# A Practical Labor Guide for Foreign Investors

January 2002

**Office of the Investment Ombudsman (OIO)**

"Your advocate and partner for resolving problems in business and daily life"

[표지속 부분(날개?)]

## Office of the Investment Ombudsman (OIO)

**The Korean government set up the Ombudsman system in an effort to assist foreign investors with their business problems in Korea.**

The Office of the Investment Ombudsman was established under Article 15 of the landmark Foreign Direct Investment Promotion Act of 1998 as a means to resolve the management difficulties experienced by Korea's foreign investors and enhance the overall business climate.

As a nonprofit institution working in cooperation with the government and related organizations, the Ombudsman is setting out to achieve the most favorable results possible for our business partners and a more stable investment setting.

The OIO home doctors are specialists in areas such as finance, construction, tax, labor and legal matters, and are assigned to numerous foreign companies to provide valuable assistance for successful resolution of investors' grievances.

- **Finance:** Foreign exchange, banking, int'l financing…
- **Tax and Accounting:** Tax exemptions, accounting procedures, central & local government tax…
- **Construction and property:** Building approval, factory location, real estate acquisition, leasing…
- **Labor and personnel:** Industrial relations, working conditions, labor law…
- **Law:** Business activities and management systems, investment procedure, general legal affaires…
- **Tariffs and Customs:** Tariffs, customs procedures, bonded goods, logistics…
- **Living in Korea:** Housing, visas, medical care, education, culture…

Homepage: www. i-ombudsman.or.kr

# FOREWORD

Korea, with its remarkable record of economic growth and newly reoriented economic paradigm based on the pursuit of globalization and advances in information technology, has joined the ranks of countries offering world-class business environments. As such, Korea now stands as a thriving destination for foreign investment.

Undoubtedly, Korea's most attracting factors as a location for FDI are quality labor, technological competitiveness, and its strong market potential. On the other hand, complicated regulations and administrative procedures, combined with misunderstandings about labor relations, have discouraged some foreign investors from coming to Korea.

The primary goal of the Office of the Investment Ombudsman (OIO) is to help foreign investors resolve any problems and difficulties they may face while doing business in Korea. As a good example of the successful performance of our Office, more than 900 grievance cases have been handled by the OIO over the past two years.

A majority of the grievances and complaints from foreign investors are associated with labor affairs. It is extremely important, therefore, that foreign investors have a clear and comprehensive understanding of the labor customs, practices and mentality of the general public, which are somewhat unique in comparison with those in other countries. In addition, it is necessary for foreign investors to be equipped with practical knowledge about up-to-date labor issues and legislation.

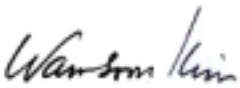
Hence, the OIO is proud to publish the "Practical Labor Guide for Foreign Investors", with the hope that CEOs and personnel managers of foreign-invested companies in Korea will be able to gain a deeper understanding into current labor regulations and issues. This publication is intended to provide practical tips on labor legislation that are essential to the day-to-day operations of companies operating in Korea.

Various government agencies, including the OIO, have been committed to building a participatory and cooperative labor relations culture in which social partners can share in the ever-growing gains of the Korean economy. As a consequence, the number of labor disputes in foreign-invested firms is on the decline and the overall working environment is making significant progress.

The Office of the Investment Ombudsman will make every effort to ensure that Korea is the most favorable and attractive destination for foreign investors.

We wish you continued success and happiness in all of your business endeavors!

January 2002



Dr. Wan-soon Kim
Ombudsman
Office of the Investment Ombudsman (OIO)

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# We Help You With Grievances On Labor

The Office of the Investment Ombudsman(OIO) is mandated, under the Foreign Investment Promotion Act, to serve as “a body exclusively for handling grievances of foreign-invested companies”. **In an effort to concentrate more resources on addressing the difficulties that foreign-invested companies face in relation to labor issues,** the OIO created the “Labor Desk for Foreign - Invested Companies” in July 2001.

Feel free to ask for help with any questions or grievances regarding labor and personnel management at a foreign-invested company. The Labor Desk would be more than happy to help you. (Our service is at your disposal, free of charge.)

o **Employment** : Recruitment of employees; contracts of employment; staffing arrangements; job promotion and employee transfer; vocational training and education; retirement, etc.

o **Labor Relations** : Disciplinary actions and dismissal; collective bargaining; industrial actions; Labor-Management Council; trade unions; unfair labor practices; local labor offices; Labor Relations Commission, etc.

o **Working Conditions** : Rules of employment; working hours; leaves; industrial accidents; statutory insurance; maternity protection, etc.

o **Wage and others** : Wages; allowances; retirement pay; annual salary system; dispatched workers; personnel rules, etc.

For more information, call us at the phone numbers below or mail us at the following addresses (either on-line or off-line):


o **Labor Desk for Foreign-invested Companies**

o Phone: **02-3460- 7652 / 7653 / 7658 (fax:02-3460-7944/7949)**

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**A Practical Labor Guide for Foreign Investors**
**(Useful Summary of Labor Legislation)**

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■ Published January 2001 by the Office of the Investment Ombudsman.

# 1. For Recruitment of Employees

## ☐ Applicable legislation

'Labor Standards Act', 'Equal Employment Act'

## ☐ Recruitment of employees

▶ An employer is free to hire workers as standard or non-standard (on a daily-based, fixed-term or employee leasing basis) employees, depending on the business purpose.

▶ The employer shall treat men and women equally in recruitment and hiring of workers.

▶ The employer may use the job-seeker information available at the public employment services run by the national government and local governments (cities, provinces or districts); Korea Manpower Agency; and fee-charging private employment agencies, to obtain workforce needed for his/her business.

## ☐ Conclusion of the contract of employment

▶ The contract of employment that an employer is to conclude with an employee shall specify wage level, working hours, the place of work and job descriptions.

▶ Except for the employment of an indefinite period and the fixed-term contract for completion of the pre-determined work, the contract of employment shall not exceed 1 year.

▶ The contract of employment shall not specify a fixed amount of the

penalty or damages for breach of the contract.

▶ The elements of the contract of employment which derogate from the relevant provisions of the Labor Standards Act are null and void.

## □ Employees probationary period

▶ An employer is allowed to initiate a probationary period scheme in which he/she can evaluate the occupational competency and aptitude of an employee before making a final decision on recruitment of the employee.

▶ The probationary period, in case employment is not guaranteed after the period, shall not exceed 3 months.

▶ The employer may repeal the recruitment of an employee after the end of the probationary period, if he/she finds that the work performance of the employee is not satisfactory.

## □ Contract-based employees

▶ Contract-based employees refer to the workers who are hired for a given time of period for the directed work, by way of the contract of employment. The employment relationship automatically terminates upon the end of the period specified in the contract.

▶ In case a worker has been employed for a job a considerable period of time and his/her employment contract, which is rather a formality, has been already concluded for several times for the same job, the employer shall not refuse to renew the contract without giving a justifiable reason.

## □ Other obligations of the employer in recruitment

▶ Obligation to hire persons with disabilities:

In a company regularly employing 300 workers or more, 2% of the workforce shall be persons with disabilities. Any employer who does not comply with the quota for employment of disabled people is obliged to pay a certain rate of the employment levy.

▶ An employer regularly employing 300 workers or more shall make effort to hire elderly workers at a rate of 3% or more of the workforce. The employer who meets the given rate of elderly employment or re-employs a retired middle-aged or elderly worker within 2 years of retirement is entitled to the government subsidy.

▶ Obligation to hire those who made contributions to the nation (designated patriots and veterans):

A manufacturing company with 200 employees or more and a non-manufacturing company with 20 employees or more per day are obliged to hire a certain rate (3 - 8 % of the workforce) of the designated contributors.

## □ Ban on recruitment

▶ An employer shall not hire any person without qualifications, licenses or skills required for a harmful or dangerous job dealing with pressure containers, radioactive waves, etc.

▶ Any employer shall not hire persons under 15 of age, unless the worker holds a work permit issued by the Minister of Labor.

# 2. Current Working Hour Systems and Discussions on Working Hour Reduction

## ☐ Applicable legislation

'Labor Standards Act'

## ☐ Statutory working hours

| Worker type | Standard work hours | | Overtime work | Night · holiday work |
|---|---|---|---|---|
| | daily | weekly | | |
| Adult workers | 8 hrs | 44 hrs | Allowed with the limit of 12 hours a week, with the agreement between the employer and employees.<br><br>▶Pregnant workers : Not allowed.<br>▶Female workers who have recently given birth (1 year or less):<br>Overtime is allowed within the limit of 2 hours a day; 6 hours a week; and 150 hours a year. | No limit is placed on hours of work<br><br>▶Pregnant workers: Allowed at the employee's request or the permission of the Labor Minister<br>▶Female workers who have recently given birth:<br><br>Allowed at the employee's request or the permission of the Labor Minister. |
| Youth workers (under 18) | 7 hrs | 42 hrs | Allowed within the limit of 1 hour a day and 6 hours a week, with agreement between the employer and employees | Requires consent of the employee and permission of the Labor Minister. |
| Workers in harmful · dangerous jobs | 6 hrs | 34 hrs | Not allowed. | - |

## ☐ Work break

▶ The employer shall allow a work break of 0.5 hour or longer for an employee who works 4 hours or more; and a break of 1 hour or longer for an employee who works 8 hours or more.

▶ The employee is free to use the work break for personal purpose, and the break is not counted in the hours worked.

## ☐ Flexible work time scheme

▶ An employer may, subject to the rules of employment, have his/her employees work in excess of 8 hours per day and 44 hours per week on average for a two-week period. In any case, however, no specific workweek may be longer than 48 hours.

▶ In case an employer reaches a written agreement with the employee representative on the following matters, he/she may have an employee work, for a specific week, in excess of 8 hours per day and 44 hours per week on average for a 1-month period. In any case, however, no specific workweek may be longer than 56 hours, and no specific workday may be longer than 12 hours.

1. Scope of the employees affected;
2. Period for which workweek or workday is averaged (1 month or shorter);
3. Workdays within the particular period, and work hours of each workday; and
4. Effective period of the written agreement.

## ☐ Selective work hour system

▶ If an employer has concluded a written agreement on the following matters with the employee representative in regard to an employee who can decide

the start and finish time of his/her workday, subject to the rules of employment, the employer may have the employee work in excess of 8 hours per day and 44 hours per week on average for a given period of 1 month or shorter.

1. Scope of the employees affected (excluding employees of 15 or older but younger than 18);
2. Work hour adjustment period (a given period of 1 month or shorter);
3. Total working hours within the adjustment period;
4. Start/finish time of workdays, during which work must be performed;
5. Start/finish time of workdays, which are allowed to be selected by the employee; and
6. Standard working hours.

### □ Discretionary work hour system

▶ In case an employer concludes a written agreement with the employee representative on the following matters, in regard to a job which requires, due to the nature of the work involved, the employer to leave the decision on the work performance method up to the employee, such as a travelling or professional job, the calculation of hours worked shall be in compliance with the agreement.

1. Scope of the work affected;
2. No detailed instructions from the employer on the means of work performance and the apportionment of working hours; and
3. Compliance with the agreement, with regard to the calculation of hours worked.

### □ Special clauses on working hours and breaks

▶ An employer who is in engaged in transportation, goods sales, film-making, entertainment business, communications, medical or hygiene service, cleaning, hairdressing and social welfare service may have employees work in excess

of 12 hours per week or may change break hours, provided that he/she has agreed with the employee representative in writing.

## □ Discussions on work hour reduction

▶ In step with changes in the economic environment and the labor market, the issue of work hour reduction has been gaining a wider acceptance, on the assumption that a shorter workweek will generate more jobs, improve workers' quality of life; and enhance labor productivity. However, the strong support for work hour reduction is countered by questions concerning the possibility of higher labor costs on the part of employers and the consequent damage to the competitiveness of domestic companies. At the moment, a heated debate is under way at the Korea Tripartite Commission concerning how and when to introduce a shorter work hour system.

▶ The employers and employees are sharply divided over the introduction of the 5-day workweek system which primarily concerns a statutory workweek of 40 hours. The bone of contention lies in monthly and annual paid leave; and adjustment of overtime premium rate. As a consequence, the adoption of the new work-hour system has been delayed. However, the new system will be first implemented at pubic agencies and financial institutions, and then extended to large and small businesses on a gradual basis, with the aim of applying the shorter workweek to all workplaces in 5 to 6 years.

# 3. Distinction and Application of Normal Wage and Average Wage

## ☐ Applicable legislation

'Labor Standards Act'

## ☐ Difference between normal wage and average wage

▶ The terms 'normal wage' and 'average wage' should be first distinguished from the wage actually paid to an employee. They are the wage units which are used as a base when there is a need to calculate the wage of a particular employee.

▶ In addition, normal wage and average wage differ from each other: the former is a base for wage calculation in case there is a need for wage calculation while the employee concerned is engaged; whereas Average wage is used as a base in case the need to calculate wage takes place when an employee cannot continue to work, for the purpose of ensuring the employee a stable living.

## ☐ Concept and coverage of normal wage

▶ Normal wage refers to the hourly-based amount which is pre-determined for a given amount of work or total work and is to be paid on a regular or lump-sum basis.

▶ Normal wage, which means a fixed-rate amount to be paid at one payment time, excludes the wage whose payment or amount depends on whether or not the employee has actually done additional work, or on his performance at work.

## ☐ Application of normal wage

- o To calculate additional pay for overtime, night or holiday work
- o To calculate pay for overtime or holiday work
- o To calculate compensation for unused monthly or annual leave

## ☐ Concept and coverage of average wage

▶ Average wage refers to the amount calculated by dividing the total amount of wage paid to the employee during three months immediately preceding the date on which the need of such calculation occurred by the total number of days of the three months.

▶ For the purpose of average wage calculation, the amount paid to reimburse actual costs or the temporary amount paid during the three months is excluded from the 'total amount of wage'.

▶ The 'days of the three months' above are the calendar days of the three months, not the days when the employee actually worked during the period.

▶ Periods not to be counted in calculating average wage :

- o Unworked period due to an occupational reason or illness or injury of the employee
- o Unworked period due to a reason for which the employer is responsible
- o Probationary period
- o Period of industrial actions

※ If the average wage is lower than the normal wage, the latter shall take place of the former.

## ☐ Application of average wage

- o To calculate retirement pay
- o To calculate allowance for temporary business shutdown
- o To calculate compensation for unused annual leave
- o To calculate compensation for industrial accidents
- o To restrict pay cuts

## ☐ Practical Questions & Answers

Q : In case the amount of family allowance depends on the number of dependants, is the allowance included in the normal wage?

A : In such case the family allowance is not included in the normal wage, although it is included in the normal wage in case it is paid at a flat-rate, regardless of the number of dependants.

Q : Suppose an employer and a union concluded a collective agreement that excluded from normal wage an employee allowance which should be included in normal wage under the relevant law. Is the collective agreement still effective?

A : A court ruling said that "the normal wage, which is a base for calculation of pay for overtime, night or holiday work and compensation in lieu of dismissal notice, may not be derogated by a collective agreement which excludes from normal wage such allowances as laid down in the law as an element of normal wage", declaring such collective agreement to be invalid.

Q : In case an employee tended a resignation, which has not been accepted by his/her employer yet, when does the period subject to the average wage calculation begin?

A : In the case of the employee's voluntary resignation, if the employer refuses to accept the resignation or delays acceptance of the resignation, the calculation period starts from the day when the resignation takes effect: that is, the following day of the first payment date after the date on which the resignation is submitted to the employer.

Q : In case it is agreed that daily working hours will be shortened by 1 hour in wintertime, is it compulsory to reflect the shorter working hours on the calculation of the given number of monthly working hours, which is one of the basic elements for normal wage computation?

A : The shorter workday in wintertime is a measure usually taken for policy or seasonal reasons. If the shorter day working hours are taken into account in setting the given number of monthly working hours, it would lead to a higher hourly-based pay rate. In the case in question, therefore, it is not obligatory to adapt the monthly working hours to the shortened daily hours.

# 4. Introduction of Annual Salary System

## ☐ Applicable legislation

'Labor Standards Act'

## ☐ What is the 'annual salary system'?

▶ A annual salary system is a performance-based pay scheme in which the employee wage is determined as an annualized amount, based on his/her performance results and occupational capacities.

▶ The company which considers introducing the annual salary system should ensure that the new system is not contradictory to the relevant provisions of the Labor Standards Act.

## ☐ Employees covered in the annual salary system

▶ The annual salary system, which takes into consideration performance ability and results as a measurement of employee salary, is suitable to employees engaged in professional, managerial or clerical positions, but not to low-skilled or production workers whose performance results are in proportion to the hours worked and not easy to measure.

▶ It is advisable that the annual salary system, once it is introduced to a workplace, is gradually extended to cover the employees, depending on the purpose of the salary system and the type of jobs affected.

## ☐ Annualized salary specified in the contract of employment

▶ At a company where the annual salary system is introduced, the employer and the employee shall conclude a contract of employment, on a annual basis, which specifies working hours, elements of the wage, the payment

method, etc.

▶ The annual contract, however, does not mean that the employee concerned is a fixed-term contract worker, but simply an annual change in the salary rate.

## □ Working hours

▶ Even under the annual salary system, an employee may not work in excess of the statutory working hours.

※ Standard working hours and maximum overtime hours

<table>
<tr><td colspan="2">Standard/Overtime</td><td colspan="2">Men</td><td>Women</td><td>Youth</td></tr>
<tr><td rowspan="2">Standard work hours</td><td>Daily</td><td colspan="2" rowspan="2">8 hrs<br>44 hrs</td><td></td><td>7 hrs</td></tr>
<tr><td>Weekly</td><td></td><td>42 hrs</td></tr>
<tr><td colspan="2">Maximum overtime hours</td><td colspan="2">12 hrs per week</td><td>1 hr per day<br>6 hrs per week</td></tr>
</table>

▶ The flexible work hour system; the selective work hour system; or the discretionary work hour system, all of which are provided for in the Labor Standards Act, may be used to adapt the standard working hours to the need of the workplace concerned.

## □ Statutory benefits

▶ Overtime pay:

For any hours worked in excess of the standard hours or the overtime hours specified in the annual pay contract, the employer shall pay an overtime premium.

▶ Monthly · annual leave benefits:

The contract of employment which includes monthly and annual leave allowance in the annualized salary is effective, provided that the contract still grants the right to use monthly and annual paid leave.

## ☐ Dismissal under the annual salary system

▶ Under the annual salary system, if the annual salary contract of an employee is not renewed or concluded again upon the expiry of the former contract, it would be no different than a dismissal of the employee. Therefore, the annual salary system should be based on fair and reasonable measurements of the employee performance.

▶ In the case of dismissal of an employee due to no renewal of the annual salary contract, if it is proven that such dismissal is a result of an unreasonable evaluation of the employee's job performance, the employer is responsible for an act of unfair dismissal.

## ☐ Retirement pay under the annual salary system

▶ It should be clearly described how much of the annualized salary the retirement pay is, in case it is agreed that the retirement pay is included in the salary paid.

▶ Only at the request of the employee concerned may the retirement pay be included in the annualized salary. In addition, the included amount shall not be lower than the statutory amount.

## ☐ Practical Questions & Answers

Q : Under the annual salary system, is it possible to grant the retirement pay by monthly installments?

A : According to the authoritative interpretation of the Ministry of Labor, 'in case the retirement pay is given, fully in compliance with the contract

of employment providing that the retirement pay for the coming year, which has been agreed by an employee out of his/her own volition, shall be paid by equal monthly installments at the monthly salary payment date, it is admitted that the paid amount is part of the retirement pay'. In practice, in order to receive the retirement pay on a monthly basis, the employee shall include an agreed amount of retirement pay for the coming year in the contract of employment and then submit a request for earlier settlement of the retirement pay.

**Q** : In case an employee, covered by the annual salary system, has recorded leave of absence from work, lateness or early-leaving, is the employer allowed to place a sanction of pay rate cut on the employee?

**A** : The employer is permitted to deduct pay for the hours unworked. However, the sanction of pay rate drop is originally intended for the hourly- or daily-based pay system. Meanwhile, under the annual-based system, which involves pay-by-results, it is not advisable that any hours unworked lead to an immediate pay cut. Instead, such conduct of the employee may be taken into account at the time of performance evaluation to determine the annual salary rate.

# 5. Holidays and Leaves

## ☐ Applicable legislation

'Labor Standards Act', 'Act concerning the Designation of the Labor Day'

## ☐ Purpose of the holiday and leave system

The Labor Standard Act provides that workers who have worked a given number of days within a certain period are entitled to weekly holidays and monthly and annual leave and that female workers are entitled to menstruation leave and maternity (pre- and post-natal) leave. The purpose of these holidays and leaves is to give workers time to refresh themselves and gather enough strength to resume work. Moreover, under the Act concerning the Designation of the Labor Day, the 1st of May has been designated as the Labor Day, when employees enjoy a paid holiday.

## ☐ Weekly holidays

▶ An employer shall give a 1-day or longer paid holiday every week to his/her employees, provided that they have worked a given number of days a week.

- o The weekly holiday is not necessarily Sunday, but should be an uninterrupted 24 hours or more.

- o Part-time workers are entitled to a weekly holiday in proportion to their weekly working hours.

- o The employees who work every other day or on shift are also entitled to a 1-day paid holiday, provided that they have worked all the days excluding their off-duty days.

## ☐ Monthly and annual paid leave

▶ The employer shall provide a 1-day monthly paid leave to employees who have worked all the given number of days in a month.

▶ The employer shall provide a 10-day annual paid leave for the employees who have worked all the given number of days in a year, and an 8-day annual paid leave for those who have worked 90% or more of the given number of days.

o Unused monthly leave can be saved for later use within 1 year, and the accumulated days can be split for use on several occasions.

o The exact date of annual leave shall be decided by the employee concerned, but the date may be changed by the employer in case it is deemed that the leave of absence on that date will adversely affect the business operation.

o For employees whose length of consecutive service is 2 years or more, 1 day per year shall be added to the annual leave, starting from the 2nd year. In case the annual leave available is longer than 20 days, the employer may pay normal wage, in lieu of leave, for the days in excess of 20 days.

o The right to use annual and monthly leave is effective for 1 year, while the right to claim compensation for unused leave is effective for 3 years.

o The employer may have employees take a paid leave on a particular working day in substitution for monthly or annual paid leave, provided that he/she makes a written agreement with the employer representative(s) to do so.

▶ Women workers are entitled to a 1-day menstruation leave with pay every month, and pregnant workers shall be granted a 90-day maternity leave.

## □ Exceptions of application of the weekly leave

▶ Workers exempt from application :

o Workers engaged in farming; forestry work, livestock breeding, fishing, and sericulture

o Workers engaged in surveillance activities which are approved by the Minister of Labor

※ Workers whose main job is surveillance which is not mentally or physically exhausting

o Workers engaged in an intermittent job which is approved by the Minister of Labor

※Workers who have a long recess or waiting period between work

## □ Practical Questions & Answers

Q : Suppose the rules of employment stipulate that a certain number of lateness, early-leaving or outing within a month is regarded to be equal to 1 day of absence from work. In this case, does it mean that the employer has no obligation to give weekly holidays or monthly leave to an employee who recorded the given number or more days of lateness, early-leaving or outing within a week or month?

A : For the purpose of weekly holidays and monthly and annual leave, the term 'full attendance' concerns the number of days worked, not the number of hours worked. Accordingly, an employee who, due to lateness, early leaving or outing, fails to work the entire hours of a certain working day but comes to work each and every working day, is regarded to record full attendance and therefore is entitled to weekly holidays and monthly leave with pay.

Q : In case a trade union applies for collective monthly or annual leave as part of its industrial action, is the employer allowed to refuse to give such leave?

A : As for the annual leave, the employer can refuse to accept the

application for use of leave, for a time being, with his/her statutory power to modify the proposed timing of annual leave.

Meanwhile, as no provision is given on monthly leave in the Labor Standards Act, it is debatable whether an employer still has a mandate to refuse an application for use of monthly leave when the union makes the application as a means of work-to-rule. A court ruling said that 'in case there is an attempt to use monthly leave only as a means of obstruction of business, with no justifiable reason given, it cannot be considered a fair exercise of the right to monthly leave, although the use of monthly leave is left to a free decision of an employee'. In this view, it would be practically reasonable for the employer to regard an employee on such monthly leave as absent from work.

**Q** : When an employer intends to request an exception to application for employees engaged in surveillance or intermittent work, is the employer required to obtain a prior consent of the employees concerned?

**A** : According to the administrative interpretation, "an employer is not required to obtain a prior agreement of the employees concerned, in requesting that statutory provisions on holidays should not apply to his/her employees engaged in surveillance or intermittent work". This interpretation indicates that an employee's consent is not required as far as the type of work is mentally or physically less exhausting.

In practice, however, as an employer is required to submit a copy of the employment contract he/she concluded with the employee concerned when he/she makes a request for such exception to application, the employer needs to make sure 'at the time of concluding the employment contract' that the employee is informed that he/she would be exempt from such legal protection.

# 6. Working Women and Protection of Their Working Conditions

## ☐ Applicable legislation

'Labor Standards Act' , 'Equal Employment Act', 'Employment Insurance Act', etc.

## ☐ Guaranteed protection of working conditions for female workers

It is generally agreed that special protection should be given to working women, taking into full account their physical and biological aspects and the need to protect maternity and reconcile work and family responsibilities. Accordingly, such protection should be guaranteed in determining working conditions for women workers.

## ☐ Restrictions on harmful and dangerous work

A woman who is 'pregnant' or 'has recently given birth (1 year or less has elapsed)' or 'a worker below 18 of age' shall not be employed for any work harmful or dangerous to their mental or physical health.

▶ The detailed list of jobs prohibited is given for each of the above three groups of workers (in the Enforcement Decree of the Labor Standards Act).

## ☐ Restrictions on night work and holiday work

No female worker aged 18 or more may work during any period of time between 10 p.m. and 6 a.m. or on holidays, unless the worker concerned agrees to do so.

▶ 'Pregnant workers' and 'those under 18 of age' may not work during any period of time between 10 p.m. and 6 a.m. or on holidays, unless the worker concerned agrees to do so or, at the request of the employer, the Minister of Labor gives permission for such work.

| Type of work | Below 18 (both men and women) | Pregnant workers | Female workers aged 18 or above |
|---|---|---|---|
| Night work | - **Prohibited** in principle<br>- **Exceptionally allowed** with the worker's consent or with the permission of the Minister of Labor at the request of the employer | | - **Prohibited** in principle<br>- **Exceptionally allowed** with the worker's consent |
| Holiday work | | | |

※ Night work : work during any period of time between 10 p.m. and 6 a.m.

※ Holiday work : work on a holiday when a worker has no duty to work under the employment contract

※ Overtime work : work in excess of the pre-determined working hours

## □ Restrictions on overtime

A female worker 'who has recently given birth (1 year or less has elapsed since the childbirth)' may not perform overtime work exceeding 2 hours per day, 6 hours per week or 150 hours per year.

| Work type | Pregnant workers | Workers with recent childbirth | Other women workers |
|---|---|---|---|
| Overtime work | Prohibited | - 2 hours or fewer per day<br>- 6 hours or fewer per week<br>- 150 hours or fewer per year | The same as male workers |

▶ In the past, the restriction on overtime work was uniformly applied to all working women. In step with the global drive to promote female employment, the restriction is narrowed down to cover only the 'female workers who have had a recent childbirth'.

## ☐ Maternity (pre-natal and post-natal) leave

An employer is obliged to grant a 'pregnant worker' 90 days of maternity leave covering the period before and after her childbirth, and at least 45 days shall be included in the post-natal period.

▶ In case a female worker uses the 90-day-long maternity leave, her employer shall pay wage for the first 60 days which are paid portion of whole the leave.

▶ For the remaining 30 days, the maternity benefit is given from the Employment Insurance Fund and the national treasury.

▶ The maternity benefit is equivalent to 30 days' worth of the normal wage (1.35 million won at most and the minimum wage at least), provided that the female worker concerned has been insured for 6 months or more and she is to use 90 days of maternity leave.

▶ The employer may not dismiss a female worker during maternity leave or for 30 days afterwards.

▶ In calculating the number of days of maternity leave, a 1 day is 1 calendar day, not 1 working day, which means that statutory holidays or agreed holidays are also counted in the period of maternity leave and that the employer has no obligation to give additional days.

## ☐ Menstruation leave

An employer shall provide his/her female workers with 1-day menstruation leave every month.

▶ Regardless of job classification, number of working hours, attendance records or employment status (regular, casual, temporary or part-time work), every female employee is entitled to menstruation leave.

▶ In case a female worker does not use the menstruation leave, which is of

her own choice, the employer is not obliged to pay for the unused leave.

▶ As for female workers who do not have a menstruation period due to pregnancy, menopause or other reasons, the employer has no obligation to provide menstruation leave.

▶ The menstruation leave should be used within 1 month, each leave has no effect after 1 month has elapsed and the unused leave cannot be saved for later use.

### □ Childcare leave

In case a worker 'whose child is younger than 1 year' requests leave for childcare purpose, his/her employer shall provide the worker with childcare leave.

▶ Both male and female workers are entitled to childcare leave, whether or not their spouse is also working.

▶ The childcare leave is up to 1 year, provided that the last day of the leave is not after the child's 1st birthday. The period of leave is counted in the length of service.

▶ While on childcare leave, the worker concerned is paid 200,000 won per month as childcare benefit, which comes from the Employment Insurance Fund. (The provision of childcare benefit applies to workers whose childcare leave starts on Nov. 1, 2001 or afterwards.)

▶ In order to be entitled to the childcare benefit, a worker should have worked for 1 year or more in the same workplace; have contributed to the employment insurance for 6 months or more; and is to use childcare leave of 30 days or longer.

▶ A worker who desires to receive the childcare benefit shall submit, to the head of the competent public employment service office, a written request for the benefit (along with the written confirmation on childcare leave)

every month once the childcare leave begins.

※ In case the childcare leave starts in the middle of a month, the first request may be made by the end of the immediately following month.

## □ Nursing break

An employer shall provide 'a female worker whose child is younger than 1 year' with two 30-minute paid nursing (breast-feeding or bottle-feeding) breaks every day, if the worker requests so.

▶ In this regard, 'a child younger than 1 year' may be either a child delivered by the worker herself or a child adopted by her.

▶ Furthermore, it does not matter whether the worker concerned is married or unmarried.

## □ Restrictions on underground work

Women workers, in principle, shall not work underground, but a female worker who is engaged in any of the following may work underground provided the work is on a temporary basis:

1. Health, medical care and welfare work;
2. News release or news gathering for the purpose of producing newspapers, publications or broadcasting programs;
3. Research for scientific studies;
4. Managerial or supervisory work; or
5. Experimental work in relation to 1~4 above.

# 7. Equal Employment and Prevention of Sexual Harassment at Work

## ☐ Applicable legislation

'Equal Employment Act', etc.

## ☐ Significance of equal employment

Equal employment is laid down in the law with a view to ensuring equal opportunities and treatment in employment for both men and women; protecting maternity; and developing vacational capacities of working women, which will surely strengthen their position and promote their welfare.

## ☐ Definition of the term 'discrimination in employment'

An employer discriminates against an employee when he/she applies different terms and conditions of employment or work to the employee or takes any measure to the disadvantage of the employee for no other justifiable reason than the ground of gender, marital status, family responsibility or pregnancy. The cases where the employer applies personnel standards or criteria, which are substantially difficult to meet by one of the two genders, are also included in the discriminatory cases.

## ☐ Application of equal employment

### ① Equal opportunity in recruitment and hiring

An employer shall provide an equal opportunity to both men and women in the event of recruitment and hiring. Furthermore, the employer, when he/she intends to hire a woman for a certain job, shall not present or request her to meet any condition that is not required for the performance of the job, such as physical conditions, including outer appearance, stature and weight, and marital status (being unmarried).

### ② Ban on discriminative treatment in wage payment

An employer is obliged to pay an equal wage for work of an equal value within the same undertaking.

▶ The yardsticks to measure work of an equal value include skills, effort, responsibilities and working conditions required to perform a job. An employer shall ensure that employee representatives are heard when he/she establishes up the list of such measurement criteria.

▶ Even if comparable jobs appear to be the same or similar, wage differentials may be justified only when the holders of the jobs are different in educational attainment, seniority, length of uninterrupted service years and job responsibility, and the wage differential standards are to be objective and reasonable.

**③ Ban on discrimination in non-wage cash benefits and loans**

The employer shall not discriminate against a female worker in payment of non-wage cash benefits and loans intended to supplement employees' living costs just because of her gender.

▶ House rental, housing allowance, family allowance, travel allowance, etc.

**④ Equality in education, deployment and promotion**

The employer shall not discriminate against a female worker in training/education, deployment and job promotion on the grounds of marital status, pregnancy, confinement or gender.

**⑤ Equality in retirement and dismissal**

The employer shall not discriminate against a female worker in retirement, retirement age and dismissal just because of her gender. Moreover, the employer shall not make an employment contract which envisages marriage, pregnancy or confinement as a cause of the retirement of the female worker concerned.

▶ It is prohibited that male and female workers at the same workplace are subject to different retirement ages without any justifiable reason.

▶ A female worker has the right not to be unduly transferred or dismissed on the ground of her marriage or pregnancy.

## □ What is 'sexual harassment at work'?

An employer, higher-ranking employee or co-worker sexually harasses an employee when the former takes advantage of his/her position at work or a job-related activity to commit physically or verbally sexual acts which may make the latter feel sexually humiliated, or takes any measure to the occupational disadvantage of the latter or threatens to do so on condition of such acts. The acts of sexual harassment, which are rightly regarded as undermining equality in the workplace, are banned by law.

▶ The offenders of sexual harassment at work, subject to the legislation, include the employer for whom the employee concerned works, and higher-position holding employees and colleague workers of the same workplace, excluding individual customers and staff members of buyer or supplier companies.

▶ The victims of sexual harassment at work, although predominantly women in practice, also include male workers. Job applicants who are sexually harassed in the processes of recruitment and hiring are also covered.

▶ The locations of sexual harassment at work are not confined to the company premises. All cases where the physical or verbal act in question is job-related or is committed by the offender using his/her job position, whether it is done inside or outside the company premises, are regarded as those of sexual harassment at work.

(For example, locations such as group dining, sporting events, meetings with corporate clients, and job-related trips are also covered.)

▶ It is generally agreed that sexual harassment refers to an explicitly sexually offending act in a verbal or gestural form, or an act of sexual humiliation or threatening or inflicting disadvantage in employment on condition of such sexually offending act.

▶ For the purpose of determining whether the case in question is an act of sexual harassment or not, no reference is made to whether it involves only one act or repeated acts or to whether the offender intended sexual harassment or not. Instead, the cases where the victim feels sexually humiliated by an act (acts) or disadvantaged as a result of such act (acts) are all subject to the legislation, provided that such feeling is deemed to be socially justifiable.

## □ Examples of sexual harassment at work

**<Physical acts>**

- ○ Physical contact such as kissing and hugging (including hugging from behind)
- ○ Acts of touching certain parts of the body, notably breasts and buttocks
- ○ Acts of coercing massages or caresses

**<Verbal acts>**

- ○ Acts of making obscene jokes and other discourses face to face, on the telephone or in other ways of communication
- ○ Acts of making comparisons or evaluations on outer appearances by using sexual expressions
- ○ Acts of asking a question on factual aspects of sexual relationship or deliberately disseminating information on sexual relationship
- ○ Acts of coercing or appeasing sexual intercourse
- ○ Acts of forcing an employee to sit beside him/her at such setting as a group dinner and forcing her/him to pour drinks

**<Displaying acts>**

- ○ Acts of posting or displaying obscene photos, pictures, notes and publications (including such acts via computer communications and

facsimile)

○ Acts of intentionally exposing or touching, in others' view, parts of his/her own body that are related to sexuality

## □ Preventive measures by the employer

The employer is required to take the following measures to prevent sexual harassment at the workplace:

① Pro-active education (once or more per year)

▶ The employer shall use in-house or outside instructors or audio-visual materials for the purpose of sexual harassment prevention, whichever is deemed to be appropriate to the company, as part of a class education course or a division-specific meeting.

▶ The employer who uses female workers dispatched by a temporary worker agency shall arrange a session of education for such workers.

② Disciplinary actions against sexual harassment perpetuators, such as job transfer

▶ In case no appropriate disciplinary measure can be imposed on a clear case of sexual harassment, the employer concerned shall be punished with a fine not exceeding 5 million Korean won.

③ The employer shall not take any occupational measure to the disadvantage of the victim of sexual harassment just because the latter has presented a consultation request or a grievance in relation to the case, or brought the case to a competent authority.

④ An employer who is charged with sexual harassment at work is punished with a fine not exceeding 10 million Korean won.

## □ Handling cases of sexual harassment at work

▶ The employer should ensure that, once any sexual harassment case takes place, it is reported to the division in charge of personnel management or staff affairs, or a grievance-handling body and then goes through the follow-up procedures of counselling and investigation. If the investigation results show that the case in question is clearly sexual harassment, it is advisable that the employer should take proper measures against the offender and, at the same time, make efforts to ensure that such an act is not repeated.

※ In case the victim is dissatisfied with the employer's remedy, he/she may make a complaint or report to the regional labor office or ask the Equal Employment Committee to mediate.

# 8. Use of Dispatched Workers

## ☐ Applicable legislation

'Act Relating to Protection, etc., for Dispatched Workers' (effective on July 1, 1998)

## ☐ What is 'worker dispatching (employee leasing)'?

A worker who is employed by a temporary service agency may perform work, while maintaining the employment relationship with the agency employer, under the control and instructions of a user employer who concludes a contract with the agency employer over leasing (dispatching) of the worker.

## ☐ Types of work permitted for worker dispatching

▶ In order to prevent adverse effects of an indiscriminate use of worker dispatching on job security and working conditions, worker dispatching is confined to certain types of work.

① Principle: Worker dispatching is permissible only for the work designated by the Presidential Decree, which requires professional knowledge, skill or experience, except for the work of direct production process in the manufacturing sector (see Appendix 1).

② Exceptions :

In case there is a vacant job due to childbirth, illness or injury of an employee; or

In case there is a need to temporarily or occasionally secure manpower

※ In any case, the employer is obliged to consult the trade union or employee representatives in good faith beforehand.

▶ Types of work not permitted :

o Work to be performed on a construction site

o Loading/unloading work at harbors or railways (as prescribed in the Harbor Transport Business Act and the Railroad Transport Business Act)

o Work of seamen (as prescribed in the Seamen Act)

o Harmful and dangerous work (as prescribed in the Industrial Safety and Health Act)

o Work for a certain period after a massive lay-off

o Work suspended during industrial actions

## □ Length of service by dispatched workers

① Principle : The length of service of a dispatched worker may not exceed 1 year.

② Exceptions : The length of service may be extended for up to 1 more year, as long as the agency employer, the user employer and the dispatched worker agree to do so.

※ In the cases of a job vacancy due to childbirth, illness or injury: the service length may be extended until such objective causes are resolved.

※ In the cases of a need to secure temporary or occasional workforce : the service length shall be within 3 months (extensible once for up to 3 months, provided that the three parties agree to do so)

## □ When a dispatched worker is used for more than 2 years

① Principle : If a user employer uses a dispatched worker for more than 2 years, the worker shall be deemed to be an employee of the user employer as of the next day of the maturity of the 2-year period.

※ However, this is not the case when the worker is opposed to being employed by the user employer.

② Exception : No exception exists. (No dispatched worker can be used for more than 2 years, unless he/she becomes an employee of the user employer.)

▶ Accordingly, if there is a need to use a dispatched worker for more than 2 years, the worker shall be employed:
- o as a regular employee;
- o as a contract-based employee; or
- o as a daily or casual worker, by the user employer.

## □ Practical Questions & Answers

Q : Suppose an employer, after using a dispatched worker for certain work for 2 years, is now using another dispatched worker who is also employed by the same agency employer as the previous dispatched worker for the same work. Is the user employer obligated to employ the second worker as his/her employee?

A : The user employer has no legal obligation to employ a dispatched worker as his/her own employee, as long as the length of service of each worker is 2 years or less, even in case the two dispatched workers were engaged in the same job. It is recommended, however, that the user employer should hire a regular employee for the work that demands a worker for a long time.

Q : Suppose a company which has three production lines (Lines A, B and C) began to use a dispatched worker for work at Line A due to the need of temporary or occasional workforce and, 2 months later, used another dispatched worker for Line B and, some time later, used one more dispatched worker for Line C. In this case, is the length of service permissible calculated for each worker, or is the date when the worker at Line A started working a beginning date for the purpose of calculating the avaliable period of the worker at Line C? (In other words, is it possible to use each worker for up to 6 months, or should the service length combined of the three workers be within 6 months, in case the

work at the three lines are all extended for 3 more months?)

**A** : The length of service of a dispatched worker is computed from the moment when the user employer begins to use the worker at his/her undertaking. In the case above, the length of service should be separately calculated for each individual worker and, therefore, for each production line.

**Q** : In case a worker dispatched to a company continues to work in the same company even after he/she concludes an employment contract with a new agency employer, how is the length of service of the dispatched worker computed?

**A** : The length of service of a dispatched worker is calculated from the moment when the user employer begins to use the worker. If the agency employer of the worker is changed while he/she is working at the same workplace, such change in the employment relationship between the dispatched worker and an agency employer has no implication on the service length calculation. In particular, the date on which the worker began to work at the company concerned is the first date of his/her service period at the company.

**Q** : In case a user employer uses a dispatched worker for a certain job and later uses him/her for another job, how can the length of service of the worker be calculated? For example, suppose a user employer used a dispatched worker for job A from July 1, 1998 to June 30, 1999 and then used the same worker for job B from July 1, 1999 to June 30, 2000. How long is the length of service of the worker?

**A** : For the purpose of computing the length of service of a dispatched worker, how long the worker has worked for the same company should be measured. Accordingly, the dispatched worker in the example above is regarded to have worked 2 years for the company, although he/she had engaged in two different types of work.

## [Appendix 1] Types of work allowed for worker dispatch

| Korean Standard Classification of Occupations | Type of work | Additional remarks |
|---|---|---|
| 213 | computing professionals | |
| 241 | business professionals | |
| 243 | archivists and related information professionals | Librarians (24321) excluded |
| 2444 | philologists, translators and interpreters | |
| 31141 | telegraph and telephone communications engineering technicians | Limited to assistants to check and monitor the status of reception in an area with poor reception. |
| 3118 | draughtspersons | |
| 3121 | computer assistants | |
| 31317 | image equipment operators | Limited to assistants |
| 31325 | radio and television broadcasting equipment operators | Limited to assistants |
| 33409 | other teaching associate professionals | |
| 3431 | administrative secretaries and related associated professionals | |
| 347 | artistic, entertainment and sporting associate professionals | |
| 411 | secretaries, typists and other relevant office workers | Data entry operators (4113) and calculating machine operators (4114) excluded |
| 414 | library, mail and related clerks | |
| 4215 | debt collectors and related workers | |
| 4223 | telephone switchboard operators | Excluding the cases where the work is considered a core service in the business concerned |
| 5113 | travel guides | |
| 5122 | cooks | Excluding the cooks of tourism and hotels prescribed in Article 3 of the Tourism Promotion Act |
| 5131 | childcare workers | |
| 51321 | institution-based care givers | Excluding assistant nurses |
| 5133 | home-based personal care givers | |
| 52204 | petrol pump attendants | |
| 832 | motor vehicle drivers | Excluding the work prescribed in subparagraphs 5 and 6 of Article 2 (2) |
| 91132 | telephone salesperson | |
| 91321 | building cleaning persons | |
| 91521 | janitors | |

Note) The Korean Standard Occupational Classification hereof is based on Notice No. 199201 of the National Statistical Office.

# 9. Considerations to be Made for Dismissal and other Disciplinary Measures

## ☐ Applicable legislation

'Labor Standards Act'

## ☐ Principles for disciplinary actions and dismissal

An employer may not take any disciplinary measure, such as dismissal, forced leave, suspension, transfer and pay cut, against an employee without reasonable justification.

▶ The details on just causes and procedures of dismissal are generally laid down in the collective agreement or the rules of employment. Moreover, the justifiability of a particular dismissal should be thoroughly examined, with the custom and practices being taken into full consideration.

▶ In case a disciplinary procedure is specified in the collective bargaining or the rules of employment, any disciplinary measure should be in compliance with the procedure. The principle is that a violation of the specified procedure renders the disciplinary measure concerned invalid.

▶ In case there is no disciplinary procedure specified, the fact that a disciplinary measure has not undergone a special procedure does not automatically invalidate the measure.

## ☐ Types of disciplinary measures

① Warning : The employer gives a written or verbal warning to the employee concerned.

② Reprimand : The employee concerned shall hand in a written explanation or apology for his/her wrongdoing.

③ Pay cut : Part of the pay is subtracted.

▶ The subtracted amount for each pay cut may not exceed 50% of 1 day's worth of the average pay. Moreover, however many times a worker is disciplined, the total amount subtracted may not exceed 10% of the whole pay during a given payment period.

④ Suspension : The provision of work is suspended, although the employment relationship is retained.

▶ Whether the days of suspension should be paid and counted in the length of service is dependent on the provisions in the collective bargaining or the rules of employment, or the practices of the company.

④ Dismissal : The employer terminates the employment relationship with the employee concerned.

## □ Causes of disciplinary measures [examples]

① Disciplinary dismissal (in case the employee is held responsible for any of the following):

- ○ Unauthorized leave of absence, repeated early-leaving or lateness, or bad conduct at work
- ○ Deliberate failure to provide agreed work, or deliberate provision of defective work
- ○ Instigation of or participation in unlawful industrial actions
- ○ Causing financial damages to the business or undermining the reputation of the company
- ○ Failure to obey a reasonably job-related instruction of a company higher-up
- ○ Disclosure of company secrets and confidential information related to the business
- ○ Undermining the company's reputation and failure to provide work, as a result of the employee's criminal offense

※ The incapacity for work, due to illness, an abnormal character, considerable loss of the ability to work, alcohol abuse, etc, may be a just cause of dismissal.

② Dismissal for economic reasons

▶ An employer may dismiss his/her employees due to an urgent economic need, provided that specific requirements are fulfilled.

## □ Dismissal for economic reasons

An employer may dismiss his/her employees when it is proven that there is an urgent economic need, after satisfying the following conditions:

① There should be an 'urgent economic need' to dismiss employees, which is objective, reasonable and socially justified.

[Examples]
- ○ Economic crisis at the company level in the wake of persistent malpractices
- ○ Structural adjustment, technological innovation or a shift into different sectors with a view to improving productivity
- ○ Business transfer or merger in an effort to prevent further deterioration of business conditions

② The employer shall make every effort to normalize the business conditions before dismissing employees. That is, the dismissal should be the last resort.

[Examples]
- ○ Reduction of overtime work and working hours in general
- ○ Freeze of new recruitments, and job transfer
- ○ Temporary leave, or voluntary retirement
- ○ Asset sell-off, innovations in working methods and work organization, etc.

③ Reasonable and fair criteria should be used to select workers to be dismissed.

- For example, with regard to selection of workers to be dismissed, regular employees may have priority for sustained employment over daily-based workers; older or senior workers over those younger or with a shorter length of service; and full-time employees over part-time workers. However, female workers shall not be the dismissed first just because they are women.

④ The employer shall notify the trade union representing a majority of the employees or (if there is no such union) the employee representatives of the proposed dismissal no later than 60 days before the day the dismissal takes effect, and he/she shall make consultations in good faith with the union or representatives during the period.

⑤ In case the employer plans to dismiss the following number of employees within a month, he/she shall report the planned dismissal to the Minister of Labor at least 30 days before the day the first dismissal takes effect.

- ○ Workplace with fewer than 100 employees : 10 or more
- ○ Workplace with 100 or more but fewer than 1,000 employees : 10% or more of the normal employees
- ○ Workplace with 1,000 employees or more : 100 or more

## □ Term of notice

In order to prevent employees from getting into financial trouble as a result of an unexpected and sudden loss of job, it is provided by the law that the employer shall give a notice to the worker to be dismissed no later than 30 days in advance.

▶ The employer may give 30 days' worth of the normal wage of the employee concerned, instead of the 30-day notice.

▶ Summary dismissal (dismissal without an advance notice) is possible in case the business cannot be sustained for an unavoidable reason such as a

natural disaster, outbreak of war, or other cases of *force majeure* (an Act of God), or when the employee has deliberately caused a serious disturbance to the business or inflicts financial damages on the company.

[Examples]

- ○ In case an employee took a bribe for allowing an inflow of flawed products from a supplier, which has disturbed the production process of the company
- ○ In case an employee let or made a non-employee person drive a company vehicle and the latter caused a car accident
- ○ In case an employee provided confidential information on business to another competitor company, which has adversely affected the business
- ○ In case an employee made up or disseminated ungrounded facts or masterminded unlawful collective actions, which has caused a considerable disturbance to the business
- ○ In case an employee took advantage of his job position or committed breach of trust to misappropriate, embezzle or use company money for private purpose for a long time
- ○ In case of stealing or unauthorized carrying-out of products and product materials
- ○ In case an employee engaged in personnel management, treasury or accounting manipulated the records or produced fraudulent statements, which caused damages to the business
- ○ In case of deliberate destruction of company equipment and properties
- ○ Other cases where the act involved is reasonably regarded as disturbing the business or causing financial damages to the company

▶ In the event of dismissal of an employee with any of the following employment status, the employer is not obliged to give a 30-day notice.

- ○ Daily workers who have not worked for a 3 consecutive months
- ○ Workers employed for a pre-arranged period of time lasting 2 months or shorter
- ○ Salary workers who have worked for less than 6 months
- ○ Workers employed for seasonal work for a pre-arranged period of time lasting 6 months or less
- ○ Workers under probationary period (of 3 months or shorter)

## □ Remedies for unfair disciplinary measures

An employee who reasonably believes that the disciplinary measure (including dismissal) taken against him/her is unjustifiable may file the case before the Labor Relations Commission or the court of law.

▶ The request for remedy shall be made within 3 months from the date when the disciplinary measure in question was taken. The Labor Relations Commission, upon arrival of the request, makes inquiries and investigations to determine whether the measure in question can be justified.

※ In case the Commission finds the dismissal to be fair, the employee's appeal is turned down

※ In case the Commission finds the dismissal to be unfairs, the Commission orders the employer to take a remedial action (reinstatement of the dismissed employee and payment of wage for the unworked period)

# 10. Retirement Benefits and Liquidation of Payables

## ☐ Applicable legislation

'Labor Standards Act', 'Wage Claim Guarantee Act'

## ☐ Retirement pay plan

▶ An employer shall give a retiring employee retirement pay, which is equivalent to at least 30 days' worth of his/her average wage per consecutive year of service.

▶ Method for calculation of the retirement pay:

Retirement pay=consecutive years of service (consecutive days of service/365) x the average wage for 30 days

▶ Within the same workplace, the employer shall not apply different calculation methods or progressive rates for the purpose of retirement pay computation on the basis of employee status, job, division and location of work.

▶ An employer may take up retirement insurance or another similar type of insurance so that his/her employee may receive retirement pay on a lump sum basis at the time of retirement.

▶ Periods of time counted or not counted in retirement payment calculation

| Counted | Not counted |
|---|---|
| * Period of vocational training or occupational probation<br>* Period of business suspension for a reason attributable to the employer<br>* Period of no work due to unfair dismissal<br>* Periods between repeated renewals of employment contract | * Period of leave for military service<br>* Period of leave for a reason attributable to the employee, and period of work suspension for disciplinary nature<br>* Period between retirement to re-employment |

## ☐ Liquidation of money and other valuables

▶ In case an employee dies or retires, his/her employer shall pay wages, damages, or money and valuables in any other form, which the employer is obliged to pay to the employee under the employment relationship, within 14 days of occurrence of the cause for such payment.

▶ Under special circumstances, however, the period may be extended by agreement between the two parties.

▶ An employee who retired after the date of bonus payment is also entitled to the bonus for the worked days, on a pro rata basis.

▶ Even in case a retiring employee is liable for damages to the employer, the employer may not deduct the amount equivalent to the damages from the wage payable to the employee.

## ☐ Priority of wage claims

▶ Under the wage claims guarantee system, in case an employee has not received wage or retirement pay from his/her employer, the government, on behalf of the employer, may give a certain rate of overdue wage or

retirement pay to the employee.

▶ The employee's claims to wage, retirement pay or damages or other claims deriving from the employment relationship take precedence over other liabilities of the employer, including taxes and utilities, except for his debts secured by a pledge or mortgage on his properties.

▶ However, the wage for the last three (3) months and the retirement pay and damages for the last three years have the priority to be repaid over any other claims to the employer, including debts secured by a pledge or mortgage on the employer's properties.

## ☐ Issuance of the employment certificate

▶ In case a retired employee requests a copy of the employment certificate, which contains the employment period, type of work, job status, wages and so on, the employer shall issue a copy of the certificate that provides accurate information on the requested items.

▶ The employment certificate issued shall contain only the information requested by the employee.

▶ Only employees whose period of consecutive service is 30 days or longer may request for issuance of the employment certificate. The right to request for the employment certificate lasts 3 years after retirement.

## ☐ Ban on the act of employment obstruction

▶ No one is allowed to use codified signs or to make or use listings, or communicate such codes or listings, with the aim of obstructing employment of a worker.

## ☐ Practical Questions & Answers

Q : Suppose a company modifies the retirement scheme which involves a dual system: the progressive rate for executive officers, and the statutory rate for non-executive employees. Is this differential system against the provisions of the Labor Standards Act?

A : The Labor Standards Act prohibits an employer to institute different conditions of retirement pay based on status, responsibility or job of employees within the same company. However, this is not the case for the directors of a corporate organization. Because those directors are executive officers who are empowered with managerial prerogatives, such as the right to represent the management and the right to execute the business, they are not bound by the Labor Standards Act. Accordingly, a differential rate for their retirement pay would not be against the law.

Q : In case the rules of employment provide that "the employer may have a worker complete a probationary period that lasts 3 months or shorter from the date of recruitment before finally deciding to employ him or her", is the probationary period counted in the consecutive years of service for the purpose of retirement pay calculation?

A : The probationary period is intended to build or upgrade occupational capacity of employees. As those in a probationary period are placed at work to adapt to the working environment and perform a job, the period should be included in the consecutive years of service.

# 11. Business Transfer and Employment Relationship

## ☒ Applicable legislation

'Labor Standards Act', 'Commerce Code', 'Civil Code'

## ☒ Definition of the term ‘business transfer’

‘Business transfer’ is a term originally used in the Commerce Code which refers to the transfer of a body of business organization under the agreement between the two parties to the transfer (that is, transferor and transferee).

- The ‘body of business organization’ that is transferable refers to an organization created for business purpose, which includes factual aspects such as trade secrets, customer relations and management structure, as well as functional properties, that is, properties for business purpose.

- Business transfer concerns, unlike mergers the ‘succession of specific business’, not the ‘succession of general business’, which indicates that separate procedures of transfer shall be followed for individual properties.

## ☒ Transfer of the employment relationship in the process of business transfer

A. Agreement between the transferor and the transferee

A case of business transfer, as a general rule, involves the transition of the employment relationship, as well as that of operational properties of a company. In other words, the employment relationship, as a whole, shall be also handed over to

the transferee, unless there is a separate agreement between the transfer parties that part or all of employees will be excluded.

- In principle, the parties (transferor and transferee) may agree to exclude part of the employees from employment succession. However, this kind of agreement, which is virtually not much different than employee dismissal, is valid only when a justifiable cause can be presented for such exclusion.

B. Employee consent not required

It may be questionable whether or not the consent of the employees affected is required to make the transition of the employment relationship effective. It is widely agreed that, even without employee consent, the employment relationship is transferred to the transferee.

- Such automatic transition is not to the disadvantage of the employees because they have the freedom to terminate their employment relationship with the transferee.

### ☒ Change in working conditions in the wake of business transfer

A. Principles for application of working conditions

If the transferor and the transferee have agreed to employment succession and the employees affected have given their consent to the agreement, the employees shall be retained, regardless of whether the employees have concluded a separate contract of employment with the transferee.

- The same rules of employment that the transferor employer applied to the employees shall be applied to them even after they begin to work for the transferee employer. In calculating length of service or seniority for the purpose of determining annual paid leave, retirement pay, promotion and pay scale increase, the length of service recorded at the transferor company shall be carried over to the transferee company.

B. In the case of formal retirement procedures

In a majority of business transfer cases, the employees affected are encouraged to undergo formal procedures of retiring from the transferor company and then engage in the transferee company. Even in this case, it should be presumed that the employment relationship is a continuous one, not a new one after termination of the former relationship. This principle applies to any of the following examples:

- In case the retirement was not of the employee's own choice, but was unilaterally carried out by the employer in order to reduce the retirement pay;
- In case the procedures of retirement and re-engagement were only formalities conducted by the unilateral decision of the parties to business transfer; or
- In case the employee is engaged in the same work even after the transition, although, in formality, he/she was newly hired after tendering a resignation.

C. In the case of voluntary retirement procedures

In case an employee, out of his/her own volition, has received retirement pay from the transferor company and then has chosen to work for the transferee company, it should be understood that his/her employment relationship with the former company is terminated. In this case, new working conditions of the transferee company may apply to the employee, and his/her first working date at the transferee company will be the initial date for the purpose of calculating his/her length of service.

## ☒ Business transfer and dismissal

When the business transfer has entailed employment succession, the successor employer may dismiss the employees transferred only

if such dismissal is aimed at avoiding financial difficulty, as prescribed in Article 31 of the Labor Standards Act.

- In case the transferee employer dismissed the employees transferred by the reason of managerial rationalization of the transferred business division, if such dismissal was merely for the purpose of business expansion, it is judged that the employees were unfairly dismissed.

- Business transfer is usually conducted when the transferor is in financial trouble. Therefore, it is advisable that the transferor company should go through redundancy for economic reasons or voluntary retirement, ahead of the business transfer, provided that there is a justifiable reason for such workforce reduction.

- In case an employee dismissed by the transferor is in dispute over the dismissal, in principle, the transferor is held responsible for the employee, but in the event of transfer of an entire business, the dispute case is also transferred.

  The Supreme Court ruled that "in case the parties to partial business transfer have agreed to retain the employment of the employees affected, the employment relationship between the employees and the transferor employer shall, in principle, be handed over to the transferee; however, the employment retention applies to the employees who were actually engaged in the transferred business on the date of conclusion of the business transfer, excluding the employees who had been dismissed before the date and were in dispute over the dismissal".

### ☒ Business transfer and trade union

A. In case part of union members are transferred

When only part of the union members are transferred, they are disqualified for the trade union of the transferor company, and

remain unorganized at the transferee company. They are free to join the trade union of the transferee company.

B. In case all union members are transferred

In such case, if the transferred employees were to be recognized as a trade union under a different employer, the result would be that there are two trade unions, which represent different groups of workers in the same company. Therefore, it is recommended that the two organizations merge into a single union.

### ☒ Business transfer and collective agreement

It is a matter of great concern whether the collective agreement that the transferor employer concluded with the trade union should be recognized by the transferee employer as applicable to the transferred employees. In general, it is believed that the collective agreement, just as the rights and obligations of the transferor, is still effective in the transferee company, unless stipulated otherwise in a separate agreement.

### ☒ Practical Questions & Answers

Q : Are the parties to business transfer allowed to conclude a separate agreement or contain a special clause to the effect that part of the employees affected are excluded from employment succession or that the existing length of service of the employees to be transferred is not counted at the transferee company?

A : In case the parties to business transfer agree to retain only part of the employees affected, this essentially constitutes dismissals. For the agreement to be valid, the parties should offer justifiable reasons other than the business transfer

itself.

With regard to whether the existing length of service will be recognized for the purpose of calculating retirement pay and annual paid leave, it should not be decided simply based on the agreement between the transferor and the transferee, but also with the consent of the employees concerned.

# 12. Establishment and Effects of Trade Unions

## ☐ Applicable legislation

'Trade Unions and Labor Relations Adjustment Act'

## ☐ Requirements for the establishment of trade unions

① A trade union is an exclusive organization of workers, which means no others are allowed to join a trade union.

② A trade union is an independent organization which, in relation to its establishment and operation, is not subject to any intervention or control of outside parties, such as employers, government, political parties, religious organizations or other interest groups.

③ A trade union is designed to maintain or improve working conditions including wages, working hours etc.

④ An organization which falls into any of the following is not recognized as a trade union. (※ In case such organization makes a report on a union organization, such report will be turned down.)

a) In case the employer or an employer representative who always acts in the interest of the employer is allowed to join the organization
[Examples] employer or executive officer; head of the personnel management team; head of the safety division; employer's exclusive secretaries and drivers etc.

b) In case the main part of the expenditure of the organization is financed by the employer
[Examples]
- In case facilities, fixtures, labor costs, allowances and travel expenses of the staff members of the office are totally funded by the employer or
- in case the operating fund of the organization comes from the

employer

• However, the following are not included in the applicable cases:
- negotiations with the employer during the working time;
- the employer's grants for employee welfare and injured employee assistance; and
- the employers's arrangement of an office no larger than the given size are not included in the applicable cases.

c) In case the organization is mainly aimed at mutual aid, community activities or other welfare purposes
[Examples]
- Organizations only for assistance of employees who are in a needy situation (for special events such as weddings or funerals); or
- Organizations only for community activities, such as reading and music listening

d) In case non-employee workers are members of the organization, provided that 'a dismissed worker who has filed his/her dismissal case before the labor relations commission', shall not be regarded as a non-employee worker until the National Labor Relations Commission(NLRC) gives a decision on the case.

▶While a dismissed worker is waiting for the decision of the NLRC on the case filed, he/she has a limited right to involvement in labor relations activities, such as the establishment of a trade union, coming in and out of the workplace, running for an elected position of the union, collective bargaining and industrial actions.

▶ With regard to the matters of employment relationship, however, such as provision of work and wage payment, the complainant shall be regarded as a retiree.

e) In case the organization is mainly aimed at political activities
[Examples]
- in case it belongs to a political party or is heavily dependent on a

certain politician;
- in case its main focus is placed on political activities;
- in case its unit organization at an undertaking or workplace level makes a political donation;
- in case the unit organization is a member of the sponsor group of a political party; or
- in case the organization stages an election campaign, taking advantage of its alleged status as a trade union

• However, the following are not included in the applicable cases:
- in case the organization launches a campaign for fair election and holds a public discussion by candidates;
- in case the head or a member of the organization joins a political party or stages an election campaign, as an individual; and
- in case the organization is in support of or in opposition to a particular political party or candidate.

### □ Report on the establishment of a trade union

For the purpose of recognition of a trade union, the organization shall submit a written report on union establishment, along with the bylaws of the trade union, to the competent authority.

▶ As for a federation of trade unions, and a unit union which covers two or more municipalities (Seoul City, Metropolitan Cities or Provinces), the establishment report shall be extended to the Minister of Labor.

▶ For other unions, the report shall be presented to the head of the municipality (Mayor of Seoul City, Mayor of the Metropolitan City or Province Governor) which has the jurisdiction over the organization.

### □ Review by the competent authority

The competent authority, after it receives the written report on union establishment, reviews the legality of the organization as a union and then

decides to issue a union establishment certificate, ask for supplements or revisions or turn down the report, based on the review results.

▶ Issuance of the establishment certificate : When the competent authority finds the union organization to be fully in compliance with legal requirements, it shall issue the union establishment certificate within 3 days from the arrival of the report.
(The date when the report arrived at the competent authority is the date of union establishment.)

▶ Request for supplements or revisions : In case the bylaws of the trade union are not appended, any of required entries is omitted, or part or the whole of what is stated is not true, the competent authority shall ask the organization concerned to submit the report again after the requested supplements or revisions has been made within 20 days from the request.

▶ Return of the report : In case the organization concerned has any of the disqualifying conditions above, does not comply with the request for supplements or revisions, or its coverage of employees is overlapped with that of the existing union within the same workplace, the report submitted is turned down.

## □ Effects of the establishment of a trade union

A trade union which has fully complied with the requirements for establishment laid down in the law and has received the establishment certificate after undergoing the required procedure is entitled to the following:

① the title of a trade union;
② request for the Labor Relations Commission to mediate a labor dispute;
③ request for the Labor Relations Commission to remedy an unfair labor practice;
④ making it an incorporated body by registering at the competent register office;

⑤ exemption from taxation for its union activities, in accordance with the tax code, except for profit-making activities; and

⑥ immunities, for justifiable industrial actions, from civil and criminal liabilities

## ☐ In case the establishment certificate is not issued

In case an organization has fulfilled the requirements for a trade union but has not made a report on its establishment to the competent authority, no protection under the Constitution and labor laws is given to the organization.

※ Many scholars observe that, in such case, the organization can be called a 'constitutional trade union' or 'non-statutory trade union' and is entitled to constitutional rights, such as the rights to bargain collectively and conclude a collective agreement as well as immunities from civil and criminal liabilities.

## ☐ Dissolution of a trade union

A trade union will be dissolved, voluntarily or by force, in the case of any of the following:

① occurrence of any of the causes for dissolution prescribed in its bylaws (the bylaws of a trade union may contain the causes for dissolution, although in practice they do not);

② merger or division (in the case of merger of plural existing unions, the target union(s) shall be dissolved, and in the case of split of a trade union into 2 or more new ones, the original union will be automatically dissolved) ;

③ resolution made to do so at a general meeting or by the council of delegates (such resolution requires the presence of a majority of registered union members and the approval by at least 2/3 of the union members present); or

④ decision of the competent authority to do so, with the resolution of the Labor Relations Commission, when the union has no executive officials and has not carried out any union activity for 1 year or more.

▶ In the case of dissolution of a trade union, the representative of the union shall report to the competent authority within 15 days from the dissolution.

# 13. Full-time Union Officials

## ☐ Applicable legislation

'Trade Unions and Labor Relations Adjustment Act'

## ☐ What is the 'full-time union official' scheme?

▶ Under the full-time union official scheme implemented with the permission of the employer or by means of the collective agreement, employees who are union members, especially union office-holders, can be fully engaged in the union activities.

▶ Full-time union officials are partly or entirely exempt from the duty of work for a given period of time, while maintaining their status as an employee under the contract of employment with his/her employer.

## ☐ Wage payment to full-time union officials

▶ From Dec. 31, 2006 onward, no pay shall given to an employee by his/her employer, for the period of time when he/she works as a full-time union official.

▶ An employer who violates the ban on wage payment to full-time union officials on or after Dec. 31, 2006 is regarded to commit an act of unfair labor practices.

▶ The employer who is currently paying wages to full-time union officials is encouraged to scale down the wages after consultations at the labor-management council.

## ☐ Status of full-time union officials

▶ As a full-time union official also has the status of an employee, he/she is obliged to attend the place of work. In the case of authorized leave of absence, the employee may be subject to disciplinary dismissal.

▶ In the event of an injury inflicted on a full-time union official during the performance of union activities, the union official is also entitled to the compensation for industrial accidents. However, this protection does not apply to the cases where the activities concerned were associated with the higher-up union organization or unlawful union activities, or where the injury occurred after and in connection with an industrial action.

▶ Once an employee had his/her term of full-time union official expired, the employer shall re-deploy him/her to the position of work where he/she had left for the performance of union activities. If the employer refuses to re-deploy the employee to the original position, or applies wages and working conditions for promotion, pay scale, etc. to the disadvantage of the employee in comparison with comparable workers, the employer is regarded to commit an act of unfair labor practice.

## ☐ Practical Questions & Answers

Q : In case the collective agreement provides that "the employer shall pay wages to full-time union officials", should the wage of a full-time union official be equal in amount to that of the employee paid before his initiation of the job of full-time union official? Or, is the employer allowed to deduct bonus, overtime allowance, etc. for the period of time when he/she has worked as a full-time union official, on the ground that the employee has not performed any work for the employer?

A : The wages of full-time union officials shall, in principle, be paid by the trade union. However, in case the wage payment by the employer is laid down in the collective agreement, the provision of the collective

agreement has an overriding effect. But the employer has no obligation to pay bonus or overtime allowance to full-time union officials, unless there are separate provisions that require the employer to do so.

Q : Are full-time union officials entitled to annual and monthly paid leave during their term of office as a full-time union official? If so, in case a full-time union official does not use the paid leave, is the employer obliged to pay compensation for the unused leave?

**A** : The period of time when an employee works as a full-time union official shall be counted in his/her length of service, as long as his/her employment relationship with the employer is sustained. However, as full-time union officials are not under the control or instruction of the employer in relation to part of the working conditions, such as start/closing of working days and holidays and leave, and they do not provide work for the employer, he/she has no legal obligation to grant annual and monthly paid leave, or pay compensation for unused paid leave.

# 14. Collective Bargaining and Collective Agreement

## ☐ Applicable legislation

'Trade Union and Labor Relations Adjustment Act'

## ☐ What is 'collective bargaining' ?

▶ Collective bargaining refers to the negotiation between an employer and his/her employees as a group over maintenance or improvement of working conditions and enhancement of the social and economic status of the employees.

▶ The employer may not neglect or refuse to conduct a collective negotiation requested by the trade union, without giving a justifiable reason.

▶ Either the trade union or the employer may mandate a third party with the right to collectively bargain or the right to conclude a collective agreement, and the empowered party may exercise the right within the limit of the mandate.

## ☐ Matters subject to collective bargaining

▶ The 'matters subject to collective bargaining' refer to the matters which the employer is obliged to negotiate with the employees at the request of the latter. In case an employer refuses to accept such request, it is deemed that the employer commits an act of unfair labor practice.

▶ The matters subject to collective bargaining include: those related to working conditions; those of collective nature; and those which may reasonably be dealt with by the employer. The exclusive rights of the employer, that is, the prerogatives concerning management and personnel arrangement, are not included.

※ However, in case an employer's exercise of the managerial prerogative affects or is closely associated with working conditions of the employees, the prerogative may be negotiated within the setting of collective bargaining.

▶ An employer who refuses to sit at a collective negotiation requested by the employees for the matters not included in the collective bargaining subjects is not regarded to have committed an act of unfair labor practice.

## □ Collective agreement

▶ What is the 'collective agreement'?

Collective agreement is a written agreement between the employer and the trade union on working conditions and the social and economic status of employees.

▶ Contents of the collective agreement

The collective agreement consists of two main parts: working conditions and status of employees; and rights and obligations of the employer and the trade union.

▶ Conclusion and reporting of the collective agreement

The collective agreement should be in writing and be signed by the two parties to the agreement. Another requirement for a valid agreement is that it should be reported to the competent authority within 15 days from conclusion of the agreement.

▶ Effective period of the collective agreement

The effective period of a collective agreement may not exceed 2 years. In

case a new agreement has not been concluded even after the closing of the collective bargaining, the effect of the former agreement is extended for up to three months.

In the case of a collective agreement which provides that the agreement will continue to be effective after the expiry of the agreement until a new one is concluded, the effect of the collective agreement shall be extended. If one of the two parties to the collective agreement intends to terminate the effect of the expired agreement, it shall notify the other party of its intention no later than 6 months before the date on which the termination takes effect.

## □ Practical Questions & Answers

Q : Is a branch or a chapter of the trade union able to conduct independent collective negotiations or to conclude a collective agreement?

A : As long as a branch or a chapter of the trade union is an independent organization with an independent set of rules and a governing body, it may carry out independent collective bargaining or sign a collective agreement over the matters peculiar to the organization and its member workers .

**Q** : In case a trade union requests that its objection to the proposed massive layoff be negotiated, is the employer obliged to collectively bargain the matter? And, if the trade union takes an industrial action to pressure the employer to accept the request, is the industrial action justifiable?

**A** : The mass layoff for an urgent economic cause is a decision grounded on the managerial prerogative of the employer. If the union requests that the proposed layoff should be revoked, such request would be an infringement on the employer's exclusive right and, therefore, cannot be included in the subjects of the collective bargaining. Furthermore, an industrial action which is intended to achieve what is not permitted cannot be justified.

**Q** : Suppose a collective agreement contains a provision that the agreement shall be automatically extended in case notice on revision or denunciation of the agreement is not made within a certain period of time after the expiry specified in the agreement. Is this provision against the legal provision which limits the effect of a collective agreement to 2 years?

**A** : In case the parties to a collective agreement agree to extend or renew the agreement after expiry of the agreement, the extended or renewed agreement is valid because it seems that such extension or renewal is equal to conclusion of the same agreement. Likewise, such provision contained in the agreement on the automatic extension of the agreement is also valid, as it does not lead to any restriction on or deprivation of the right to conclude a collective agreement. However, the renewed effect is limited to 2 years.

# 15. Due Procedures of Industrial Actions

## Applicable legislation

'Trade Union and Labor Relations Adjustment Act'

## Definition of ‘industrial actions’

An “industrial action” refers to a labor relations action taken by a party to get its demand through and the counter-action taken by the other party. Industrial actions which undermine the regular functioning of the business operation include strike, slowdown, sabotage and lock-out.

Employees’ industrial actions: Strike, slowdown, sabotage, production control, boycott, picketing, etc.

Employer’s industrial action: Lock-out

## Requirements for a justifiable industrial action

The first requirement for employees’ industrial action is that the industrial action shall be taken by a party which is entitled to collective bargaining or concluding a collective agreement, that is, a trade union.

A union member is prohibited from participating in an industrial action which is not initiated by the trade union. This means that an individual employee, a temporary employee organization or a body exclusively organized for industrial actions is not entitled to industrial actions.

Any industrial action of employees shall be aimed at getting through a demand for wage, working hours, employee welfare, dismissal and other working conditions. Accordingly, in principle, a political strike, a sympathy strike or any other industrial action on behalf of a third party (government, or employees of another company) is not legally acceptable.

An industrial action should be staged to a minimum extent which is required for the purpose of the action, and should be the last resort after all the other peaceful means have

been attempted.

Under no circumstance may a violent or destructive act be justified. However, as for assaults or verbal abuse inevitably committed by some union members in the course of an industrial action, the extent of inevitability is taken into consideration to determine whether those acts can be justified.

An industrial action shall not disturb, suspend or shut down the regular functioning of safety protection facilities (e.g. facilities for power generation and distribution; furnace; communications; cave-in precaution; ventilation and drainage; and medical care).

## Procedures of industrial actions

Development of a labor dispute:

'Labor dispute' is a dispute between a trade union and an employer or an employer organization over the issues of wage, working hours, employee welfare and other working conditions. If the two parties do not make any further effort to resolve their disagreement, they are in a labor dispute.

Written notice of the labor dispute:

In the case of a labor dispute, one party to the labor relations shall notify the other party of the dispute in writing.

Ahead of such notice, both parties are required to make concerted efforts to reach agreement on the disputed issues. In case the parties have failed to reach agreement, they may move on to follow-up processes such as a third-party's assistance and industrial actions.

Request for mediation of the labor dispute:

As it is laid down in the law that any industrial action shall be preceded by a mediation process, either of the two parties shall request the Labor Relations Commission for mediation.

Mediation preceding system :

While in the mediation period (10 days for ordinary businesses, and 15 days for public services, from the request for the mediation), the parties concerned shall not take any industrial action. Meanwhile, in case the mediator proposal is not accepted by both parties during the mediation period, or in case, once the dispute case was brought before the arbitration committee, the arbitration award is not made during the no-dispute period of 15 days, the two parties are not prevented from taking an industrial action during the following days.

Union members' voting on industrial actions:

Before starting an industrial action, a trade union shall organize a direct, secret and unsigned voting by a majority of union members.

[Court ruling] "If the union chairman decided to initiate an industrial action on his/her own or with the mandate of shop stewards, without conducting a voting by union members, such industrial action is not valid, unless the chairman can give an objective reason for not having conducted such voting."

Reporting of the industrial action:

The trade union, which intends to wage an industrial action, shall make a written report to the competent authority and the territorial Labor Relations Commission, specifying the date and location of the industrial action and the number of participants.

## Employer's industrial action : lock-out

Lock-out is an industrial action that can be resorted to by an employer in response to the industrial action of the union.

[Court ruling] "Even in case employees occupied the company premise after conducting a lawful industrial action, if the employer counteracted the action with a legitimate lock-out and ordered the occupying employees to withdraw from the company, the employees shall respect the order. Any employee who does not comply with the order has a criminal responsibility for not observing the eviction order.

Lock-out is permissible only after the trade union commences an industrial action.

No lock-out is allowed before an industrial action of employees.
No lock-out is allowed after the end of the strike.

The employer who plans a lock-out shall also report to the competent authority and the Labor Relations Commission in advance.

Lock-out may not involve any act of violence or destruction, and may not lead to disturbance, suspension or shutdown of the safety protection facilities at work.

Once a legal lock-out is in place, the employer may cut employees from the production means and, consequently, may be exempt from the obligation to pay wages.

# 16. Unfair Labor Practices of Employers

## ☐ Applicable legislation

'Trade Union and Labor Relations Adjustment Act'

## ☐ What is the 'remedy for unfair labor practices'?

The remedy for unfair labor practices is laid down in the law, with a view to protecting basic labor rights of workers and their organizations from the unfair practices of employers. This system is aimed at facilitating the contractual autonomy of social partners, as well as safeguarding the rights and interests of workers.

## ☐ Perpetrator of unfair labor practices

It is questionable whose unfair labor practices shall be regulated in the law. In Korea, only the unfair labor practices by employers in relation to their employees are banned by law.

Accordingly, neither employees nor trade unions can be implicated in an unfair labor practice.

## ☐ Types of unfair labor practices

### A. Discriminatory treatment

① No employer may dismiss, take disciplinary measures against or take any other discriminatory action against an employee on the grounds that the employee has joined, or intended to join or organize, a trade union, or has performed justifiable activities for a union. The following may be regarded as justifiable actions that, therefore, shall not be used as grounds for

discriminatory treatment:

- Collective bargaining and other collective actions;
- Election of union officials, attendance and presentation at a union meeting, and participation in decision-making;
- Travels for the purpose of union activities :
- Departure from the union, or the act of persuading others to depart from the union; or
- Organization of a new union, criticizing a union official or opposition to the union.

② No employer may take any discriminatory action against an employee on the grounds that the employee has taken part in a justifiable collective activity; has reported the employer's violation to the Labor Relations Commission; or has testified about such violation or presented evidence before a competent authority.

**B. Yellow dog contract**

An employer shall not employ an employee on the condition that the employee does not join or withdraws from a certain union, or joins a particular union.

- However, in cases where there is a trade union representing 2/3 or more of the workforce of the company concerned, the employer may conclude a collective agreement which provides that the trade union affiliation is a precondition of employment.

- The yellow dog contract is, in itself, an unfair labor practice. The provisions of such contract have no legal effect.

**C. Refusal to conduct collective bargaining**

An employer who refuses or neglects to conduct collective bargaining or conclude a collective agreement with a union representative or a person who is

authorized by the union commits an act of unfair labor practice unless he/she gives a justifiable reason for doing so.

The following are the justifiable reasons for which the employer may refuse to sit at a negotiation table. That is to say, in the case of any of the following, the employer's refusal to start collective bargaining does not constitute an unfair labor practice:

- In cases where the employees are not a legitimate party to collective bargaining:
  - In case they are just a body of employees, not a trade union
  - In case they are not authorized at a general meeting of the union
  - In case there are an excessive number of bargaining representatives
  * However, the fact that the members of the union are a minority may not be used as ground for the employer's refusal to conduct collective bargaining.

- In cases where the demand of the employees is not simply a matter that can be negotiated at the collective bargaining:
  - Demand for a political solution
  - Demand for revocation of a dismissal and for other matters which are clearly related to personnel and managerial decisions
  - Demand for discussion of illegal actions

- In cases where the employees have violated the method, means and procedures of collective bargaining laid down in the collective agreement or the rules of employment :
  - Heavy-handed actions, such as verbal abuse and violent acts in the course of collective bargaining
  - Demand for a lengthy negotiation without reasonable justification
  - Infringement on privacy
  - Demand for an immediate response (yes/no) to a specific matter

- In case the employer has no mandate to conduct collective bargaining

### D. Domination and intervention

An employer may not dominate or intervene in the organization or operation of a trade union by his/her employees, and may not provide financial supports for the operation of a union.

- Interference with the organization of a trade union, or collective bargaining, collective actions and all the other union activities
- Financial supports to the extent which may undermine the independence of a trade union
- However, an employer may allow employees to take part in consultation or bargaining with the management during working hours; grant subsidies for employee welfare or for relief from occupational disasters; and provide the minimum space for the union office.

## □ Procedures of the remedy for unfair labor practices

### A. Principles of restitution and penalization

The remedy for unfair labor practices is based on the principles of restitution and penalization: the Labor Relations Commission may issue an administrative order of restitution, and an employer who does not comply with the order will be penalized.

### B. Application for the remedy

In case an employee reasonably believes that his/her right has been infringed on by the employer, the employee or the trade union may file a request for remedy to the Labor Relations Commission within 3 months from the day when such unfair labor practice took place.

### C. First ruling by the Labor Relations Commission

The Regional Labor Relations Commission, upon the arrival of the application for remedy, shall carry out an investigation into factual aspects of the case and conduct an inquiry of the parties concerned and, based on the results of the investigation and the inquiry, may issue an order for a remedial action (restitution) by the employer or decide to dismiss or return the application for remedy.

- Reasons for dismissing or returning the application:
- When the claimant union is not a union organization recognized in the labor legislation;
- When the filing is made after 3 months from the occurrence of the alleged unfair labor practice;
- When it is clear that the action in question is not an act of unfair labor practice; or
- When the remedy is neither beneficial to the employee nor possible to achieve.

**D. Second ruling by the Labor Relations Commission**

In case one of the parties disobeys the order for a remedial measure or the decision to dismiss the application, made by the Regional Labor Relations Commission or the Special Labor Relations Commission, the party may ask the National Labor Relations Commission to review the case, within 10 days from the date of receiving the notice of the order or decision.

**E. Administrative filing**

One of the parties concerned that finds unacceptable the second ruling of the National Labor Relations Commission may bring an administrative suit in accordance with the Administrative Litigation Act, within 15 days from the date of receiving the notice of the ruling.

**F. Remedy by the court of law**

An employee, apart from the remedy procedure at the Labor Relations Commission, may file a suit before the court of law to invalidate the employer's action in question and ensure compensation for the damages inflicted on him/her.

# 17. Industrial Action of the Employer (Lock-out)

## ☐ Applicable legislation

'Trade Union and Labor Relations Adjustment Act'

## ☐ What is a 'lock-out'?

▶ Lock-out is an industrial action that can be taken by an employer as a means of protection against industrial actions by the trade union. With a lock-out, the employer may refuse to accept the labor of the employees, with a view to protecting business facilities and management rights from the industrial action of the union.

## ☐ Procedures of a lock-out

▶ The employer shall make a public notice on the start of a lock-out in advance, before refusing to receive the labor of employees.

▶ Another requirement is that the employer shall report the planned lock-out to both the competent authority and the Regional Labor Relations Commission in advance.

▶ Even during the lock-out, the employer may not close a trade union office and employee accommodations.

## ☐ Requirements for legitimacy of a lock-out

▶ Only after the trade union has staged an industrial action may the employer conduct a lock-out. Any lock-out before the union's industrial action is illegal.

▶ If the lock-out continues even after the end of the union's industrial action, the lock-out is regarded as an 'offensive' one and its legitimacy will be lost.

▶ As for an industrial action which is clearly unlawful or a strike waged by unorganized workers, the employer is advised to resort to legal proceedings, not to a lock-out.

## □ Scope of a lock-out

▶ When the union's industrial action covers the entire company, the employer is allowed to implement a company-wide lock-out. However, in case the union's industrial action is waged only for a part of the company, the employer may not conduct an offensive full-scale lock-out which suspends work at the entire company.

▶ However, if the union's industrial action for a part of the workplace makes it impossible to continue operation in any part of the workplace, a full-scale lock-out is permissible.

## □ Effects of a lock-out

▶ In the case of a justifiable lock-out, the employer is exempt from the obligation to pay wages. However, this exemption does not apply to the case of an illegitimate (preemptive or offensive) lock-out.

▶ Once a fair lock-out is in place, the employer may order the union members to be evicted from the workplace. A union member who refuses to observe the order is guilty of eviction order non-compliance.

# 18. Mediation of Labor Disputes

## ☐ Applicable legislation

'Trade Union and Labor Relations Adjustment Act'

## ☐ What is the 'labor dispute mediation system'?

Labor disputes shall, in principle, be resolved by the parties concerned by means of independent negotiations and conclusion of an agreement.

However, in case the parties find it hard to reach agreement and it is likely that the trade union will stage an industrial action, either of the parties may ask for reliable and professional assistance from a third party who is experienced in or knowledgeable about the labor dispute settlement, with a view to bringing the dispute to a quick end in an efficient manner.

## ☐ Mediation and arbitration

'Mediation' refers to a set of procedures in which a mediator, who is a third party, offers a proposal to the parties concerned, which, after a review of the proposal, may accept it and reach a mutual agreement. However, the parties concerned are not bound by the mediator proposal.

In comparison, 'arbitration' is a process in which an arbitrator, who is a third party other than the court of law, offers the parties concerned a legally binding proposal. The employer and employees are obliged to reach agreement within the framework of the proposal. This arbitration process applies to the exceptional cases where an independent agreement between the parties or mediation of a third party has not been achieved.

## ☐ Private vs. public mediation

In case the employer and employees find it hard to settle the labor dispute in an autonomous manner, they may resort to private mediation, or a third-party mediation in accordance with the public mediation system.

The parties in dispute may agree to initiate private mediation prior to public mediation. The public mediation is the supplementary and complementary mechanism that can apply to the cases where there exists no private mediation or the private mediation has not resolved the dispute.

### □ Private mediation system

In the event of a labor dispute, the parties concerned may appoint a private mediator, as laid down in a specific agreement or in the collective agreement, in order to resolve the dispute.

Private mediation may be used at any time for the purpose of dispute prevention or settlement.

- Before the labor dispute takes place
- After the labor dispute takes place and before public mediation commences
- After public mediation commences

When the parties to the labor dispute have agreed to start private mediation, they shall notify the Regional Labor Relations Commission of the commencement. The duration of private mediation is 10 days for ordinary businesses, and 15 days for public services.

In case the private mediation has led to dispute settlement, the agreement made has the same effect as a collective agreement.

In case the parties have failed to reach an agreement after the private mediation, the union may resort to industrial actions, and may ask the Regional Labor Relations Commission to mediate (under the public mediation system) or arbitrate.

## ☐ Public mediation system

In case there exists no agreed procedure for private mediation, or the private mediation has failed to resolve the dispute, the process of public mediation, at the request of either party, may commence.

- Mediation preceding principle: A trade union may not take an industrial action without undergoing a private or public mediation for the labor dispute in advance.
- Public mediation can be divided into mediation and arbitration.

## ☐ (Public) Mediation

### A. Commencement of mediation

When either of the parties to a labor dispute submits a request for mediation to the Regional Labor Relations Commission with a view to dispute settlement, the Commission shall conduct the proceedings of mediation without delay. And the parties shall be in good faith in following the proceedings.

### B. Period of mediation

Mediation shall be completed within 10 days for ordinary businesses, and within 15 days for public services, from the date of mediation request. However, the duration of mediation may be extended to twice the limited length, so long as the two parties agree to do so.

### C. Mediators

***[Labor Relations Commission]*** A Mediation Committee of the Labor Relations Commission shall be responsible for labor disputes. The Mediation Committee consists of an employer member, an employee member and a public interest member, all of whom are members of the Labor Relations Commission.

***[Single Mediator]*** The Labor Relations Commission may authorize a single mediator, who is a member of the Commission and is selected by the two parties, to conduct mediation proceedings in place of the Mediation Committee at the request or consent of both parties.

**D. Mediation procedure**

The Mediation Committee or the Single Mediator, after gathering opinions of the parties and making investigations, shall prepare and present a mediator proposal to the parties and recommend them to accept it.

**E. Effect of mediation**

The mediator proposal, once accepted by both parties, has the same effect as a collective agreement.

In case the mediator proposal is not accepted by both parties, the Mediation Committee shall notify the parties of the closing of mediation. Then, if the parties concerned agree to ask for arbitration, the arbitration process will commence. If there is no such agreement on arbitration, the trade union will be allowed to engage in an industrial action.

## □ Arbitration

**A. Commencement of arbitration**

The Labor Relations Commission may conduct arbitration: in case both the parties have requested arbitration; in case one of the parties has requested arbitration, in accordance with the relevant provisions of the collective agreement; or in case the Commission Chairman has decided to refer a dispute in essential public services to arbitration.

**B. Period of arbitration**

The arbitration process lasts 15 days during which no industrial action is permitted.

**C. Arbitrators**

The Arbitration Committee within the Labor Relations Commission shall be responsible for arbitration, and the Committee consists of 3 members representing public interests, all of whom should be members of the Commission and whose selection should be agreed on by both parties.

**D. Arbitration procedure**

The Arbitration Committee shall hold a meeting on a specific date so that both parties may be heard in relation to their claims and the Commission members representing employers and employees may be heard. Based on circumstantial evidence and relevant data, the Committee shall draw up an arbitrator proposal.

The arbitrator proposal (arbitration award) shall be made in writing and be sent to the parties, with the effective date being clearly stated thereon.

**E. Effect of arbitration**

The finalized arbitration award has the same effect as a collective agreement.

**F. Challenge against the arbitration award**

***[Request for review]*** In case either party reasonably believes that the arbitration award made by the Regional Labor Relations Commission or the Special Labor Relations Commission is unlawful or beyond the mandate, the party may request the National Labor Relations Commission to review the case within 10 days from the date of receiving the arbitration award.

***[Filing administrative suit]*** In case either party reasonably believes that the ruling of the National Labor Relations Commission on the arbitration award of

the Regional Labor Relations Commission or the Special Labor Relations Commission, or the arbitration award by the National Labor Relations Commission is unlawful or beyond the mandate, the party may file an administrative suit within 15 days from the date when the ruling or the arbitration award was delivered.

# 19. Establishment and Operation of the Labor-Management Council

## ☐ Applicable legislation

'Act concerning the Promotion of Worker Participation and Cooperation'

## ☐ Purpose of the Labor-Management Council

▶ The Labor-Management Council system is designed to encourage participatory and cooperative labor relations, instead of antagonism between the employer and workers, thereby serving the interests of both parties.

## ☐ Establishment of a Labor-Management Council

▶ A Labor-Management Council shall be set up at every workplace normally employing at least 30 workers.

▶ In case an enterprise is divided into several workplaces, each with fewer than 30 workers, a Labor-Management Council shall be established at a main workplace if the total workforce of the enterprise numbers 30 or more.

▶ The Labor-Management Council consists of the same number (3 to 10) of representatives from the employer and employees.

※ Procedures for establishment of a Labor-Management Council

o In case there is a trade union which represents a majority of the workforce, the employer shall consult the union about the establishment of a Labor-Management Council.

o In case there is no such trade union;

① a public notice on establishment of a Labor-Management Council is made at the workplace

② a preparation body is organized

③ the number of Council members is determined

④ the matters relating to election of employee members are determined

⑤ candidates for employee members are registered

⑥ a list of voters for election of employee members is made

⑦ votes are cast and counted, and the successful candidates are announced

⑧ the Labor-Management Council is established

## □ Operation of the Council

▶ The Labor-Management Council shall set bylaws concerning its organization and operation and hand in the bylaws to the Minister of Labor within 15 days from the establishment of the Council.

▶ The Labor-Management Council shall call a regular meeting every 3 months, and keep the minutes of the meeting for 3 years.

▶ A meeting shall open with the presence of a majority of both employee members and employer members, and a resolution shall be passed with the approval of 2/3 or more of the members present.

## □ Functions of the Council

▶ The Labor-Management Council serves to increase efficiency in business management and promote the rights and interests of employees. The matters that are discussed at the Council are classified into the matters for resolution; those for consultation; and those for reporting, depending on the extent of employee involvement.

▶ Matters for resolution:

The employer shall bring these matters to the Labor-Management Council for resolution before enforcing them, and the resolution is obligatory to both the employer and employees.

- o Setting the framework of the training, education and capacity-building for employees
- o Installation and maintenance of welfare facilities.
- o Organization of the in-company employee welfare fund
- o Other matters that have not been resolved at a grievance-handling body

▶ Matters for consultation:

Resolution is not compulsory for these matters, but once a resolution is made for any of them, it is obligatory to both the employer and employees.

- o Productivity improvement and profit-sharing
- o Recruitment, deployment and training/education of employees
- o Prevention of labor disputes
- o Handling of employee grievances
- o Promotion of employee welfare, etc.

▶ Matters for reporting:

The employer shall report the business plan or performance to employee representatives, who has the right to request the employer to submit relevant documents.

- o Business plan, performance and prospects, and any change in the organizational structure
- o Quarterly production plan and performance
- o Personnel policy, flow of workforce, and new recruitments
- o Economic and financial situation of the enterprise
- o Matters that shall be reported under the resolution of the Council

## □ Grievance handling

▶ Grievance Handling Officers shall be appointed at every workplace employing 30 or more workers.

- o The number of Grievance Handling Officers per workplace shall be 3 or less.
- o In case there is a Labor-Management Council, the Officers shall be elected among the Council members; and in the absence of the Council, the employer shall appoint the Officers.

▶ Matters subject to grievance handling:

- o Personnel management
- o Working conditions
- o Wages and pay scale promotion
- o Work environment, etc.

▶ Grievance handling procedure

① An employee grievance is reported.
② The remedy for the grievance is taken.
③ The complainant is notified of the results of grievance handling (A notification shall be made on the measure taken or the grievance handling results within 10 days from the reporting of the grievance.)
④ The records on the reporting and handling shall be kept for 1 year.

## □ Practical Questions & Answers

Q : Is it possible for the Labor-Management Council to modify working conditions specified in an individual employment contract, the rules of employment or the collective agreement?

A : In general, wages and working conditions are to be dealt with within the collective bargaining between the employer and employees (or the union), not at the Labor-Management Council. However, in case the Council reaches an agreement on working conditions which are not included in the matters for consultation at the Council, in accordance with the empowerment provided for in the collective agreement, and the agreement is signed by the parties to the collective agreement, the

agreement has the same effect as the collective agreement.

Q : Suppose the employer and the union agreed, in the collective agreement, that a working-level consultative body would be set up within the framework of the Labor-Management Council to discuss how the monthly-based wage scheme should be implemented. In this case, if the union unilaterally declared the agreement to be void, and demanded collective bargaining on the wage scheme and waged industrial actions with a view to putting pressure on the employer, could the demand and industrial actions of the union be justified?

**A** : When the two parties to collective bargaining agree to resolve a certain issue through the Labor-Management Council, they are obligated to do so in good faith. In such case, if one of the two parties attempts to go against the agreed commitment of consultations at the Labor-Management Council and to resort to collective negotiations for resolution of the issue, the attempt is not justifiable. Moreover, if the party engages in industrial actions for that purpose, such actions are not immune from civil and criminal liabilities.

# 20. Employee Welfare System

## ☐ Applicable legislation

'Basic Employee Welfare Act'

## ☐ Purpose of the employee welfare system

▶ The employee welfare system is designed to support a stable living and wealth formation of workers, and to promote cooperation between employers and employees through the employee stock ownership plan, with the ultimate aim of ensuring workers a high quality of life.

▶ Non-standard workers, such as daily hires and fixed-term employees, are also entitled to the employee welfare schemes.

## ☐ Support for stable livelihood and wealth formation

▶ Employees and their dependants are entitled to special loans for medical, wedding and funeral expenses.

▶ Employees whose wages are overdue may request a stable livelihood loan to cover their living costs.

▶ In addition, employees may benefit from the worker preferential savings products, and scholarship programs and tuition loans for their children.

▶ The employer should ensure that the inventions at work are properly compensated for, by setting up detailed standards and procedures of such compensation within the framework of the Labor-Management Council.

## ☐ Support for stable housing

▶ Employees may use housing loans at a low interest rate in cases of purchasing, newly building or renting a house.

▶ Employees who move to another regional area or stay away from their family for a job-related reason are entitled to the moving allowance or accommodation facilities.

## ☐ Credit guarantee grants

▶ Employees who have little or no ability to offer collateral may receive the loan for stable living, schooling, etc. with the help of the credit guarantee granted by the Korea Labor Welfare Corporation.

※ Loans eligible for the credit guarantee grants (yet to be confirmed) : loan for incumbent employees' stable living ; loan for living costs of employees with overdue wage; loan for employees' college education; loan for stable living of unemployed workers; the loan for stable living and college education of injured workers

※ Guarantee limit (yet to be confirmed) : ranging from 5 million to 10 million Korean won per person, depending on the loan program

## ☐ Employee stock ownership plan

▶ An employee stock ownership cooperative may be established, which enables employees to acquire and own the stocks of the company they are working for, and thereby improve their economic and social status and increase employer-employee cooperation at workplace.

▶ For the purpose of operating the employee stock ownership program, the Steering Committee for Employee Stock Ownership may be organized, consisting of the same number of representatives from the employer and the employee stock ownership cooperative.

▶ Various opportunities of stock acquisition:

Employee stocks may be acquired in a range of manners, such as contribution of the company's treasury stocks, contribution of retained earnings, and borrowings from financial institutions.

▶ The government offers tax benefits and financial supports for stock acquisition by the members of the employee stock ownership cooperative. Furthermore, the government, in an effort to make it easier for employees to encash the stocks owned, allows the company to build a repurchase reserve and to buy stocks of its own issuing for the purpose of greater ease of encashing.

▶ The stocks which are bought with the company's contribution or a borrowing from a financial institution shall be distributed to employees over a given period of time, or within the limit of the amount repaid to the financial institution.

## □ Support to employee welfare facilities

▶ Employees have the right to use government-subsidized employee welfare facilities, and are also entitled to the government subsidy when they use private-sector welfare facilities.