued any work orders. The finance and sales managers (applicants) performed their work under the supervision of their superiors. Accordingly, the applicants did not have the

3) Seoul Central District Court ruling on Nov. 23, 2018, 2017gahap559829.
4) Supreme Court ruling on Nov. 13, 2001, 2001da2797.

authority to independently manage the business in Korea, such as director rights to execute business and finances and exercise the right to manage personnel.

Third, the company had argued that termination of the employment contracts was legitimate because the employer was withdrawing from the business. However, the company continued to sign ERP technical support service contracts with new customers. In January 2022, they signed a new long-term technical maintenance service contract with four companies and received an advance payment. This proves that, while the company will not work offline in the future, it will continue to provide technical support services online.

Ⅲ. Judgment on the Main Issues in this Case

1. Determining whether the Korean finance director and sales director were employees

In general, employee status is not recognized for registered directors, and is recognized only when they are under considerable direct command and supervision. In the case of unregistered directors, in principle, their employee status is recognized, and is denied only when independent decision-making or business execution rights are quite obvious. [5] Although the titles of “finance director” and “sales director” were used in this case, they were actually ordinary employees without any authority in their employment contract. They were not listed as directors in the company's Corporate Register, and they did not have any independent authority in practice. In fact, even in business, they reported directly to their direct managers in charge of Asia and received work instructions from them.

2. Whether it is possible to apply for remedy for unfair dismissal even if Company A is a workplace with fewer than 5 employees

In accordance with Article 11 of the Labor Standards Act, a remedy application for unfair dismissal can only be filed by an employee who works at a workplace with five or more employees. However, if the workplace of a foreign company with fewer than 5 employees does not have independence in Korea and acts as a branch of the head office, it is counted together with employees of the head office in calculating the number of employees, so its employees are protected from unfair dismissal.[6] The issue

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5) Ahn, Tae-Sik, “Criteria for Judging Employee Status of Corporate Registered Directors,” 「Law and Policy Researc h」, No. 22, Korean Association for Policy Studies, June 2014, p. 624.

here is to be judged based on whether the Korean branch has independence. In this case, in Korea, an independent corporation was registered according to commercial law and independent settlement of accounts was made, but in reality, it was operated under the business instructions of the head office, and the head office managed all accounting.

3. If employees are dismissed on the premise that the business is abolished, are they justifiable dismissals?

According to Article 23 of the Labor Standards Act, if it is impossible to continue a business, dismissals are regarded as justified. A related precedent also states, “If an employer who has dismissed employees practically closes the workplace and there is no workplace for employees to return to, the employment contract relationship that is premised on the existence of the company is effectively terminated.”[7] Company A asserted that termination of the employment contracts in this case amounted to legitimate dismissals because the business was abolished. However, based on the actual facts, the employer in this case continues to conduct business online, so the business never closed.

Ⅳ. Conclusion

As the facts in this case were clearly confirmed, the employer proposed a settlement of an additional six months' wages to the employees since Company A’s chances of winning were quite low. In response, the employees demanded 12 months' wages, mentioning the difficulties in the job market. The employer and employees reached agreement for 8 months' wages as compensation. On June 10, 2022, the two parties drafted a settlement agreement at the Labor Commission and settled this case.

This case can be considered meaningful and can be used as reference for dismissal of employees when a business moves online. Although a brick and mortar business can be transitioned online at the discretion of the company, the employer should be aware that the employment relationship with the employees remains valid regardless of the termination of its offline business.

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6) Ministry of Employment and Labor Guidelines, Labor Improvement Policy Division -438, Jan. 28, 2014.

7) Supreme Court ruling on Dec. 24, 1991, 91nu2762.

A Case Study on Workplace Harassment against a New Employee

Ⅰ. Introduction

Since the Workplace Harassment Prevention Act was introduced in the Labor Standards Act and enforced for employers in April 2021, many companies have experienced claims of workplace harassment. In the past, the general workplace atmosphere (in which new employees or lower-level employees accepted it as part of adapting to the existing workplace) is no longer placed on the individual alone, but the onus is now on organizations to improve. The employer's obligation introduced in April 2021 means an objective investigation must be conducted without delay if a worker reports workplace harassment to the company. If workplace harassment is confirmed, measures must be taken that are appropriate to the harassment of the victim, and disciplinary action must be taken against the perpetrator (offender). The claimant shall not be treated unfavorably because of the claim of workplace harassment. Of particular note is that all those involved in a claim of workplace harassment are obligated to maintain the confidentiality of the claim. If the employer fails to comply with these obligations, the fine for negligence shall be not more than 5 million won.[8)]

A report was received that an employee recently hired by a foreign IT company had been harassed several times at the workplace by the team leader. Through the company's appropriate handling of this case, we can take a detailed look at how employers have dealt with such incidents. I would also like to take a look at what constitutes workplace bullying, the standard for determining whether workplace bullying has occurred and how the company's disciplinary procedures are to be conducted.

Ⅱ. Criteria for Determining Workplace Harassment

“No employer or employee shall (i) cause physical or mental suffering to other employees or deteriorate the work environment (ii) beyond the appropriate scope of work (iii) by taking advantage of superiority in rank, relationship, etc. in the workplace.” (The Labor Standards Act Article 76-2). Any judgment that workplace harassment (bullying) has occurred must be made only if the above three requirements are met.[9)]

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8) However, unfavorable treatment of the complainant or the victimized worker by the employer shall be punished by imprisonment for not more than three years or by a fine not exceeding 30 million won (Labor Standards Act, Article 76-3 (6)).

1. Taking advantage of one's position or relationship in the workplace

"Position in the workplace" refers to cases where the accused is of a higher position than the victim in the workplace organizational structure. Even if the employee is not higher, this component can be fulfilled if the accused perpetrator has taken advantage of his/her higher standing in terms of work performance (number of service years etc.) or is higher in the seniority ranking system.[10)]

Dominance within workplace relations includes just about any relationship where advantage is deemed to exist for the accused perpetrator. The following can be used to judge advantage: (i) stronger job competency, professional knowledge, or higher number of service years, (ii) Personal attributes such as age, academic background, gender, region of origin, race, (iii) Influence in the workplace, such as working for the auditing or human resources department, (iv) Employment status (full-time vs. part-time etc.), and (v) Influence within organizations such as labor unions or workplace councils. Workplace harassment has not occurred unless the act involved taking advantage of one's position or relationship at work.

2. Exceeding the appropriate scope of work

The relevance to work must be comprehensive. Even if the incident does not occur directly in the course of performing work, work relevance is recognized if it occurs while carrying out work duties and requires the claimant having to perform more than required by the job position, or under the guise of performing work.[11)]

In order to be recognized as exceeding the appropriate scope for work, it must be recognized that social norms would not see the incident as a business necessity, or that, even if business necessity is recognized, the behavior of the person in higher position would not, according to social norms, be deemed appropriate. Even if the employee is unhappy with some instructions, it is difficult to recognize it as workplace harassment if it is deemed that the act is necessary for work in accordance with social norms. However, if the instruction or command is accompanied by violence or verbal abuse, it can be deemed as exceeding the appropriate scope for work, and thus fall under workplace harassment. In addition, even if the act in question is recognized as necessary for work, if the target worker is designated without reasonable cause when compared to workers performing the same and similar work in the workplace, it can be considered as an inappropriate act in the conventional social sense.

3. Acts that inflict physical or mental pain or aggravate the working environment;

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9) Ministry of Employment and Labor, "Manual on Judgment, Prevention and Handling of Workplace Harassment," Feb. 2019, pp. 10-14.

10) Supreme Court ruling on July 10, 2008, 2007du22498.

11) Supreme Court ruling on Dec. 21, 2006, 2005du13414.

Inflicting physical or mental pain occurs from a variety of actions, such as:

1) Assault or intimidation;
2) Abusive language, profanity, gossip, particularly continuous and repeated violent or abusive language that could seriously impinge on the victim's personal rights and cause psychological pain;
3) Repeatedly requiring the employee to run personal errands;
4) Bullying in a group, intentionally ignoring or excluding the employee in the course of ordinary work;
5) Ordering the employee to do something repeatedly or over a considerable period of time that has no relation to the job description specified at the time the relevant labor contract was signed, and there is no justifiable reason for the instruction;
6) Requiring excessive amounts of work from the employee where no unavoidable circumstance to do so exists at the time the work is assigned;
7) Intentionally interfering with the employee's smooth business performance, such as not providing major equipment (computers, telephones, etc.) necessary for business or blocking access to the Internet or intranet.

"Aggravating the working environment" means that the act impedes the victim's ability to perform his or her work duties. Here, the intention of the accused perpetrator is not taken into account.

Ⅲ. Facts of the Case

On May 15, 2022, at the end of a company dinner, a new employee (the claimant) approached the CEO and reported that he was being bullied in the workplace. Accordingly, the head of the personnel department conducted an interview with the claimant on May 17 and instructed him to submit the relevant details in writing with specific evidence. The new employee had been hired in December 2021 and had been assigned to the technical sales team. He submitted the facts in writing that he had been harassed at least 10 times by the team leader (the perpetrator) and provided the relevant body of evidence.

The details were as follows:

① On March 16, 2022, the team leader was having a serious conversation with another employee when the claimant went into the team leader's office and watered the flowerpots there. The team leader, who was angry, said to the claimant at lunchtime, "(Omitted) You have to run when others are walking, you have to climb three steps at a time when others are going up one at a time, and when others are running, you have to run faster. Understand? If you don't, we know you'll be a do-nothing later." ② On March 21, the victim had to give a

PowerPoint presentation after completing the three-month probationary period. Here, as feedback, the team leader remarked, “This is not a place to consult with your psychiatrist,” “Your English is not good enough, and your presentation was like what you presented in university. This is not school.”

③ On April 1, the claimant was ordered to drive more than 5 hours round trip to and from a funeral for someone the team leader knew. During this trip in the car, the team leader scolded him, saying, “How many months have I been telling you about your clothes?”

④ On April 22, the claimant's team received an email from another department, complaining about the work of the technical sales team. In response, the team leader summoned everyone on the team and criticized the claimant in front of them for an hour for his incompetence in handling work. Here, thinking that the claimant had ignored the team leader's orders, the team leader stared at the claimant angrily, and slapped the victim's left thigh with his hand. In response, the victim apologized, "Team leader, I wasn't ignoring you, and I had no intention to do so. I'm sorry." The claimant stated in the claim, “For an hour I choked up, feeling as if I were a criminal, and after coming out of the team leader's office, my head hurt and I felt very dizzy.”

⑤ On April 29, the team leader had a meeting with the team and took issue with the work attitude of the claimant. “I can't understand you guys born in the '90s these days. Work and life balance? Such a rotten thought. Isn't it really a rotten attitude?” “You work with the mindset that you will only give as much as you receive, all while the company has to pick up the slack from the new employee, who receives as much as 34 million won a year.” The team leader looked at the claimant and said that the minds of kids born in the '90s are rotten and that he could not understand them. “If you don't take your work seriously, just leave. I still have a lot of people to work with. There's no need for you to start here. Right?”

⑥ On May 17, the claimant had a meal with three new employees and team members, but didn't say a word. In response, the team leader said, "If you don't feel good, is it okay to show your feelings here? Are you expressing your anger? ” “Do what you want. If you're going to show your temper and not talk, fine. I'll have nothing to do with you anymore. Just get out of here!” After that, the team leader didn't respond to any greetings from the claimant. However, he called other employees from the department for a meeting over the claimant drinking too much the night before and coming late to work. The claimant had to write a letter of apology and submit it to the team leader.

The statements used to demean the claimant included:

⑦ “Dress properly. Don't you have any shirts? Buy some. Where is your salary going? When you have some money, buy some pants and new shoes.

⑧ “If you don't pass the OJT exam, you will be cut loose, you know that? If you're not serious about your work, you'll just be fired. If you don't come to your senses by the end of the three-month probation period, you'll be fired, you know?

⑨ “Your English skills aren't that good. Your language skills are very poor. You can't speak English anywhere. Your English skills are terrible.”

⑩ During a team meeting, “Why are you wearing a mask? You bastard! You only care about yourself, about not getting infected."

⑪ The team leader never called the claimant by his title, instead calling the claimant by name directly (which is rude in Korea), or “Hey!” “You” and “Ni” (which are also rude in Korea).

Ⅳ. Decisions on this Case and Actions Taken by the Company

1. Harassment in the workplace confirmed

The claimant was deemed a victim after the evidence was reviewed and all parties were interviewed. In fact, the team leader, who was the perpetrator, did not recognize the victim's personal rights in the process of performing his duties and concentrated only on the work process. Here, the superior (the team leader) used his superior position as the team leader to continue inflicting mental and physical pain on the new employee beyond the proper scope of work. Inappropriate terms and derogatory remarks were used repeatedly, and the victim was excluded from work and inflicted with psychological pain that was beyond acceptable. Therefore, protective measures were taken with the claimant, including a change of location to allow him to continue to work for the company, while disciplinary actions were taken against the team leader. The company is also working hard to prevent recurrence in the workplace where superiors infringe on the personal rights of their subordinates in the process of performing their duties.

2. Company actions upon receipt of claim

The company received a claim of workplace harassment on May 15. In response, the HR team leader realized harassment had likely taken place at work through

interviews from May 17-19, and asked the claimant to provide additional evidence. On May 27, the company decided that an objective investigation into workplace harassment was necessary, to which it brought in an external expert: in this case, this author's firm, KangNam Labor Law Firm. After investigating the claimant, the related persons, and the perpetrator, the labor law firm reported its findings and determination of workplace harassment on July 10. Accordingly, as stipulated in the rules of employment, the company notified the perpetrator, seven days in advance, of a planned disciplinary committee meeting related to workplace harassment to be held on July 20, 2022. At the disciplinary meeting, the company notified the perpetrator of the facts that had been confirmed, and listened to the perpetrator's response. After that, the company imposed a six-month wage reduction in consideration of the severity, including excluding the offender from pay-for-performance for one year and suspending promotion for one year. In addition, after listening to the claimant, it was decided to assign the victimized worker to the development team where he would perform similar tasks as he had for the technical sales team.

Ⅴ. Conclusion

The Workplace Harassment Prevention Act was introduced to bolster the personal rights of employees. It was enacted due to the conviction that Korea's long tradition of seniority-based personnel management was deeply rooted and that abuses could not be prevented by the introduction of voluntary rules of employment alone. Therefore, as in the case we've looked at here, acts that exceed the appropriate scope of work violate the company's duty to protect workers, and companies need to be aware that they may find themselves compensating recipients of workplace harassment in the future. The case herein looked at the most frequent type of workplace harassment, bullying, which involved a new employee and that employee's superior. The resulting consequences show the significant implications of such bullying, even if done with the intent to “mentor.”

Severance Settlement-related Taxation Issues

Ⅰ. Introduction

Unfair dismissals are often resolved through a severance settlement between the company and the dismissed worker, but new conflicts often arise over taxation issues. I recently handled a similar situation. On February 15, 2022, a case for unfair dismissal was filed on behalf of two dismissed employees. In this case, an oral proposal was developed between the company and the dismissed employees as an out-of-court settlement which included a severance payment equivalent to 8 months of salary. In response to this, the company's attorney wrote and sent an agreement which stated that 30% in earned income tax for wages would be deducted from the severance settlement. The employees objected to the company's tax decision and requested that the severance agreement be tax-free as consolation pay for termination of employment. The company asked its certified public accountant about the taxation method for a severance settlement. Accordingly, the certified public accountant contacted the National Tax Service about how to handle taxation on a severance settlement that is relief for unfair dismissal. The National Tax Service responded that if the amount was paid as a condition for withdrawing the lawsuit, it should be regarded as reward money, which would be taxed according to “other income” rules, which would mean it would be taxed at 22%. In response, the dismissed employees argued that the company treated it as “other income” because they wanted to avoid any sort of legal risk despite the fact that it could be non-taxable if the company handled it as compensation for forced termination, and negotiations between the two sides broke down. The company and employees attended a hearing on June 3, 2022 for the Labor Commission's decision. Judges at the Labor Commission understood that both parties, labor and management, had an intention to reach an agreement on this dismissal case, but that they could not reach one due to taxation issues. The judges did not render a decision on the hearing day and gave both parties an additional week to come to an agreement. During this period, the company made a final proposal that included 8.5 months’ salary as compensation and applied for it to be taxed as retirement income. The employees accepted this proposal and an agreement was reached.[12)]

Here, I would like to examine the taxation methods for earned income, retirement income, other income, and when income related to a severance settlement is untaxable, and then look at related precedents to confirm which taxation method should apply.

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12) Seoul Labor Commission decision on June 10, 2022, 2022buhae631.

Ⅱ. Types of Taxation for Severance Settlements (Earned Income, Retirement Income, Other Income, Non-taxable)

1. Earned income

"Earned income" refers to salary, money, remuneration, wages, bonuses, allowances, and payments of a similar nature received for providing work (Article 20, Paragraph 1, Item 1 of the Income Tax Act). Unlike business income, earned income is generally generated by those who provide work and receive payment in a subordinate position to others. [13] Regardless of the name, anything with a "similar nature" is taxed as earned income. The scope of earned income includes not only general wages, but also all income received by workers from employers, except for tax-free items and retirement income on the premise of retirement (Article 38 of the Enforcement Decree to the Income Tax Act).

> The tax base, excluding personal exceptions and various income deductions from wage and salary income, is applied as: ▲ 6% for up to KRW 12 million ▲ 15% for more than KRW 12 million and up to KRW 46 million ▲ 24% for more than KRW 46 million and up to KRW 88 million ▲ 35% for more than KRW 88 million and up to KRW 150 million ▲ 38% for more than KRW 150 million and up to KRW 300 million ▲ 40% for more than KRW 300 million and up to KRW 500 million ▲ 42% for more than KRW 500 million and up to KRW 1 billion won ▲ 45% for more than KRW 1 billion.[14]

For example, if the severance settlement is KRW 120 million, the total amount of tax due would be KRW 52,153,200, with KRW 47,412,000 being earned income tax and KRW 4,741,200 being 10% local income tax. The total tax bill comes to 43.4% of the total amount received, reducing the actual amount received to KRW 67,846,800.[15]

2. Retirement income

"Retirement income" refers to income paid by an employer to a worker due to that

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13) Lee, Changhee et al., 「Tax Law」, KNOU Press, 2017, p. 162.

14) The Chosun Ilbo, "Employee income tax has increased by 39% since the Moon Jae-in administration took office." Feb. 13, 2022.

15) Refer to the KangNam Labor Law Firm app: Automatic calculation of Retirement Income tax: https://k-labor.co.kr/main/auto4.html

worker's retirement (Article 22, Paragraph 1, Item 2 of the Income Tax Act). This includes severance pay, honorary retirement pay and severance benefits as a result of corporate restructuring. [16)]

Retirement income enjoys significant reductions in taxes owed as a way of protecting retirees' ability to provide for themselves in their old age. Retirement income tax varies depending on the number of years of service, but comes to a maximum of 24%.

Retirement income							(Number: KRW)
Years	Severance Settlement	KRW 50 million	Deduction (plus 10% resident tax)	KRW 150 million	Deduction (plus 10% resident tax)	KRW 300 million	Deduction (plus 10% resident tax)
	5 years	2,810,000	6.2%	23,320,000	17%	65,170,000	24%
	10 years	1,610,000	3.5%	12,740,000	9%	46,370,000	17%
	20 years	650,000	1.4%	6,420,000	5%	24,900,000	9%
	30 years	160,000	0.4%	4,030,000	3%	15,190,000	6%

For example, if the retirement allowance for an employee with five years of service is KRW 120 million, the actual tax on that retirement income would be KRW 12,342,500 plus 10% local income tax of KRW 1,234,750, for a total tax bill of KRW 13,576,750. This means that 11.3% of the total amount is deducted as Retirement Income tax, and so the actual amount to be paid is 106,423,250 won.[17)]

3. Other Income

"Other income" refers to income other than interest income, dividend income, business income, earned income, pension income, retirement income and capital gains (Article 21, Paragraph 1 of the Income Tax Act). If the employer pays the severance settlement in good faith to end the employment relationship early, it is regarded as reward money belonging to "other income," and means a 22% tax bill. However, if the amount is paid as compensation for emotional or status damage, it is not taxed. [18)]

For example, if the retirement settlement amount is KRW 120 million, KRW 26,400,000, or 22%, is deducted as tax on other income, with the actual amount received totaling KRW 93,600,000.

4. Non-taxable Income

16) Lee, Changhee et al., 「Tax Law」, KNOU Press, 2017, p. 168.
17) Refer to the KangNam Labor Law Firm app: Automatic calculation of Retirement Income tax: https://k-labor.co.kr/main/auto4.html
18) National Tax Service Administrative Guidelines, Income, Income Tax Division-1126, Nov. 8, 2010.

Compensation received due to a breach or cancellation of a contract is considered “other income” (Article 21, Paragraph 1, Item 10 of the Income Tax Act). However, in relation to a severance settlement, the amount received as compensation for damages or consolation money for damage to the freedom or honor of another person or inflicting mental pain, etc., is not taxable.[19)]

Ⅲ. Major Cases on Taxation of Severance Settlements

One example of a case of unfair dismissal recognized the severance settlement as non-taxable, while another decided a 22% tax rate applied to a severance settlement as “other income.”

Judicial guidelines for the relevant cases:

(1) If a settlement has been reached in a lawsuit, stating that the employer pays a certain amount to the worker, and that the worker gives up the rest of the claim during litigation, the amount paid should be viewed as dispute settlement money agreed to instead of giving up his/her claims. Even if the settlement amount was calculated by the employee's wages, it cannot be regarded as wages or severance pay.[20)]

(2) The “reward money” stipulated as “other income” in Article 21 (1) 17 of the Income Tax Act means money and goods paid as a courtesy in relation to handling office work or providing services, etc. The decision must be made after comprehensively considering the motive and purpose for seeking that money, the relationship with the other party, and the amount.[21)]

1. A case in which severance settlement was recognized as non-taxable [22)]

(1) Facts

19) Song, Gae-dong, “Damage Compensation and Tax Law,” Tax Law Research, Nov. 2004, p. 82.
20) Supreme Court ruling on Mar. 31, 2022, 2018da237237.
21) Supreme Court ruling on Sep. 13, 2013, 2010du27288; Supreme Court ruling on Feb. 9, 2017, 2016du55247.
22) Supreme Court ruling on Mar. 31, 2022, 2018da237237.

In December 2015, Director A, who was in charge of public relations for Qualcomm Korea, was fired for disclosing the contents of the Fair Trade Commission investigation into the company to the media without the company's prior approval. Accordingly, in March 2016, Director A filed a lawsuit against the company, claiming the dismissal was invalid. The court recommended that the company reconcile with Director A and pay an additional KRW 500 million to Director A. The company and Director A did not object to this, so reconciliation was finalized in October 2016. At the time of his dismissal, Director A was paid over KRW 200 million a year, and he had about 13 years left until retirement.

The company applied a tax rate of 22% to the reward money as "other income without necessary expenses" under the Income Tax Act. Of the KRW 500 million payment, KRW 110 million was withheld and KRW 390 million paid to Director A. Accordingly, Director A applied for a debt collection order to the court, saying that the collection of income tax and local income tax was unreasonable because the settlement amount was considered non-taxable income. The court accepted his argument.

(2) Understanding the judgment and related criteria

1) "Reward money," defined as "other income," means money and/or valuables paid as a courtesy in connection with handling office work or providing services (Article 21 (1) 17 of the Income Tax Act). Whether this falls under "other income" should be determined after comprehensively considering the motive and purpose for giving and receiving money or valuables, the relationship between the parties, and the amount of money.[23] In addition, even if the money and valuables seem to be paid out as administrative processing, etc., if they contain a nature that cannot be regarded as reward money in reality, none will be regarded as reward money.[24]
2) This judgment maintained the decision of the High Court during the original trial. "The payment of reconciliation money to the plaintiff is only in accordance with the binding force of the decision to recommend reconciliation in this case, and it is difficult to see that the plaintiff should be made to express "Thank you for early resolution of this dispute" to the defendant. The lawsuit was filed on March 7, 2016, and the decision to recommend reconciliation was made after the closing of pleadings and was finalized on October 22, 2016, so it is difficult to say that the dispute between the plaintiff and the defendant was resolved early.[25]
3) Therefore, the issue is whether or not the legal nature of this severance settlement is as "reward money" equivalent to "other income." It may be other income if the employee agrees to a severance agreement to end the lawsuit, and the employer

23) Supreme Court ruling on Sep. 13, 2013, 2010du27288. Supreme Court ruling on Feb. 9, 2017, 2016du55247.
24) Supreme Court ruling on Jan. 15, 2015, 2013du3818.
25) Original ruling: Seoul High Court ruling on May 10, 2018, 2017na 2073137.

pays in return for this. However, in the process of the plaintiff arguing that his dismissal was unfair, the settlement money following the court's recommendation for mediation cannot be considered other income because it cannot be said to be an expression of appreciation by either party. Therefore, this severance settlement is tax-exempt as it is not earned income, retirement income, or other income.

2. A case in which severance settlement was recognized as reward money and other income[26)]

(1) Facts

1) The worker was hired by STX Engine Co., Ltd. in Changwon on May 10, 2004, and was fired on February 28, 2014. The worker applied for remedy against unfair dismissal with the Labor Commission, but was rejected on April 28, 2014. The employee then appealed to the National Labor Commission, where a mediation by the judgment committee resulted in reconciliation between the worker and employer. “The worker confirms that the employment relationship with the company has been effectively terminated as of February 28, 2014, and the company shall pay the worker KRW 25,302,000 (before tax), which is 6 months’ salary, as a dispute settlement by August 22, 2014. The parties agree not to raise any civil, criminal or administrative claims in the future in relation to this case, and to keep the details of this settlement confidential and never to disclose it to outside parties.”
2) On August 22, 2014, the company regarded the settlement money of KRW 25,302,000 as “reward money” under “other income,” and withheld 20% for income tax (KRW 5,060,400) and 2% for local income tax (KRW 506,040), for a total tax withholding of KRW 5,566,440. The balance of KRW 19,735,560 was paid to the worker.
3) The worker filed a lawsuit arguing that the settlement money in this case was not subject to taxation.

(2) Understanding the details of the judgment and the related criteria

1) “In the settlement of this case, it was confirmed that the employment relationship with the company was effectively terminated as of February 28, 2014, the date of dismissal of the employee, and the nature of the settlement money in this case is specified as dispute settlement money and in this case is only received on the premise that the dismissal dispute has been resolved due to mutual agreement, and

26) Supreme Court ruling on July 20, 2018, 2016da17729.

cannot be said to be earned income paid on the premise that the employment relationship continues. However, the company is paying the settlement money in this case as an example of helping to resolve the dispute regarding unfair dismissal claims quickly and amicably, such as by giving up on reinstatement and salary claims and not raising any objections in the future. So, the settlement money in this case is considered “reward money” under “other income” in Article 21 (1) No. 17 of the Income Tax Act.”

2) The original trial court in this case said, “It cannot be said that the reconciliation money paid by one party while making mutual concessions and compromises in the course of a fierce legal dispute is not a gift to be paid as an expression of gratitude.”[27] However, the Supreme Court regarded the severance settlement in this case as dispute settlement money and determined it as other income. In this case, there is criticism that the Supreme Court did not provide clear criteria for determining the severance settlement amount.[28]

Ⅳ. Conclusion

In legal disputes, such as relief applications against an employer for unfair dismissal or a lawsuit to confirm the invalidity of a dismissal, the employer pays the employee a severance settlement and the employee withdraws the application for relief in return. If this severance settlement is paid as compensation for emotional damage, it can be regarded as dispute settlement money and excluded from taxation. However, in many cases, the National Tax Service considers severance settlements as “other income” (reward money) under the Income Tax Act when the lawsuit is withdrawn by agreement between the two parties to the dispute.[29]

The actual amount a worker receives of a severance settlement depends largely on which taxation method the employer applies. Assuming that an employee with 10 years of service was dismissed and could receive KRW 100 million as a severance settlement, the employee expects that KRW 100 million will be deposited into his or her bank account. However, as a withholding agent, the employer must deduct tax and pay it to the National Tax Service. If the tax item is treated as earned income, the employee will receive only KRW 58,158,200 after KRW 41,841,800, or 42% is deducted for tax. However, if the settlement money is treated as other income, the employee will receive KRW 78 million after KRW 22 million (22%) is deducted for

27) Changwon Regional Court ruling on Mar. 24, 2016, 2015na9657.

28) Kang, Jihyeon, “Review of the 2018 Framework Act on National Tax and Income Tax Act,” Tax Law Research (25-1), Apr. 2019, p. 258.

29) National Tax Service Administrative Guidelines, Income, Withholding Tax Division-152, Mar. 26, 2012; Income, Income Tax Division-1126, Nov. 8, 2010; Choi, Jinsoo, Jeon, Youngjun, “HR and TAX”, Labor Law, May 2014, pp. 87-88.

tax. If this part is treated as retirement income, only KRW 5,024,523, or 5%, is deducted for tax, and the employee will receive KRW 94,975,477. If the termination settlement agreement is paid as compensation for emotional damage, it is not taxed. Therefore, even though an agreement is reached in a dispute over dismissal, another potential source of conflict appears regarding what tax is applicable. In this regard, when drafting a settlement agreement, one way of avoiding this potential dispute is for both parties to agree on the actual amount of the settlement money that will be deposited into the employee's bank account.

Ⅳ. Feature Articles

Workforce Restructuring-related Major Issues

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Restructuring Story

Ⅰ. Introduction

As the economy becomes more difficult, companies try to survive by reducing costs, especially with labor being the item that costs a company the most. Low labor costs help to overcome difficult times, thereby increasing the likelihood of survival. Restructuring is utilized by companies as a short-term effort to reduce labor costs. This restructuring can include unpaid leave, voluntary resignations, layoffs, etc., with layoffs being used as a last resort whenever possible. Before the economic crisis in 1998, the concept of a lifelong workplace was established along with the rapid growth of companies, and most employees continued to work until retirement; the laws and the system were set accordingly. However, during the economic crisis, the managerial dismissal law and the dispatched workers law were introduced as conditions necessary for procuring an IMF loan. Most of the companies suffering from the economic crisis chose to dismiss a large number of workers by using the managerial dismissal law (among other various methods of restructuring), and then, as the economy recovered, began using fixed-term workers or dispatched workers with lower labor costs instead of full-time workers. This type of employment raised concerns that all workplaces would use irregular workers only, and in order to cope with this trend, in 2007 the Non-regular Worker Protection Act was enacted to restrict the use of non-regular workers.

This type of employment has led to the establishment of dual employment structures in Korea. Full-time employees in large corporations are groups that receive stable employment and high wages, while non-regular workers are groups that receive insecure employment and low wages. The restructuring of SsangYong Motor is a typical example of the adverse effects of this dual structure.[30] During and since restructuring in 2009, more than 30 workers have tragically committed suicide over nine years, as a large number of workers in the first group were dismissed for managerial reasons and demoted to the second group. I will attempt to determine the most suitable restructuring methods by analyzing the restructuring of SsangYong Motor and by comparing that case with another in a foreign country.

Ⅱ. SsangYong Motor's restructuring: Layoffs[31]

30) Lee, Seungyun/Kim, Sungsup, "SsangYong Motor's layoff and sliding Korean society", Korean Social Policy, Volume 22, 2015, page 75.

31) Wikipedia online encyclopedia, key words: SsangYong Motor's Incident", downloaded on Oct. 23, 2018; Kwak,

SsangYong Motor has changed ownership (and names such as Shinjin Motors and Dongah Motors in the 1970s and 1980s), and eventually came to belong to the SsangYong Family Group in 1988. SsangYong Motor produced the Musso SUV in 1993 through technical cooperation with Mercedes Benz in Germany, and then produced the new Korando in 1996, making the company a representative maker of 4WD automobiles.

However, since 1992, deficits had accumulated and the company was sold to Daewoo Motor in 1998. When Daewoo went bankrupt in 1999, SsangYong Motor was moved to court administration and then sold to Shanghai Motor Company in 2004, after its management status had improved thanks to the court administration. After this, Shanghai Motor did not invest in new car development for four years and was placed into administration in court in 2008. Shanghai Motor withdrew from the Korean market, taking with it only current SUV technology and key personnel.

In April 2009 SsangYong Motor announced that it would cut 2,646 people (out of 7,135) in order to normalize management. In May 2009, the union took over one of plants in the Pyeongtaek factory, went on strike and proceeded to occupy the plant for 76 days, until August. The strike was stopped after a police suppression operation and successful negotiations between the union and the company. As a result, out of the original 2,646 employees, 2019 voluntarily resigned, 459 were put on unpaid leave, 3 were switched to the sales team, and 165 (159 production and 6 management) employees were laid off.[32)]

A total of 156 persons dismissed for managerial reasons filed suit against the company in November 2010 for invalid layoff.

On 1 August 2012, the court of First Trial said, "As a result of the financial crisis, there is no way to solve a liquidity shortage, and a company that is going through the regeneration process is forced to overcome the difficulties in management and lay off as part of restructuring to secure competitiveness through cost reduction. It is recognized that there is a necessity to carry out managerial dismissal."

On February 7, 2014, the Court of Second Trial (the High Court) said, "The 'Court of Appeal' has no problem in meeting the requirements related to the

Sangshin/Park, Myungjoon, "SsangYong Motor's incident: Review and Suggestion for better solutions", Labor Review, April 2013, Korean Labor Institute.

32) In June 2009, out of 2,646 employees, 1,666 left the company through voluntary retirement, and the remaining 980 employees (974 production and 6 management) were dismissed. Out of the 980 workers who were summarized through the labor-management agreement in August, 815 were unpaid leave (459), ERP resignation retirement (353), and the business was converted into employment, and finally 165 people were laid off.

selection of the dismissal candidates and the consent of the collective agreement. However, it is not clear that the actual requirements of dismissal as an effort to avoid dismissal are not implemented, and so this managerial dismissal has not satisfied the validity requirements of managerial dismissal as provided in Article 24 of the Labor Standards Act."

On November 13, 2014, the Court of Third Trial (the Supreme Court) said that that the "urgent management necessity" among the requirements of managerial dismissal should respect the judgment of management unlike the ruling of the High Court. In the judgment of "urgent management necessity", it is a requirement for judging the legitimacy of managerial dismissal. The existing interpretation in the Supreme Court accepts that there is objective rationality in order to cope with a crisis that the company may have in the near future. And this concept is also reaffirmed in this Supreme Court ruling.[33)]

In November 2010, SsangYong Motor was sold to Mahindra in India. Since then, SsangYong Motor has gradually reinstated workers previously placed on unpaid leave and dismissed other workers, in line with the company's business status. Following the reinstatement of 454 of the unpaid leave personnel in March 2013, 40 people were reinstated in February 2016, 62 in April 2017, and 16 in 2018. In September 2018 the company also agreed to complete the reinstatement of the remaining 119 dismissed workers by the end of the following year. This reinstatement was possible through the improvement in the management status of the company. As company sales improved (a deficit of KRW 141.2 bn in 2011, a deficit of KRW 9.9 bn in 2012, a deficit of KRW 8.9 bn in 2013 and finally a surplus in 2016), it outperformed GM Korea and Renault Samsung Motors, achieving third place in the domestic market in September 2017. (1st place was Hyundai Motor Company, and 2nd place was KIA Motors).

Ⅲ. Volkswagen restructuring: Job sharing[34)]

Volkswagen was founded as a German state-owned enterprise in 1937 under Adolf Hitler's Nazi government. After privatizing its shares in 1960, it became the largest automaker in

33) Lee Sung-gil, "SsangYong Motor, managerial dismissal was justifiable ", Labor Law, January 2015, Related Cases: Supreme Court Decision on Nov. 13, 2014 2014 Da 20875-20882 (for white color workers), 2012 Da 14517 (for blue color workers); Park Eunjung, "Urgent necessity for managerial dismissal," Labor Review, January 2015, Korea Labor Institute.

34) Kim Tae-jung, and others, "Cases and Implications of Labor-Management Relations in a Slowdown Economy," 「CEO Information」, Samsung Economic Research Institute, May 5, 2009; Lee Won-duk, 「News Insight」, National Future Research Institute, Aug. 8, 2016; Lee Dae-hee, "Volkswagen's job sharing for all tripartites", Pressian, June 17, 2009.

Europe following the acquisition of the Audi Group in 1969 and Skoda in 1990.

In 1993, Volkswagen reached a peak of 103,000 employees in Germany, but the factory made no profit at all. Wages of workers comprised 25% of sales (its ratio of wages vs. total sales was 20% higher than competitors such as Ford and Opel), and their productivity was the lowest in the industry. In 1992 Volkswagen's net profit was only 147 million marks, a drop of 87% from the previous year, and became a deficit of 1.94 billion marks in 1993. This was a result of the fact that Japanese car companies had entered the European market in full swing and the company could not handle the aftereffects of the collapse of the economic bubble which occurred after German unification. German media at the time pointed out that Volkswagen should take restructuring measures as soon as possible.

Volkswagen announced plans to cut 30% of its German workers (about 31,300) by 1995. The union, after consultation with the company, chose to shorten the working hours without wage maintenance, instead of dismissal. In November 1993, Volkswagen signed a labor-management agreement to strengthen job security and competitiveness after bargaining for four weeks with the union (which agreed to introduce job-sharing). This agreement was a dramatic resolution, created between a company that originally tried to dismiss 30,000 workers and a union that worked desperately against layoffs. The agreement included three points: ① The core of the job sharing initiated in 1994 was that the company guaranteed the employment of the workers, while the union agreed to shorten the working hours without wage preservation (from 36 hours to 28.8 hours per week, with the introduction of a 4-day week). This reduced labor time by 20% and labor income by up to 20%. However, due to employment security, the trust between the union and the company improved, and additional measures for labor flexibility were taken. ② In 1995, the Ministry of Labor introduced a "Work Time Account System"[35] that covered wages equivalent to the existing working hours when production was reduced; the deficient hours were settled during subsequent production. As a result, the company laid the basis for a flexible adjustment of production volume in response to fluctuations in demand, and the shift system also diversified into a one-shift system or a three-shift system, depending on the characteristics of each system. ③ Workers with reduced working hours received a block-time benefit from the government, guaranteeing paid vocational education for up to six months. As a result, workers were able to increase their work proficiency even during idle hours and the company was able to reduce labor costs.

In other words, the core content of the labor-management agreement was that first,

35) The Working Time Account System is a system in which German companies save overtime and use it as vacation time. The system is designed to be used as a means of reducing labor costs and securing workers' employment.

instead of guaranteeing the employment of all workers, they shortened working hours and cut labor costs, both by 20%. The second was to introduce a working time account system to replace overtime with vacation instead of allowance, while, if the work time fell short of the contractual working hours, the company would demand that the worker concerned work overtime when required. Through this agreement, the union achieved job security and the company was able to preserve its highly-skilled workforce as it controlled labor costs. The effects were immediate. In the first year, the company reduced labor costs by 1.6 billion marks. In addition, the proportion of labor costs to sales, which was 25% in 1993, dropped to 16% after six years. As a result, the labor productivity of workers, guaranteed to secure employment stability, rose by 6 percentage points.

Volkswagen's success was due to job-sharing and structural improvement. In particular, the innovation of the production process, which had been suffering from high cost problems, and the development of new cars suited to the market, coupled with effective marketing, saved the company. Cost reduction efforts such as platform integration and modularization greatly improved the profit structure of the company. At the time of the crisis in 1993, a total of 16 platforms were sharply reduced, enabling the company to succeed in common use and to produce a variety of derivative models at low cost. In 2000, Volkswagen had 10.3 models per platform, surpassing Chrysler (1.8), Ford (2.8) and GM (3.5). Furthermore, R & D costs, which are expensive due to the adoption of the joint platform, have declined by 3 billion marks annually.

In return for the union’s cooperation, the company responded with a guarantee of employment for all workers. The company also promised to create jobs by investing in the Hannover and Wolfsburg factories in Germany, instead of overseas factories. Volkswagen saved more than 1 trillion won (about 1.6 billion marks) over the year without employment reduction. The operating margin also improved from minus 8.7% in 1993 to plus 1.7% in 1998. Volkswagen's global sales volume has risen from 5.1 million units in 2004 (fourth in the world) to 9.93 million units in 2005, becoming the world's second-largest automaker after Toyota.

Ⅳ. Lessons and Challenges

A company is a creature that constantly changes or disappears, in a competitive market. In order for a company to survive in a 'survival of the fittest' environment, constant adaptive restructuring is necessary. However, it is wrong to think that restructuring always requires mass dismissal. Restructuring can encompass various methods such as cost reduction and productivity improvement, reduction of working hours and wage cuts, in addition to labor-management cooperation. If dismissal is

inevitable as a last resort, the dismissed workers should participate in job training and be given an opportunity to rejuvenate their mental and physical condition so they can get a new job and will not stay unemployed for a long period of time.[36)]

Volkswagen introduced a "work-sharing" system that increased productivity while preserving jobs, which was a shock to Korean industry, which focused only on the dismissal of workers when restructuring.[37)] In 2009, SsangYong Motor could have overcome many difficulties with incentives such as job-sharing rather than restructuring with one-sided layoffs, if both labor and management had only recognized their situation more maturely.

The survival of a corporation makes possible the continuous employment of workers. Since the employment of workers cannot be guaranteed without the survival of the enterprise, labor and management should seek a desirable direction for the survival of the enterprise and for the guarantee of employment. Managerial dismissal hinders the development of a company due to the lack of potential human resources due to the withdrawal of competent personnel. Therefore it is necessary to recover and restore employment by dividing the jobs in the manner of Volkswagen. This is a restructuring method in which labor and management can gain mutual benefit by restructuring in a manner in which both the company and the workers share the pain and overcome the difficulties.

Ⅴ. Conclusion

Dismissed workers from SsangYong Motor endured the hardships of living as well as mental suffering during a long unemployment period, resulting in the deaths of more than 30 dismissed workers, who committed suicide. This was caused by the shortage of safety nets in Korea's social security system and the dual employment structure. As a solution for this problem, companies should adopt a variety of restructuring methods to enhance their competitiveness, while individuals should have lifelong vocational abilities, rendering them capable of re-employment. In addition, the government should provide unemployment benefits for job security and vocational skills education for reemployment so that workers can recover from unemployment.

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36) Lee Won-deok, "For restructuring, is mass unemployment inevitable?" National Future Research Institute, Posted on its website on Aug. 2, 2018.

37) Lee, Jinchul reported in E-daily paper: "We need to make mutual concessions between labor and management", June 1, 2016.

Relevant judicial rulings concerning requirements for dismissal for managerial reasons

Ⅰ. Concept

Dismissals for managerial reasons are for the purposes of reducing the number of employees because of organizational restructuring due to economic, industrial and/or technical changes.

Ⅱ. Effect of Dismissal for Managerial Reasons

A dismissal with proper cause shall satisfy the following conditions. If these items are satisfied, the employer can be exempt from legal responsibility as proper cause under the four conditions of Article 24(1).

① Urgent necessity in relation to the business;
② Efforts were made to avoid dismissal;
③ Fair criteria for the selection of those persons subject to dismissal; and
④ Informing the employee representative 50 days in advance and consulting in good faith.

Ⅲ. Requirements of dismissal for managerial reason

1. Urgent necessity in relation to business

(1) Related article

> Article 31 of the Labor Standards Act (Restrictions on Dismissal For Business Reasons)
>
> (1) Where an employer wishes to dismiss a worker for business reasons, there must be an urgent necessity in relation to business. It shall be deemed that there is such an urgent business necessity in the case of business transfer, merger, or acquisition of the business to prevent business deterioration.

(2) Degree of urgent necessity

○ In practice, a workforce cut for 'an urgent managerial reason' must be carried out not merely to overcome the poor performance of a business, but also to change

work organization or introduce new technologies with a view to improving productivity or restoring or strengthening competitiveness, or to keep up with the innovations and structural changes in the industry. Namely, the dismissal for managerial reasons has been conducted on the grounds of technological needs as well as managerial needs. Accordingly, the requirement of 'an urgent managerial reason' should not be interpreted to mean that only the need to keep the business afloat is justifiable. Rather, it seems that when a workforce reduction is reasonable in objective terms, there is 'an urgent managerial reason for dismissal.' (Supreme Court on ruling Dec. 10,1991:No.91Da8647)

○ “The requirement of 'an urgent managerial reason' should not be interpreted to mean that only the need to keep the business afloat is justifiable. Rather, it seems that when workforce reduction is reasonable in objective terms, there is 'an urgent managerial reason for dismissal.” That is, a workforce cut for 'an urgent managerial reason' has been carried out not merely to overcome the poor performance of a business but also to change the work organization or introduce new technologies with a view to improving productivity or restoring or strengthening competitiveness, or to keep up with the innovations and structural changes in the industry. (Supreme Court on Ruling May 11, 1999: No. 99Doo1809)

(3) Continuity of necessity in relation to business

“Urgent necessity in relations to business” for the purpose of dismissal for managerial reasons requires the deterioration of the business by which the company is obliged to reduce a number of employees, and the financial difficulties that have been repeated and cannot be expected to be overcome in the near future. Accordingly, the fact that the union's strike made it impossible to maintain normal business operations does not give the employer the right to close the business for 'an urgent managerial need'. (Supreme Court on ruling Jan. 26,1993:No.91Nu13076)

(4) Examination of necessity in relation to business

It is the judicial ruling’s basic inclination that the matter of “urgent necessity in relation to the business” shall not be estimated on the basis of partial business portions or a certain branch’s business condition, but shall be estimated synthetically by evaluating the entire business.

(5) Relevant judicial rulings

○ Abolition of the related department due to cessation of production or reduced production (Supreme court Jan. 12, 1990: No.88Daka34094)

The company whose business is to produce aggregates and ready-mix has been

in operation on the designated side of the Han river, but has to stop producing aggregates and reduce its business volume. Therefore, the company had to abolish certain workplaces and reduce business volume. This case was considered an urgent necessity in relations to business.

○ Abolition of one section due to managerial reasons and merger of all employees to other business (Supreme court Dec. 2, 1987: No.87Daka2011)

A school corporation, which was operating a hospital, abolished an Industrial Health Section and assigned the related jobs to its subsidiary Industrial Health Research Center. Then, the school dismissed all employees concerned in order to transfer them with similar working conditions to the Research Center, which was held acceptable as justifiable dismissals.

○ Reorganization designed for business improvement (Supreme court June 14, 1994: No.93Da48823)

In the course of being transferred to the private sector, the public company has to prepare for free market competition in the fertilizer industry, cope with decreasing competitiveness due to careless business practices, and streamline or revise the organization to resolve deficit issues. Therefore, the dismissals were justifiable.

○ Abolition of a few business parts which are chronically losing money while the total business is in the surplus condition. (Seoul district court Nov. 7, 2000: No.11672)

In view of the total business, the company recorded surpluses in the business performance. However, some business parts are chronically losing money due to work inefficiency. So, as such chronic deficit is due to an organizational problem, the dismissal of employees by the abolition of the corresponding business parts can be accepted as justifiable.

○ In case the company has abolished one business part since it has operated two business parts separately (Supreme court May 12, 2002: No.90Nu9421)

An employer can abolish his business corporation and dismiss all employees, which is the owner's managerial right in principle. If the company owner disguisedly closed his corporation in an attempt to disturb the labor union's activities, it can be considered an unfair labor practice. The employer operated his own business, but, due to a business reason, he separated his business into two business units, and divided their personnel, facilities and accounting. However, although the two businesses have very different internal business operations, they cannot be deemed as different entities because the businesses are owned by the same person. In this case, if one business part is abolished, it can be interpreted

as streamlining the business rather than abolishing one business. Therefore, the employer cannot dismiss all employees working in the abolished business unit.

2. Efforts to avoid dismissal

(1) Related article

> Article 24 of LSA (Restrictions on Dismissal for Business Reasons)
> (2) In a case following under paragraph (1), the employer shall make every effort to avoid dismissal and shall establish and follow reasonable and fair criteria for the selection of those persons subject to dismissal. In any case there shall be no discrimination on the basis of gender.

○ An employer has made “efforts to avoid dismissal” by taking all kinds of managerial measures in order to cope with business difficulties facing the company. However, if he could not overcome business difficulties by such efforts and he could not expect any more efforts except for dismissal, dismissal for managerial reason can be accepted as the last means.

(2) Concrete methods to avoid dismissal (examples suggested by the court)

○ Improvement of business policies or change of managers, or business rationalization through scientific and rational management of production methods
○ Reduction of office size and integration of the organization
○ Relocation of personnel by transfer
○ Reduction of outsourcing personnel (subcontract, temporary, or dispatched employee)
○ Cessation of new hiring and discontinuance of renewal of short term contracts
○ Reduction of production, cessation of holiday / overtime work, use of unused leave (annual and monthly leave) and applying selective working hours
○ Reduction of directors’ wage, abolition of bonuses or special allowances exceeding the CBA’s standards, and other cost saving measures
○ Temporary suspension (closing, stay at home)

○ Promotion of early retirement or voluntary application for retirement

(3) Judicial rulings about efforts to avoid dismissal

① In case of no other methods except dismissal (Supreme court May 12, 1992: No. 90Nu 9421)

The company abolished the business part 1 due to urgent necessity in relation to business and is about to dismiss all employees. The business part 1 and business part 2 have not had any business relations in the sharing of history, operating management, and/or exchanging employees, and each business part has maintained its own independent unit. In this case, the company shall not make efforts to avoid dismissal by transferring or dispatching the employees belonging to business part 1.

② Supreme court December 22, 1992: No.92Da 14779)

The company whose business is to produce, sell and export clothing has three plants: plant A, plant B, and plant C. Plant A produces high-grade female clothes, Plant B produces exporting clothes, and Plant C produces shocks for their major products. Plant A requires very high quality technology and skill due to production of high-grade female clothes and pays higher wages in comparison with Plant B which produces a great number of exporting clothes in a mass-production line. Plant C requires simple skill and pays less than Plant B. Therefore, each plant operation is too different to exchange employees. When the company decided to close Plant B due to urgent necessity in relation to business and dismissed all employees, without transferring its employees to Plant A and Plant C, it cannot be accepted that the company did not make efforts to avoid dismissal.

③ In case of no effort to avoid dismissal, such as transfer to other plant or temporary closing, etc. (Central labor relations commission April 19, 1993: No.92Buhae341)

The company closed a plant in a certain area due to chronic deficit and did not transfer employees to other plants. The company did not take efforts to avoid dismissal, such as temporary suspension, etc. Therefore, it can be admitted that the company did not complete efforts to avoid dismissal

④. In case of no efforts such as promotion of voluntary retirement, streamlining working process, etc. (Central labor relations commission January 11, 1995: No.94Buhae317)

When the company is expected to reduce personnel in the winter season, it did not promote voluntary retirement, but rather hired new employees. The company also did not make efforts to establish concrete plans to promote the efficiency of

production and to prepare for the time to reduce personnel. Therefore, it cannot be held that the company made its best efforts to avoid dismissal.

3. Fair criteria for the selection of those persons subject to dismissal

(1) Related article

> Article 24 of LSA (Restrictions on Dismissal for Business Reasons)
> (2) In a case following under paragraph (1), the employer shall make every effort to avoid dismissal and shall establish and follow reasonable and fair criteria for the selection of those persons subject to dismissal. In any case there shall be no discrimination on the basis of gender.

○ Criteria for the selection of those persons subject to dismissal are normally described in the Collective Agreement or Rules of Employment and can be admitted as long as they are unbiased and generally accepted in society. However, if not specified, an employer can set rational and fair principles and select those persons subject to dismissal.

(2) Judicial rulings about fair criteria for the selection of those persons subject to dismissal

If an employer selects one of the three criteria - age, service period and service record - without considering each subjective condition for the employees' dependents, property, health condition, etc, the criteria cannot be validated as rational or fair (Seoul District Court, 99 gahap 55101).

4. Sincere consultations with the employee representative

(1) Related article

> Article 24 of LSA (Restrictions on Dismissal for Business Reasons)
> (3) Where there is an organized labor union representing more than half of the workers at a business or business location, the employer shall inform and consult in good faith with the labor union (where there is no such organized labor

union, this shall refer to a person who represents more than half of the workers; hereinafter referred to as "employee representative") regarding the methods for avoiding dismissals and the criteria for dismissal under the provisions of paragraph (2) at least 50 days before the intended date of dismissal.

○ When an employer tries to consult with the employee representative in good faith, but cannot reach an agreement, the dismissal of the employee according to the employer's own criteria is not invalid. Provided, however, that the criteria shall be rational and fair as a precondition.

Selecting those Subject to Dismissal for Managerial Reasons

Ⅰ. Requirements for Dismissal for Managerial Reasons

According to paragraphs (1) to (3), Article 24 of the Labor Standards Act, an employer’s decision to dismiss an employee for managerial reasons shall be based on urgent managerial needs. The employer shall make every effort to avoid dismissal of employees and shall select employees to be dismissed by establishing rational and fair criteria for dismissal. With regard to the possible methods for avoiding dismissal and the criteria for dismissal, the employer shall give notice, 50 days prior to dismissal, to a labor union which is formed by the majority of all employees in the business or workplace concerned and consult with them in good faith.

1. In consideration of all the circumstances collectively and synthetically, the dismissal shall be recognized to have objective rationality and social validity. (Supreme Court 96 nu 8031)
2. Each of the above qualifications is not defined or fixed, but shall be determined flexibly in relation to meeting other requirements in actual cases. Whether the dismissal for managerial reasons in a substantial case meets each of the above requirements shall be judged synthetically in consideration of each individual situation related to each requirement. (Supreme Court 2003 du 4119)

Ⅱ. Fair criteria for selecting those subject to dismissal

1. When the employer selects those subject to dismissal based on employee age, service years, number of dependents, faithfulness in attendance, rewards and punishments, certificates of qualification, etc., this selection is rational and fair criteria for dismissal because objectively measurable methods and distinguishable criteria were applied after considering subjective situations for each employee and the company synthetically. (Seoul Administrative Court 2005 Guhap 15694)
2. Concerning the criteria and method to select those subject to dismissal for managerial reasons, the employer shall not consider only a single factor, like employee job skills, but also consider employee living conditions, equity between employees, etc. The criteria and methods are mostly at the employer's discretion, but the criteria and methods of selection decided upon by mutual agreement between the employer and the employee representative are considered rational, unless they are extremely subjective or unjustifiable. (Seoul Administrative Court 2005 Guhap 5086)
3. In cases where dismissal of employees for managerial reasons must be done, it is desirable that the employer shall not only select those employees working in a division that will be abolished, but select those subject to the dismissals from throughout the company, as employees are transferable in personnel management. (Gungi 68207-1905)
4. If an employer excludes some employees in production from those subject to dismissal for managerial reasons, it shall be accepted as rational if they are skilled craftsmen and those possessing essential certificates of qualification to operate production lines. (Supreme Court 2000 du 8486)
5. Even though the only employees dismissed for managerial reasons were labor union members, this is justifiable if the employer consulted with the labor union in advance and dismissed them according to objective and fair criteria. (Seoul Appellate Court 2000 nu 6963)

Ⅲ. Unfair criteria for selecting those subject to dismissal

1. Criteria that only considers company circumstances

(1) In the selection of those subject to dismissal, if the employer considers educational background as the sole criteria for dismissal, and proposes voluntary resignation only to those with lower educational levels, and dismisses the employees concerned without making any effort to avoid dismissal, these dismissals would be unfair because they

were not done according to the required procedures. (NLRC 2004 buhae 78)

(2) When dismissing temporary employees for managerial reasons, a local government did not make an effort to avoid dismissal, and dismissed the temporary employees according to age, from the oldest, without determining rational and fair criteria for dismissal. The local government also implemented the dismissal unilaterally, without consultations with the employee representative, so this dismissal is an unfair dismissal, and an abuse of personnel rights. (NLRC 2001 buhae 192)

(3) An employer selected employees subject to dismissal for managerial reasons on the basis of age as unilateral and subjective criteria. If the employer did not consider the degree of disadvantages affecting the employees concerned, the necessity of social protection, contributions made or employee attitudes during their service period, etc., this dismissal cannot be seen as rational and fair criteria for dismissal. (Seoul Administrative Court 2001 gu 26794)

(4) It is hard to accept as fair dismissal for managerial reasons if the employer selected those subject to dismissal only on the basis of disciplinary punishment received by certain employees. Even though such criteria were accepted as rational, most disciplinary punishment of the employees concerned cannot be accepted as justifiable in view of their procedures, timing, and purpose. (Seoul Appellate Court 2002 nu 11860)

(5) In one case, a company unilaterally decided that length of employment would be the main criteria in choosing employees to dismiss for managerial reasons. In other words, those who had served the company longer, although they had contributed more than other workers to the company, were still more likely to be dismissed for managerial reasons. Other things, like work attitude, were also considered, but they were not weighted as heavily against an employee in determining dismissal, as length of employment. Therefore, this selection cannot be accepted as rational and fair. (Seoul Administrative Court 99 gu 34600)

(6) If the employer did not have prior consultations with the employee representative regarding criteria for dismissal for managerial reasons, and the possible methods for avoiding dismissal, dismissal for managerial reasons is illegal since correct procedures were not followed in choosing objective and socially justifiable rationale. (Seoul Supreme Court 99 nu 4930)

2. Criteria deficient in rationality and fairness

(1) In cases where the employer selected as subject to dismissal for managerial reasons, those employees who did not agree to transfer and also did not agree to voluntary resignation, this selection cannot be justifiable based upon rational criteria. (Seoul Administrative Court 2007 Guhap 16103)

An employer notified one of his employees several times of an intention to dismiss him for managerial reasons because of his constant refusal to transfer to another department. So, after consulting with the labor union, the employer dismissed the employee for managerial reasons particularly because he did not

agree on a transfer and also did not respond to suggestions to voluntarily resign. This selection for dismissal cannot be accepted as being done according to objective and rational criteria. Even though the employer completed consultation with the labor union, this selection for dismissal violated the principle of the Labor Standards Act and cannot be accepted.

(2) Even though requirements for dismissal for managerial reasons were satisfied, choosing those to be dismissed for managerial reasons by vote, cannot be admitted as justifiable. (Seoul Adm. Court 99 gu 30967)

An employer selected those employees subject to dismissal only by means of a vote by committee members, without any objective evaluation materials or evaluation criteria. This dismissal for managerial reasons could be affected by individual relationships more than by company criteria, so there is a great possibility to distort the result.

(3) An employer dismissed an employee who refused to accept an honorary resignation recommended by the employer, even though his dismissal wouldn't have any effect in reducing labor costs. This cannot be accepted as a socially fair and objective dismissal for managerial reasons. (Seoul Appellate Court 97 gu 47660)

As one method to avoid dismissal, the employer proposed honorary resignation and a position transfer to short-term contract employment to an employee who was going to retire from the company in 9 months. As the employer would not be able to reduce his labor costs by dismissing this employee, this dismissal, because the employee would not voluntarily resign, cannot be accepted as fair or objective.

(4) Even though collective bargaining had stipulated the order of and method by which employees were subject to dismissal, if the employer selected the employees subject to dismissal simply at his own discretion, this selection was not made in a justifiable way, but is a violation of rational and fair criteria. (Seoul Appellate Court 2003 nu 4838)

Methods for Individual Meetings regarding Managerial Dismissal

In the following sections, I would like to introduce methods for communicating managerial dismissal through individual meetings to ensure smoothness of proceedings.

It is essential to establish and prepare systematic plans thoroughly in advance to carry out a successful individual meeting for voluntary resignation. These processes will greatly reduce interviewer difficulties, allow the targeted employees to retain dignity, and minimize negative feelings about the Company.

Ⅰ. Prior Preparations

Sufficient preparations minimize potential for labor disputes, prevent confusion for both the targeted employees and the Company, and maintain consistency in meeting details and other related items.

Checkpoint	Details
Interview time and place	Beginning of the workweek and a quiet place without interruptions are recommended (it is best to avoid end of the week or right before holidays).
Interview scripts	To explain clearly and concisely what measures are taking place, the script needs to be completed beforehand (with one or two actual reasons).
Expected reactions	Attempt to predict and prepare for emotional reactions from targeted employees in advance
Expected questions	It is important to respond to questions with accuracy and consistency.
Control of emotions	Do not load the meeting with individual burdens or emotion. While pursuing voluntary resignation, it is necessary to focus on structured scripts. Do not talk with a third party.
Selection of targeted employees	Are there any legitimate reasons for selecting these specific employees?
Reason for dismissal notice	If the reason for dismissal was due to performance results, it is essential to explain the reason clearly, but detailed examples do not have to be mentioned. Objective personnel evaluations need to be prepared, and reasons for dismissal shall be concise, refraining from ambiguity.
Expected emotion from targeted employees	- Did the person expect dismissal? - How would he/she accept a dismissal notice? - Does the person have any physical or medical problems?

Ⅱ. Matters to be Considered before Meeting

- Do not load up the meeting with individual burdens or emotion.
- Focus on the employee.
- Do not go off the script.
- Avoid talking about unnecessary possibilities or giving hope.
- Do not discuss the problem or engage in defense.
- The decision was not an easy one, and the employee should understand that the Company considers its employees as its top priority.

Ⅲ. Detailed Meeting Procedures

1. The employee is offered a seat. Go to the main subject directly without additional explanation.
2. Starting (Go to the main subject directly.)
   "The reason I would like to talk with you is, as you know, the Company has decided to reduce the number of employees for managerial reasons. I'd like to briefly explain the unavoidable nature of this decision."
3. Decision and background
   "This reduction of employees has been decided after considering all factors in the process of helping the Company survive. In determining the criteria for selection, we defined essential functions and calculated the appropriate number of employees needed. We then selected extra employees to resign after considering recent performance and other factors. As announced in advance, we regret that your position will be terminated. This decision won't be reversed, but is official and final."
4. Explanation of the ERP package
   Introduction of related documents and ERP package (resignation letter, compensation bonus, unemployment allowance, etc.)
   - "The Company has decided to pay additional compensation outside the statutory severance pay to those who are subject to dismissal for business reasons." (Resignation-related documents are handed over.)
   - "Right after you sign the related documents, all benefits listed in the letter will be given to you. Those benefits contain ----."
   - "You do not have to sign now. Please submit it before the deadline, which is _____ (month & day), ____ days from now. Should the deadline pass without the Company receiving your signed resignation letter, all ERP benefits will be cancelled and you will be placed on the waiting list. During your wait without position, you will receive 70% of your current wages or you will be suspended without pay. At any time after being placed on the waiting list, you may be

dismissed without compensation."

- "If you have any questions, please feel free to ask."

Ⅳ. Expected questions and answers

Questions	Answers
Why was I selected? Who made the final decision? What are the criteria behind the performance rating?	The criteria for selection are employee performance, ability to do the assigned work, job experience, necessity in the organization, experienced career, etc. This decision was not easy, but after considering all the facts, management has approved it.
What is the remedy process?	In relation to this issue, you can always meet the top management. However, since the management made this decision after careful consideration, there will be no change to its decision.
Can I work a little longer for some period of time?	No, you cannot. It would be better for you and the Company if you spend more time towards a new career. We wish you success in making other opportunities and achieving your goals.
Can I be re-hired?	It is possible you will be re-hired, however, you must not expect this outcome. Instead, we recommend that you begin working on a future outside the Company.
Can you provide a good reference letter for any potential employers in the future?	The company will share objective facts concerning your work with us (number of service years, job description, etc.). Also, we will issue a career certificate for three years after your date of resignation.

Why can I not move to a position in other team?	Before making our final decision, we considered all possible alternatives. This is the conclusion we have reached.
I would like to talk more with senior manager xxx.	Of course, you can meet with senior manager xxx. However, he/she understood this decision sufficiently and agreed to it.
How can the company treat me like this after serving x years?	This decision was made not at an individual level, but at the company level under unavoidable situations. We have considered all factors carefully to avoid this decision.
Is xxx included in this ERP?	We cannot give information regarding whether other specific people were dismissed or not.

Ⅴ. Reactions of Targeted Employees and Dealing with them

Constructive / realistic (most reasonable emotions)	- It is necessary to listen to the employee carefully and try to provide plenty of information; - This information should make the next steps clear.
Anger (defensive and/or argumentative)	- Listen to the expression of anger first, then help maintain calm.
Shock (no reaction or passive due to shock, dismay, or uncertainty)	- Allow time for reaction or any questions.
Denial/Control (unemotional or relaxed)	- If the person hides his/her emotions, this may indicate serious mental distress. It is highly recommended that another time be planned to offer the Company ERP to the employee again.

Managerial Dismissal for Office Workers

Ⅰ. Summary of Related Case

"Survival of the fittest" applies not only to employees, but also to companies. Companies that cannot adjust to changes disappear, but those that can quickly make themselves relevant to changes can survive. Company M (hereinafter referred to as "the Company") requested this labor law firm to reduce redundancy in its management consulting business. The Company hired about 20 consultants and support personnel, and was operating two business organizations in human resources management consulting and outplacement consulting. As the Company had been gradually losing money with outplacement consulting, it decided to close this failing division and focus more on human resource management consulting. Due to redundancy arising from this reorganization, the Company decided to dismiss 7 redundant employees for managerial reasons. Those targeted for this managerial dismissal were five regular employees and two non-regular employees. The Company asked for the reductions to be completed within three months.

Ⅱ. Details of Managerial Dismissal

In order to complete managerial dismissal within the expected deadline, the Company shall establish plans and implement them according to schedule. It is hoped that employees targeted for managerial dismissal voluntarily agree to accept early retirement program (ERP) compensation and resign, but in reality it is very hard to conclude acceptable agreements as employees demand more compensation from the company. Accordingly, the company can initiate negotiations with those targeted employees when it is implementing procedures necessary (according to Article 24 of the Labor Standards Act) for managerial dismissal at the same time.

The Company immediately terminated the service agreement for two dispatch employees (a receptionist and an office assistant) by paying 30 days' dismissal allowance, in keeping with a special article of the "Service Agreement" where party A can terminate the contract in cases of redundancy.

In seeking applicants for the ERP, two persons from the division to be closed applied, and the Company ensured them the ERP bonus, unemployment allowance, etc. However, the Company had to persuade, through individual meetings, the remaining three employees to accept ERP resignation. The Company explained to these three employees that they would be dismissed without compensation if they refused to voluntarily resign and receive an ERP bonus, as the Company was following the correct procedures to

dismiss for managerial reasons. These employees accepted the ERP as the best option.

Timeline	Major Points	Action Plans
September	Occurrence of redundancy	Redundancy due to deterioration of business
Sep ~ Oct	Employee transfer	Efforts to avoid dismissal by transferring personnel, etc.
	Use of ERP	Announcement and promotion of the 1st ERP
	Cancellation of the dispatch service agreement	Notification of dispatch service agreement cancellation for two persons
Oct 1	Announcement of managerial dismissal	Items to be announced included business conditions for the Company, necessity of managerial dismissal, and detailed timelines
Oct 2	Interviews with targeted employees	Guidance for resignation with ERP compensation
Oct 1 ~ Nov 20	Consultation with the employee representative (50 days)	Efforts made to avoid dismissal, criteria in choosing specific employees
Nov 20 or extension	Notice of managerial dismissal	Dismissals after giving employees 30 days' notice, or 30 days' dismissal allowance; if necessary, the Company initiates a 2nd ERP.

Lay-offs of Production Workers

Ⅰ. Introduction

When experiencing difficulties many companies, viewing labor as one of their highest expenses, prefer to reduce it as a first reaction, but arbitrary lay-offs can cause significant conflict and legal disputes between the company and its workers because

their keeping job is a matter of their survival. Therefore, using a lay-off as a way of cutting costs should be the final step. In a lay-off situation, office workers usually have no problem getting hired elsewhere and tend to readily accept when they are asked for voluntary resignation in return for reasonable financial compensation, while production workers will desperately object to a lay-off because it is almost impossible for them to find similar jobs with equivalent wage levels. Accordingly, laying off production workers is extremely difficult to implement due to persistent objections from the related labor union as well as the workers involved. An example of this, showing how difficult lay-offs can be for both management and labor, is the situation at SSangyong Motor Company where recently, more than 20 production workers committed suicide as a result of being laid-off.

The following case demonstrates a lay-off that this writer provided legal advice for and which took place from December 2012 to August 2013 and that was reasonably implemented despite 'difficult situations' while doing so. Here, 'difficult situations' means that those subject to dismissal were production workers, that there was a labor union (hereinafter referred to as "the Labor Union") which consisted of all production workers, and that the Collective Agreement contained an article which restricted lay-offs.

Ⅱ. Major Disputes at Each Implementation Stage and their Resolution

1. Planning stage

(1) I had taken a project for lay-offs within an automobile parts production company (hereinafter referred to as "the Company"), in December of 2012. This company was foreign-owned and had suffered continuous deficits since 2008, as it could not get new competitive automobile products from its American headquarters company, and expected to see a continued deficit in the near future. In order to reduce this ever-growing deficit, the Company had to reduce its work force by a minimum of 30%. The HR director of the Asia-Pacific Regional Head Office was of the opinion that the Company would close its doors if it could not implement these lay-offs in time.[38)]

(2) When designing its lay-off plan, the Company had to reduce personnel through use of a voluntary early retirement system based upon a managerial dismissal schedule. As job security was part of the Collective Agreement with the Labor Union, it was considerably difficult to implement any arbitrary lay-off. The job security agreement stipulated that: "When the Company intends to reduce personnel due to urgent

38) The Company was established in Korea 30 years ago, and had suffered increasing deficits and decreasing sales since 2008. The number of employees had also gradually been reduced from 400 in 2008 to 333 in 2010, and then to 270 in 2012.

business reasons, it shall inform the Labor Union of the reason(s) 60 days prior to implementing dismissals and reach agreement with the Labor Union on the criteria and procedures for determining those who shall be subject to dismissal, as well as provisions for ERP bonuses. Provided, that the order of priority shall begin with voluntary applicants and most recently-employed." The conditions in a Collective Agreement that a company shall "reach an agreement with the Labor Union" and "the order of priority shall begin with ……most recently-employed" can be the biggest barriers in the process of managerial dismissal. The reason for this is because these conditions frame the essential procedures required by law pertaining to managerial dismissal which the Company must follow. As for the ERP bonus, reaching an agreement is likely to be difficult as the Company expects a lower amount while the Labor Union may insist on the maximum amount. So, if the Company had sufficiently consulted with the Labor Union regarding the level of the ERP bonus, it would be no problem for the Company to determine unilaterally an appropriate level for an ERP bonus. The other two conditions were that "the Company shall reach agreement with the Labor Union on the criteria…… for determining those who shall be subject to dismissal," and "if the two parties cannot reach such agreement, the Company shall adhere to procedures that choose voluntary applicants and recent employees first". This means that the Company has to respect seniority and select most-recent employees as those subject to managerial dismissal in cases where there is no agreement on the matter. Accordingly, in order to deal with the restrictions on managerial dismissal, both parties are required to decide what would be an appropriate ERP bonus through consultation, and work hard to reach an agreement on fair criteria for dismissal. In the absence of this, the Company will have to dismiss based simply on seniority.

2. Negotiation stages with the Labor Union

(1) After announcing the plan for managerial dismissal in January 2013, the Company began negotiations with the Labor Union regarding efforts to implement dismissals and selection procedures for those subject to dismissal as required by the Labor Standards Act, Article (24), "Dismissal for Managerial Reasons". When the Company announced its intention to implement managerial dismissal, the Labor Union responded that it would cooperate with the Company if the Company would pay two years' average wages as an ERP bonus. To this, the Company proposed an ERP bonus of 6 months, after getting approval from the American Head Office, as it was running out of sufficient funds due to the long-term deficit accumulated over the past years. The Labor Union rejected such a low ERP bonus, and held a special ceremony where union officers shaved their heads and put up printed banners objecting to the managerial dismissal.

(2) The Company made efforts to negotiate with the Labor Union several times from March to May of 2013, but could not reach an agreement on ERP bonus levels or who would be subject to managerial dismissal. The Labor Union became subject to increasing pressure as they were aware of the typical tendency of foreign companies

to close their businesses if they could not make money due to continuous deficits, and gradually started to compromise regarding lay-offs. On July 13, 2013, the Labor Union demanded an increase in the ERP bonus, explaining that the average wages for six months could be an amount equivalent to the average wages for only four months two years ago as they had not done much overtime lately. The Company accepted the Union's explanation as reasonable and received special approval for an increase in the ERP bonus up to 8 months for production workers, while maintaining the 6 months' average wages for office workers.

(3) The Company agreed with the Labor Union on the ERP bonus levels and the implementation of a Voluntary Retirement Program, but the Labor Union insisted that the Company should implement the managerial dismissal beginning with the most recently-employed, as there had been no agreement on those. The Company proposed that it should determine those subject to dismissal based on quality of performance and number of accidents over the past three years. While negotiating this matter, the Company instigated a Voluntary Early Retirement Program by posting the information within the company premises, but no production workers applied for this while only a few office workers applied. The Company realized that it would be difficult to effectively reduce the number of employees through the Voluntary Early Retirement Program, and so informed the Labor Union that it was obliged to implement managerial dismissals with the recently-employed to be dismissed first. Based on this information, the Labor Union feared that the Company would implement another lay-off plan next year if it conducted managerial dismissals based on the principle that the most recently-employed were to be dismissed first, because the Company would not be able to reduce its labor costs and thereby improve the competitiveness of its products. Therefore, the Labor Union responded to the Company that it would accept the Company's criteria for those subject to dismissal if the Company would accept the two following conditions: (1) the Company would reduce the number of employees to be dismissed and (2) would implement the Voluntary Early Retirement Program one time more. To this, the Company agreed to reduce the dismissals from the original 60 production workers and 14 office workers to 40 production workers and 8 office workers. In addition, the Company implemented the Voluntary Early Retirement Program from July 13 to July 25, 2013. During this period, the target number of office workers applied, but only 10 production workers, leaving 30 still to be dismissed.

3. Implementation stage

(1) On July 25, 2013 the Company announced the managerial dismissals, informing the 30 production workers selected by following the criteria of those subject to dismissal that the Company and the Labor Union agreed upon, and put them on paid leave. In line with this, the Company informed the Labor Office of the plan for managerial dismissal. In addition, the Company stipulated in its dismissal letter that the affected persons would be able to apply for a Voluntary Early Retirement Package at any time prior to his/her termination date. Although the 30 production

workers who received the advance notice of dismissal were supposed to wait at home, they came to the Company premises and occupied the Labor Union office. They then threatened the Labor Union Chairman, stating that he must hold an impeachment vote against union officers, and claiming that the Labor Union chairman's decision was null and void as it simply supported the Company's unilateral view. The dismissed workers, supported by former Labor Union officers led action, to impeach the current Union officers. The Labor Union Chairman feared violence from the dismissed workers and hid for three days, after which he returned and promised to hold an impeachment vote at the General Meeting.[39)]

(2) Dismissed workers came to the Company and occupied the Labor Union office every day, from the day that they received their advance dismissal notices to the day of the impeachment vote, and picketed the main entrance gate, during times when workers were arriving and departing, protesting what they called the mutual conspiracy between the Company and the Labor Union. The dismissed employees were supposed to wait at home, but the Company could not control their collective action of coming to the office. The Company called the police and asked for their support after explaining the situation, but the police replied that they were not allowed to intervene in labor disputes, and if the dismissed workers intended to visit the Labor Union office, the police could not prevent their visiting. Eventually, the Company realized it had to block them from coming onto company premises on its own, and so looked into acquiring the services of a Security Guard Agenc y[40)]. The service could cost 540 million won for one month, which would be too expensive for the Company to accept under its current financial situation. Therefore, the Company could do nothing but wait and watch the dispute from the sidelines.

4. Concluding stage

(1) During the labor-labor disputes, the Company continuously recommended to the dismissed workers that they apply for the Voluntary Early Retirement Package and resign through their department heads and Human Resources managers. Thanks to these efforts, an additional 5 workers applied for this voluntary ERP-based resignation. The remaining dismissed workers expected that when the current union officials were impeached at the Labor Union's General Meeting, the new labor

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39) The Labor Union and Labor Relations Adjustment Act - Article 11 (bylaws) (1) Each of the following Labor Union and matters shall require a resolution adopted by the General Meeting: 2. Election or discharge of union officials; (2) The General Meeting shall adopt resolutions by the affirmative vote of a majority of the members present at a General Meeting where a majority of all members are present. However, resolutions as to the introduction and modification of bylaws, discharge of union officials, and merger, division, dissolution and structural change of a labor union shall be passed by the affirmative vote of at least two-thirds of members present at a General Meeting where a majority of all members are present.

40) Estimate of cost of hiring a Guarding Service Agency: one person working 24 hours/day is 300,000 won/day. Twice as many guards are required as the number of strikers. The Company must provide meals and other necessary costs. 300,000 x 60 persons x 30 days = 540 million won/month; 7 months' cost = 3.78 billion won.

officers would renegotiate with the Company and cancel the managerial dismissals. On August 8, 2013 there was an impeachment vote against the current union officers and the result was 42 in favor of impeachment and 58 against, rejecting the discharge of the current officials. After this result, the 25 remaining dismissed workers all applied for voluntary retirement, believing that they could not win an unfair dismissal case as long as the current Labor Union officers cooperated with the Company.

(2) All 30 production workers eventually resigned with a voluntary ERP bonus package and the Company successfully avoided the managerial dismissals. This prevents any potential labor disputes related to legal claims, and furthermore was very fortunate in that the Company did not cause further pain to either the remaining workers or the resigned workers.

Ⅲ. Conclusion (Evaluation of the Lay-off)

This lay-off of production workers was well-implemented through the appropriate use of managerial dismissal as per the Labor Standards Act and the Voluntary Early Retirement Program in order to cope with managerial difficulties the Company faced. At first, the Company followed Article 24 (Restrictions on Dismissal for Business Reasons), which contains: 1) urgent necessity in relation to the business; 2) efforts made to avoid dismissal; 3) fair criteria for the selection of those persons subject to dismissal; and 4) consulting in good faith with the Labor Union regarding efforts to avoid dismissals and fair criteria for the selection of those persons subject to dismissal. The above case showed that the Company satisfied the legal requirements, which are to exert effort to avoid dismissals through the Voluntary Early Retirement Program. Furthermore, the Company compared other companies' ERP bonus levels with the Company's ability to pay, while setting up the ERP bonuses, and negotiated with the Labor Union in good faith by responding to the workers' demands, and then resolved the Company's ERP bonus levels based upon mutual agreement. In particular, while the selection of those subject to dismissal was previously determined as "those most recently employed" in the Collective Agreement, the employer persuaded the Labor Union to abandon the order of recent employment and to accept the result of personnel evaluations for the past three years. Throughout this lay-off process, the Labor Union and the Company showed the desired labor-management partnership which resulted in a win-win situation during difficult times.

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

Ⅰ. Introduction

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

Wage cuts refer to reducing wages lower than existing levels for the same job and require collective consent of the affected workers. Wage freezes have the same effect as wage reductions when annual wage increases or service allowances are currently in place, and therefore require collective consent. However, deciding to keep the same wage as before without increasing wages does not require collective consent. Regarding wage returns, since wages are accrued in return for work already performed, those wages belong to individual workers, so the employer must obtain the consent of that individual worker. If the company deducts wages based only on collective consent, not individual consent, those deducted wages will be considered unpaid wages. The table below provides a brief summary of wage reductions, freezes and returns. In the next sections, I will review the related principles and related labor cases in detail.[41)]

<Comparison of Wage Reductions, Freezes and Returns>

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

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

Ⅱ. Wage Increases and Wage Reductions

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

Wage reductions refer to a lower wage than before being paid at a certain point in the future. The total wages paid is lowered by reducing or abolishing the basic wage and/or various allowances, with the process carried out in a manner decided in collective decision-making. If there is a majority union, this is done through a collective agreement, but if there is no majority union, it is necessary to go through the procedures required to make unfavorable changes to the employment rules. Even if labor and management have agreed, wages cannot be reduced below the minimum wage level, and additional rates or legal allowances (such as overtime/night/holiday work allowances, weekly holiday allowance, annual paid allowance, etc.) are not subject to reductions, in accordance with the Labor Standards Act.[42] Also, the reduced wage is not included in the calculation of average wage. Wage reductions are judged differently for each case. Here are some of these individual cases.

(1) Even if individual workers agree on a wage reduction, this cannot replace collective consent. Wage reductions involve paying less in the future for the same work that is currently provided, which makes them an unfavorable change to working conditions. In order for consent to a reduction in wages obtained from individual workers to be considered valid, the collective agreement must be changed according to required procedures.[43]

(2) In order to overcome a management crisis, a company significantly reduced its

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42) Ministry Guidelines: Labor Standards Team-797, Mar. 26, 2009.

43) Incheon District Court ruling on June 25, 2010: 2009 gahop 14735.

workforce and unilaterally stopped paying bonuses to workers who were retained. The fact that workers who were retained have continued to work without objection to the unilateral cessation of bonuses, does not mean that those workers have given up their right to claim future bonuses.[44)]

(3) In accordance with the general binding force of Article 35 of the Labor Union Act, the effect of an agreement on wage reductions with a majority labor union also extends to non-union workers in the same kind of job in a workplace. However, if a separate contract for wages is signed for each worker, such as an annual salary contract, the individual worker's consent for a wage reduction is also required.[45)] On the other hand, if the number of workers who were in the labor union at the time of the labor-management agreement on wage reduction did not reach a majority of the workers, the general binding force of Article 35 of the Labor Union Act cannot be granted.[46)]

(4) In changing the shift work system, reducing the shift from 4 groups/3 shifts to 3 groups/3 shifts is an unfavorable change for workers. Conversely, if the increase is from 3 groups/3 shifts to 4 groups/3 shifts, unless the contractual working hours are shortened or wages are reduced, it is not regarded as a disadvantageous change to working conditions, even though related wages or allowances are reduced due to the reduction in overtime work.[47)]

(5) A change in the pay system can also lead to a reduction in wages. In cases where the amount of wages decreases from a reduction in the proportion of basic salary and an increase in the proportion of performance salary, the court considers it as a disadvantageous change in working conditions even though only some employees' wages decrease while the wages of most employees increase.[48)]

(6) If the wage peak system is introduced within the statutory retirement age, it is a disadvantageous change in working conditions because it results in a reduction in wages for workers at that time.[49)] In this case, if there is a labor union organized by a majority of workers, the consent of that labor union is required. Here, a union organized by a majority of workers refers to a union organized by a majority of all workers who are subject to the existing employment rules, regardless of the scope of union membership.[50)]

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44) Supreme Court ruling on June 11, 1999: 98da22185.
45) Labor Ministry Guidelines: Industrial Relations Team-1112, Nov. 18, 2008.
46) Supreme Court ruling on May 12, 2005: 2003da 52456.
47) Labor Ministry Guidelines: Labor Standards Team 68207-1732, Nov. 4, 1994.
48) Supreme Court ruling on June 28, 2912: 2010da 17468.
49) Suwon District Court ruling on June 23, 2017: 2016gadan 115485.
50) Supreme Court ruling on February 29, 2008: 2007da 85997.

Ⅲ. Wage Freezes

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

(1) If the personnel regulations stipulate that regular increases occur on January 1st and July 1st of each year, and if the annual increase in salary has been carried out regularly and uniformly, this is considered to be a habitual wage practice. In this case, if the employer unilaterally freezes the regular increase without engaging with workers in the collective decision-making method, is the courts have deemed that the amount of regular increase that remains unpaid by the regular payment date each month as unpaid wages.[51)]

(2) A certain school had financial difficulties, and the principal explained the situation to teachers at a school affairs meeting, suggested that the basic salary increase for general school teachers be frozen that year. The teachers present did not object at the time to this. However, this lack of objection at the meeting with the teachers cannot be considered the same as obtaining collective consent.[52)]

Ⅳ. Wage Returns

Wage returns refer to the return of wage bonds (wages, bonuses, etc.) already incurred for previous work based on the free-will consent of the individual worker. Due to the waiver of the right to claim wages that occurred legally, wages can only be returned through due process. Since a unilaterally-determined wage deduction by the employer violates the principle of paying full wages, individual workers' written consent is required.[53)] However, even in this case, any waiver of the right to claim severance pay is invalid because it violates the Labor Standards Act.[54)]

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51) Labor Ministry Guideline: Wage 68200-649, December 5, 2000

52) Supreme Court ruling on June 9, 2005: 2005do 1089.

53) Article 43 of the Labor Standards Act (Wage Payment) and Supreme Court ruling June 11, 1996: 98da22185 Waiver of wage claims is recognized as a clear expression of the employee's intention.

54) Supreme Court ruling July 26, 2002: 2000da27671.

For procedures to be deemed reasonable, individual workers' consent is required. Since the return of wages is effective only if it is the individual workers' voluntary decision, individual workers must recognize the purpose of wage returns and sign a return consent form in their own name.[55] While the court holds that it is desirable to obtain consent for each individual worker when returning wages, it is also possible to obtain individual consent by having workers sign a name list of workers if the company has sufficiently explained the difficult situation to the workers.[56] An agreement to return wages in the collective agreement has no effect. This is because the return of wages involves wages that already belong to individual workers, and the union cannot be forced to abandon individual member property rights. Wages returned by workers come from the workers' income and are returned voluntarily, and the employer is not obligated to return them again to the worker.[57] Returned wages are included in the calculation of average wages as they are wage bonds that were given to the employee and then returned to the employer by the employee.[58] Examples of cases where a return of wages was not recognized:

(1) To waive unpaid wages for which individual workers have the right to claim payment due to the arrival of the payment period, a collective agreement with the labor union is not enough for the workers to be deemed to have agreed to waive the unpaid wages. It can only be done to the extent that the company has received individual and explicit consent from the workers in advance to waive their right to the unpaid wages. Even if a labor union agrees to give up some worker wages in the collective agreement or through labor-management consultations, this has no effect on labor union members who have not individually consented.[59]

(2) Even if wages and bonuses are returned in accordance with a revised collective agreement, if a worker does not individually consent to the return of wages and bonuses incurred by his/her previous work, that worker shall not have their wages returned. If the workers who did not agree to the return of wages and bonuses later resigned after those wages/bonuses were deducted without their individual consent, those returned wages will be considered unpaid wages.[60]

(3) Daegu ○○ Company gave a donation to help Daegu citizens suffering from the

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55) Labor Ministry Guidelines: Labor Standards Team 68207-843, Dec. 13, 1999.
56) Supreme Court ruling on Sep. 29, 2000: 99da67536.
57) Seoul District Court ruling on Apr. 16, 2003: 2002na 20291.
58) Supreme Court ruling on Apr. 10, 2001: 99da39531.
59) Jeonju District Court ruling on Apr. 26, 2000: 99na5708.
60) Labor Ministry Guidelines: Unemployment 68430-84, Oct. 21, 1999.

corona pandemic in April 2020 by resolution of its labor-management council. It then informed the employees of the council's decision, and deducted KRW 10,000 from each individual. In response, the new labor union filed a complaint with the Daegu Labor Office for violation of Article 43 (Wage Payment) of the Labor Standards Act as these wages were deducted without the individual consent of the workers. The company then requested individual consent from all the workers, but only 50% agreed, so the deducted wages had to be returned to those workers who did not submit individual consent forms.[61)]

(4) If each worker agrees to return the allowance for unused annual leave that has occurred, it cannot be considered a violation of the law if the employer does not pay an allowance within the agreed range for unused annual leave. However, if the return of unused annual leave allowance agreed upon by the worker also applies to leave that will occur in the future, procedures must be followed that allow a collective agreement or the employment rules to be changed disadvantageously.[62)]

Ⅴ. Conclusion

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

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61) Daegu Labor Office decided this deduction was illegal. Related Labor Ministry Guidelines: Labor Standards-68207-843, Dec. 13, 1999.

62) Labor Ministry Guidelines: Labor Standards 684207-871, Mar. 23, 2000.

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 GO	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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