“Current foreign policy for addressing the shortage of foreign labor in industrial sites… Is it satisfactory?”

Kim, Haesun

On November 27th, the South Korean government announced a significant expansion of the foreign labor force to address severe labor shortages in industrial sites. In the 40th Foreign Workers Policy Committee meeting, it was revealed that the intake of foreign workers for the next year would be drastically increased. The quota for foreign labor next year would reach a record high of 165,000 individuals. To alleviate shortages in industries such as food service, forestry, and mining—sectors with a lack of local workers—the employment restrictions on non-professional employment visas (E-9) for these sectors would be lifted.

The planned intake of foreign labor (E-9) for the next year is the largest ever, increasing by 37.5% compared to this year, reaching 165,000 individuals. The decision was made after collaborative efforts with national research institutions, such as the Korea Labor Institute and industrial research institutes, to forecast the shortage of personnel and conduct comprehensive on-site demand surveys by businesses, relevant ministries, and local governments utilizing the E-9 visa.

Additionally, as a follow-up to the regulatory innovation strategy meeting held in August, the government decided to conduct on-site surveys, in collaboration with relevant ministries, to consider allowing the employment of foreign workers (E-9) in industries facing severe labor shortages, taking into account the potential displacement of local jobs and the management conditions of foreign labor in the industry. The use of E-9 foreign labor in the food service industry will initially be introduced for kitchen support tasks, with 100 restaurants in 98 local government entities and regions such as Sejong City and Jeju Island being the initial targets. For eligible employers, businesses with fewer than 5 employees need a track record of at least 7 years, and those with 5 or more employees need a track record of at least 5 years, with a maximum of 1 employee for the former and up to 2 employees for the latter.

To facilitate the deployment and utilization of foreign workers in businesses experiencing actual labor shortages, plans include parallel monitoring and inspection through the "Foreign Labor Stay Management TF" of local employment and labor offices. Bang Gi-seon, the head of the State Affairs Planning Advisory, emphasized that the expansion of the foreign labor intake (E-9) for the next year would significantly

contribute to addressing vacant jobs that locals tend to avoid. He urged comprehensive efforts to ensure swift integration and stable settlement of foreign workers.

Furthermore, he stated, "Demands for additional permission to employ foreign workers are being raised, especially in industries facing severe labor shortages. Relevant ministries, including the Ministry of Employment, need to explore ways to introduce foreign workers promptly and consider holding the 41st Foreign Workers Policy Committee in December if necessary."

This expansion of foreign labor intake, especially in industries and businesses typically avoided by locals, particularly those with fewer than 5 employees, raises concerns about potential side effects. It prompts the need for careful examination of the possible consequences and ramifications of the ambitious plans outlined by the Ministry of Employment. In particular, as Korean companies or foreign-invested enterprises in Korea have encountered various issues through foreign employment, insights from legal firms, such as Kangnam Labor Law Firm, which provide counsel in this area, would be essential in understanding the potential pros and cons.

Firstly, the aversion of Korean youth to 3D occupations is likely to intensify. There is a saying that in Korean culture, "Endure hardships when young, and you will benefit even when you are old," suggests that enduring hardships in one's youth builds resilience to face challenges in adulthood. However, a generation unfamiliar with such challenges may lack the ability to navigate difficulties later in life.

Secondly, while hiring foreigners to fill labor shortages in jobs where Korean workers are lacking is positive, the restriction to E9 visas may need reconsideration. Western European countries like Germany, experiencing labor shortages in an aging society, actively welcome skilled foreign labor. Therefore, in the era of advanced technology, Korea should consider attracting foreign experts in various scientific and technological fields. For instance, Korea is currently witnessing a concentration of talent in certain professions, leading to a scarcity of skilled workers in other areas. The phenomenon of students abandoning their initial majors to enter stable and lucrative professions like medicine exacerbates the situation, even causing aversion to STEM (science, technology, engineering, and mathematics) fields.

The world is witnessing fierce competition in advanced technology, and failure to survive in this competition will impact a country's technological competitiveness. A notable example is the Biden administration's commitment to protect semiconductor technology through the IRA Act and the National Biotechnology and Biomanufacturing Initiative (NBBI), emphasizing international technical standards and securing supply chains.

In contrast, the Korean government has reduced the national R&D budget for basic science and technology. To avoid falling behind in these fields, Korea should actively attract foreign professionals who have acquired advanced skills in these areas. This approach requires a careful review of policies to secure specialized talent, not only for E9 visa holders but also for professionals engaged in specific activities, such as E7 visa holders.

Thirdly, considering the potential increase in employment of foreign workers and the difficulty of dismissal under Korean labor standards, it is crucial to identify and minimize issues that may arise from past experiences. The significant cultural differences between Korean and foreign cultures, even within Asia or between Asia and the West, highlight the importance of understanding and overcoming cultural and business differences for effective communication.

Communication with foreign companies and users, as well as domestic workers, cannot be considered a simple issue due to these complexities. Therefore, policies related to foreign labor should be crafted with the guidance of experts who have extensive experience and expertise in foreign labor management and labor issues. This approach can help prevent potential issues between countries and minimize unforeseen problems.

In conclusion, South Korea is entering a rapidly aging society and faces the challenge of being the world's leading country with the lowest birth rate. In addressing these issues, it is essential to adopt a long-term and strategic perspective rather than resorting to short-term and populist solutions. Countries like Singapore and Hong Kong, which effectively utilize foreign labor, have implemented long-term plans and learned from trial and error since the 1970s. Even Western European countries like Germany have established policies for foreign high skilled labor with a long-term vision, regardless of political leanings. "During this state visit, President Yoon visited the United Kingdom, which has been ruling and connecting various territories for over a century since the Victorian era in 1819, creating a total of 54 Commonwealth nations that continue to exist to this day."

Therefore, policies related to foreign labor are complex and cannot be decided hastily or simplistically. Establishing and refining regulations requires the formation of a team of experts with extensive experience and expertise in foreign labor management and labor issues. This approach can help anticipate and prevent potential cross-national issues and contribute to the effective integration of foreign labor in the future.

Annual Paid Leave Q&A for Practitioners

Summarized by Labor Attorney Dongshin Lee

Q1. What is the most significant feature of the annual paid leave stipulated by the Korean Labor Standards Act?

A1. The most significant feature of annual paid leave under the Korean Labor Standards Act is that it is a form of compensation for past work. This is because annual paid leave is granted to employees on a yearly or monthly basis based on their past attendance rate (Article 60 of the Korean LSA). This feature has led to the establishment of the concept of allowance for unused annual paid leave through Supreme court rulings.

The Supreme Court has interpreted that if an employee who has acquired the right to paid annual leave does not use the leave within one year from the time the right arises, or if it is confirmed that the employee can no longer use the leave due to retirement or other reasons before one year has elapsed, the right to leave expires and the employee may claim unused annual leave allowance corresponding to the number of days of remained annual leave. (Supreme Court Ruling 99da10806, December 22, 2000)

The purpose of the vacation system is to provide employees with time off to rest and relax, to promote labor reproduction, to guarantee cultural life, and to reconcile work and family. Therefore, it is possible to argue that it is desirable to grant vacation rights in advance, along with the labor to be provided through the employment contract, and to check whether labor and vacation are used in a balanced manner after a certain period. However, the Korean LSA grants paid annual leave as a concept of compensation for past work and recognizes annual leave allowance for unused leave. Therefore, it is thought that many practical questions and disputes arise in the operation of the annual leave system.

Q2. If one does not use all of one's annual leave during the usage period, must the one always be compensated in the form of an unused annual leave allowance? Is it also possible to extend the usage period so that the one can use it later?

A2. The Korean Ministry of Employment and Labor(MOEL) interprets that it is possible for the parties to agree to carry over unused annual leave. The following is a summary of the relevant administrative interpretation (Labor Condition Guidance Division-1047, February 20, 2009).

(Question 1) Our employees asked the company to pay a portion of the annual paid leave that accrued at the beginning of the year as an allowance in advance and let them use the remaining portion of the leaves, and

the company agreed to this. Is this a legal operation?

(Answer 1) If an employer pays leave allowance in advance before the right to paid annual leave expires, and agrees not to grant that many annual leaves in the future, this could have the effect of restricting the employee's right to request leave, and could violate the regulation of the annual paid leave system under the LSA. However, if the employee's right to request leave is not restricted, such as by ensuring the employee's free use of leave, it will be difficult to see it as a violation of the law.

(Question 2) Can annual leave that has not been used be carried over to the next year? If the carried-over leave cannot be used in the next year either, can it be carried over again to the following year?

(Answer 2) An agreement between an employee and an employer to carry over unused annual paid leave instead of paying allowance in cash will be allowed.

(Question 3) If the carry-over of unused annual paid leave is continued, and the annual leave is accumulated for more than 2 years, and then it is claimed as a allowance at once, the average wage for the calculation of statutory severance pay will be much higher than in the normal case. Can the average wage be calculated in this form?

(Answer 3) The average wage for the calculation of statutory severance pay should only include 3/12 of the amount of unused annual leave allowance paid for the number of days worked without using the annual leave accrued in the year of one year before the year of retirement, based on the attendance rate in the year of two years before the year of retirement.

Let us also introduce the contents of other administrative interpretations on the carry-over of annual paid leave (Labor Conditions Guidance Division-1046, February 20, 2009).

(Question) The remaining annual paid leave was agreed with each employee to be carried over and used, but the employee did not use the annual paid leave again by the deadline. In this case, can an employer carry over the remaining annual leave again by the company's policy or notification without the consent of the employees?

(Answer) It is possible for the parties to agree to carry over unused leave instead of paying compensation in lieu of an annual paid leave claim that has expired, but the employer cannot unilaterally force it against the will of the employee.

Q3. My company employs four employees, including myself. However, my company says that we do not have paid annual leave. Paid annual leave is a system stipulated by the LSAct, and is it not available to all employees?

A3. The LSA's annual paid leave regulations do not apply to businesses or workplace with 4 or fewer regular employees (Article 11 (2) of the LSA and Appendix 1 of the Enforcement Decree of the LSA).

In addition, the annual paid leave regulations do not apply to parttime employees whose working hours are less than 15 hours per week on average over a period of 4 weeks (Article 18 (3) of the LSA).

Q4. According to the LSA, annual paid leave is calculated individually based on each employee's date of employment. However, our company grants and manages annual leave based on the fiscal year (January 1 to December 31 of each year). Isn't there a problem?

A4. The principle is to individually calculate and manage the attendance rate for granting annual paid leave and the period for using it based on the individual employee's date of employment. However, it is also possible to uniformly grant and manage it based on the fiscal year or other criteria for the convenience of labor management. However, the administrative interpretation (Wage and Working Hours Policy Team-2888, September 11, 2007) explains that this should not be disadvantageous to the employee. Let us explain the contents.

(Question 1) When an employee retires, we compare the employee's employment start date and end date. If the end date is earlier, we do not grant annual paid leave for that year. If the end date is later, we generate annual paid leave and pay unused annual leave allowance. Is our practice legal?

(Answer 1) The starting date of the period for calculating the attendance rate for granting annual paid leave under Article 60 of the LSA should be the employee's employment date. However, for the convenience of labor management in the workplace, the employer can uniformly set the period on the basis of the fiscal year (January 1 to December 31) for all employees by collective bargaining agreement or rules of employment, but in this case, it should not be disadvantageous to employees who have joined in the middle of the year.

In the case of calculating annual leave based on the fiscal year, in order to grant annual leave without disadvantage to employees who have joined in the middle of the year, annual paid leave should be granted in proportion to the length of service in the year of joining for the period of less than one year since joining, and from then on, the number of days of leave should be calculated based on the fiscal year and granted. However, if the number of days of annual leave calculated based on the employee's start date at the time of retirement is less than the number of days of annual leave calculated based on the fiscal year, the number of days of annual leave that are less should be paid out.

☞ In summary, the administrative interpretation's position is that annual paid leave can be uniformly granted and managed based on the fiscal year or other criteria for the convenience of labor management, but

at the time of retirement, the amount of annual paid leave granted based on the fiscal year and the amount of annual leave granted based on the individual employee's start date should be compared to ensure that the employee is not disadvantaged.

(Question 2) If the company has promoted the use of annual leave, does it not have to pay the annual leave allowance for unused annual leave to employees who have not been able to use all of their annual leave due to early retirement? And for employees who will retire at the retirement age, is it okay to promote the use of annual leave based on the date of retirement age, not the end of the fiscal year?

(Answer 2) If the employer has taken measures to promote the use of annual paid leave, and the employee leave the company before the designated period for the usage of annual leave, it cannot be considered that the promotion measures for use of annual leave have been carried out normally, so the unused annual leave should be paid as compensation. In addition, it is considered that annual paid leave use promotion measures can be implemented for employees whose date of retirement age is June 30 in accordance with the procedures specified in the law.

☞ The administrative interpretation's position is that even if the company has promoted the use of annual leave, it must pay annual leave allowance for the number of days of unused annual leave to employees who have retired early, and that the company can promote the use of annual paid leave based on the expected date of retirement age for employees who are scheduled to retire at retirement age.

Q5. I know that annual paid leave must be given at the time specified by the employee (Article 60, Paragraph 5 of the LSA). However, our company's rule of employment requires employees to specify the date of use of annual leave and obtain the company's approval at least one day before the day they want to use it. Is it legal to require the company's prior approval?

A5. If granting annual leave at the date requested by the employee would cause a significant disruption to business operations, the employer may change the date (Article 60, Paragraph 5, Clause 2 of the LSA). This is called the employer's right to change the time of leave. If the procedure of obtaining annual leave approval through the company's rule of employment is interpreted as a regulation to properly exercise the employer's reserved right to change the time of annual leave, it cannot be seen as illegal to have such a procedure. The following is a summary of the relevant court decision (Supreme Court ruling 92da7542, June 23, 1992).

If a rule of employment stipulates that an employee who wishes to take annual leave must apply to their supervisor in advance and obtain the approval of the CEO, this is interpreted as a regulation to ensure that the employer can properly exercise its right to change the time of leave, rather than to deprive the employee of the right to designate the time of leave as stipulated in Article 48, Paragraph 3

of the LSA(Article 60, Paragraph 5 of the current LSA). Therefore, the regulation in the rule of employment requiring prior approval of leave cannot be considered an invalid regulation that violates the provisions of the LSA.

In the case of a transportation company that operates regular passenger transportation services to an unspecified number of people, a regular and continuous passenger transportation plan is confirmed, and the scheduled vehicle operation at the designated time must be carried out smoothly. If there is a disruption in the operation, it will cause a significant disruption to the operation of the transportation business. Therefore, it can be said that requiring the driver of the operating vehicle to apply for paid leave in advance and obtain the approval of the CEO to take annual leave is a necessary measure to properly exercise the employer's right to change the time of annual leave.

Q6. If the rule of employment do not specify the procedure for requesting annual paid leave, how should an employee apply for annual leave?

A6. You can specify the type of annual leave you want to use and the dates you want to use it by expressing your intention in a reasonable manner, such as orally or in writing.

According to a court decision (Supreme Court ruling 92nu404, April 10, 1992), in a company that does not have a procedure for requesting annual leave in its rule of employment, if an employee does not come to work due to injuries sustained in a mutual assault with a colleague, and calls the company to ask for the treatment period to be treated as continuous annual leave, this is a valid request for annual leave. If the company does not exercise its right to change the time of annual leave in a lawful manner, the period during which the employee did not come to work cannot be considered as absenteeism.

On the other hand, even if an employee exercises their right to designate the time of leave without specifying what leave they want to use and when they want to use it, this cannot be considered a lawful designation of the time.

According to a court decision (Supreme Court ruling 96nu4220, March 28, 1997), in a case where a union leader submitted an annual leave application without specifying the type or period of the leave for the purpose of enforcing a demand for collective bargaining and a meeting, but the employer refused to approve it and instructed the employee to come to work, the employee's refusal to comply and absence from work was considered to be unauthorized absence and a ground for disciplinary action.

Q7. What does "significant disruption to business operations" mean, which allows the employer to exercise the right to change the time of annual paid leave, and who should prove it?

A7. The term "significant disruption to business operations" means a case that significantly hinders or has a major impact on the normal operation of the business. This means that if the employee is given annual leave on the requested date, it will not only be impossible to operate the business unit (department, team,

etc.), but it will also be impossible to secure replacement workers for this purpose. The burden of proof for this is on the employer.

There is a lower court's decision (Seoul High Court ruling 2018nu57171, April 4, 2019) that is worth referring to. The court ruled that the employer's right to change the time of annual leave is not recognized solely on the general possibility that the number of workers will decrease due to the employee's use of annual leave, resulting in increased workload for the remaining workers.

Q8. I understand that annual paid leave is granted as a form of compensation based on the attendance rate. So, how is the attendance rate calculated? And there are many exceptional cases, such as missing work due to reserve military training, disciplinary action, and labor disputes. Please explain the exceptional matters that should be known when calculating the attendance rate.

A8. The attendance rate is calculated as the ratio of the number of days an employee actually worked during the year, i.e., the annual scheduled working days, to the total number of working days in a year. In other words, it is calculated as "Annual working days / Annual scheduled working days".

The following are examples of periods that are considered as attendance even though the employee did not actually provide work when calculating the attendance rate (Article 60, Paragraph 6 of the LSA).

- The period of absence of an employee due to occupational injury or illness
- The period of absence of a pregnant female employee due to maternity leave under the LSA
- The period of absence due to parental leave under the Equal Employment Opportunity and Family Support Act

In addition to the above, the following cases should also be considered as attendance days, even if the employee did not provide labor:

- Periods recognized as worked by law, such as reserve military training/civil defense training, and days off for exercising civil rights
- Annual paid leave, menstrual leave, etc.
- Days of absence due to the employer's fault, such as management-related difficulties
- Days on which the employee was unable to come to work due to an illegal lockout
- Periods of unjust dismissal (Supreme Court ruling 2011da95519, March 13, 2014)

On the other hand, there are periods that should be excluded from the annual scheduled working days when considering the purpose of the annual leave system. These periods are as follows (Supreme Court ruling 2015da66052, February 14, 2019):

- Periods during which the employee did not actually provide work due to a

legitimate labor dispute

- Periods during which the employee did not actually provide work due to the use of sick leave (in accordance with the rule of employment, etc.)
- Periods during which the employee worked as a union leaders
- Periods during which the employee was unable to come to work due to a lawful lockout by the employer

According to the Supreme Court decision mentioned above, it is reasonable to reduce the number of annual paid leave days in proportion to the reduction in the annual scheduled working days. For example, if the usual annual scheduled working days are 250 days, but the annual scheduled working days have been reduced to 150 days due to the use of sick leave, and the attendance rate for 150 days is 80% or more, then it is reasonable to grant 9 days of annual paid leave, not 15 days [15 (150/250)].

Finally, there are periods that should be considered as absence when calculating the attendance rate. These periods are as follows:

- Days on which the employee illegally went on strike
- Periods during which the employee participated in an illegal labor dispute during the employer's lawful lockout period
- Periods during which the employee did not work due to disciplinary action, such as suspension or dismissal (Supreme Court ruling 2008da41666, October 9, 2008)

Our Labor Standards Act defines annual paid leave as a form of compensation for previous work. This means that there are a variety of cases that need to be considered when calculating attendance rate, and that the purpose of annual paid leave is often not met, with employees prioritizing monetary compensation over the original function of rest. As a result, annual paid leave is one of the most frequently asked questions in the labor law field.

I hope that the Q&A explained above will help you to understand annual paid leave a little more accurately.

- End -

Precedents Following the Supreme Court's Unanimous Decision on Ordinary Wages

Ⅰ. Introduction

Ordinary wages refer to predetermined compensation agreed upon for the hours an

employee is contractually obligated to work. It is mandated that the employment contract explicitly specify both ordinary wages and contractual working hours (Article 17 of the Labor Standards Act). Ordinary wages serve as the basis for calculating additional compensation for overtime work, holiday work, night work, and similar categories. To maintain ordinary wages at the lowest possible level, employers have introduced a system of annual regular bonuses. Consequently, the wage structure in our country consisted of 50% ordinary wages and 50% non-ordinary wages. The groundbreaking decision that significantly rectified this distorted wage structure was a unanimous Supreme Court ruling in 2013. The core meaning of this decision can be summarized into two key points. Firstly, the decision established that regular bonuses paid at certain intervals exceeding one month as remuneration for work are considered part of ordinary wages. Secondly, any consensus reached among employers and employees to exclude certain wages, falling under ordinary wages according to the Labor Standards Act, from ordinary wages, is invalid.[1)]

The Supreme Court's 2013 decision regarding ordinary wages has provided clear guidelines for the components and payment methods of ordinary wages. Nevertheless, disputes have arisen in practical application. Firstly, while it was ruled that regular bonuses paid on specific dates and only to incumbent employees (not those who resigned before those specific payment dates) and not settled on a daily basis upon resignation should not be considered ordinary wages, subsequent judgments contradict this. Secondly, there is ambiguity concerning whether retroactively claiming an allowance calculated as a new ordinary wage when a fixed bonus is included in ordinary wages contradicts the principle of good faith.

In connection with these issues, I would like to examine the criteria for judgments related to ordinary wages only paid to incumbent employees and delve into specific application of the good faith principle concerning retroactive claims for allowances.

Ⅱ. Criteria for Determining Payment only for Incumbent Employees

The 2013 Supreme Court decision on ordinary wages established that wages designated to be paid only to incumbent employees at specific points in time, regardless of whether they have actually worked their regular hours, become eligibility criteria for receiving wages at those particular points in time. Such wages are generally withheld from individuals who were previously engaged in labor but were not in active service at those specific points in time, while individuals in active service at those specific points in time typically receive them without regard to the nature of their previous work. In cases where wages are paid under such conditions, it is difficult to consider them as compensation for contractual working hours worked. Even if an

1) Supreme Court ruling on Dec. 18, 2013, 2012Da89399 En Banc Unanimous Decision.

employee provides labor, if they resign before the arrival of that specific point in time, they will not receive the corresponding wages. Therefore, whether the payment condition will be met at the time when the employee provides labor is uncertain, suggesting little connection to work already provided.

Hence, the courts have determined that such payments only to incumbent employees are not considered ordinary wages. However, it was noted that if bonuses are paid in proportion to the number of days worked even if an employee resigns before a specific point in time, there is no substantial difference from wages paid for each day worked. Therefore, in cases where wages are paid proportionally to the number of days worked, the absence of connection to work already provided is not considered a factor.

Normally, regarding regular bonuses, if an employee resigns before the wage payment date, a daily settlement is calculated and paid. However, holiday bonuses or summer vacation allowances, for instance, are often intended to be paid on specific dates, and, therefore, they are not paid if an employee resigns before those dates. Thus, the criteria for payments only to incumbent employees should be limited to such special bonuses.

Nevertheless, precedents have applied the incumbent employee criteria even to regular bonuses and have not recognized them as ordinary wages if the employee is no longer actively employed at the time of payment. Fortunately, recent precedents have ruled that the incumbent employee criteria do not have any bearing on the determination of ordinary wages for regular bonuses. In other words, the argument that regular bonuses, which are regularly, uniformly, and consistently paid as remuneration for labor, should be excluded from ordinary wages solely based on the incumbent employee criterion at the time of resignation is considered erroneous. Several such cases are pending before the Supreme Court's decisions, awaiting a final decision.[2] Consequently, there is an urgent need for clear guidelines at this juncture.

Ⅲ. Precedents Recognized as Ordinary Wages for Regular Bonuses Despite Payment only to Incumbent Employees

1. Supreme Court Decision dated November 10, 2022, Case No. 2022da252578[3]

In this case, the defendant stipulated in salary regulations that regular bonuses would be paid "only to those who remain employed at the time of payment." Accordingly, they paid regular bonuses to those who were still employed at the time of payment. The regular bonuses, paid regularly and continuously to employees at a rate of 600%

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2) Seoul High Court Decision 2016na2087702 is awaiting a Supreme Court (2019da244942); Busan High Court Decision 2018na55282 is awaiting a Supreme Court (2019다289525) decision.

3) Supreme Court Decision on November 10, 2022, Case No. 2022da252578; Court of Original Jurisdiction: Seoul High Court Decision on May 4, 2022, Case No. 2019na2037630. Wage Claim Case by the Financial Supervisory Service.

annually, can be considered as definitively paid as long as the employees provide regular labor. Hence, it is reasonable to categorize them as ordinary wages, which are fixed, uniform, and consistently paid. Additionally, considering the significant proportion that these regular bonuses occupy of total wages, including factors such as the amount, payment method, and payment frequency, it becomes evident that these regular bonuses are not merely a form of compound fringe benefits, indemnification, or gratuitous compensation, nor are they remuneration for specific periods of service. Instead, from the employee's perspective, they can be regarded as wages that are expected to be received as a fundamental and definitive compensation, akin to the base salary, as long as the employee provides regular labor.

2. Seoul High Court Decision dated December 2, 2020, Case No. 2016na2032917

In this case, the annual amount of the bonus was determined to be 800% of the monthly base salary, and such an amount was firmly established as remuneration for annual regular labor. Therefore, this bonus can be considered a fixed wage that is granted to employees simply for providing annual regular labor, irrespective of the achievement of additional conditions. Furthermore, the "incumbent employee criterion" in this case, even if it results in unpaid or excess amounts when compared to calculations made for employees who provided regular labor for a full year but resigned prematurely, is merely a matter of calculation for the sake of convenience. It does not negate the nature of this bonus as a fixed wage. In particular, even when assessing connection to labor provided, the exceptional circumstance of "resignation," which occurs only once during the employment period, cannot be used as a basis for negating such connection.

3. Seoul High Court Decision dated December 18, 2018, Case No. 2017na2025282 (Transferred to the Supreme Court's Unanimous Decision Process (2019da204876))[4)]

Withholding payment for labor already provided, even when an employer unilaterally adds an incumbent employee condition to regular bonuses and an employee resigns before the payment date, constitutes a unilateral withholding of accrued wages and cannot be considered valid. Furthermore, even in cases where the incumbent employee condition is stipulated in valid employment rules or individual employment contracts, withholding payment for the portion corresponding to the labor already provided is invalid as it amounts to preemptively waiving the wages that should be received as compensation for labor that has already been provided.

4. Seoul High Court Decision dated May 14, 2019, Case No. 2016na2087702 (Transferred to the Supreme Court Grand Bench (2019da244942))[5)]

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4) Seoul High Court Decision on December 18, 2018, Case No. 2017na2025282: Wage Claim Lawsuit by SeAH Besteel

Regular fixed payments of a fixed amount continuously and periodically paid constitute compensation for labor, even if the payment period is on a multi-month basis: it is merely an accumulation of compensation for labor over those months. Even if an employee resigns before the regular fixed payment date, they should naturally be entitled to receive the payment corresponding to the labor they have actually provided. However, not paying basic performance bonuses and evaluation performance bonuses based on the "incumbent employee criterion" is difficult to validate as it unilaterally withholds payment for labor already provided. This practice also makes it difficult to recognize the effectiveness of preemptively waiving accrued wages. In this particular case, given that 1) basic performance bonuses and evaluation performance bonuses were paid alternately on a bi-monthly basis, 2) the amount exceeded 50% of the monthly base salary, and 3) they were paid regardless of evaluation results, from the employee's perspective, these payments were considered as fundamental and definitive compensation, provided they fulfilled their labor obligations.

Ⅳ. Precedents Where Regular Bonuses Paid only to Incumbent Employees Were Not Recognized as Ordinary Wages

1. Supreme Court Decision dated April 9, 2020, Case No. 2017da4638

The defendant annually paid the plaintiffs an 800% bonus, consisting of 100% of their ordinary wages in even-numbered months and during major holidays such as New Year's and Chuseok. The salary regulations specified that "bonuses shall be paid only to those who remain employed at the time of payment," and in practice, only those employees still employed at the time of payment received bonuses. The defendant calculated ordinary wages based on the collective agreement, employment rules, etc., excluding fixed bonuses, and paid statutory allowances such as overtime pay, holiday pay, special pay for extra hours, and annual leave pay, among others, on the basis of the agreed-upon ordinary wages. The defendant paid fixed bonuses only to employees still employed at the time of wage payment and did not pay bonuses to those who resigned before the payment date. Therefore, since this bonus was paid only to employees still employed at a specific point in time, it cannot be considered fixed.

2. Supreme Court Decision dated September 21, 2017, Case No. 2016da15150 (Hyundai Steel)[6]

The collective agreement in this case stipulated that "the company shall pay an

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5) Seoul High Court Decision on May 14, 2019, Case No. 2016na2087702: Wage Claim Lawsuit by the Korea Technology Finance Corporation (KTFC).

6) Busan High Court Decision on February 17, 2016, Case No. 2015na3044 (Appeal); Supreme Court Decision on September 21, 2017, Case No. 2016da15150 (Appeal Dismissed) (Hyundai Steel).

annual bonus of 750% to all employees still employed at the time the bonus is paid." In practice, bonuses were paid only to employees whose employment relations had not terminated at the time of the bonus payment date, and no bonuses were paid to employees who resigned before that date. Consequently, it can be acknowledged that the defendant was required to pay the bonuses only to employees that were still employed by the bonus payment date, making it uncertain whether the payment condition would be met at the time when the employee provides labor. Therefore, there is no clear connection to labor provided and cannot be considered ordinary wages.

3. Supreme Court Decision dated September 26, 2017, Case No. 2017da232020 (ThyssenKrupp Elevator)[7)]

The defendant company had been paying employees an 800% bonus, totaling 100% of their base salary and allowances for even-numbered months, as well as on the Chuseok and New Year holidays, in accordance with a collective agreement. However, when calculating ordinary wages, the defendant excluded this bonus. The defendant company did not pay this bonus to employees who were not employed at the time the bonus was paid, as employees were required to remain employed on the payment date. Since this bonus was conditional on the employee still being employed on the payment date, it cannot be considered part of ordinary wages due to the absence of both compensation for regular labor and connection to labor provided.

Ⅴ. Recognition and Non-recognition of Retroactive Claims for Allowances

1. Principles for determining good faith

The court's position is that in cases where a good faith agreement between labor and management violates the mandatory provisions of the Labor Standards Act, the agreement is of no effect. In other words, the standards set by the Labor Standards Act are minimum standards, so mandatory provisions should take precedence over good faith agreements. However, exception can be made when a company is facing financial difficulties. In such cases, good faith agreements may be recognized.

(1) Supreme Court Decision dated March 11, 2021, Case No. 2017da259513

When determining whether to apply good faith agreements over mandatory provisions that regulate labor relations, it is necessary to consider the legislative intent of the Labor Standards Act, which establish minimum standards for working conditions to

7) Seoul Southern District Court Decision on April 27, 2017, Case No. 2016na60674 (Trial Court); Supreme Court Decision on September 26, 2017, Case No. 2017da232020 (ThyssenKrupp Elevator Korea Wage Claim Case).

ensure and improve the basic livelihood of workers. Moreover, companies are the ones responsible for running businesses, and the business situation can change frequently due to various economic and social factors both inside and outside the company. Rejecting additional statutory allowances claimed by employees based on the recalculation of ordinary wages, on the grounds that it would cause significant operational difficulties for the employer or jeopardize the company's existence, could effectively shift the business risks to employees. Therefore, the question of whether an employee's additional statutory allowance claim would cause significant operational difficulties for the employer or jeopardize the company's existence, in violation of good faith principles, should be assessed with caution and rigor.

(2) Supreme Court Decision dated December 16, 2021, Case No. 2016da7975

Whether an employee's additional statutory allowance claim based on the recalculation of ordinary wages causes significant operational difficulties for a company or jeopardizes its existence should be determined by considering multiple factors such as the size of the additional statutory allowance, the real wage increase resulting from payment of the additional statutory allowance, the rate of increase in ordinary wages, the company's net profit and its fluctuation, the available funds, total labor costs, revenue, the company's continuity and profitability, and overall trends in the industry to which the company belongs. Even if a company is temporarily facing operational difficulties, if the employer made reasonable and objective predictions regarding its operations, and there is a possibility of overcoming such operational difficulties in the future, good faith agreements should not be easily rejected to deny employees' claims for additional statutory allowances.

2. Cases recognizing good faith agreements

(1) Supreme Court Decision dated July 9, 2020, Case No. 2015da71917 (GM Korea)

In this case, the regular year-end bonus amounted to 700% of the monthly ordinary wages, and considering the overtime work routinely performed by production workers, the statutory allowances that the defendant would have to additionally bear based on the recalculation of wages significantly exceeded the range of statutory allowances used as reference during wage negotiations. The defendant's accumulated net profit was negative, reaching around minus KRW 6 trillion from 2008 to 2010 and minus KRW 8 trillion from 2008 to 2014. The defendant's debt ratio from 2008 to 2014 was significantly higher than that of similar companies, and the current ratio did not match that of similar companies. Additionally, the amount of borrowed funds exceeded KRW 2 trillion as of the end of 2014. Considering these circumstances, the plaintiff's claim for additional statutory allowances for the regular year-end bonus, calculated by

including it as part of ordinary wages, would result in the pursuit of unexpected benefits far exceeding the agreed-upon wage level between labor and management. It would also impose an unforeseen financial burden on the defendant, potentially causing significant operational difficulties or endangering the defendant's existence. Therefore, the plaintiff's claim could not be allowed, as it would violate the principle of good faith.

(2) Supreme Court Decision dated July 9, 2020, Case No. 2017da7170 (SsangYong Motor)

If the year-end bonus were included in ordinary wages, the estimated additional amount that the defendant would have to pay to functional employees each year from 2010 to 2012 would be around KRW 20 billion. The defendant had been incurring significant losses since 2008, and around 2009, the defendant's very existence was threatened. Starting in 2009, labor and management (the defendant) agreed to various cost-cutting measures, such as freezing the basic wages of the defendant's employees, reducing bonuses, and not paying certain welfare benefits, in order to overcome the defendant's crisis. Considering these circumstances, if the plaintiff's claim for statutory allowances related to bonuses and retirement payments were granted, the plaintiffs would gain unexpected benefits that would exceed the originally agreed-upon wage level, while the defendant would face unforeseen financial expenses, potentially leading to significant operational difficulties. Therefore, the plaintiffs' claim was in violation of the principle of good faith.

3. Cases where an agreement was not recognized as being in good faith

(1) Supreme Court Decision dated March 11, 2021, Case No. 2017da259513 (Kumho Tire)

If the bonuses in this case were included in ordinary wages, the ordinary wages of the defendant's employees could significantly increase compared to the agreed-upon ordinary wages. Consequently, the total wage amount that the defendant would have to pay would also increase substantially, resulting in a new and unforeseen financial burden. However, when considering the size and trends of the defendant's annual revenue, gross profit, net profit, total debt, and total equity, which far exceed the KRW 2 trillion being maintained for the additional statutory allowances that were recognized in this case, it cannot be considered that these circumstances would directly and substantially cause significant operational difficulties or endanger the existence of the defendant.

(2) Supreme Court Decision dated December 16, 2021, Case No. 2016da7975 (Hyundai Heavy Industries)

The deterioration in the financial situation as described cannot be regarded as a

circumstance that the defendant could not have foreseen. Risks and disadvantages due to fluctuations in domestic and international economic conditions are within the range that companies, like the defendant, which have been engaged in large-scale business for a long time, can anticipate or bear. Given the size of the defendant's business, this can be seen as a temporary difficulty that could be overcome.

(3) Supreme Court Decision dated April 23, 2019, Case Nos. 2016da37167 and 37174 (Hanjin Heavy Industries)

Examining the following circumstances in light of legal principles, it cannot be concluded that paying additional statutory allowances by including regular bonuses in ordinary wages would directly and substantially cause significant operational difficulties for the defendant or endanger the existence of its business.

① The additional statutory allowances that the defendant would bear due to the plaintiffs' claims amounted to approximately KRW 500 million. The defendant's annual revenue remained stable at around KRW 5 trillion to KRW 6 trillion without significant fluctuation. The size of these additional statutory allowances accounted for only about 0.1% of the defendant's annual revenue.

② The defendant's cash assets held annually far exceeded the amount required to cover the additional statutory allowances by approximately 160 times.

③ The defendant had no significant difficulties in securing the funds needed to cover the additional statutory allowances, given the smooth cash inflow from its business operations.

Ⅵ. Conclusion

The Supreme Court's unanimous decision in 2013 regarding ordinary wages can be considered a groundbreaking event in South Korea's wage structure and payment methods. It simplified the components of wages that were previously complex. Through this, it clarified that wages are compensation for labor and played a substantial role in reducing actual working hours. Despite its significant role, some companies continue to maintain the existing fixed bonus system by setting criteria for employee resignation dates, even though fixed bonuses should technically be included as part of the basic salary. This has led to the persistence of distorted wage systems. It is hoped that a prompt and clear judgment from the Supreme Court on the criteria for employees will

occur. Additionally, while the application of the principle of good faith to retroactive claims related to the existing method of calculating ordinary wages is recognized as an exception, disputes still arise in practice, indicating the need for clear interpretations through legal precedents.

Workplace Harassment Cases Arising from Excessive Work by a Superior

Ⅰ. Introduction

It has been four years since the legislative introduction of workplace harassment prevention measures in 2019. Initially, the provisions only included voluntary improvement efforts by employers, with no specific punitive regulations. In essence, employers were required to incorporate provisions related to workplace harassment into their employment regulations and ensure that appropriate investigations and disciplinary actions were taken by the employer in the event harassment was reported. However, effective prevention and proper actions in response to actual incidents were not consistently carried out in practice. In response to these issues, new legislation was introduced to include punitive provisions for incidents of workplace harassment, similar to those for workplace sexual harassment cases. These legislative changes mandated objective investigations by employers, obligations to provide protective measures, enforce appropriate disciplinary actions, maintain confidentiality, and prevent any adverse actions for reporting.

Employers are diligent in conducting thorough investigations and implementing protective measures and preventive actions for employees who report workplace harassment incidents. However, they appear to be hesitant to impose appropriate penalties on competent employees who engage in harassment. The reasons for this reluctance are threefold: Firstly, lenient penalties are applied to the harassing manager who is a high-performing employee since the harassment was driven by the desire to achieve greater results. Secondly, the organization itself is primarily focused on achieving its operational goals, and employee protection is considered a secondary responsibility for the employer. Thirdly, imposing severe penalties on the harassing manager could negatively impact the motivation of other managers and their commitment to achieving organizational objectives.

In this context, we aim to examine specific cases of workplace harassment and delve into the company's handling procedures in greater detail.

Ⅱ. Workplace Harassment Incidents: Some Details

1. Incident Summary

A female department head at a foreign pharmaceutical company engaged in excessive work demands and, as a result, subjected a specific female employee from another department to workplace harassment. Jung Ha-eun, a member of the Technical Support Team (referred to as "Ms. Jung"), reported to the branch manager and the HR department that she had been subjected to workplace harassment by Team Leader Lee OO, the Logistics Department Team Leader (referred to as "Ms. Lee"), on several occasions starting from June 10, 2023. In response to the complaint, the HR department promptly initiated an objective investigation. They altered Ms. Jung's work arrangement from the original schedule of three office days and two remote work days to full remote work. The HR team conducted a comprehensive fact-finding investigation based on the details of the complaint and interviewed relevant witnesses. Ultimately, they interviewed Ms. Lee regarding the allegations. However, she consistently denied that she had been involved in any workplace harassment.

2. Specific Allegations of Workplace Harassment

(1) In the fall of 2022, Ms. Jung mistakenly designated the wrong warehouse for a specific product, which was promptly rectified by a member of Ms. Lee's department. Ms. Lee, the team leader, called Ms. Jung via Teams and berated her for approximately 20 minutes, saying, "Don't you know how to do your job yet? I won't let you off the hook next time if this happens again." However, Ms. Lee denied that such an incident had occurred.

(2) On January 20, 2023, Ms. Jung expressed a difference of opinion in email response to an email from Ms. Lee. This led to her being summoned to Ms. Lee's office, where Ms. Lee allegedly criticized her for about 30 minutes, not only for her email response but also for her method of handling emails in general. During this time, Ms. Lee used derogatory language, repeatedly shouting at Ms. Jung, saying, "Haven't you learned anything from working in society? Do you have no common sense?" Two witnesses backed up the fact that Ms. Jung had been called into Ms. Lee's office, which Ms. Lee acknowledged, but she denied using offensive language.

(3) On February 7, 2023, Ms. Jung was reprimanded by Ms. Lee for approximately 40

minutes in her office because her response to Ms. Lee's email was delayed. Three witnesses confirmed this incident. Ms. Lee stated that her intent was to provide constructive feedback and guidance on Ms. Jung's work performance and denied that it amounted to workplace harassment.

(4) On May 15, 2023, Ms. Lee summoned Ms. Jung to her office because Ms. Jung failed to greet her in the hallway. During this encounter, Ms. Lee used informal language (which is inappropriate in a professional situation in Korea) and criticized her for not following workplace etiquette, stating, "You have no workplace manners. You must not have had a proper upbringing." For the sake of non-Korean readers of this article, it's important to point out that the latter statement is particularly offensive within Korean culture, as it greatly insults the target's family as well. On that day, Ms. Jung verbally reported workplace harassment to the HR department and expressed her grievances about being insulted by Ms. Lee to her own team leader. These claims are considered factual. Ms. Lee acknowledged using informal language but denied making the comment about her upbringing.

(5) In 2022 and 2023, Ms. Lee allegedly and frequently used profanity, calling her "bitch" and using "fuck" while talking on the phone during office hours in the open office space. Additionally, she often used informal language and failed to address team members by their names, instead saying "hey," "you," and "you there." Ms. Jung and the witnesses attested that they had heard Ms. Lee using such offensive language on multiple occasions. Ms. Lee admitted to addressing people by saying only "you" but denied calling people simply with "hey" and claimed that she had never used profanity during personal phone calls.

Ⅲ. Legal Evaluation on Workplace Harassment

1. Legal Requirements for Establishing the Occurrence of Workplace Harassment

"Employers and employees shall not engage in conduct that goes beyond the appropriate scope of work and causes physical or mental suffering to other employees in the workplace or deteriorates the working environment by using their superior position or relationship in the workplace" (Article 76-2 of the Labor Standards Act). To determine that workplace harassment has occurred, all three of the following

requirements must be met, and the conduct must be thoroughly examined before making an overall judgment.

(ⅰ) Utilization of superior workplace position or relationship

Workplace position refers to hierarchical relationship within the workplace, where the actor holds a superior position in a direct or indirect supervisory capacity. Utilizing one's position, even if not in a direct supervisory relationship, based on factors such as seniority, expertise, personal characteristics, influence within the workplace, being in auditing or HR departments, regular employment status, influence within the labor union or workplace councils, etc., should be considered.[8)]

(ⅱ) Relevance to work necessity and exceeding the appropriate scope of work

Relevance to work encompasses a broad interpretation of work-relatedness. It is not limited to acts that occur directly during work processes but also includes acts that accompany or arise from work or are related to work. For an action to be deemed exceeding the appropriate scope of work, it must either lack social necessity when viewed from societal norms or, even if necessary, be considered socially inappropriate in terms of its manner. Dissatisfaction with a work-related directive or order, even if it may cause discontent, cannot be considered workplace harassment if the action is deemed necessary from a societal perspective. However, if the behavior accompanying the directive includes physical violence or excessive verbal abuse, it can be considered as exceeding the appropriate scope of work. Furthermore, if the directive, despite its necessity, is unreasonably directed at one employee over others engaged in similar duties without justifiable reasons, it can be considered socially inappropriate.[9)]

(ⅲ) Causing physical or mental suffering or deteriorating the working environment

Causing physical or mental suffering refers to a wide range of actions,[10)]

- including physical violence, threats,
- continuous verbal abuse, or any act that seriously infringes upon a person's dignity and causes mental suffering. Actions causing emotional distress or fear and anxiety in an individual fall under this category.
- Actions that deteriorate the working environment are those that hinder an

8) Supreme Court ruling on July 10, 2008: 2007du22498.
9) Supreme Court ruling on Dec. 21, 2006: 2005du13414.
10) Ministry of Employment and Labor, Workplace Harassment Assessment and Prevention Response Manual (May 2019),

individual's ability to function optimally.

- Intent is not considered in this context.
- Thus, the act of the person causing the harm is not relevant; instead, what is essential is whether the victim has suffered.
- In summary, for an action to be considered workplace harassment, it must meet all three conditions: i) the action is perpetrated by a person using their superior workplace position or relationship, ii) the action exceeds the appropriate scope of work, and iii) the action results in physical or mental suffering or deterioration of the working environment. In essence, there must be tangible evidence of the victim experiencing physical or mental distress or the working environment being negatively impacted.

2. Decision on whether Workplace Harassment Occurred, Based on the Investigation

According to the Ministry of Employment and Labor's Workplace Harassment Determination and Prevention Response Manual (May 2019), the specific criteria for judgment include ① the relationship between the parties involved, ② the location and circumstances of the actions, ③ the victim's response to the actions, ④ the nature and degree of the actions, and ⑤ the duration of the actions (single occurrence, short-term, or continuous). The manual emphasizes that even if the immediate superior is not the perpetrator of workplace harassment, if they exercise their workplace influence and negatively affect the work capacity (e.g., seniority) and workplace impact of the alleged victim, this can be considered as "using a superior position or relationship."

According to the internal investigation report, specific actions reported about the accused (the team leader, Ms. Lee) include: 1) On January 20, 2023, the accused criticized the alleged victim (Ms. Jung) for expressing a difference of opinion regarding the method of receiving emails, stating, "Have you never lived in society? Have you not learned anything all this time? Do you not have common sense?" 2) On February 7, 2023, Ms. Jung was called out for a delay in responding to emails, for which Ms. Lee engaged in a 40-minute reprimand.

Reviewing the aforementioned actions, it can be observed that the superior engaged in: ▲ unilateral calls to Ms. Jung and harshly criticized her, causing significant humiliation; ▲ reprimanded Ms. Jung extensively during a unilateral call, failed to provide specific advice on improving work-related issues, but rather simply reprimanded

Ms. Jung for a prolonged period; and ▲ according to the statements of witnesses, the superior had ongoing feelings of discontent with the team to which Ms. Jung belonged and exhibited particularly aggressive behavior towards Ms. Jung, which indicates that the actions were not spontaneous. Considering these factors, it can be concluded that the superior's conduct, although possibly related to work necessity, exceeded the appropriate scope of work and was carried out to an excessive degree, thus causing Ms. Jung significant mental distress. Consequently, this behavior can be deemed workplace harassment and a basis for disciplinary action.

However, concerning the action in which Ms. Lee criticized Ms. Jung for a warehouse designation mistake in the fall of 2022 during a Teams call when Ms. Lee is alleged to have stated, "Have you never lived in society? Have you not learned anything all this time? Do you not have common sense?" There was insufficient concrete evidence or witnesses to confirm these statements, making it difficult to establish it as a basis for disciplinary action.

As for the action on May 15, 2023, when the accused called Ms. Jung to her office and criticized her for not following "workplace etiquette," it is confirmed that there were remarks made by both the accuser and the accused regarding greeting each other. The reprimand extended for a lengthy period of time regarding workplace etiquette, which has no direct relevance to work performance. This can be considered workplace harassment.

Based on the internal investigation report, it is confirmed that the accused repeatedly used offensive language such as profanity, such as "fuck(씨발!)," towards colleagues during phone calls, as stated by Ms. Jung and other witnesses. This occurred in the presence of several colleagues in a shared office space. Such verbal abuse created a hostile work environment and violated the dignity and integrity of fellow employees, even if it was uttered in private. This can be considered workplace harassment.

Assuming that the facts uncovered in the investigation are based on objective evidence, the actions of the accused, including verbal harassment, extended reprimands, and the use of derogatory language, disrupted the company's harmony and order and therefore largely fall within the grounds for disciplinary action.

Ⅳ. Evaluation of Disciplinary Measures and Decision of the Disciplinary Committee

1. Legal Standards for Disciplinary Measures and Review of Opinions on this Case

The determination of what disciplinary action should be taken against an employee subject to disciplinary measures is at the discretion of the disciplinary authority. However, disciplinary action taken by the disciplinary authority is considered unlawful when it is recognized as an abuse of discretion, significantly deviating from societal norms.[11] In the event of termination as a disciplinary measure, it is considered legitimate only when there are reasons for which the employee can be held responsible to an extent that continuing the employment relationship would be impractical in the eyes of society. This should be determined by comprehensively reviewing various factors, including the purpose and nature of the employer's business, workplace conditions, the employee's position and job responsibilities, the motivation and circumstances of the misconduct, its impact on the corporate order, past work attitudes, and other relevant circumstances.[12]

Therefore, the employee subject to disciplinary measures can be subject to a significant disciplinary action if: ? repeated misconduct is perceived to be ongoing over a substantial period, and ? there is persistent use of verbal abuse beyond the scope of normal work duties, which is related to personal conflicts with the alleged victim. However, considering the employee's clean disciplinary record and the presumed situation of interdepartmental conflict and work overload, imposing significant disciplinary measures is not advisable. Given the recurring and persistent nature, if the person subject to disciplinary action were to be found to have committed similar incidents of workplace harassment in the future, termination as a disciplinary measure could be considered.

2. Decision of the Disciplinary Committee

In October 2023, a disciplinary committee was convened to address the workplace harassment involving the perpetrator, Team Leader Lee, within the organization. The disciplinary committee was chaired by this labor attorney, and its members included the branch manager and a labor representative from the labor-management council. The head of the HR department explained the disciplinary issues to Ms. Lee and provided her with an opportunity to present her side of the story.

During this process, Ms. Lee stated that she had provided guidance and training to subordinates regarding proper work methods as part of her commitment to achieving perfection in the performance of her duties. She denied engaging in workplace harassment and did not display any signs of remorse. In response, the chairman of the disciplinary committee emphasized that assessments of workplace harassment should be made from the perspective of the victim. If a third party experienced the same

11) Supreme Court ruling on Nov. 26, 1999: 98du6951.
12) Supreme Court ruling Nov. 10, 1998: 97nu18189.

behavior from the victim's standpoint, the actions would likely be perceived as going beyond the reasonable scope of work and thus constitute harassment.

The disciplinary committee chairman recommended a 1-month unpaid suspension due to Ms. Lee's lack of remorse and the high likelihood of a recurrence of such behavior. However, the branch manager explained that Ms. Lee's actions stemmed from her desire to achieve perfection in the company's workflow, although recognizing that there was ample room for improvement. The branch manager proposed a 3-month salary reduction as a disciplinary measure. The other disciplinary committee member was in agreement, ultimately confirming a 3-month salary reduction as the determined disciplinary action.

Ⅴ. Conclusion

The workplace is one of the foundations in an individual's life, and is where most people spend a significant portion of their day. Employees seek happiness and personal fulfillment through their work, making it a vital space for their well-being. As such, employees hope for workplaces where they are treated with respect and dignity, fostering an environment of mutual respect. However, it's not uncommon for superiors, especially in the pursuit of excessive work demands, to prioritize tasks over the well-being of their subordinates. They might unintentionally issue excessive work directives or treat subordinates in an inhumane manner. The cases described earlier represent forms of workplace harassment that can frequently be found in workplace culture. Employers must put in their best efforts to create a workplace culture that values and respects the dignity of all employees. In cases where workplace harassment occurs, thorough investigations are essential. Employers should provide protection and support for the victims while also imposing appropriate consequences on the perpetrators to establish a desirable workplace environment.

The Workplace Harassment Case Involving a Dispatched Worker

Ⅰ. Introduction

Workplace harassment Cases occur in various forms during the course of performing duties. When dealing with workplace harassment cases, there are cases where individuals report being harassed in the workplace by peers of equal position due to conflicts during work. Additionally, there are instances where superiors report being harassed in the workplace by subordinates' offensive remarks. However, to be

recognized as workplace harassment, it must involve the use of superior status or relationships within the workplace, as specified in the definition of workplace harassment. In this case, the incident involved the issue of whether disrespectful remarks made by a subordinate to a superior constituted workplace harassment.

On October 16, 2023, a manager-level employee (victim, manager Ms. 00 Kang) reported being harassed in the workplace by a dispatched worker (offender, assistant manager Mr. 00 Kim). The conflict arose during a disagreement between the victim and the offender over the victim's job performance, expressed through the company messenger (MS Teams Messenger). The victim reported that the offender's statements constituted workplace harassment.

The victim claimed to have experienced verbal abuse from the dispatched worker, causing significant stress to the point where they could no longer work together. The company, upon receiving this incident report, faced two main issues. Firstly, whether the verbal abuse the victim endured during working hours met the criteria for workplace harassment. Secondly, if the psychological distress experienced by the victim qualifies as workplace harassment, the company needs to address how to take action against the dispatched worker, who is an employee of another company.

Ⅱ. Summary and Content of Workplace Harassment

1. Summary of the case

The company has three offices: Gangnam office, Samsung office, and Yeoksam office, each managed by a designated individual. The victim manages the Samsung office, the offender manages the Gangnam office, and another employee is responsible for the Yeoksam office. While all three individuals share office management (OM) responsibilities, their reporting lines are different. Office management involves overseeing each office's operations, making their tasks independent of each other. However, there are some collaborative tasks such as voucher receipt and distribution, pouch services, etc. They primarily communicate through the company messenger (MS Teams), and face-to-face meetings between the two individuals occur approximately once a month.

The victim, Manager Kang, joined the company in October 2020 and has been working as the Office Manager at the Samsung office. In contrast, the offender, assistant Kim, is a dispatched worker from a service provider and has been working as an Office Administrator at the Gangnam office since July 2023. The communication within the messenger is as follows:

<Dispatched Company Employee, Assistant Mr. 00 Kim>	<Regular Employee, Manager Ms. Kang>
① (Expressing Dissatisfaction with Manager Kang's Work) Manager Kang, please properly handle the modification of the preferred office requests. It's confusing to repeat the same tasks when issuing vouchers, and I'm getting mixed up. Isn't it Manager Kang's responsibility to organize the voucher list? You always ask me to do this and that.	① (Uncooperative Response to Assistant 00 Kim's Work Complaint) Assistant 00 Kim, do it yourself. I'm not sure if you really understand this task and are requesting changes properly. If you speak to the person directly involved in leading this task from the beginning, it's understandable that it's confusing. Instead of requesting updates from me every time, you can update the data directly. (Some parts omitted)
② (Getting Angry at Manager Kang's Response and Insulting Manager Kang) Can you (Manager Kang) change things as you please? Do you know how many times I've been confused because of the preferred office? You never apologize for your mistakes. Do you realize how much I have to endure because I work in the same position as you? I try to get along as much as possible. You (Manager Kang) doesn't seem like such a nice person either, and I'm not that nice either. So, let's just be ourselves. It would be more comfortable for both of us when working, right? I won't ask you anything. Don't tell me what to do or not to do in the future. Fix the way you talk, mixing talking-down language and short sentences. If you speak talking-down languages to me again, I will use talking-down language with you. (Some parts omitted)	② (Manager Kang will ask HR for changing Assistant 00 Kim's Job Changes) Since it doesn't seem like we're in a situation to work together from the start, go ahead and talk to HR to sort it out. It doesn't seem necessary for us to have a conversation. You came in as a Manager Position, right? When others hear it, they might think you came in as a manager with such competence that you can handle the work alone. It seems to go beyond what I and HR think. You should ask HR about that. Whatever you say (Some parts omitted) I don't know how much I talked down to you, but if you feel bad because I used taking down to you, I apologize. I have things to apologize for and things not to apologize for, and I make that distinction. I'll contact HR, so try to adapt to

You don't have the position or qualification to tell me what to do. And you don't have that qualification, right? No, I'm an admin (responsible person), but I'm not the one who does what you (Manager Kang) tell me to do. (Some parts omitted) ③ (Assistant 00 Kim Expressing Anger for Manager Kang Mentioning Assistant 00 Kim to HR) Please try mentioning it to HR. I've been considerate of what I want. (Some parts omitted) If you've been doing it for three years, stop thinking about passing work to others. What's the point of giving orders if you don't set an example? (Some parts omitted) You can never apologize, can you? You still have your pride. I've been very considerate. You should have felt it by now. Please contact me. You're dense. You express your emotions the most. It's not kindergarten. If I do more, I'll do the same as you (Manager Kang). If someone who has been in the company for a long time is like this now, it's a big problem, isn't it?	the work later. ③ (Intentional Discontinuation of Conversation Regarding Assistant 00 Kim's Insults) There's really no need for emotional battles at work, so it's quite interesting. Try experiencing corporate life a bit more later on.

2. Detailed Description of Harassment

Expressions such as "Manager Kang doesn't seem like such a nice person either," "You still have your pride," "You're dense," "You express your emotions the most, what a kindergarten," and "If someone who has been in the company for a long time is like this now, it's a big problem" in the conversation have the potential to be considered insults that go beyond the reasonable scope of work. However, these remarks arose during a disagreement in the process of expressing dissatisfaction with the work style. During the interview, the offender acknowledged his mistakes and mentioned that such incidents would not happen in the future. The offender's behavior of insulting the

victim, as in this case, did not show a pattern of repetition or persistence.

The victim is complaining about the psychological distress caused by the messenger conversation. However, this harassment incident was a one-time occurrence, and since then, the victim has voluntarily refused any communication with the offender, including work-related contacts.

3. Investigation findings of the company

On October 16, 2023, Manager Kang (the victim) reported being harassed in the workplace by the offender. As evidence of workplace harassment, the victim submitted the content of the MS Teams messenger from 2:20 to 3:15 on the same day.
Following this, the company's HR representative conducted an interview with the offender on October 19, 2023. The offender stated that he received personal insults and rude treatment from the victim due to being a newcomer and decided to address the conversation mentioned earlier via Teams messenger, thinking it should be discussed and moved on. The offender acknowledged his inappropriate behavior but refused to apologize.

On November 1, 2023, the company's HR conducted an investigation through an interview with the victim. The victim stated that the offender's attitude does not align with the company's culture, making it difficult to continue working together. The offender displayed a similar attitude in work-related messages on October 25, 2023. The victim suffered significant stress and health deterioration due to the offender's harassment. The victim requested the separation of duties from the offender and disciplinary action against the offender. After completing the investigation into the harassment report involving the victim and the offender, the company convened a disciplinary committee on November 20, 2023.

Ⅲ. Legal Evaluation on Workplace Harassment

1. Legal Requirements for Establishing the Occurrence of Workplace Harassment

"Employers and employees shall not engage in conduct that goes beyond the appropriate scope of work and causes physical or mental suffering to other employees in the workplace or deteriorates the working environment by using their superior position or relationship in the workplace" (Article 76-2 of the Labor Standards Act). To determine that workplace harassment has occurred, all three of the following requirements must be met, and the conduct must be thoroughly examined before making an overall judgment.

(i) Utilization of superior workplace position or relationship

Workplace position refers to hierarchical relationship within the workplace, where the actor holds a superior position in a direct or indirect supervisory capacity. Utilizing one's position, even if not in a direct supervisory relationship, based on factors such as seniority, expertise, personal characteristics, influence within the workplace, being in auditing or HR departments, regular employment status, influence within the labor union or workplace councils, etc., should be considered.[13)]

(ii) Relevance to work necessity and exceeding the appropriate scope of work

Relevance to work encompasses a broad interpretation of work-relatedness. It is not limited to acts that occur directly during work processes but also includes acts that accompany or arise from work or are related to work. For an action to be deemed exceeding the appropriate scope of work, it must either lack social necessity when viewed from societal norms or, even if necessary, be considered socially inappropriate in terms of its manner. Dissatisfaction with a work-related directive or order, even if it may cause discontent, cannot be considered workplace harassment if the action is deemed necessary from a societal perspective. However, if the behavior accompanying the directive includes physical violence or excessive verbal abuse, it can be considered as exceeding the appropriate scope of work. Furthermore, if the directive, despite its necessity, is unreasonably directed at one employee over others engaged in similar duties without justifiable reasons, it can be considered socially inappropriate.[14)]

(iii) Causing physical or mental suffering or deteriorating the working environment

Causing physical or mental suffering refers to a wide range of following action s.[15)] ? Physical assault or threatening behavior.

- Verbal acts such as insults, swearing, gossip, etc. Particularly, persistent verbal abuse or swearing can seriously violate the victim's dignity and cause mental distress.
- Repeatedly assigning personal errands to an individual.
- Acts of ostracism within a group, intentional disregard or exclusion during work processes.
- Directing an employee to perform tasks unrelated to the duties specified in the employment contract against the employee's will, with such instructions persisting over a considerable period without a valid reason.
- Imposing excessive tasks in the workplace, which refers to assigning tasks that should not be assigned unless there are unavoidable work-related circumstances.

13) Supreme Court ruling on July 10, 2008: 2007du22498.
14) Supreme Court ruling on Dec. 21, 2006: 2005du13414.
15) Ministry of Employment and Labor, Workplace Harassment Assessment and Prevention Response Manual (May 2019),

- Acts that hinder smooth job performance, such as not providing essential work equipment (computer, phone, etc.) or disrupting access to the internet or the company's intranet.

"Aggravating the working environment" refers to acts that impede the victim's ability to demonstrate their capabilities due to such behavior.

(Ⅳ) Comprehensive Judgment

In summary, for an action to be considered workplace harassment, it must meet all three conditions: i) the action is perpetrated by a person using their superior workplace position or relationship, ii) the action exceeds the appropriate scope of work, and iii) the action results in physical or mental suffering or deterioration of the working environment. In essence, there must be tangible evidence of the victim experiencing physical or mental distress or the working environment being negatively impacted.

2. Assessment of Dispatched Workers

In the case of dispatched workers, they are considered third parties as they do not fall under the categories of 'employer' or 'employee' as defined in Article 76-2 of the Labor Standards Act. Despite this, the relationship in labor dispatch involves a special separation of employment and utilization. Therefore, workplace harassment arising from the employment relationship is jointly attributed to the using employer and the dispatching company as co-employers. Article 34 of the Act on the Protection of Dispatched Workers (hereinafter referred to as the Employee Dispatch Act) provides a special regulation regarding the application of the Labor Standards Act. The first paragraph of Article 34 stipulates, "For the dispatched work of dispatched workers, both the dispatching employer and the using employer are considered employers under the Labor Standards Act." Furthermore, Article 21 of the Employee Dispatch Act states, "Neither the dispatching employer nor the using employer shall engage in discriminatory treatment towards dispatched workers compared to workers performing the same or similar tasks within the business of the using employer." Therefore, in the case of harassment incidents involving dispatched workers, the using employer must assess the occurrence of harassment against dispatched workers using the same standards applied to regular employees within the workplace.[16)]

Consequently, both the dispatching employer and the using employer are considered employers under the Labor Standards Act, sharing the joint responsibility and obligation stipulated by the workplace harassment provisions of the Labor Standards

16) Lee Sangkon, "A Study on the Improvement of Workplace Harassment Legislation," Doctoral Dissertation, Ajou University Graduate School of Law, 2020, pp. 122-125.

Act. While, in principle, both the dispatching employer and the using employer should conduct a joint investigation and take necessary measures, in cases where the incident occurs during the provision of labor at the user workplace, the using employer is responsible for the investigation and measures, and the nature of these actions should be communicated to the dispatching employer.[17)]

3. Determination of Workplace Harassment

Upon comparing the factual circumstances described earlier with the legal principles of workplace harassment, the following conclusions can be drawn. The offender is a non-regular employee (dispatched worker) and holds a lower position compared to the victim. In contrast, the victim holds a higher position and is a regular employee with the ability to influence the offender's future regular employment or job evaluation. Therefore, the offender cannot be considered to have a superior position in terms of the victim's workplace status or work relationship.

The statements made by the offender, such as "You still have your pride," "If someone who has been in the company for a long time is like this now, it's a big problem," and "What a kindergarten," are derogatory remarks targeting the victim and can be considered verbal abuse, a form of workplace harassment. Additionally, irrespective of the determination of workplace harassment, it is unacceptable for a subordinate to use verbal abuse towards a superior in a hierarchical and respectful organizational society.

The dialogues constituting verbal abuse by the offender can be deemed as causing psychological harassment to the victim. As a result, the victim has expressed psychological distress and avoidance of the offender in work-related matters, leading to significant mental suffering and a deterioration in the working environment associated with job performance.

In assessing workplace harassment, all three elements must be satisfied: 1) the use of a superior position or relationship, 2) excessive behavior beyond the appropriate scope of work, and 3) resulting in psychological or physical suffering or worsening of the work environment. In this case, elements 2) and 3) are met, but since the offender is a lower-ranking employee, a non-regular employee (dispatched worker), and lacks superiority in the relationship, element 1) is not satisfied. Therefore, it can be concluded that the offender's actions do not constitute workplace harassment in relation to the victim.

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17) Ministry of Employment and Labor, "Prevention and Response Manual for Workplace Harassment" (April 2023), p. 54.

Ⅳ. Conclusion

The company only assessed whether the actions of the dispatched worker, who is also a lower-ranking employee, constituted workplace harassment by exceeding the appropriate scope of duties towards the superior employee. In this context, it did not address disciplinary measures such as warnings or other punishment for inappropriate behavior by the subordinate employee in the future.

This workplace harassment case has two notable features. Firstly, it revolves around determining whether the inappropriate verbal abuse from the subordinate to the superior exceeded the appropriate scope of workplace harassment. The text concludes that inappropriate language violence from a subordinate to a superior does not qualify as workplace harassment because the requirements for workplace harassment involve actions from someone in a superior position using their authority over a subordinate employee. Secondly, it raises the question of whether a dispatched worker can be either the offender or victim of workplace harassment. In cases involving workplace harassment related to dispatched workers, the using employer is obligated to take necessary measures for addressing workplace harassment. As mentioned earlier, the employer must fulfill the obligations outlined in Article 76-3 of the Labor Standards Act as the using employer for the dispatched worker.

Feature Articles

Feature Articles: Flexible Working Systems

How to Introduce and Use Flexible Working Systems

Ⅰ. Introduction

Productivity depends on increasing production or achievements in a limited time. The term '52-hour week' originated from the introduction of 'one week' in Article 2 of the Labor Standards Act, which states that "one week is seven days including holidays."[18] A statutory work week is 40 hours, (a total of 52 hours with maximum allowable overtime of up to 12 hours per week). In order to achieve better results with a reduction of working hours, a flexible working time system that focuses on the characteristics of the work is urgently needed. In 2006 I provided wage consultation for a French company that was in charge of the operation of subway line 9, and what the manager told me is still vivid in my mind. "Koreans work 44 hours per week, but are less productive than those who work 32 hours per week" the French manager said. At that time, when I considered what he said, I thought it was because Korea was constantly working on extended work and holiday work due to the rigid working hours. Most Korean companies still work from 9 am to 6 pm, Monday through Friday. In order to be efficient during these traditional hours, an introduction of flexible working hours as allowed by the Labor Standards Act is urgently required.

The Labor Standards Act includes (i) flexible working hours, (ii) selective working hours, (iii) deemed working hours, and (iv) discretionary working hours. How to adopt and use these four flexible working systems is described in detail below.[19]

Ⅱ. The Flexible Working Hours System

1. Concept

'Flexible working hours' means a shortening of the working hours of other working days or other weeks instead of extending the working hours of particular days or weeks, so that the average working hours of a given period shall remain within the limit of statutory standard working hours (40 hours per week). For example, if you work 45 hours (9 hours x 5 days) in the first week and 35 hours (7 hours x 5 days) in the second week, the two weeks will have an average of 40 hours per week, and so it will

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18) The Labor Standards Act was revised on the concept of one week (March 30, 2018).

19) Ministry of Employment and Labor, Flexible Working Hour System Guides, September 2019; MOEL, Q&A for Flexible Working Hour System, December 2017.

not be necessary to pay overtime for the extended 5 working hours of the first week.

For the workers, increased leisure time as a result of a reduction in working hours, a decrease in the number of commuting days, and increased holidays, all of which cause a change in their biorhythms resulting in increased fatigue, is coupled with a decrease in real wages due to reduced overtime allowances.

From the perspective of the employers, labor costs can be reduced by increasing the efficiency of working hours and reducing the need for overtime by arranging working hours to proactively respond to market conditions and management, thereby avoiding the too-strict fixed statutory time system.

2. How to Introduce Flexible Time

(1) Introduction of flexible working hours within a twoweek period

In order to introduce flex-time in two weeks, it must be prepared in advance through the establishment and revision of the rules of employment. In order for this system to be introduced through the employment rules, the opinion of the labor union, or workers representing the majority, should be heard, and consent should be obtained if introduction of the system will affect the workers disadvantageously.

(2) Introduction of flexible working hours within a 3- month period

This system requires labor-management agreement. The employer should receive a written agreement from the labor union which comprises a majority of the workers, or the employee representative for the majority of the workers. The contents of the written agreement must include (i) the scope of the covered workforce, (ii) the unit period, (iii) the working day in the unit period, and the working hours for each working day, and (iv) the validity period of the agreement.

1) The scope of covered workers does not necessarily have to include all workers, as it can apply to only some workers engaged in specific sectors, industries and occupations. However, it cannot be applied to young workers (between 15 and 18 years of age) or pregnant workers.
2) Since the unit period is within 3 months, it can be implemented in various unit periods such as 3 months, 2 months, 1 month, or 3 weeks.
3) The working day and the working hours for each working day must be specified. Workers should be notified of the work schedule before the start of the unit period by specifying the work day by work type and working hours by work day in the work schedule. Working hours in a particular week may not exceed 52 hours, and working hours on a particular day shall not exceed 12. If more than

that, overtime work allowance must be paid.

4) There is no special limitation on the validity of written agreements. If an expiration date is set, an automatic renewal clause or an auto-expansion clause may be implemented in case the expiration date passes.

3. How to use Flexible Time

(1) Let's use the instance of a brick factory.[20] We use a combination of sand, special cement, and water to make differentiated bricks in the factory. In January each year, temperatures drop below -20 degrees, and when the water completely freezes at this temperature, it is almost impossible to produce bricks. Therefore, workers come to work as usual and perform chores such as cleaning rather than producing bricks. But in March, the situation is completely different. As construction starts in earnest, there is no choice but to work overtime due to the large volume of brick orders. For this company, a flexible working-hour system could solve their problem. Workers could work 30 hours per week in January, 40 hours per week in February, and 50 hours per week in March. In this case, the average working hours per week would be 40 hours, which would mean the company is not obligated to pay an overtime allowance in March, even though the work week at that time exceeds 40 hours.

(2) For a luxury-brand store: December is the peak season, and so customers shop a lot and store workers work overtime. On the other hand, January is off-season and customers don't go to luxury brand stores as much, resulting in an overabundance of workers who must be paid, but have minimal production. In this kind of store, flexible working hours could reduce labor costs and enhance work efficiency. In December, during peak season, workers would work 52 hours a week, but in January, during the off-season, they could work just 28 hours a week.

Ⅲ. Selective Working Hours System

1. Concept

The Selective Working Hours System sets only the total working hours of the settlement period within one month, allows workers to arbitrarily select a working time for each work day per week within the standard working time range, and to freely determine their commute time for each day and each week. In other words, the system sets only the total working hours within one month and leaves the start and end times of working hours to the workers' discretion. Therefore, the selective working hours

20) Boksoo Kim, The Practical Use of the Flexible Working Hour System <Labor Law>, June 2018.

system gives workers the choice of commute times, enabling them to balance work and life to increase their work efficiency while improving their quality of life.

2. How to introduce a Selective Working Hours System

(1) Introduction through the employment rules: Employers must stipulate that the start and end times of work are left to each worker's discretion for a group of workers subject to selective working hours, through the establishment or revision of employment rules.

(2) Written agreement with the employee representative: To introduce a selective working hours system, a written agreement with the labor union or worker representing the majority of the workers is required. The written agreement shall include (i) the scope of workers subject to this system, (ii) the adjustment period (within one month) and the total working hours within the adjustment period, (iii) starting and finishing limit of working hours if a mandatory work period (core time) is in force, (iv) starting and finishing time of eligible hours for selection by workers (selective time), and (iv) standard working hours to become the basis for paid leave.

1) The scope of covered workers: In general, it is easy to apply the system to managers and supervisors who do not have strict restrictions on commuting, etc., and for professional, research, and office workers, where the emphasis is on quality rather than the amount of work. However, this system can be introduced in any workplace.

2) The settlement period and total working hours: The discretionary period for which the worker chooses to provide the work can be set within one month (two weeks or four weeks). The total working hours are usually calculated as the total sum of the contractual working hours within the settlement period (e.g. 40 hours x 30 days/7 days = 171.4 hours) prior to the introduction of the system. If the total working hours are set, even if the working hours in a given unit exceed the legal working hours per day or per week within the total working hours of the settlement period, they will not be considered extended working hours subject to O/T allowance.

3) Core working hours and selective working hours: A core working time is the time when the worker must work, and the selective working time is the time when the worker can decide which hours to work.

4) Standard working hours: Standard working hours refers to the working hours for one day, as set by labor and management, which becomes the basis of calculation for paid leave, etc. in the selective working hour system. For paid leave, it is considered that the standard working hours of 1 day are used.

3. How to use

(1) General selective working hours system: The selective working hours system is divided into mandatory working hours and selective working hours. Standard working hours, based on the calculation of paid leave, are from 09:00 to 18:00. For example, workers are given discretionary hours from 07: 00 - 11: 00 for coming to the office and from 15: 00 - 20: 00 for leaving the office. Mandatory working hours for all workers are between 11: 00 and 15: 00.

(2) Jobs where it is difficult to verify working hours, and/or with high waiting times (The 00 company specializes in renewable energy): Employees were dissatisfied because they did not get paid overtime due to difficulties in verifying their working hours. Also, for after-sales service, irregular overtime work occurred frequently and there were many waiting hours. The company introduced a selective working hours system on a monthly basis for the sales and AS teams through written agreements with labor representatives after consultation between labor and management. As a result, it was possible to adjust working hours according to work volume and reduce unnecessary waiting time and overtime work by carrying out flexible and efficient work.[21)]

(3) Jobs related to irregular work types: The 00 company, which is a refrigeration facility installation and management company, works according to the project schedules requested by clients and their companies, due to their unique natures. There was a lot of overtime hours due to irregular, nighttime and holiday work. The company therefore introduced a selective working hours system which allowed each worker to manage their time of arriving and leaving work according to the circumstances and demands of client companies. This has minimized unnecessary overtime. As a result, workers could adjust their working hours according to the schedule of their clients, which made it possible to reduce overtime caused by irregular working hours.[22)]

Ⅳ. Deemed Working Hours System

1. Concept

The Deemed Working Hours System is a system for recognizing working hours when it is difficult for workers to calculate all or part of their working time outside the workplace due to business or other reasons. In this case, in principle, the prescribed contractual working hours are considered to be worked. However, in the case where work in excess of predetermined working hours is normally required for

21) MOEL, Flexible Working Hour System Guides, September 2019, p. 52.
22) Above guide, pp. 53-54.

performance of the work, the required time is generally regarded as working time. If labor and management have determined generally-necessary working hours in writing in advance, such working hours are regarded as working hours performed. The deemed working hours system outside the workplace is sometimes referred to as an authorized labor system, and was established to make working hours more rational in consideration of the increasing number of working hours outside the workplace due to the development of the service industry and the progress of automation. Difficulties in calculating such working hours include sales, AS service, business trips, taxi driving, reporters' work, and home-stay work.

2. How to introduce a Deemed Working Hours System

(1) Provision of work outside the workplace: Work outside the workplace should be judged after comprehensive consideration of the place of work and the type of work performed. A working place is a situation in which a worker deviates from the management of working hours at his or her own place of work. The form of work performance refers to the conduct of work without specific direction and supervision from the employer's working time management organization.

(2) Difficulty in calculating working hours: It is difficult to calculate working hours because the starting and finishing time when working outside the workplace are discretionary for the workers concerned, and because the workers concerned work the number of working hours due to each unique situation and working conditions involved. Therefore, if it is possible to calculate working hours when specific direction and supervision by the employer is applied directly to workers working outside, those workers are exempted from application of the deemed working hours system.

(3) How to introduce: If (1) and (2) above are met, workers' working hours, regardless of actual working hours, should be considered as working hours as either: (i) predetermined working hours, (ii) time normally required for the performance of the work, or (iii) agreed working hours between labor and management.

3. How to use

Overseas business trips: When traveling for long-distance overseas business trips or returning home, flight times, immigration procedures, and travel time are all likely to exceed actual working hours. In such cases, it is desirable to establish a written agreement with the worker representative. Generally, the company guarantees paid or alternative leave for the time required for the work because of overseas business regulations. In this regard, the courts and the Labor Ministry consider working time spent abroad as working hours.[23)]

Ⅴ. Discretionary Work System

1. Concept

The discretionary work system is a system that requires the delegation of the method of work to the discretion of the workers, in light of the nature of the work. Due to technological advances, information-oriented work, the increasing share of the service industry, increase of knowledge labor, etc., workers have a lot of discretion in the way they work, and so their remuneration depends on the quality of their work rather than the number of working hours.

Professional work that requires creativity (such as R&D, information processing, system analysis, design work, news article composition, and editorial work) is not appropriately regulated by the number of working hours in the same way as for general workers. But it is preferable for both labor and management to leave working hours to the discretion of such professional workers rather than to control them.

2. How to introduce a Discretionary Work System

(1) Work falling under 'discretionary work'.

Work that may be considered discretionary work is limited to the work prescribed in Article 31 of the Enforcement Decree of the Labor Standards Act. The work must be at the discretion of the workers. They should not be given specific instructions as to how to perform, but this should not be left to the full discretion of the workers either, so the employer can direct the basic content of the work. However, the employer must not give specific instructions regarding the distribution of working hours.

(ⅰ) Research and development of new products or technologies, and research in the areas of the humanities or the social or natural sciences;

(ⅱ) Design or analysis for data processing systems;

(ⅲ) Gathering, compiling and editing of news in a newspaper, broadcasting or publication business;

(ⅳ) Design or creation of clothing, interior decoration, industrial goods, advertising, etc.;

(ⅴ) Work as a producer or director in the business of producing broadcasting programs, motion pictures, etc.; and

(ⅵ) Consultation, advice, appraisal or an agency with the delegation or commission of others in the affairs of accounting, legal cases, tax payment, legal affairs, labor management, patents, appraisals, etc.

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[23] Suwon District Court ruling on November 25, 2016: 2015 gadan 505758; Labor Ministry Guideline on June 14, 2001: 68207-1909,

(2) There must be written agreement on statutory matters.

In order to introduce a discretionary work system, the employer must specifically identify the work concerned, as well as all other necessary items, through a written agreement with the employee representative. Statutory matters that must be included in the written agreement include: (ⅰ) provision as to the work to be provided; (ii) provision that the employer would not give directions to the worker regarding how to perform the work, and details concerning the allocation of working hours; and (iii) provision for the computation of working hours as determined by written agreement.

3. How to use

In order for the company to adopt and use discretionary work hours for certain occupations, departments, and duties within the organization, its application must include (ⅰ) the six discretionary work tasks mentioned above, (ii) discretionary rights in work performance must be allocated and (iii) there should be a written agreement with the worker representative.

Ⅵ. Conclusion

In order to improve the productivity of the company and improve the quality of life of the workers, it is necessary to introduce a working-hour system tailored to the characteristics of workers' jobs. Through this, it will be possible to create a desirable work culture where work and life are equally compatible.

Work-from-Home Systems

Bongsoo Jung / KangNam Labor Law Firm

Ⅰ. Introduction

As of March 23, 2020, the number of persons confirmed to have been infected by the coronavirus in Korea was approaching 9,000, with over 100 dead. COVID-19 is spreading worldwide and showing signs of prolongation. In this emergency situation, many companies are putting work-from-home procedures in place to protect workers while continuing business. However, these procedures have been introduced without preparation, lowering work efficiency and causing many negative side-effects.

To maintain efficiency while a work-from-home system is in place, the following three criteria must be met in the introduction process: (i) the jobs must be suitable for working from home; (ii) the employee(s) must have the necessary work environment to work from home; and (iii) there must be continuous management supervision of those working from home. First, a work-from-home system should be introduced only for jobs in suitable fields. Second, an IT work environment must be in place for the employee(s). Only then will it be possible to manage and supervise the work and address the security concerns related to working from home. Third, application of the Labor Standards Act to maintain and manage the working conditions of those working from home must be made clear. From this point of view, I would like to review the concept of working from home and suggest concrete methods to make a work-from-home system sustainable.[24)]

Ⅱ. Jobs Suitable for Working from Home and Required Equipment

1. The concept of working from home

Working from home provides flexibility when a work space is provided in a home and utilizes information & communication technology and the facilities & equipment necessary for the work. Regular working from home involves most of the work being done from home, while occasional working from home involves only part of the week spent working from home and the other part at the office. This would include, for example, Mondays and Tuesdays at home working and the rest of a 5-day work week in the office.

2. Jobs suitable for working from home

Jobs that allow workers to work independently and involve the performance of individual tasks, jobs that have little or no face-to-face contact with customers, and jobs that do not need to be performed at a specific location are all suitable for a work-from-home system. Such a system is particularly easy to introduce into fields such as program and game development, web design, book publication, distance education, financial and insurance marketing, civil complaint consulting, planning and administrative processing, and computational work.

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24) Reference: Ministry of Employment and Labor, Manual for the Introduction and Operation of a Systematic Flexible Working System, December 2017; Ministry of Employment and Labor, How Korean Companies Will Put Flexible Work into Action, November 2016; Labor Ministry Guidelines (kungi 68201-4085, December 29, 2000): Standards for Application of the Labor Standards Act with Those Working from Home; Ministry of Employment and Labor, Flexible Working Hours Guide, August 2019; Seung-Gil Lee, Status of Those Working from Home in Terms of Labor Law, Labor Law, August 2001, vol. 123.

(1) Suitable tasks:

1) Work with little or no face-to-face contact with customers;
2) Work allowing a high degree of independence and little need for approval or reporting, or organizational management that allows a high degree of independence due to little need for cooperation between organizations;
3) Work easy to quantify in work performance evaluations; and 4) Jobs determined by managers with approval authority after considering business characteristics and working conditions of the department.

(2) Unsuitable tasks:

1) Jobs where there is significant security risk due to insufficient security measures in the relevant business;
2) Jobs involving safety inspections, equipment inspections, and accident handling measures, etc., where the person responsible should be there to do such jobs, or the risk will inevitably and significantly increase if the work were to be done from home;
3) Jobs where the work must always be carried out in a specific place for the purpose of receiving and processing civil complaints;
4) Jobs where other serious obstacles are expected before business (administrative) objectives can be achieved.

3. Equipment needed when working from home

A certain level of working environment and work facilities (seats, PCs, etc.) are needed at home so that the work can be performed in an identical or very similar environment to the regular office.

(1) Preparing work space

As contact with family members can disrupt work performance, employers need to ensure that those working from home have an independent space dedicated to work.

(2) Construction of an IT infrastructure

The company will need to provide the basic IT devices and networks needed to do business at home. These would include computers and accessories, printers, communication equipment, and personal web cameras for video conferencing. The company will also need to provide the necessary solutions (electronic payment, messenger, file sharing, project management, etc.) when accessing office systems or performing company work.

(3) Cost burden

It is common for the employer to bear the communication expenses related to working from home, the cost of information and communication equipment, and work-related consumable items.

(4) Security measures

Working from home requires measures to protect information security. Such measures may include (i) providing a solution to security threats that may occur when accessing an office system from home, and to support with related technologies, (ii) introduction of a computer that leaves all work and records on the cloud rather than individual computers, (iii) actions to prevent family members of the employee working from home from accessing any company data, (iv) safe disposal of document waste, and (v) preparation of measures to ensure security of the home office space and computers (such as shutting them down automatically) when the employee is not at the work-from-home location.

Ⅲ. Introducing a Work-from-Home System

Introduction of a work-from-home system requires (i) a written agreement with the workers' representative, (ii) changes in the labor contract with individual workers, and (iii) changes in the rules of employment. Even when a work-from-home system needs to be revised, the employer must follow the above 3 steps again. However, when the work-from-home system will apply only to a particular worker, only that worker's consent is needed.

1. Written agreement with the workers' representative

The Labor Standards Act (Article 58 (2)) provides for the provision of a written agreement with the employees' representative when working outside the workplace, such as working from home. The time required for the performance of work is usually determined through a written agreement, but the content of the rest of the written agreement is not otherwise specified. Eventually, if the working hours for a work-from-home system are determined in a written agreement, the details of place of work and those to whom the agreement applies should be included.

2. Changes to the employment contract

(1) Since the details of workplace and working hours are legally required to be specified in the employment contract, the working contract must reflect the changed workplace and working hours under the work-from-home system (regular work from home).

(2) For occasional work from home at a certain frequency and time while the company workplace remains the main workplace, it is necessary to state in the

employment contract that work at a certain frequency and time outside the workplace is possible. However, as is the case for remote work, it is common for employment contracts to stipulate that uniform working conditions such as working place, working hours, and holidays are subject to employment rules or collective agreements. In this case, even if it is not specified in the employment contract, it is recognized in the employment rules that the company fulfilled its obligation to notify workers of compulsory working conditions.[25)]

3. Changes to rules of employment

When introducing a work-from-home system, whether there is a need to change the existing rules of employment needs to be confirmed. Any changes shall be reflected in the existing rules of employment.

(1) If there is no change to the rules of employment: When comparing the working conditions of working from home with those of ordinary workers at the workplace, if there are no changes in working conditions besides workplace, individual consent of the worker who wants to work from home is all that is needed. There is no need to change the rules of employment.

(2) When the rules of employment need to be changed: If the employer requires all workers in the business or workplace to work from home.

Example rules of employment: Article 00 (Working from home)

① The company may introduce a work-from-home system for workers desiring to work part or all of their working hours at home.

② The working hours of workers to work from home are considered to be 8 hours a day. However, working hours may be determined separately according to the work performed. When the working hours are determined by written agreement with the workers' representative, the hours in the agreement shall be considered working hours that have been worked.

③ If those working from home want to work overtime, at night or during holidays, the approval of the head of the department must be obtained in advance. In this case, 50% of the normal wage is added and paid.

④ Requests to come to the company workplace due to reasons such as business meetings, work orders, work performance evaluation, education, events, etc. must be followed.

25) Labor Ministry Guideline: Labor Standards Team-5809, August 7, 2007.

Ⅳ. Application of the Labor Standards Act

1. Attendance management

The Labor Standards Act regulations on working hours and rest also apply to workers working from home. However, working from home is a form of work in which workers' working hours and daily home life cannot easily be separated due to the nature of the workplace. It is difficult to manage and supervise such working hours as they are at home. In the end, it is left to the worker whether to fulfill the duty to provide work during the specified working hours. However, online attendance records and information and communication devices can provide some assistance with worker management.

Regulation example: Work-from-Home Service Regulations

① Workers who have been approved to work from home are expected to manage their time and attendance well, including the time they start and finish their work each day. If necessary, the authorized person can confirm this by telephone or an in-person visit.

② Workers shall not leave the at-home workplace for personal reasons during the performance of work. If they need to work outside their home or at the applicable smart work location, this must be approved by the relevant company authority in advance. However, if it is unreasonably difficult to obtain this relevant authority's prior approval, the worker must immediately report to the relevant authority after changing the place of work for a late approval.

③ The worker shall immediately report any emergency while working from home to the approval authority, who shall respond with appropriate instructions.

④ Those working from home must provide an electronic report of their work plan and outcomes to the approval authority at least once a week.

2. Working hours, overtime, night work allowance

When the work-from-home system is introduced, whether or not an overtime allowance, night work allowance, or holiday work allowance occurs depends on the

specified working time for the worker or the time normally required to perform the work and the range of working hours established by the labor-management agreement.

In principle, if the teleworkers (which is another term referring to those working from home for an employer) required to perform a specific task in accordance with the employer's instructions work overtime, at night or during a holiday, overtime and nighttime work allowance must be paid. However, it is desirable to prepare a similar procedure for general workers to apply for overtime, night, and holiday work in advance and be approved by the employer before working those hours. For example, a procedure might include reporting in advance plans to work over a holiday to obtain the employer's permission and then report the outcome in detail.

3. Leave and rest time for tele-workers

If the rules of employment do not provide separate rules for leave and rest for ordinary workers working from home, the employment rules on working hours, leave, and rest for ordinary workers apply. In this regard, it is desirable for the employer to set in advance the matters concerning working hours and non-working hours (for example, non-working hours due to vacation or sick leave).

4. Job training and compulsory training

It is unavoidable that workers who work remotely or from home are susceptible to some concern that they may lag behind their colleagues in development of their abilities, etc., because working from home does make it difficult to have the educational opportunities normally obtained during on-the-job training (OJT). When a separate in-house education or training system, or legally-required program is run, this should be reflected in the employment rules. In particular, as education on safety and health (Article 29 of the Industrial Safety and Health Act), preventing sexual harassment (Article 13 of the Equal Employment Act), and protecting personal information (Article 28 of the Personal Information Protection Act) is normally run for workplace workers, the employer will need to provide equal training opportunities to those working from home.

5. Safety and Health Standards

Depending on the nature of their work, if it falls under the safety and health standards in the Industrial Safety and Health Act, those working from home will need to follow those rules. Accidents arising during the work at home will be considered occupational accidents and those injured/ill are eligible to insurance benefits under the Industrial Accident Compensation Insurance Act. However, accidents caused by workers' actions unrelated to work are not recognized thus.[26)]

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26) Labor Ministry Guideline: medical care 0509-90, February 14, 1996

6. Performance evaluation

When employees are working from home (full time), it is desirable to establish a system so that workers do not worry about performance evaluation and personnel management issues because they are not working at the normal workplace. The most difficult thing for companies who have workers providing work from home is ensuring efficiency from those workers. In the course of evaluating work performance, tele-workers are often less productive and feel less managed. It is a good idea for the company to do the following: (i) measure the performance of tele-workers based on visible results; (ii) manage quality of work from teleworkers, and (iii) implement performance evaluations for teleworkers as necessary, and report summary results and explain to them their ongoing progress.

Ⅴ. Conclusion

In order to increase work efficiency and promote the morale of workers working from home, it is necessary that a work environment is put in place that is suitable for independent work. In addition, it is important to separate work duties from the private lives of the workers so that they can continue to work from home. Therefore, rather than having them work from home the entire week at the beginning, it is necessary to introduce working from home on an occasional basis to ensure it is possible to do so on a regular basis later.

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. 산업재해보상보험 10. 직장내 괴롭힘&성희롱 예방 11. 근로감독 준비 12. 취업규칙 13. 고용보험 14. 남녀고용평등 15. 노사협의회 16. 산업안전보건법 17. 국민연금, 국민건강보험	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. Industrial Accident Compensation 10. Workplace Harassment Prevention 11. Labor Inspection Preparation 12. Rules of Employment 13. Employment Insurance 14. Equal Employment Act 15. Labor Management Council 16. Industrial Safety and Health Act 17.National Pension, Health Insurance
Auditing	Self-Assessment for Labor Inspection	근로감독 자가진단 앱 추가 제작
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. 임금명세서, 2. 연차휴가, 3. 퇴직금 4. 4대보험, 5. 퇴직소득세 6. 산재보상 (장해보상, 유족보상, 민사상 손해배상)	1. Payslip, 2. Annual Leave, 3. Severance Pay 4. Social Insurance Premiums 5. Retirement Income Tax 6. Industrial accident benefits and civil compensation
Labor Auditing	1. 주요 질문/답변 2. 인사감사	1. FAQ 2. Labor Auditing

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