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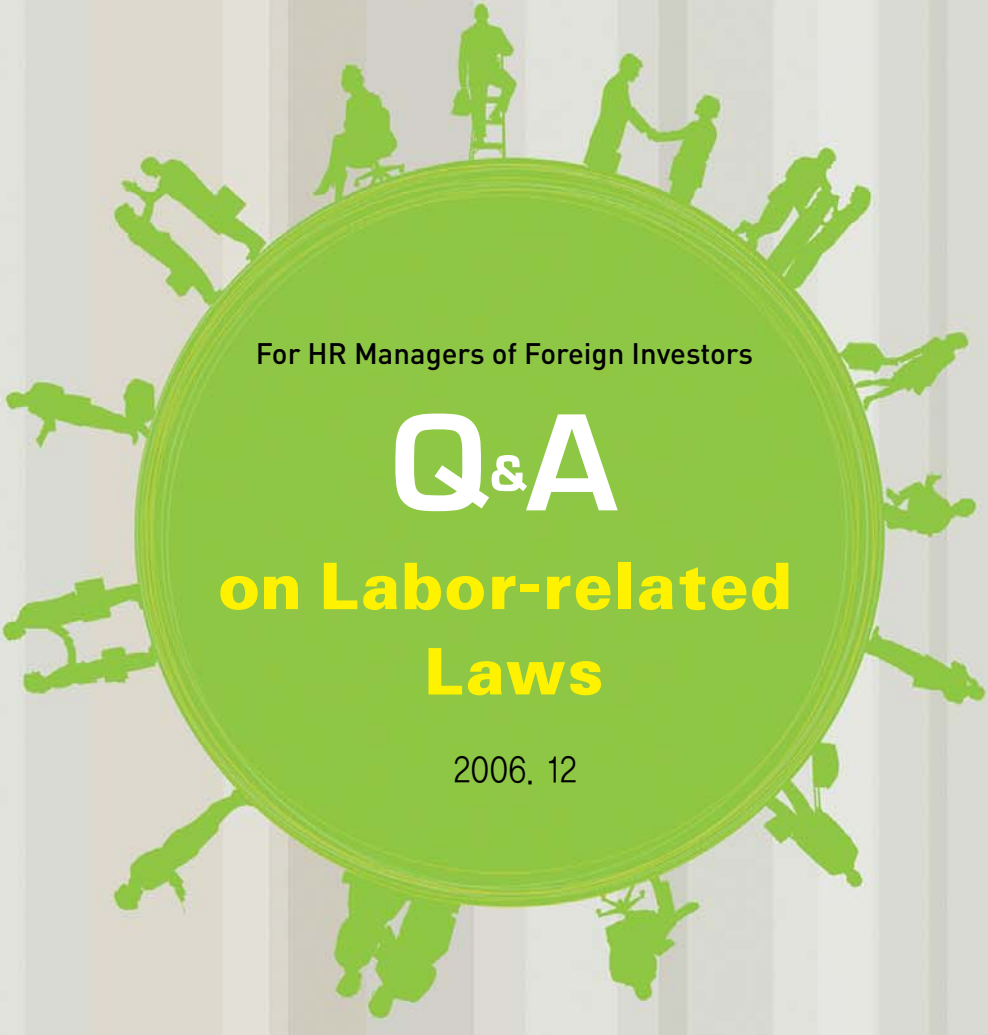

For HR Managers of Foreign Investors

# Q&A on Labor-related Laws

2006. 12

INVEST KOREA

The Investment Promotion Arm of KOTRA

For HR Managers of Foreign Investors

# Q&A on Labor-related Laws

# Introduction

Invest KOREA has been making diverse efforts to relieve foreign investors from burdens related to personnel and labor matters. In part of these efforts, Invest KOREA published and distributed Major Court Rulings on Labor Cases in Korea, a booklet containing field-level guidelines on labor-related regulations, explanations and court rulings in 2003 and 2005.

This year, we are publishing this "Q&A on Labor-related Laws", encompassing the matters related to labor laws that have been frequently asked by HR managers of foreign investors. This booklet contains administrative interpretations by the Ministry of Labor on labor standards and labor union issues mostly frequently asked by foreign companies from 2001 to 2005.

Furthermore, for useful reference in labor management, we attached explanations on enacted laws relating to fixed-term and part-time workers and dispatched workers, which were passed by National Assembly lately, We hope that this booklet will be useful to foreign investors' personnel in charge of HR and labor management.

Tong-Soo Chung
Head of Invest KOREA

For HR Managers of Foreign Investors

# Q&A on Labor-related Laws

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# Q&A

## on Labor-related Laws

# 01 Employment and employment contract

## 01 Can an employer revoke its decision to employ a person("a person selected for employment") on the ground of employer's own circumstances?

"A person selected for employment" refers to a person who has been determined as qualified for employment through employer's recruitment process, but has not been officially employed yet. If the employer has placed such person in stand-by status without entering into a specific agreement on terms and conditions of employment, such as timing of appointment or wages, the latter can hardly be deemed as a worker as defined by Labor Standard Act, and we believe he can not be protected under the same Act. However, in the event that the employer revokes its decision on 'qualification for employment' after placing such qualified person for a specified time span, it would be desirable to settle the issue upon mutual discussion. If the parties fail to reach agreement, the issue may be resolved through a litigation for damage compensation in accordance with procedure prescribed by civil laws.

An agreement to employ a person automatically after passage of specified time span (or from specified date) without other conditions, e.g. submission of documents evidencing graduation or academic degree is a 'definitive' employment agreement, not simply a 'decision on employment'. As such, the period until actual provision of service shall be deemed as mutually agreed 'suspension period' or "stand-by period."

## 02 What is difference between "worker in probationary period " and "worker in trial period"? Is dismissal of "worker in trial period" a legitimate dismissal?

"Probationary (apprenticeship)period" refers to a period after formal employment intended for education to develop job-performing capabilities of an employee, and "trial period" refers to a period established before formal employment or execution of definitive employment contract intended to make judgment on worker's aptitude for job or job-performing ability in consideration of work conditions.

The labor relationship during the trial period would be an employment agreement whereby a party to agreement reserves right to terminate it, and dismissal during such trial period or refusal to employ such worker as regular employee would be deemed as exercise of the reserved right to terminate the agreement. As the exercise of said right is related to the implication of the 'trial period' whereby the employer determines worker's qualification for the job, such as aptitude, personality and competence, the dismissal may be acknowledged in broader scope than ordinary dismissal. However, there should be objective and justifiable reason for dismissal, based on judgement on qualifications derived from observation of worker's attitude toward the job and competence, in order for such dismissal to be acknowledged as reasonable under social norms.

As a worker in trial period would fall under category of "worker in probationary period" as defined by Article 35 of Labor Standards Act, the employer does not need to make advance notice of dismissal to the worker in trial period, who has not worked for more than 3 months.





## 03 Is fidelity guarantee agreement under Fidelity Guarantee Act violation of 'Prohibition of predetermination of nonobservance'?

"Fidelity guarantee agreement" refers to an agreement for indemnity for damage incurred by the employer as a result of act conducted by employee, regardless of title, such as assumption or guarantee of liabilities. The provision of Article 27 of Labor Standards Act (Prohibition of Predetermination of Nonobservance) only prohibits an agreement between employer and employee whereby a penalty or indemnity for damage incurred from nonobservance of labor contract is predetermined. Hence, the said provision does not prohibit the fidelity guarantee agreement itself. If an employer enters into fidelity guarantee agreement with a surety, or fidelity guarantee agreement by which the surety and employee bear joint liability, it would not constitute predetermination of nonobservance. Even if labor contract is renewed, the fidelity guarantee agreement is not automatically renewed, thus new agreement is required.

## 04 When labor contract expires after such contract specifying the term of employment was executed, is the employer required to make advance notice of dismissal?

The triggers for termination of labor contract can be divided into A)case where the contract is terminated by employee's discretion or consent [Retirement : voluntary retirement or retirement due to age limit], B)case where labor relationship is terminated without consent of employee or against intention of the employee [Dismissal : Ordinary dismissal,


disciplinary dismissal, or dismissal due to managerial reason], and 3) case where labor relationship lapses regardless of intention of employee or employer [Automatic expiration : Expiration of contract term, completion of project, death of employee, or extinction of business enterprise].

The term of labor contracts, except the contract without specific term or contract specifying period required for completion of business project, may not exceed one year. If a labor contract is executed with contract term in excess of one year, it is deemed as a labor contract with contract term of one year, and labor relationship thereafter is deemed as under labor contract without definitive term, unless there is particular reason for otherwise. However, if a term of 3 years was required for a research project and business itself has ceased to exist with expiration of such term, the labor relationship in such case would constitute a contract specifying the definitive term required for completion of business project, and with expiration of the contract term, the contract is deemed as terminated.

In summary, if a contract was executed with definitive term or term required for completion of business, we believe that advance notice of dismissal is not mandatory. However, in order to minimize the room for dispute, it will be desirable to make advance notice for the purpose of informing the employee of dismissal due to expiration of the term.





## 05 If a worker who has executed a labor contract based on monthly wage or annual salary system is absent from the work without permission, how wage is calculated?

"Ordinary wage" refers to hourly wage, daily wage, weekly wage, monthly wage or subcontract amount predetermined to be paid for contractual working hours or total working hours. Unlike average wage, the ordinary wage is fixed wage to be paid for the period covering the wage on regular and uniform basis, regardless of actual number of work days or actual amount paid.

If contractual working hours are 40 hours

- Base hours for calculation of weekly, ordinary wage : Weekly contractual working hours(40 hours)+hours that count toward paid hours(8 hours)
- Base hours for calculation of monthly ordinary wage : {(40 hours+8 hours) 365days/7days}÷12 months 209 hours.

In case of monthly wage system based on 40 working hours per week, hourly wage is calculated by dividing the fixed monthly wage (monthly ordinary wage) by the base hours for calculating the monthly ordinary wage (209 hours), and daily wage is calculated with formula [hourly wage rate 8 hours(contractual working hours per day)]. Hence, the amount of wage can be calculated by adding or deducting based on daily wage rate.

※ Contractual works : As the wage for contractual works refer to the wage to be paid for contractual working hours for the period covered by wage, or working hours prescribed by law, it does not include allowance for extended working hours or holiday works

beyond contractual working hours. It also excludes family allowances, transportation allowances, and meal subsidy, which do not have nature of compensation.

## 06 Does bonus constitutes wage as prescribed by applicable regulations, and must it be paid to worker scheduled for retirement?

As there is no regulatory provision on bonus, amount, conditions, recipients, and method of payment should, in principle, follow collective agreement or rules of employment. Whether specific bonus is included in average wage would depend on type of payment.

If the bonus is paid in specific amount or specific proportion, on fixed/regular basis with specific intervals, a worker who has retired before due date for bonus payment may claim for such bonus as compensation for labor corresponding to the period of service, unless there is a rule for otherwise. There is a judicial precedent that even if a person entitled to bonus has been defined by internal rule as "person who is employed as of the last day of each bonus-payment period", it may not be deemed as a special provision precluding the payment of bonus to a person who has retired in the middle of bonus-payment period. However, if a provision of collective bargaining agreement, rules of employment, or labor contract explicitly defines person entitled to the bonus as "person currently employed", such provision would be deemed as effective.

※ If there is no specific provision in rules of employment, bonus may be paid only to those retained by convention or practice.





※ As the compensation for temporary interruption of work paid to a patient under medical treatment due to industrial accident is based on average wage including regular/uniform bonus, the employer would not be legally obliged to pay the bonus to such patient other than compensation for temporary interruption of work.

## 07 Can expense incurred for repair of automobile due to an accident attributable to gross negligence of the employee be deemed as advance payment of wage, thus deducted from his salary?

Article 28 of Labor Standards Act stipulates that "An employer shall not offset wages against advance or other credit given in advance on condition that a worker offers a work."

As the expense for repair of automobile should be, given its nature, redeemed through civil law proceeding, even if it is viewed by the employer as advance payment of wage, the deduction from the wage would be deemed as 'offsetting against the indemnity for damage'.

# 03 Holidays and leaves

## 08 Can recess hour be replaced by lunch hour?

Under Labor Standards Act, recess hours refers to, regardless of how its is called (recess hours or stand-by hours, etc) those which a worker can freely use without command or supervision of employer, and they do not count toward actual working hours or paid for.

If a worker uses the recess hours in aforementioned form, we believe that the recess hour may be replaced by lunch hour.

※ At least 30 minutes of recess should be allowed for every 4 working hour, and one hour for every 8 working hour, during some time between beginning and end of a workday.

※ Although there is no regulatory provision regarding split of recess hours, granting the recess hour in whole would be consistent with the intended purpose of the recess system. However, it would be acceptable to grant the recess hours in split when necessary under social norms in light of the nature of work or condition of business site, and in a scope generally acknowledged as reasonable, to the extent that such split is in compliance with the purpose of the recess system.

## 09 Are full-moon festival holidays (Choosuk) legal holidays?

Holiday refers to a day when a worker is completely free from any bindings placed by an employer, including obligation of work. Holidays and leaves are divided into legal holidays/leaves and contractual holidays/leaves depending on whether grant of them is mandatory or not. The holidays and leaves are also divided into paid holidays/leaves and





unpaid holidays/leaves, depending on whether wage is paid for such holidays/leaves.

Unless full-moon festival holidays are defined as holidays by collective bargaining agreement or rules of employment, they are not legal holidays.

**[ Classification of holidays and leaves ]**

| | Type | Legal ground | Features |
|---|---|---|---|
| Legal holiday | Weekly holiday<br>Labor day | §54<br>Act on establish-ment of labor day | • Mandatory<br>• May be determined autonomously by labor and management if equal to or above legal standard<br>• Wage must be paid (however, childcare leave and menstruation leave are unpaid leaves)<br>※ Under previous act, menstruation leave was paid leave |
| Legal leave | Monthly leave<br>Annual leave<br>Menstruation leave<br>Maternity leave<br>childcare leave | §57<br>§59<br>§71<br>§72<br>Equal employment opportunity act<br>§11 | |

※ Holiday is a day when an employee is not obligated to offer work, thus excluded from contractual work days. Leave is a day when an employee is obliged to offer work, but is exempted from such obligation upon his request or satisfaction of particular condition.

※ Under the Labor Standards Act, legal holidays and leaves must be granted to an employee regardless of type of work or type of employment (e.g. working on alternate days, working on shift, or 5-day work week/employment on probationary condition, temporary

position, entrustment, dispatched or subcontracted worker status, flexible/selective work hours, etc)

## 10 If labor day is a non-working day, how is the allowance for paid holiday paid?

Act on establishment of labor day stipulates that "May first shall be the labor day, a paid holiday under Labor Standards Act."

Here, "Paid holiday" refers to a day when an employee shall be paid an amount that he would have received if he had offered work, but shall not be obliged to offer the work.

If an employee offered work on labor day, a paid holiday, he would be entitled to sum of normal wage that he would have received without offering work (100%) plus additional remuneration for work offered on public holiday (150%), pursuant to Article 55 of Labor Standards Act.

As for the first 100% of wage, however, to an employee who is paid fixed wage each month based on monthly wage system, the employer only has to pay contractual monthly wage, regardless of the number of contractual work days or the number of paid holidays in the month or whether labor day falls on any day from Monday to Sunday.

※ As "labor day" is a legal holiday fixed on particular calendar day to celebrate a particular event, it may not be substituted with another day.

## 11 Is a general business place required to observe non-working days as defined by "Regulation on holidays of public authorities"?

# 03 Holidays and leaves

The non-working day under "Regulation on holidays of public authorities" is a day when public authorities do not open, thus applies only to public servants, not general business place. General business place should determine whether to designate holidays under Labor Standard Act and labor day under "Act on Establishment of Labor Day" as holidays in its collective bargaining agreement and labor contract. If there is no specific rule, an employer is not obligated to grant holidays under the Act to employee. In this case, even if an employee offers work on aforementioned holiday, he will not be entitled to allowance for work on holidays.



## 12 If legal working hours are set at 40 hours a week, must a non-working Saturday be deemed as paid holiday?

In case where legal working hours are reduced to 40 hours per week, and employees do not work on Saturday, Saturday does not necessarily become a holiday. Unless labor and management makes specific agreement, the Saturday would become an unpaid, non-working day.

If an employee works on Saturday, he will not be entitled to allowance for work on holiday. If he works for hours in excess of 40 hours a week, he will only be entitled to allowance for extended work.

## 13 Must a general election day (for election of members of National Assembly) designated as paid holiday?

The "civil rights" are citizens' basic rights protected by the Constitution, and an employer does not have to designate the general election day as paid holiday, unless its collective agreement or rules of employment provides for otherwise. However, in the event that a worker requests for time necessary to exercise election right or other civil rights during the work hours, the employer may not refuse such request. In this case, the employer may modify the hour requested by the employee.

※ Any activity for labor union performed by an employee who is not a full-time union official does not fall under category of official duty.

## 14 If an employee joins a company on January 1, 2005 and retires on January 1, 2006, how is allowance for unused portion of annual paid leaves calculated?(Assuming that he has attended work for more than 80% of work days in the year immediately prior to retirement)

If an employee did not use any of annual paid leaves (15 days) he is entitled to in year of retirement (2006) as he attended work for more than 80% of the work days in previous year (2005), the employer must pay the allowance for unused portion of annual paid leaves (15 days) within 14 days following the retirement, regardless of the number of days available for leave in the year of retirement.

The allowance for unused portion of annual paid leaves paid in this case is not included in "standard wage for calculating the average wage for the purpose of calculation of severance pay."





## 15 Can measure of promoting use of leaves under amended Labor Standards Act be performed via intranet e-mail, in stead of written notice?

Article 59.2 of amended Labor Standards Act stipulates that an employer shall inform each employee of the balance of leaves and urge him/her to make "written" notice of his plan to take the remaining leaves to the employer, and if so urged employee fails to make such written notice to the employer, the employer shall determine the timing of leaves for the employee and make "written" notice" thereof to him/her. In the event that the employee still does not use the leaves despite aforementioned 'measure to promote use of leaves', thus the balance is forfeited, the employer shall not be obligated to compensate for unused portion of the leaves.

As the intention of the provision requiring employer to urge or notify in written form is to ensure that measure of promoting the use of leaves is clearly performed, thus right of worker is substantively protected, and to prevent potential disputes between the parties resulting from unclear measure. In light of such intention of the law, making notice using intranet e-mail or posting a memorandum listing the unused portion of the leaves for each employee would hardly be acceptable unless such method is proved more clear than 'written' notice.

※ As the measure to promote use of leaves is not obligation of an employer, if an employer does not take the measure to promote use of leaves and an employee also fails to specify the timetable for use of the leaves and does not take the leaves, the employer shall pay the allowance for work during the annual leaves for unused portion of such leaves.

## 16 In the event that an employee has taken menstruation leave under amended Labor Standard Act, can the wage be deducted?

The timing for applying the amended provision on menstruation leave is same as that for reduction of 40-hour workweek.

**Amended provision on menstruation leave**

Before amendment : An employer shall, grant a female worker one day's paid menstruation leave per month.

After amendment : An employer shall, if requested by a female worker, one day's menstruation leave per month.





Under previous act, portion of wage corresponding to the days of menstruation leaves could not be deducted. Under revised act, wage may be deducted if menstruation leave is taken.

Example ) If a female employee whose ordinary monthly wage is KRW 1.2 million takes menstruation leave, her wage would not have been changed under previous act. Under amended act, however, ordinary wage may be offset against the number of menstruation leaves taken (KRW 40,000 per day).

Menstruation leave shall be granted if requested by the female employee due to menstruation, irrespective of whether she has worked full contractual workdays per month, term of labor contract, or form of employment.

## 17 If a worker has poor attitude toward he job and shows poor job performance, can an employer dismiss him?

Article 30.1 of Labor Standard Act stipulates that an employer shall not dismiss, suspend, lay off, transfer a worker or reduce wages or take other punitive measures against a worker without justifiable reason. The exercise of employer's punishment right shall not beyond the scope necessary for the purpose of keeping the order in the enterprise, and matters subject to punishment shall be provided in rules of employment pursuant to Article

96.10 of Labor Standards Act, and the procedure of the punishment shall be taken fairly by an authorized entity as prescribed in collective bargaining agreement or rules of employment to be justifiable.

Poor attitude toward the job refers to an act of deteriorating the efficiency of the work or product volume, usually by failing to focus on worker's duties. While a worker does not necessarily become subject to punitive measure only on ground of job attitude or poor performance, he may become so if he has ignored a number of instructions for correction or order to attend an education program, or failed to improve his job attitude.

If this is the case, we believe that if the employer grants time to the concerned employee to prepare data for explanation and opportunity to excuse himself and state his opinions attending the sanction committee, it would reduce probability of legal dispute.

## 18 In case of making advance notice of dismissal with 5 days short of legal period of 30days, does an employer pay 5 day's allowance for advance notice of dismissal?

If an employer intends to dismiss a worker (including dismissal for managerial reason), he must make at least 30 day's notice. If he has not make 30 days' notice, he shall have to pay at least 30 day's ordinary wage ("allowance for advance notice of dismissal").

# 04 Dismissal

While notice of dismissal may be made either verbally or in written form, it must specify the date of dismissal, and a notice of dismissal not specifying the date or condition would be invalid.

As the period of advance notice is computed based on calendar days, not work days, such period is not extended even if a holiday falls. The first day does not count toward the period of advance notice, thus the period counts from the next day. If the period of advance notice is only one day short of the legal period, the employer must pay at least 30 day's ordinary wage (allowance for advance notice of dismissal).

※ Once an employer makes advance notice of dismissal, he may not revoke the notice without consent of the concerned employee.

※ The dismissal becomes effective when notice is delivered to the concerned party.

※ During the period of advance notice of dismissal, labor relationship remains effective. If the employer retains the concerned employee after expiration of such period, he shall have to follow the procedure of dismissal again.

## 19 In the event that an employee has submitted a resignation, is an employer required to accept it immediately?

Retirement(resignation) is a termination of labor relationship by worker's unilateral expression of intention, and may divided into voluntary retirement, agreed-on retirement and retirement due to age limit. As there is no provision in Labor Standard Act regarding the procedure of retirement, the procedure shall follow provisions of Civil Law unless provided in advance by rules of employment or collective bargaining agreement. In regard to the time when retirement becomes effective, please refer to Rules of Ministry of Labor No. 37, 1981.6.5, Article 660 of Civil Law.

<table>
<tr><th colspan="2">Intention of retirement</th><th>Time of effectuation</th></tr>
<tr><td colspan="2">When a worker has expressed intention to retire (submission of resignation) and an employer accepts it (resignation).</td><td>When resignation is accepted</td></tr>
<tr><td colspan="2">In case where there is a specific agreement under collective agreement and rules of employment</td><td>Time specified in the agreement</td></tr>
<tr><td rowspan="2">In case where employer refuses to accept resignation of a worker</td><td>In case where wage has been set as term-based wage, such as monthly wage.</td><td>Retirement becomes effective with passage of one wage term (i.e. next month in case of monthly wage system) following the term during which the employee submitted the resignation (the month when the employee submitted it, in case of monthly wage system).</td></tr>
<tr><td>In case where wage has not been set as term-based wage</td><td>Retirement does not become effective until passage of one month following the date when the employer is notified of employee's intention to retire.</td></tr>
</table>





## 20 If a worker requests to issue certificate of employment after retirement, is the employer required to state all matters requested by such worker, or issue the certificate?

Article 38.1 of Labor Standards Act stipulates that "If an employer has been requested by a worker to issue a certificate specifying term of employment, job specification, title and wages or other necessary information even after the retirement of the worker, he shall immediately prepare based upon fact and deliver the certificate."

In the certificate, only matters requested by the employee shall be stated, and those not requested by the employee may not be stated even if they are legally required matters.

※ Monthly work status, statement of wage, receipt of withholding tax on earned income, copy of traffic accident record, copy of written explanation, monthly absence report, a copy of rules of employment does not have to be included in the certificate, as they are matters subject to confirmatory inquiry.

※ Only workers who has offered consecutive service for 30 or longer are entitled to request for delivery. The request for delivery may be made only within 3 years after retirement.

# 05 Severance pay

## 21 In case where labor contract based on annual salary system has been executed, is it possible to pay the severance pay in split in advance to a worker whose consecutive service period is less than one year?

"Annual salary system" refers to a system of determining the wage usually on annual basis based on worker's competence and performance. As Labor Standard Act requires that items constituting the wage, methods of computation and payment be specified in labor contract, the labor contract based on annual salary system must also specify matters profile of an employee, annual salary, methods of computing, determining, and paying the annual salary, period for computation of annual salary, matters related to time of payment and wage increase, computation/payment method for legal allowances other than annual salary, disposition of severance pay, bonus and minimum annual salary, and procedure for appeal against annual-salary based labor contract.

※ Even if an employer enforces "annual salary-based labor contract", the provisions of Labor Standards Act relating to working hours, holidays and leaves would still remain effective. Therefore, including allowances for extended work, allowances for work on holiday or night, or allowances for annual leaves in the annual salary would be, in principle, in violation of Labor Standards Act.

Advance payment of severance pay in split, as in question above, would be deemed as a form of early payment of severance pay, which may be effective only when satisfying the following requirements.

# 05 Severance pay

## Amendment of requirements for early payment of severance pay under annual salary system

(Severance benefit guarantee team -No. 1276:"05.12.23)

### Details of amendment

■ In many cases workers under annual salary system are paid severance pay plus amount of annual salary in split each month. In order for such payment of severance pay to be deemed as lawful early payment of severance pay, following requirements must be satisfied.

| Current guidelines (97.5.21 Wage No. 68207-287) | Amended guidelines |
|---|---|
| ① The amount of severance pay to be included in the amount of annual salary must be clearly specified | ① The amount of severance pay to be included in the amount of annual salary must be clearly specified, and sum of the severance pays received each month shall not be less than the amount computed as of the time of early payment, in accordance with Article 8.1 of Employee Retirement Benefit Security Act. |
| ② There must be a request by a worker for early payment of the severance pay | ② There must be a separate request by a worker for early payment (other than rules of employment or annual-salary agreement), and clear statement that the severance pay will be paid in split each month must be included. |
| ③ The total amount of severance pay that a worker receives in advance each month or upon passage of one year pursuant to the labor contract shall not be less than the amount of severance pay computed based on average wage upon passage of one year of contract term. | ③ The period for which early payment of severance pay can be calculated and paid will only include the period during which the employee provided continuous labor at the time of early payment. Therefore, an employee whose consecutive service period is less than one year is not entitled to early payment of severance pay, as in this case legal severance pay will not have occurred. |

### Time of application

■ The amended guidelines will apply beginning July, 2006.

■ Annual-salary agreement expiring in July, 2006 and going forward would not constitute effective early payment.

■ Note

- Severance pay of those who have been employed continuously for less than 1 year may not be paid in monthly installments as part of the annual salary
- Employees who have worked for one year or longer may be given only the severance pay amount for periods already worked.

## 22 Does a company have to pay severance pay to its officers?

The nature of severance pay is deferred payment of wage to an employee of an entity of which work force is 5 persons or more, whose consecutive service period is at least one year. If an officer's status is acknowledged as employee, he would be entitled to the severance pay.

※ In determining whether a person falls under category of worker as prescribed by Labor Standards Act , judgment must be made based on whether the concerned worker has offered work in business or business venue for the purpose of wage in subordinate relationship in substance, whether the underlying contract is an employment contract or a subcontract under Civil Law.

※ The one year of consecutive service period refers to period from execution of the labor contract (record date: date of enrollment or date when labor contract was executed) until completion of the contract (closing date: expiration of labor contract, date of employee's death, etc). Irrespective of actual years of service, attendance rate or absence rate, all the periods during which an employee has been employed for the same business or business venue count toward years of service.





## 23 If an employee requests for early payment of severance pay, must an employer comply with such request?

Article 8.2 of Employee Retirement Benefit Security Act stipulates that "An employer may, in case a worker demands, pay the worker the amount of severance pay corresponding to his/her consecutive service period earlier than his/her retirement."

The early payment of severance pay may be implemented when the worker has requested, and an employer is not obligated to comply with such request. With respect to implementation of early payment of the severance pay, it would be desirable to prepare in advance reasonable internal standards relating to requirements and procedures, in order to prevent any potential labor dispute.

※ In computing the amount of severance pay after early payment, a dispute may arise in regard to whether the early payment was requested by the employee. Therefore, it would be desirable to implement early payment of the severance pay after receiving written request from the worker. Even if there is a ground for early payment of severance pay in rules of employment or collective agreement, individual employee's specific request is required for implementation thereof.

※ As there is no restriction on unit of term for early payment of severance pay when requested by the worker, the worker may freely request the unit of term(annual or monthly settlement) he chooses.

## 24 In the event that part of severance pay has not been paid due to reasons such as errors in computation of severance pay paid earlier, is the employer required to pay the balance?

Applicable regulation stipulates that right to receive wage shall be forfeited unless exercised in 3 years, and initial dates in reckoning for extinctive prescription by type of wage are as follow:

- Wage : Regular wage payment date
- Severance pay : Date when a worker retires
- Allowance for annual and monthly leaves: Date when right to claim for allowance for annual and monthly leave arises
- Bonus : When entitlement to relevant bonus arises.

Severance pay shall be paid at the time when a worker retires. In case where an employer has accepted worker's request for early payment of the severance pay before his retirement and paid part of the severance pay, but in amount less than the due amount due to a reason such as miscalculation, the extinctive prescription of unpaid portion counts from the date of retirement. Therefore, the employer would have to pay the balance (portion not paid due to error in computation).

## 25 Can severance pay system, defined contribution retirement pension plan, and defined benefit retirement pension plan be established within one business at the same time?

Retirement pension plan and severance pay system are not differential systems, and whether to establish retirement pension plan and what form





to adopt may be determined autonomously by employer and employees. Therefore, within a single business, severance pay system, defined benefit retirement pension plan, and defined contribution retirement pension plan may be established at the same time, allowing each employee (or employee group) to select based on his own needs. Even if the levels of benefits received by each employee differ, it is due to the distinctive features of the benefit plans, thus the different plans do not constitute differential systems.

※ Only a single system applies to one employee.

※ Example of application) Severance pay system applies to existing employees, and retirement pension plan applies to newly recruited employees.

In this case, an employer should obtain consent of representative of employees with employer's policy that more than one benefit system will be established, and each employee will have option to choose one of such systems.

## 26 If retirement pension plan is established within one business, how should employee's service period prior to the establishment be handled?

Regarding employees' service period prior to establishment of the retirement pension plan, matters may be determined autonomously upon agreement between labor and management, in accordance with specific

circumstances of the business. you can choose from diverse alternatives: alternative of applying the plan retrospectively to the period prior to the establishment, alternative of paying such portion in the form of severance pay in the future, and alternative of early payment of severance pay, etc.

Please note that, in case where newly established pension plan is applied retrospectively to the period prior to the establishment upon mutual agreement between labor and management, it is allowed to set aside reserve for severance benefits payables from the past over a period up to 5 years, instead of setting aside the reserve for full amount at once.

# 06 Rules of employment

## 27 In order to amend the rules of employment, is it required to obtain the consent at the presence of all employees?

In case where a labor union comprised with majority of all employees has been organized within a business, the employer shall, with respect to preparation or amendment of the rules of employment, listen to the opinion of the said labor union. If there is no such labor union, the employer shall listen to majority of its employees. However, amendment of the rules of employment to the disadvantage of employees requires the consents.

When preparing or amending rules of employment not to disadvantage of employees

- Labor union : Attach letter of labor union's opinion
- Majority of employees : Any method evidencing the fact that the employer has listened to the opinion from majority of the employees, such as collective conference, and distributing copies of rules of employment to the employees and obtaining their signatures, etc.

When amending the rules of employment to the disadvantage of employees

- Labor union : Attach letter of consent from labor union
- Majority of employees : Consent of majority through collective decision making process or conferences held by each department.

※ As long as consent is obtained from majority of employees in a condition free from employer's involvement or intervention, method of obtaining the consent, in terms of expression of affirmative or negative opinion (i.e. signed or unsigned vote) does not matter.

# 07 40-hour workweek

## 28 In relation to timing of enforcement of amended Labor Standards Act, what is criteria for determining 'ordinarily employed' workers?

"The number of ordinarily employed workers" usually means the average number of workers that are ordinarily employed by an employee. The number of ordinarily employed workers shall be determined by daily average number of employees for one month prior to enforcement date of the amended act; after the enforcement date, you can calculate daily average number of employees every month to determine whether the amended act would apply.

Furthermore, as Labor Standards Act applies irrespective of whether a employee has been employed on temporary, daily, or permanent basis, in computing the number of ordinarily employed employee it is required to include employees directly employed by the employer irrespective of whether they have been employed on temporary, daily or permanent basis, and exclude employees of subcontracted party or dispatched employee, who has not been directly employed by the employer.

## 29 If an employer wishes to apply 40-hour workweek under revised Labor Standards Act before its enforcement, what shall he do?

If an employer wishes to become subject to the provisions of amended act prior to the enforcement date prescribed in Article 1 of Supplementary Rules of the amended act, he shall obtain consents from majority of employees, or labor union if a labor union comprised with majority of the





employees has been organized in the business in accordance with ordinances of Ministry of Labor, and file "Report on Special Exception to Application of Amended Rules" by 14 days prior to the date application of amended act has been scheduled for. In case where such statement has been accepted, the date scheduled for application of the amended act, stated in the statement, will be deemed as the enforcement date of the amended act.

Even in the event that after application of the amended act a business becomes smaller than the one subject to the amended act due to decline of workforce for reasons such as financial difficulties , the amended act will still be effective for the purpose of legal stability and projection of trust.

# 08 Transfer of business

## 30 Is a special agreement between parties to business transfer to exclude part of labor relationship from succession an effective agreement?

Article 31.1 of Labor Standards Act stipulates that "If an employer wants to dismiss a worker for managerial reasons, there shall be urgent managerial needs. In such cases as transfer, acquisition and mergers of business aimed to avoid financial difficulties, it shall be deemed that there is an urgent managerial need." As such, the transfer of business is viewed as one of urgent managerial needs.

According to judicial precedents, a business transfer related to succession of labor relationship shall commence on basis of the business transfer under Commercial Act. But in order to resolve the issue of succession of the labor relationship, the concept of business shall be viewed as organic entity including labor relationship, thus such relationship shall be included in the target of transfer.

In case there is a special agreement between the parties to the business transfer that part of labor relationship will not be included in objects of transfer, it is possible not to succeed such part pursuant to the agreement. However, as such special agreement would be de-facto dismissal, there must be justifiable reason as prescribed by Article 30.1 of Labor Standards Act in order for such special agreement to be effective. Dismissing an employee only on ground of business transfer would not constitute a dismissal for justifiable reason.

※ In case where labor relationship under previous business is succeeded by a new business due to merger, transfer or





assignment, obligation to pay outstanding wage payable is also succeeded, and employees may seek for payment of wage from new business, through civil proceedings. Criminal obligation resulting from failure to pay the wage is not succeeded by new employer.

## 31 In case of business transfer, is it necessary to establish new rules of employment or collective agreement?

A transferee of business shall bear employer's obligations, such as payment of wages and determination of working hours in accordance of work conditions set by previous labor contract, rules of employment and collective bargaining agreement, and employees shall also bear same obligations as under previous labor relationship.

Furthermore, the rules of employment that was effective at the time of business transfer may not, without consent of the employee group, modified to the disadvantage of employee. The responsibility to pay the severance pay resulting from employee's retirement after business transfer shall lie with the transferee of the business.

※ The status of labor union will remain same as in merger in case where all of business is transferred. However, in case where part of business is transferred, the membership in the previous labor union will be forfeited.

# 09 Worker engaged in surveillance or intermittent work





## 32 In case where initial approval of competent district labor authority was obtained, will such approval continue to be effective?

In case where an employer has obtained approval for exclusion of workers engaged in surveillance or intermittent works from application of provisions on working hours pursuant to Article 61.3 of Labor Standards Act, the approval will continue to be effective unless type or nature of works or duties, or number of employees has not been changed.

However, in case where the number of workers engaged in the same work increased the number of employees approved for exclusion, an employer must obtain separate approval for so increased number of employees.

## 33 In case where an employer has obtained approval for workers engaged in surveillance and intermittent work from the head of district labor authority, but actual working hours have been different, is he required to obtain a new approval?

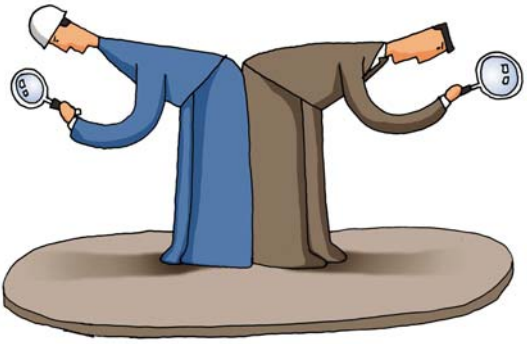
# 09 Worker engaged in surveillance or intermittent work





In case where the working hours of a worker engaged in surveillance and intermittent work approved for exception to application pursuant to Article 61.3 of Labor Standards Act differ from actual working hours offered, and consequently the type of work has changed to that other than surveillance or intermittent work, or fell short of the requirement for approval, the previous approval will become ineffective, and the employer shall obtain a new approval.

With respect to a worker whose term of work has changed and does not engaged in surveillance or remittent work, the approval will become ineffective at the time of change. Hence, for said employer, provisions of Labor Standard Act on working hours, holidays and recess will apply.



# 10 Childcare leave



## 34 With respect to childcare leave, when is initial date in reckoning of the first birthday of the infant?

The duration of childcare leave shall be one year or less, and shall not pass the first birthday of the infant. As the first birthday of the infant should be computed with the date of birth as in resident registration, the duration shall be until the next year's birthday.

## 35 In case where consecutive service period is less than one year, can a worker receive childcare leave benefits if the employer allows?

The childcare benefits under Article 55.2 of Employment Insurance Act are paid in case of childcare under Article 18 of Equal Employment Act. Even in case of childcare leave that an employer may refuse to allow pursuant to the proviso of Article 19 of Equal Employment Act or Article 5 of Enforcement Decree of the same Act, if the employer has allowed, the said childcare leave shall be deemed as one under Article 19 of the same Act. Therefore, pursuant to Article 55.2 of Employment Insurance Act, the benefits shall be paid unless it is not in compliance with requirement for payment.

Therefore, if an employer has allowed childcare leave for a worker whose consecutive service period within the workplace is less than one year, it would constitute a childcare leave as defined by Article 19 of Equal Employment Act, and the employee would be entitled to the childcare leave benefits under Article 55.2 of Employment Insurance Act.

# 10 Childcare leave





## 36 Is it possible not to pay a bonus on account of taking the childcare leave?

According to Article 19.3 of Equal Employment Act (Article 11.3 of previous act), an employer shall not give unfair treatment to a worker on account of taking childcare leave. In this case, the 'unfair treatment' refers to the excluding the period of childcare from the consecutive service period, which is basis for promotion, wage increase, and computation of severance pay.

Therefore, in case where total consecutive service period is used as basis for computation of bonus amount, the period of childcare leave shall be included in such period. However, in case where the bonus is paid as remuneration for works offered during a specific period (i.e. good attendance), and if the part or all of period of childcare leave is included in such period, not paying all or part of bonus would not constitute violation of Equal Employment Act.

## 37 Can a worker adopting a child or having a child through a subrogated mother take childcare leave?

Article 19 of Equal Opportunity Act (Article 11 of previous act) prescribes responsibility for childcare from national and social perspective, in light of reality that many workers suspend work or retires on account of childcare.

Given that the childcare leave system is intended for care of infants, it should be allowed for a worker having an infant aged less than one year by means of adoption or subrogated mother, as well as a worker directly giving birth to a child.

## 38 In case where a worker gave birth to twins, what will be the duration of the childcare leave and childcare leave benefits?

Childcare leave benefits are paid for the purpose of providing supports for living and childcare cost in light of fact that the childcare leave is unpaid leave. Therefore, even if a worker gave a birth to twins, it doesn't mean that the duration of childcare would be extended, or childcare benefits would be doubled.

## 39 Regulation stipulates that childcare leave may be extended once. If a worker has applied for extension of childcare leave twice and employer approves it, is the employee entitled to childcare leave benefits?

Pursuant to Article 7.2 of Enforcement Decree of Equal Employment Act, a worker may extend childcare leave only once. The purpose of this provision is to ensure predictability for employer in procurement of human resources and allocation of works in relation to the childcare leaves taken by workers, and prevent the childcare leave from becoming a burden with frequent changes made by worker.

As such, a worker may extend the closing day of childcare leave only once, and annual leaves of which extension has been approved twice constitutes voluntary leave of absence agreed on between worker and employer, thus shall not be deemed as childcare leave under Equal Employment Act. Therefore, we believe that childcare leave benefits shall not be paid in this case.

# 10 Childcare leave

## 40 In case where a worker used part of maternity leave due to preterm labor pain, and remaining part later, is she entitled to maternity leave benefits under Employment Insurance Act?

Article 72 of Labor Standards Act prescribes that "An employer shall allow a female pregnant worker 90 days of maternity leave before and after child birth. In such case, 45 days or more shall be allocated after the child birth." The term "before and after child birth" means "before and after delivery", and duration of the maternity leave shall be computed based on actual day when the worker gives birth to a child. And the concerned worker must 90 calendar days consecutively.

Furthermore, under Employment Insurance Act, the maternity leave benefits shall be paid to a female worker who has been insured by the employment insurance for 180 days or more, and granted maternity leave for 90 consecutive days.

In light of aforementioned regulatory provisions, the leave used before the child birth can hardly be deemed as maternity leave, and as the concerned worker has not been granted 90 days of maternity leave prescribed by the Labor Standards Act, she is not likely to be entitled to the maternity leave benefits under Employment Insurance Act.

# 11 Gender discrimination

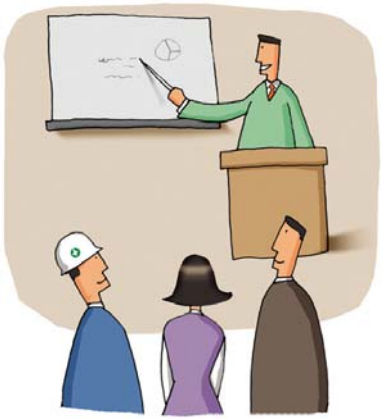
## 41 In case an employer has hired male and female part-time helpers, can he pay differential wages to female and male helpers?

An employer shall pay same wages for labors in same value within a business. If a helper in the same workplace has offered labor on same condition as others, an employer may not pay differential wages to male and female helpers, or reduce wage based on gender of a helper.

## 42 Is a camp training for female worker with child violation of law?

Article 7 of Equal Employment Act prescribes that an employer shall not discriminate against a female worker in education, allocation and promotion on account of marriage, pregnancy, child birth, or gender.

Therefore, if a female does not attend a camp training on account of having no one to cake care of her child, it would not be a legitimate reason for non-attendance.



# 12 Sexual harrassment within a workplace





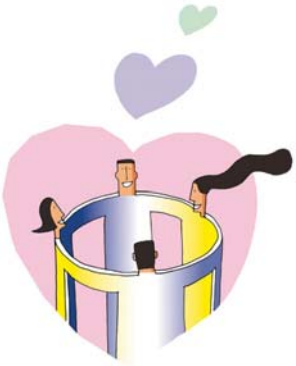
## 43 Criteria for determining sexual molestation and sexual harrassment in workplace

The sexual molestation under Act on the Punishment of Sexual Crimes and Protection of Victims thereof refers to any act that would objectively arouse in an ordinary person a sense of being sexually offended and disgust. With respect to sense of being sexually offended and disgust, criteria for determining the molestation shall be limited to case where from perspective of an ordinary person, the act in question would remarkably infringe on individual's sexual freedom and be deemed as molesting act. In this sense, determining the molesting act shall be made in comprehensive consideration of victim's intention, gender, act, specific actions, form, the specific circumstances, and ethical norms relating sex of the time. (Supreme Court 1998.1.23.97Do2506) The sexual harrassment in the workplace under Equal Employment Act refers to an act of giving a worker a disadvantage in employment on ground of not responding to sexual statement or action or rejecting sexual advance, or causing a worker feel sexually humiliated or disgusted.

Whether particular act has caused sexual humiliation and disgust, the criteria of sexual harrassment in workplace, shall be determined based on subjective feelings. However, how a rational person under social norms would view and react to the same act, and whether the act in question has consequently created intimidating or hostile working environment, interfering with job performance of the worker should also be considered to make judgment. (Refer to Table in Exhibit to Enforcement Rules of Equal Employment Act, Article 2).

## 44 In case an incident of sexual harrassment between employee of a worker-dispatching agent and employee of entrusting facility owner has occurred, does it constitute sexual harrassment in the workplace?

The purpose of regulation on sexual harrassment in workplace is to protect not only employed workers, but also persons seeking a job, from the sexual harrassment, and to prevent infringement of personal rights. Therefore, judgment should be based on whether the incident has occurred under the circumstance where the two employees are working together inseparably in terms of process and contents of duties. Not only does sexual harrassment occurring between workers of head office and branch, or during dinner or travel related to business constitute sexual harrassment in workplace, but sexual harrassment occurring in labor relationship based on business cooperation or outsourcing service, or against a dispatched worker, may constitute the sexual harrassment in workplace, if both parties involved in sexual harrassment have been working in the same team.



Therefore, regarding the incident occurring between an employee of a worker-dispatching agent and entrusting facility owner, if the incident has occurred when the two employees are working together inseparably in terms of process and contents of duties, it would constitute the harrassment in the workplace, but if both workers have been engaged in mutually independent duties in the same space, it would not be deemed as sexual harrassment in the workplace.

# 13 Labor-management council

## 45 What is relationship between labor-management council and labor union?

Labor-management council is established in each business or workplace with right to decide the working conditions that ordinarily employs 30 workers or more pursuant to Act Concerning the Promotion of Worker Participation and Cooperation("Worker Participation Act"), and is defined as "the consultative body which is established to improve welfare of workers and to keep sound development of business through participation and cooperation between workers and employers." The regulatory purpose of the labor-management council differs from that of labor union, which is organization or associated organization of workers formed in voluntary and collective manner upon the workers' initiative for the purpose of maintaining and improving working conditions, or improving the economic and social status of workers. Pursuant to Article 5 of Trade Union and Labor Relations Adjustment Act, workers are free to organize the labor union or join it.

Meanwhile, Article 5 of the Worker Participation Act prescribes that collective bargaining of trade union or all the other activities thereof shall not be affected by this Act.

## 46 What is definition of "worker" under Worker Participation Act?

The "worker" in Article 6.2 of Worker Participation Act means, as prescribed in Article 3.2 of the same Act, a worker as provided in Article 14 of Labor Standards Act. Therefore, the worker under Worker Participation Act is not necessarily the same as that as provided in Article 2.1 of Trade Union and Labor Relations Adjustment Act.

## 47 Are time for labor-management council conference and deadline for submission of minute thereof prescribed?

Article 12 of current Worker Participation Act stipulates that the council shall hold meetings once every three months, but it doesn't provide that the meeting shall be held on quarterly basis. Therefore, specific time for council meeting of each business may be prescribed by its rules of labor-management council, pursuant to Article 5 of Enforcement Decree of the same Act.

The minute of labor-management council meeting does not have to be submitted to applicable authority.

## 48 In case where regular council meeting was not held as workers' members have not been organized, is it in violation of law?

Pursuant to Article 12.1 of Worker Participation Act, the labor-management council shall hold meetings once every three months on regular basis. However, the council conference can be held with attendance of both employer's members and workers' members elected





(entrusted) on workers' initiative. If the meeting could not be held due to reasons not attributable to the employer (e.g. workers' failure to elect workers' members), it would hardly be deemed as employer's default of his obligation to hold the council meeting.

As provided by Article 10.1 of the Act, an employer shall not intervene in or interfere with an election of workers' members. However, in case where organization and operation of labor-management council is difficult due to workers' unwillingness to be appointed as workers' members, the employer may communicate need for establishment and operation of labor-management council, and the fact that workers' members must be elected on workers' own initiative, through internal memorandum or notice. And if necessary, an employer may make request to a district labor authority governing the workplace in question for aid in respect of prompt election of workers' members.

## 49 Are matters subject to consultation at meetings of labor management council and specific scope of matters subject to resolution prescribed?

Matters subject to consultation as provided in Article 19 of Worker Participation Act are those to be discussed for promotion of common benefit of labor and management, and matters proposed by either of labor or union, or proposed mutually by both parties, are treated as matters for consultation at the meeting. As such, the specific scope of matters subject to consultation shall be determined autonomously by labor and management, in accordance with general principles or standards.

Therefore, with respect to each individual matter, such as employment of an individual worker, an employer does not have obligation to go through advance consultation of the council. Even in case where the council discusses a matter with proposal made by either party or both parties, the employer does not have to obtain resolution by council to implement such matter, unlike matters subject to resolution pursuant to Article 20 of the same Act.

# 14 Labor union





## 50 Does company's head of team fall under category of 'employer or a person who always acts on behalf of the interest of the employer' as provided in Trade Union Act?

Qualifications and scope of persons for joining a labor union may be prescribed by bylaws of individual labor union, to the extent that they do not fall within category of employer or person representing employer's interest as provided in Paragraphs 2 through 4, Article 2 of Trade Union and Labor Relations Adjustment Act.

Determination on whether a person falls within category of employer or a person representing employer's interest shall be based on, rather than his formal title or position, specific factual relations such as actual enforcement of internal rules, specific nature of his duties, degree of his involvement in matters relating to workers, and in comprehensive considerations of whether he has been assigned authority and responsibilities by the business owner or a person engaged in management with respect to decision on work conditions including management of personnel, wages, benefits, or labor, as well as business command, supervision or direction, and whether his duties and responsibilities directly conflict with fidelity and responsibilities required for member of union (e.g. having access to secrets of employer, such as plans or policies on labor relations).

## 51 Is it possible to establish a labor union of non-regular workers, not under organizational jurisdiction of existing labor union within a business?

Although Article 5 of Trade Union and Labor Relations Adjustment Act stipulates that "Workers are free to establish a trade union or join it.", Article 5.1 of its Addenda provides that "In case where a trade union exists in a business or workplace, a new trade union which has the same organizational jurisdiction as existing trade union shall not be formed by December 31, 2006, despite the provisions of Article 5."

In case where the organizational jurisdiction of newly established trade union is clearly different from that of existing union as provided in its bylaws, and no worker under its organizational jurisdiction is already a member of the existing union, it should be possible to establish a new labor union.



## 52 Are the resolutions made at the general meeting summoned in violation of prescribed period of notification valid?

As prescribed in Article 19 of Trade Union and Labor Relations Adjustment Act, general meeting shall be summoned by making public notice of matters to be discussed by 7 days prior to the commencement of the meeting (Provided that, notification period may be reduced in accordance with bylaws of the union in cases where a trade union is composed of workers in the same workplace), and in method prescribed by the bylaws of the trade union. The purpose of regulatory provision on notification period for summoning of general meeting is to guarantee equal opportunity to members to prepare to attend the meeting and participate in discussion and resolution of the matters proposed, by ensuring that they are informed in advance of summoning of the meeting.

# 14 Labor union

A meeting held in violation of prescribed notification period may not be deemed as effective, and resolutions adopted at said meeting may not be held valid.

※ "7 days prior to commencement of the meeting" means period up to 0:00 AM of the last day of 7 days counted retrospectively from the day immediately prior to the commencement of the meeting.

※ In computing the notification period, the date when notice is made does not count, but holidays after notification count toward such period.

## 53 In case where a labor union organized within a business converts its form of organization into a branch of an industrial union, will the delegates of the existing union maintain their status?

In case where a labor union organized within a business has converted its form of organization into a branch or a chapter of an industrial union with resolution adopted with affirmative vote of majority of all members present with quorum present as provided in Article 16.2 of Trade Union and Labor Relations Adjustment Act, and it has joined such industrial union and has been engaged in activities thereof, it shall follow the bylaws of the industrial union in question related to operation of branches or chapters(or other rules as delegated by the bylaw, if any), as such branch or a chapter is only an internal unit of the union. As aforementioned conversion of organizational form shall be deemed as conversion into a branch or a chapter of an industrial union maintaining existing organizational identity, the status of existing delegates shall be deemed as maintained, unless there is reason for otherwise.

## 54 Does an employer have obligation to pay remuneration for full-time official of labor union to a dismissed one?

The status full-time official of a labor union provided in Article 24 of Trade Union and Labor Relations Adjustment Act is similar to that of a worker in temporary leave of absence in that the basic labor relation with employer and his status as a worker are maintained, but during the period in which he is dedicated to the union he is exempted from obligation to offer the work, and in principle, his employer is also exempted from obligation to pay the wage. The proviso in paragraph D of Article 2.4 of the same Act stipulates that a dismissed person shall not be regarded as a person who is not a worker, until a review decision is made by the National Labor Relations Commission when he/she has made an application to the Labor Relations Commission for remedies for unfair labor practices. The purpose of this provision is to protect establishment and continued existence of a labor union, and to prevent activities of the labor union from being interfered with by employer's unfair exercise of his personnel management right, and this provision is applicable to the status of member of a labor union only, and shall not apply in broader scope to general effect of individual labor contract between a worker and an employer. (Refer to ruling of Supreme Court 2004.3.12. Ruling 2003 Du11834).

# 14 Labor union





With respect to treatment of full-time official of a labor union, the collective bargaining agreement provides that he shall be treated equally as an ordinary member in terms of wage and promotion, as his service to the labor union shall be deemed as ordinary service to employer. The purpose of this provision is to protect a worker assuming office as a full-time official of labor union from any disadvantages in connection with his engagement in labor union, as the employer shall exempt 'his employee' who assumes office as a full-time official of labor union from obligation to offer work and support remuneration equivalent to wage amount, regarding his service to the union as 'ordinary service' to the employer.

Therefore, in the event that a worker who has been acknowledged as a full-time official of labor union under collective agreement is dismissed for punitive reason and the labor contract between him and an employer has been terminated, even if he maintains his status as member and official of union by filing application to the Labor Relations Commission for remedies for unfair labor practices, the employer would not have obligation to continue to pay the remuneration, as support of such remuneration has been conditional to maintenance of relation under the labor contract.

## 55 If an employer does not deduct labor union membership fees uniformly from the wages, depending on intention of individual workers, does it constitute a breach of collective agreement?

Uniform deduction of membership fees is based on agreement for

provision of convenience, whereby an employer deducts membership fees from wages of workers who are members of labor union and deliver them to the labor union. Thus, in case where the collective agreement has provision on uniform deduction of membership fee based on resolution of general meetings (meetings of delegates) of the labor union as well as bylaws thereof, an employer shall uniformly deduct membership fees from wages and deliver them to the labor union. In the event that an employer does not deduct membership fee from wage of an individual member on account of the member's refusal to pay the membership fee, it would constitute breach of the collective agreement.

In case where neither resolution has been made at general meeting (meeting of delegates) of labor union for uniform deduction of membership fee, nor there is a relevant provision in bylaws of the labor union even if the collective agreement has provision on uniform deduction of the membership fee, the employer would not be able to deduct the membership fee from wage of a member who refuses to pay the fee on account of the collective agreement. In such case, failure to deduct the membership fee uniformly and deliver it to the union would not constitute a breach of the collective agreement.

## 56 Can a labor union continue to exist in case of consolidation of the business, such as transfer of business or sale of assets?

If a business entity in whole is transferred to another entity with identity of its physical and human organization intact, the labor union having organizational jurisdiction over workers of previous entity would remain





effective. In this case, the concerned labor union shall amend the provision on the scope of organizational jurisdiction in its bylaws, to the extent that it would not be in violation of provisions of Article 5.1 of Addenda of Trade Union and Labor Relations Adjustment Act (Prohibition of overlapping organizational jurisdictions ), and if the case falls within categories requiring notification provided in Article 13.1 of the same Act, the concerned labor union shall make notification of modifications accordingly.

However, the transfer constitutes sale of assets (i.e. sale of partial business), the labor union having organizational jurisdiction over the existing business shall not remain as effective labor union in the transferee.

## 57 What is difference between party to collective bargaining and party responsible for collective bargaining?

The parties to collective bargaining refer to persons who can perform a collective bargaining and execute a collective bargaining agreement, and are divided into party representing workers and party representing employer. As the party to the collective bargaining performs it under his own name and is bound by its legal effects, he becomes main subject of rights and obligations under collective agreement, as well as in collective bargaining process. The party responsible for collective bargaining refers to a person who is entitled to perform a collective bargaining by law- a party having authority to perform collective bargaining.

▶ Parties to collective bargaining

- Party representing workers: Any duly organized labor union satisfying the requirements for establishment of labor union may be become the party to collective bargaining, irrespective of the form of organization or the number of members.
- Party representing employer: Refers to a person who is a party to labor contract for employing a worker, and has authority to make decision on work conditions, bearing rights and obligations under a collective agreement. Therefore, if a party having labor relation with a worker is a legal entity, it would fall under category of employer bearing obligations of performing the collective bargaining process. However as a legal entity is not natural person, a representative of such legal entity, who represents the legal entity internally and externally, and has authority and responsibilities in respect of business management, shall be deemed as having status of party to collective bargaining.

▶ Parties responsible for collective bargaining

- Labor union: Representative of the labor union and delegates to collective bargaining appointed in accordance with procedure prescribed in bylaws of the labor union
- Employer : Business owner or a person acting on behalf of the business owner, depending on organization structure of business





## 58 What is difference between normative validity and contractual validity of collective agreement?

Although collective agreement is acknowledged as norm, but it has a nature of collective contract between labor union and employer. However, for the purpose of protecting workers and stabilizing the labor relations, Labor Union Act grants to certain provisions of collective agreement validity binding individual workers, not only the parties to the agreement, and an employer ("Normative or general validity"). Furthermore, for other provisions not having normative validity, a contractual, obligatory validity binding the parties to the collective agreement is acknowledged. As such, validity of collective agreement is acknowledged in two ways- normative (general) validity and obligatory (contractual) validity.

▶ Normative part and its validity

• Normative validity is granted by law to the provisions of collective agreement concerning "working conditions and other matters pertaining to treatment of workers"(Article 33.1).

- The applicable matters are those pertaining to 1) wages, allowances and severance pay 2) working hours, holidays and leaves 3) Types of compensation of industrial accidents and method of computation 4) Rules of conduct, personnel changes, promotion, awarding and punishment, and dismissal 5) matters pertaining to safety and sanitation 6) matters pertaining to welfare and benefits

- The normative provisions apply to individual labor relations forcefully and directly. (Article 33.2).
  - Part of rules of employment or labor contract which violate standards concerning working conditions and other treatment of workers specified in collective agreement shall be null and void. (forceful validity)
  - Matters which are not stipulated by labor contract, and what has been invalidated by the forceful validity as above, shall be governed by the terms and conditions of the collective agreement. (Direct validity)
- Even in case where the term of collective agreement expires and new agreement has not been executed, the normative part of the previous collective agreement shall survive and govern the labor contract.

▶ Obligatory part and its validity

- The provisions governing mutual rights and obligations of parties to the collective agreement have 'obligatory validity', whereby mutual rights and obligations between labor union and employer are bound by the agreement.
  - The applicable provisions are peace clause, shop clause, provisions on collective bargaining, provisions on scope of members, provisions on activities of the union, and provisions on disputes.
- The aforementioned obligatory part of collective agreement is based on validity under law of obligations, whereby parties to the





agreement (i.e. employer and labor union) bear certain obligations to each other.

- A labor union shall comply with its obligations under the obligatory provisions of the agreement, and make efforts to ensure that its members also comply with provisions of the collective agreement.

## 59 Difference between matters subject to mandatory bargaining and matters subject to discretionary bargaining

As prescribed in Article 2.5 of Trade Union and Labor Relations Adjustment Act, the subject matters of labor dispute are those pertaining to determination of working conditions, such as wages, working hours, welfare, dismissal and other treatments. Article 29.1 of the same Act only stipulates that "The representative of a trade union has the authority to bargain and to make collective agreement for trade union and union members.", and the Act doesn't have any explicit provision on matters subject to the collective bargaining. However in general, matters on which an employer is obliged to bargain are referred to as "matters subject to mandatory bargaining", and those on which an employer is not obliged to bargain are referred to as "matters subject to discretionary bargaining."

In case where a labor union requests for collective bargaining on matters subject to mandatory bargaining, the employer has obligation to faithfully comply with such request and said matters constitute due subject matter of the dispute. With respect to matter subject to discretionary bargaining, employer does not have obligation to bargain, and such matter has

binding effect only when the employer has responded to the request for bargain and executed the collective agreement. Thus, such matter is not deemed as due purpose of labor dispute.

In general, matters pertaining to working conditions, such as wages, working hours, welfare and benefits, and matters pertaining to collective labor relations, such as labor union activities during the working hours, demand for shop system, and deduction of labor union membership fee are matters subject to mandatory bargaining, and part of matters pertaining to management and labor union's activities are those subject to discretionary bargaining.



## 60 In case where collective bargaining has been delegated, does the labor union in question still has collective bargaining right?

'Delegation of collective bargaining right' means that the labor union entrusts administrative works involved in collective bargaining to a party other than its representative for itself or members of the union, and on behalf of the labor union. Even though there has been specific expression of intention after delegation (e.g. termination of such delegation), the labor union's collective bargaining right shall be deemed as remaining concurrently in competition with the collective bargaining right delegated to the trustee. (Refer to Supreme Court 1998.11.13. Ruling 98Da20790).





Even in case where a unit labor union has delegated its collective bargaining right to a confederation of union, a superior group, if a representative of such unit labor union executes collective agreement upon normal process of bargaining directly with the employer, the validity of such agreement cannot be denied. In this case, the parties to the agreement shall have obligation to faithfully comply with the executed collective agreement during the period in which it is effective.

## 61 Whether matters pertaining to a non-regular worker who is not a member of union, are subject matters of the collective bargaining

Given that article 29.1 of Trade Union and Labor Relations Adjustment Act stipulates that "the representative of a trade union has the authority to bargain with employers or employers' association, and to make collective agreements for the trade union and union members", the matters pertaining to a person who is not a member of the union cannot become, in principle, subject matters of the collective bargaining.

Hence, in case where non-regular workers are not members of the labor union, the representative thereof will be able to request for collective bargaining to the employer after having the said non-regular workers obtain qualification to joint the labor union.

## 62 Are there restrictions on venue, time and number of bargaining persons with respect to collective bargaining?

Article 30.1 of Trade Union and Labor Relations Adjustment Act stipulates that "A trade union and employer or employer association shall bargain, in good faith and sincerity, with each other and make a collective agreement, and shall not exceed their authority." The paragraph 2 of the same provision only stipulates that "A trade union and employer or employer association shall not refuse or delay, without just causes, bargaining or concluding collective agreements." The Act does not explicit provision on procedure and method of collective bargaining process. Therefore, matters pertaining to time, venue, number of persons attending, procedure and method of bargaining process, shall be determined upon discussion between labor and employer.

## 63 Validity of collective bargaining conducted by a party who has no authority to execute collective agreement.

As prescribed by Article 31.1 of the same Act, the validity of a collective agreement is acknowledged when persons authorized by management and labor bargain with each other, draw up the agreements in written form, and sign and affix their seals thereto.

In case where bargaining commissioners or administrators from management or labor union draw up their agreements in written form, sign and affix their seals thereto, if such parties have just authority to execute the collective agreement, the documents drawn up shall be deemed as collective agreements under the same law. However, if the





persons who signed and affixed seals to the said documents do not have authority to execute the agreement, the documents in question would be mere documents evidencing tentative agreements, thus shall not be deemed as concluded collective agreements.

## 64 In case there is an automatic extension clause, what are valid term of collective agreement, date when it can be terminated, and validity of the collective agreement after termination?

In case where a separate provision within collective agreement states, pursuant to proviso in paragraph 3, Article 3 of Trade Union and Labor Relations Adjustment Act, that the existing collective agreement shall remain in effect until new collective agreement will have been concluded if no conclusion is made on new collective agreement after expiration of the effective term, such provision shall be observed. But one party concerned may terminate the collective agreement by giving notice to the other party 6 months in advance of the date he wants to terminate the collective agreement.

Therefore, in case where there is an automatic extension clause within the collective agreement pursuant to Article 32.3 of the same Act, the existing agreement shall be deemed as effective until a new collective agreement will have been concluded, unless there is a reason for otherwise.

However, if one party wishes to terminate the existing collective agreement during the period in which its term is automatically extended, he shall give a notice to the other party 6 months in advance of the date he wants to terminate it.

※ In case where a collective agreement, of which term has been automatically extended after expiration of the term pursuant to the proviso in paragraph 3 of Article 32.3 of Trade Union and Labor Relations Adjustment Act, is terminated with a notice given by a party, so-called 'obligatory' provisions within such collective agreement become ineffective with expiration of the notification period, the provisions thereof pertaining treatments for workers(so-called normative provisions'), such as working conditions, shall have been converted into part of labor contracts of individual members of the union. Therefore, the said provisions shall remain in effect until the provisions on working conditions will have been modified due to reasons such as conclusion of a new collective agreement.

## 65 Criteria for determining justifiable reasons to refusal of collective bargaining

Article 81.3 of Trade Union and Labor Relations Adjustment Act defines and prohibits as unfair labor practice "a refusal or delay of conclusion of a collective agreement or of collective bargaining, without justifiable reasons, with the representative of a trade union or a person who has been





authorized by a trade union.", The judgment on whether there has been justifiable reason for refusal of collective bargaining shall be made, in consideration of time and venue of bargaining, subject matters of the bargaining that have been requested by persons authorized by an employer and labor union, and their attitude toward the bargaining, based on whether compliance with obligations for collective bargaining by an employer is deemed as difficult to expect, in light of social norm. (Refer to Supreme court 1998. 5. 22. Ruling 97Nu8076).

For HR Managers of Foreign Investors

# Q&A

## on Labor-related Laws

## Appendix

# 01 Key Contents of Acts relating to Protection of Non-regular Workers

## 1. Background of enactment

### Economic polarization is one of the most serious issues in our society.

- Discrimination and abuse of non-regular workers are key phenomena of social polarization.
- The size of non-regular workers have been continuously increasing to account for more than one third of total number of workers (15.35 million as of August, 2006)
- Discriminatory treatments for non-regular workers have not been remedied.
  - Monthly average wages earned by non-regular workers are only 62.5% of those earned by regular workers ('06.8).
  - Although systematic discrimination has been mostly cleared in social insurance, actual application rate is still remarkably low, and non-regular workers have also been alienated from bonus payments and corporate welfare system.

### Discrimination and abuse must be eliminated.

- Circumstances where there is no regulatory or systematic devices for protecting non-regular workers from discrimination and abuse.
- Although there have been advocates for prohibiting employment of non-regular workers, the reality that it has been established as ordinary



form of employment should also be considered.

- It is necessary to reconcile between stabilization and flexibility of the labor market through proper protection of non-regular workers.

### Rational standards for employment by business need to be in place.

■ Regulatory/systematic devices, whereby regular workers are employed or non-regular workers are converted for permanent positions requiring skills and experiences, and non-regular workers are employed for temporary duties.

## 2. Progress to date

### Tripartite commission commenced discussion.

■ As issue of non-regular workers have been raised after Economic Crisis, the tripartite commission organized a 'Special Committee on Measures for Non-Regular Workers' in July, 2001, which discussed this issue over 100 times over 2 years, through conferences, forums, and investigations.

### Government bill submitted to National Assembly

■ Based on results of the discussions by tripartite commission, the government, after taking steps for compilation of opinions, including

advance announcement of enactment and public hearings, submitted 3 bills related to protection of non-regular workers to National Assembly on November 8, 2004.

### Review by National Assembly

- National Assembly's Commission for Environment and Labor referred the bills to Subcommittee for Review of Bills.
- Labor-Management Conversation Sessions were held 11 times with arrangement of the Uri Party in November, 2005, but no agreement have been reached.

### National Assembly's Commission for Environment and Labor passed a joint bill agreed by ruling party and opposition party

- The Subcommittee for Review of Bill resumed review of the bills in December, 2005, and reached tentative agreement on majority of matters except key areas in dispute (e.g. method of restricting use of fixed-term employees, obligation of employing dispatched workers), by February 7, 2006.

### Bills passed by National Assembly

- Bills referred on authority to main meeting of National Assembly, and passed on November 30, 2006.

  - Date of enforcement modified to July 1, 2007. (Provision related to discrimination will be enforced on step-by-step basis).

# 3. Key contents

## (1) Prohibition of discrimination

### Current regulation

■ No regulatory provisions prohibiting the discrimination

※ The discrepancy between wages of regular workers and non-regular workers is 62.8% (National Office of Statistics, joint administration of survey of population with economic activities)

→ Discriminatory difference due to form of employment, other than determinants of wage such as career history, consecutive service period, qualification, and size of business was in range of 10 to 20%, depending on surveys.

### Enacted regulation

■ Regulatory provision prohibiting unreasonable discriminatory treatments for non-regular workers (Fixed-term, part-time, dispatched workers)

■ Preparation of procedure for correcting discrimination through Labor Relations Commission

- Ensure that disputes may be settled through mediation, and grant to mediation judgment same effect as that of compromise in litigation

- Impose Fines up to KRW 100 million in case of non-compliance with finalized order for correction

- Provide diverse methods of correction, including suspension of discriminatory practice, order for improvement of working condition, and monetary indemnification
- Burden of proof regarding discrimination borne by employer

## (2) Fixed-term work

### Current regulation

■ As there is no restriction on period of Fixed-term work, repetitive renewal of Fixed-term labor contract over long time cannot be sanctioned.

※ Currently, only restriction placed on labor contract is maximum term, which is one year

- Although restrictions are placed on some cases through judicial precedents, there is a hardly a case given in favor of worker, and also criteria for judgment is not clear, which makes inconsistency in case by case.

■ As employers can easily modify workforce with Fixed-term workers on ground of expiration of contract term, while having difficulty in dismissing regular workers, the Fixed-term employment has sharply increased recently.

※ Size of part-time workers: 1.86 million ('01) → 3.63 million ('06)

※ Consecutive service period : 15 months('01) → 25 months('06)



### Amended regulation

■ Limit total employment period of Fixed-term worker to 2 years

- When such worker has been employed for period in excess of 2 years, he shall be deemed as a worker who executed labor contract with no term defined term(indefinitive term).

■ However, in case falling within category of 'reason for special exception', an employer may employ a Fixed-term worker in excess of 2 years.

※ E.g. Completion of specific project, substitute for temporarily vacant position, completion of academic career/job training by a worker, professional position, worker aged over 55

■ Time of enforcement shall be when an employment contract is executed or renewed after July 1, 2007 or when existing labor contract is extended after July 1, 2007(Article 2 of Addenda)

## (3) Dispatched worker

#### A. Prohibition of discrimination

### Current regulation

■ Declaratory provision on equal treatment for dispatched workers

### Amended regulation

■ Prohibits unreasonable discriminatory treatment for dispatched workers, and enforces correction through Labor Relations Commission ("Act on protection of Fixed-term and part-time workers, etc" applied mutatis mutandis)

## B. Jobs to which worker dispatch system may apply

### Current regulation

■ Positive list- 26 jobs allowed by enforcement decree(Maximum term of dispatch-2 years)

▶ Jobs to which worker dispatch system may not apply : Construction, jobs involving hazardous or dangerous activities, medical works

▶ Manufacturing and other jobs : Allowed in limited scope only when there is temporary/intermittent reason (Maximum 6 months)

### Amended regulation

■ Positive-list system maintained, but

- To criteria for determination under current regulation ("Jobs requiring professional knowledge, skill or experience"), add "nature of job"

※ Job requiring professional knowledge, skill, or experience Job believed as appropriate in consideration of professional knowledge, skill, experience or nature of job

- Provide ground for expanding or adjusting the jobs under category in light of reality of the labor market

※ Current provision on 'prohibited job, temporary or intermittent reason in manufacturing or other jobs' shall be maintained.

## C. Obligation of direct employment

### Current regulation

■ In case where an using employer uses a same dispatched worker in excess of 2 years consecutively, the worker shall be deemed as using employer's own employee (fictitious employment)

■ There is no regulatory provisions on application of fictitious employment to illegal dispatch practices other than excess of dispatch term, such as dispatch of a worker to jobs not permitted or dispatch without permission.

■ Even in case of fictitious employment, there is no provision on working condition

※ With approach based on prescription of fictitious employment, it is difficult to place direct sanction on using employer, and relief may be awarded only if a concerned worker files a lawsuit against unfair dismissal, which requires considerable time and cost.

### Amended regulation

■ Impose on an using employer who uses the same worker in excess of 2 years obligation to employ the said worker (Fines up to KRW 30 million for violation)

■ Provide for imposition of obligation of direct employment upon employer who uses the same worker in excess of two years, even in case of all illegal dispatch practices, such as dispatch of a worker to jobs not permitted, and dispatch without permission

※ Obligation of immediate employment of worker dispatched for prohibited job

■ Provide for standards of working conditions to be complied with in case of direct employment

- Equal treatment in case where there is a worker engaged in same type of job, and prohibit downgrade of working condition in case there is no other worker engaged in the same type of job.

## D. Penalty for illegal dispatch practice

### Current regulation

■ Penalty imposed on using employer is lighter than that on dispatching employer

▶ Dispatching employer: Prison term up to 3 years, fines up to KRW 20 million

▶ Using employer: Prison term up to 1 year, fines up to KRW 10 million

### Amended regulation

■ Heavier liability borne by using employer, by adjusting the penalty to the same level as the penalty imposed on dispatching employer

※ Prison term up to 1 year, fines up to KRW 10 million → Prison term up to 3 years, fines up to KRW 20 million

## E. Written notice of commission for dispatch

### Current regulation

■ No applicable provision

### Amended regulation

■ For the purpose of preventing the dispatching employer from deducting excessively in the middle, stipulate to make written notice of consideration paid in return for dispatch if requested by the worker

# (4) Part-time work, time of enforcement, etc

## A. Restriction on abuse of part-time work

■ Set limits to overtime in excess of prescribed working hours (12 hours per week), even if its within legal working hours (40 hours or 44 hours per week)

- Stipulate worker's right to refuse employer's unfair demand for overtime

※ Current Labor Standards Act only prescribes limit to overtime in excess of legal working hours (12 hours per week, payment of wage increased by 50%)

## B. Rigid enforcement of obligation to specify working conditions in written form

■ Insert provision stipulating obligation of specifying in written form the important working conditions, such as wage, term of labor contract, and working hours

※ Current Labor Standards Act only stipulates to specify items constituting the wage, method of computing and payment of wage in written form.

- To improve effectiveness of relief of non-regular worker's rights in disputes over overdue wages or dismissal.

## C. Amendment of Labor Relations Commission Act

■ Revamp of provisions aimed to enforce the procedure for correction of discriminatory practices, including establishment of committee for correction of discriminatory practices within the Labor Relations Commission, and appointment of public-interest commissioner responsible for correction of discriminatory practices

### D. Time of enforcement

■ To be enforced from July, 2007.

■ However in consideration of burdens on SME's, the provisions on correction of discriminatory practices by business with workforce less than 300 will be enforced on step-by-step basis

※ Business with workforce 300 or more, public entity→July, 2007; business with workforce 100~299→July, 2008;business with workforce less than 100→July, 2009



# 4. Q&A regarding Non-regular worker protection act

## (Prohibition of Discrimination)

### (1) What constitutes discriminatory treatment?

■ Discriminatory treatments prohibited by the law mean unfavorable treatments given to non-regular workers (fixed-term, part-time or temporary agency workers) with no rational reason compared with those to regular workers engaging in the same or similar jobs in the same workplace.

※ The comparison is made between fixed-term and open-ended contract workers, between part-time and full-time workers, and between temporary agency and directly employed workers

### (2) Do the 'discriminatory treatments' include any discrimination made in terms of workers' welfare?

■ The term "discriminatory treatments"refer to unfavorable treatments given with no rational reason in terms of wages and other working condition(Article 2.3)

■ If workers' welfare is considered a working condition, it will also be subject to the ban on discrimination

※ Given the matters to be included in rules of employment as prescribed in Article 96 of Labor Standards Act, and definition of labor dispute in Article 2 of Trade Union and Labor Relations Act, matters pertaining to welfare may be a working condition.

- Yet it is hard to see one-off issues as working condition.

■ The enacted law stipulates roughly that discrimination shall not be made in "wages and other working conditions". More specific details are likely to be established as decisions made according to judgment criteria come up with by the Labor Relations Commission accumulate.

### (3) What are the criteria for judging charges of discrimination?

■ The forms of discrimination are so diverse that it is very hard to have specific judgment criteria set by law.

■ The judgment criteria will take shape as decisions and rulings made by the Labor Relations Commission or the courts accumulate in the future.

■ In particular, if discrimination were made on grounds of individual workers' career experiences, productivity, etc., it would not be easy to judge their case

- On the other hand, in case of obvious discrimination, such as those prescribed by employment rules, it is easy to judge and thus can be redressed soon after the enforcement of the law.

  ▶ Wage discrimination : Non-regular workers are paid lower wages even though employment rules stipulate that workers with the same qualifications and educational levels perform the same job

  ▶ Discrimination in working hours, etc. : Regular workers are granted paid holidays while non-regular workers unpaid ones.

  ▶ Discrimination in other working conditions : Non-regular workers are excluded from other welfare and fringe benefits, such as year-end performance bonuses, bonuses for long-term service, on grounds of their employment type. Or they are restricted from using a company cafeteria or commuter bus service with no rational reason.

### (4) What is procedure for correction of discriminatory treatments and what are details of the corrections?

■ A discriminated worker may file a complaint for correction with Labor Relations Commission within 3 months after he has been discriminated.

- In this case, burden of proof regarding the charge of discrimination is borne by the employer.

■ The regulation stipulates to actively use mediation or arbitration in the course of investigation conducted by Labor Relations Commission.

- As concluded mediation or decision on arbitration will have effect of compromise in litigation, workers can be awarded remedies more promptly and easily.

■ If Labor Relations Commission determines a certain act as discriminatory treatment, it orders the employer to correct it.

- The correctional order may include cease of discriminatory act, improvement of working conditions such as wages, and appropriate monetary compensation.

■ Considering that a worker may feel uneasy about filing a complaint against discrimination during the service, the enacted law stipulates that in case where the concerned worker has resigned, he shall be entitled to appropriate monetary compensation.

### (5) Aside from discriminated workers, is a trade union entitled to directly file a complaint with the Labor Relations Commission on behalf of the workers to remedy discrimination?

■ Non-regular workers who have received discriminatory treatments can file a complaint themselves to remedy discrimination. But a trade union cannot file a complaint on behalf of the workers.

■ The enacted law provides the following complementary means in order to reduce the difficulties discriminated workers have had in filing a complaint with the Labor Relations Commission to remedy discrimination.

- An employer must not give workers unfavorable treatments, including dismissal, on the grounds that they have filed a complaint to remedy discrimination.(Article 16.2)
- Any employer who has given unfavorable treatments is punished by imprisonment of up to two years or a fine not exceeding 10 million won(Article 21)
- Workers are allowed to file a complaint to remedy discrimination for the three-month period even after their retirement. In case of

retirees, monetary compensations are paid if their case is judged in favor of them.

### (6) What if an employer fails to comply with the final order to dress discrimination?

■ If an employer fails to comply with the correction order issued by the Labor Relations Commission, the Minister of Labor imposes on the employer a fine for negligence not exceeding 100 million won.

※ Specific criteria and procedures for the imposition will be prescribed by a Presidential Decree.

■ The amount of the fine is huge enough to have an indirect effect of forcing an employer to follow such a correction order.

### (7) What is finalized correctional order?

■ In case where appeal has not been filed with Central Labor Relation Commission against correctional order issued by a district labor relations commission within 10 days, a period within which an appeal may be filed.

■ In case where a administrative lawsuit against review by Central Labor Relations Commission has not been filed within 15 days, a period within which such lawsuit may be filed.

■ In case where final ruling has been issued by Supreme Court, if the case has been referred to the Supreme Court after other litigations including administrative litigation.

### (8) What if an employer does not comply with the correctional order even though he has been imposed fines by Ministry of Labor?

■ The concerned worker may would be able to seek remedies through civil proceedings, including filing of application of tentative disposition, litigation for confirmation, or litigation for compensation of loss, depending on the specific contents of the correctional measure.

## ( Fixed-term and part-time work )

### (1) What are cases where an employer can employ a worker for fixed term in excess of 2 years?

■ The cases where an employer may employ a worker for fixed term in excess of 2 years are as follow: (Proviso in Article 4.1)

- In case where period required for completion of project or particular business is specified (paragraph1)
- In case where vacancy has arisen due to temporary leave of absence or dispatch of a worker, and such vacancy needs to be filled until the worker returns (Paragraph 2 )
- In case where a worker is engaged in academic programs or job training, and period required for completion of such engagement is specified. (Paragraph 3)
- person (a person aged 55 or older) as provided in Article 2.1 of 'Aged Worker Employment Promotion Act'. (Paragraph 4)

- In case where utilization of professional knowledge and skills is necessary, and case where a job is offered in line with government's welfare or unemployment measures, and prescribed by Presidential Decree (Paragraph 5).
- In other cases where reasonable reason comparable to the above, and prescribed by the Presidential Decree (Paragraph 6)

※ The details of paragraph 5 and 6 will be provided in Enforcement Decree

### (2) Can an employer dismiss a fixed-term worker within 2 years without a just reason?

■ By Article 30 of Labor Standards Act, an employer may not dismiss a worker without a just reason.

- In case where an employer has dismissed a worker, he will be subject to Labor Relations Commissions' order for relief of unfair dismissal, or punishment for violation of law.

■ Therefore, even if the limit of period for employment of fixed-term worker is 2 years, an employer may not dismiss him without justifiable reason during the term of labor contract executed with the worker.



### (3) Employing a fixed-term worker in excess of 2 years will be deemed as having executed a labor contract for no defined term (regular worker). In this case, when is initial date in reckoning?

■ [Act relating to protection of fixed-term and part-time workers] is an enacted law, and does not apply retrospectively to the period prior to date of enforcement.

- The Act has transitional provision in its addendum to clarify this.
- The provision for restriction on employment term of fixed-time workers (Article 4) shall apply to labor contracts executed or renewed, or case where term of existing contract is extended after the date of enforcement(Article 2 of Addendum).

■ For example, in case where a labor contract with term from Jan 1, 2007 to Dec. 31, 2007 has been executed and it is renewed on Jan.1, 2008,

- As the initial date for reckoning the period of employment is Jan.1, 2008, if the concerned worker continues the work in excess of 2 years from such date, he will be deemed as a regular worker.

### (4) If a worker works for period in excess of 2 years and is deemed as a worker who has executed a labor contract with no defined term, how would his wage and working conditions be determined?

■ If a fixed-term worker continues to work in excess of 2 years thus is regarded as a worker who executed a labor contract with no defined

term, his working conditions, including wage, shall be determined in accordance with collective agreement, rules of employment, or the terms and conditions of the labor contract executed between the employer and the worker.

■ However, even during the period within 2 years, the fixed-term worker shall not be treated discriminatorily relative to a regular worker engaging in same or similar job.

- And even if a fixed-term worker is regarded as a worker based on labor contract with no defined term, the working conditions may not be downgraded from existing conditions without his consent.

### (5) Is extra wage paid for overtime work conducted by part-time worker?

■ The purpose of extra wage system is to limit a long-time work in excess of legal working hours (i.e. 8 hours a day, 40 or 44 hours per week).

- In case where a part-time worker conducts work in excess of working hours previously agreed on with employer, payment of extra wage for such overtime work would not be correspond to the purpose of the system.

■ However, if a part-time worker has worked overtime in excess of legal working hours, he shall be entitled, like regular worker, to extra wage for the hours in excess of such legal working hours.

■ Even a full-time worker who has worked overtime in excess of

mutually agreed working hours would not be entitled to extra wage, if the hours worked has not exceeded the legal working hours.

- Therefore, a provision requiring extra wages only applicable to part-time workers would cause an issue of equity.

## ( Worker dispatch)

### (1) What kinds of jobs are permitted or prohibited for temporary agency workers?

1. Permitted jobs

■ Jobs requiring direct involvement in production processes in the manufacturing industry are excluded.

- Jobs judged suitable for temporary agency workers in consideration of professional knowledge, skills and experiences or the nature of a job, and determined by a relevant Presidential Decree are permitted.

■ Even in this case, the dispatch period must neither exceed one year nor be more than a total of two years including an extended period.

2. Temporarily permitted jobs

■ Even in case a job is not a permitted one, temporary agency workers can be limitedly used for that job if there is a vacancy caused by childbirth, diseases or injuries,

- Or if a company needs to secure workforce temporarily and intermittently

Dispatch period

- In case there occurs a vacancy due to childbirth, diseases or injuries, the dispatch period must be the period during which a replacement worker is needed for the vacancy
- In case a company needs to secure workforce temporarily and intermittently, the dispatch period must not exceed a maximum of six months.

3. Prohibited jobs

① jobs performed for a construction project

② stevedoring jobs for which labor supply services are permit

③ seamen's job

④ harmful and hazardous jobs prescribed in Article 28 of the Industrial Safety and Health Act

⑤ jobs exposing workers to dusts

⑥ jobs for which health management pocket books shall be issued under Article 44 of the Industrial Safety and Health Act

⑦ medical workers' jobs

⑧ nurse aides' jobs

⑨ medical technicians' jobs

⑩ jobs of driving passenger and cargo transportation



### (2) What constitutes illegal dispatch service?

■ Illegal dispatch service means dispatch service in violation of jobs permitted(Article 5) or length of dispatch period(Article 6), or dispatch without permission(Article 7).

■ Violation of jobs permitted for dispatch

① In case a job is not permitted for worker dispatch, a temporary agency worker can be dispatched for that job only if there is a vacancy caused by childbirth, diseases or injuries. or if a company needs to secure workforce temporarily and intermittently. If a temporary agency worker has been dispatched for a job not permitted without such reason as above, it would constitute illegal dispatch service.

② A temporary agency worker may not be dispatched for a prohibited job, even if there is a reason for temporary use. If a temporary agency worker has been dispatched for a prohibited job, it would constitute illegal dispatch service.

■ Violation of dispatch period

① In case where the length of consecutive service period of a dispatched worker is in excess of 2 years

② In case a dispatched worker is used for a job that is not a permitted for reasons such as childbirth, diseases or injuries, he can be used until such reason exists. If an employer continues to use the dispatched worker even after such reason has been cleared, it would constitute illegal dispatch.

③ In case a company needs to secure workforce temporarily and intermittently for a job that is not permitted for worker dispatch, it may use such worker for 6 months or less. If the company uses such dispatched worker in excess of 6 months, it would constitute an illegal dispatch practice.

■ In case where a temporary worker dispatch agency engages in such business without permission for worker dispatch service, or an employer receives worker dispatch service from an agency who has not obtained permission for dispatch service.

### (3) What punishment and sanctions are imposed for illegal dispatch services?

■ In case of illegal dispatch services, employers dispatching and using workers are both punished by imprisonment of no less than three years, or a fine not exceeding 20 million won.

- The inspection organization makes any breach of laws be redressed by giving punishment.

■ In order to protect employment of temporary agency workers, an employer using temporary agency workers will be obligated to directly employ them if he/she has illegally used them for more than two years.

- However, if the employer has used temporary agency workers for prohibited jobs, he/she must directly employ them even when their employment period is less than two years.

- An employer who is obligated to directly employ his/her temporary

agency workers but fails to comply with this will be punished by a fine for negligence not exceeding 30 million won.

### (4) In case where a worker has been used through illegal dispatch, but service period has not exceeded 2 years, is the employer obligated to employ him?

■ The employer would be obligated to employ a worker illegally dispatched only if the service period is in excess of 2 years.

- As imposing obligation to employee on using employer would forcing the labor relation against concerned party's will, it doesn't seem in conformity to principle of private autonomy.
- That's why obligation of direct employment is imposed only when labor relation has continuously been in place in excess of dispatch period.

■ However, as even temporary dispatch is not allowed for jobs prohibited, obligation of direct employment is immediately imposed for prompt correction, even if the service period has not been in excess of 2 years.

### (5) To an employer who has used a worker dispatched illegally, are both criminal punishment for illegal dispatch practice and fines for non-performance of obligation to employ imposed?

■ A using employer may be subject both to criminal punishment for using a worker dispatched illegally and fines for failure to comply with the correctional order.

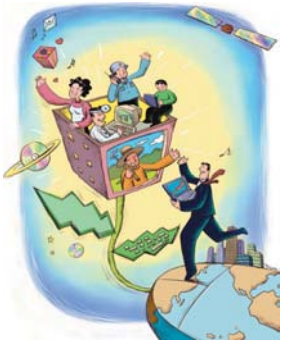
■ As the criminal punishment for violation of Act relating to Protection of Dispatched Workers and imposition of fines for failure to comply with the correctional order differ in terms of the legal purposes and benefits of legal protection, they do not constitute double punishment.

※ Similar cases : In case where a person has been ordered for correction from applicable authority for using the basement and indoor parking space as residence space, he may be subject to punishment for violation of law and fines for failure to comply with the order if he has not corrected it.

### (6) Time of enforcement of Acts relating to protection of non-regular workers?

■ Both 'Act relating to protection of dispatched workers' and 'Act relating to protection of fixed-term and part-time workers' will take effect from July 1, 2007.

■ However, provisions relating to prohibition of discrimination and correction will be enforced at different timings, depending on the size of business



- Business having 300 persons or more and public sector : 2007.7.1.
- Business having less than 300 persons : 2008.7.1
- Business having less than 100 : 2009.7.1

## Comparison of key contents between current regulations and bills passed by National Assembly

| | | Current regulation | Bills passed by National Assembly('06.11.30) |
|---|---|---|---|
| Common | Prohibition of discrimination | • No provision | • Stipulate to prohibit discrimination against fixed-term, part-time, and dispatched workers without reasonable reason<br>• Procedure of correcting discriminatory practice through labor relations committee<br>- Disputes may be resolved through mediation, and finalized mediation shall have same effect as compromise in litigation<br>- Fines of KRW 100 million or less shall be imposed in case of non-compliance with finalized correctional order<br>- Stipulate methods of correcting the discriminatory practices in diverse ways- cease to discriminatory practice, order for improvement of working conditions, and appropriate monetary compensation, etc<br>- Stipulate that burden of proof with respect to discriminatory practice shall be borne by employer |
| Fixed term | Period of employment | • No separate provision (No provision on restriction on repetitive renewal of fixed-term labor contract) | • Limit the employment period to two years |
| | Excess of employment period | • No separate provision | • Employment in excess of 2 years shall be deemed as labor contract with no defined term<br>- Exception allowed for fixed-term business project, completion of particular project, or temporary substitution for vacancy |
| part time | Restriction on overtime work | • Restriction placed only on overtime work in excess of legal working hours(12 hours per week, 50% extra wage) | • Restriction placed even on overtime within legal working hours (12 hours per week)<br>• Stipulate right to refuse employer's unfair instruction for overtime work |
| | Specifying working conditions in written form | • Obligation of specifying items constituting wage, method of computation and payment in written form | • Obligation of specifying major working conditions including wages, term of labor contract, and working hours in written form |

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# 01 Key Contents of Acts relating to Protection of Non-regular Workers

## Comparison of key contents between current regulations and bills passed by National Assembly

| | | Current regulation | Bills passed by National Assembly('06.11.30) |
|---|---|---|---|
| Dispatched workers | Jobs permitted/prohibited for worker dispatch | • Stipulation in Positive list<br>- Jobs permitted for worker dispatch shall be those requiring professional knowledge, skill and experience, and prescribed by Presidential Decree<br>※ 26 jobs stipulated in enforcement decree | • Positive list maintained<br>- "nature of job" inserted in provision on jobs permitted for worker dispatch<br>※ Specific jobs permitted stipulated in enforcement decree |
| | Dispatch period | • Maximum 2 years<br>• In case of use in excess of dispatch period, the worker shall be deemed as employed by the using employer (fictitious employment) | • Maximum 2 years<br>• In case of use in excess of dispatch period, obligation to employ imposed to the using employer. However, there is no restriction on period with respect to aged worker (55 years or older) |
| | Use of worker illegally dispatched | • No provision on fictitious employment or obligation for employment<br>• No penalty | • Stipulate using employer's obligation for employment<br>- violation of job, period, or illegal dispatch :When service period is in excess of 2 years<br>- Violation of jobs absolutely prohibited : Immediately<br>• Penalty provision inserted<br>- Fines for failure to perform obligation for employment (KRW 30 million) |
| | Prohibition of illegal dispatch | • Different penalties imposed<br>- Dispatching employer: Imprisonment up to 3 years or fines up to KRW 20 million<br>- Using employer : 1 year | • Same penalties (Penalty to using employer enhanced)<br>- Dispatching and using employers : Imprisonment up to 3 years or fines up to KRW 20 million |
| Time of enforcement | | | • Effective from July 1, 2007<br>• However, provisions on prohibition of discrimination shall become effective differentially<br>- Business having 300 persons or more/public sector : '07.7.1<br>- Business having 100~299 persons : '08.7.1<br>- Business having less than 100 persons : '09.7.1 |

## Korea's Social Insurance System

| | Employment Insurance | Industrial Accident Compensation Insurance | National Pension | Health Insurance |
|---|---|---|---|---|
| Purpose | To prevent unemployment; promote employment; and develop workers' vocational ability | To provide medical treatment for occupational injury or disease and offer compensation for disabilities or deaths caused by injury or disease at work | To provide pension for those who cannot earn a living due to age or sickness, or for their bereft family after their death | To prevent, diagnose and treat diseases and injuries |
| Entering into force | July 1995 | July 1964 | January 1988 | July 1977 |
| Companies covered | Companies constantly employing 1 worker or more | Companies constantly employing 1 worker or more | Companies constantly employing 5 workers or more | Companies constantly employing 1 worker or more |
| Insurable people | Those below 65 of age | All the employees of the companies covered | Aged 18 or older but younger than 60 | All the employees of the companies covered |
| Excluded people | Employers, foreigners | Employers (insurable in exceptional cases) | Those who worked less than 3 months | Those who worked less than 1 month |
| Provisions for foreigners | Insurable, upon request | Included in the coverage | Included in the coverage, in principle<br>* Differs from country to country | Included in the coverage |
| Acquisition of the insured status | When the employee starts work in employment | - | When the employee starts work in employment | When the employee starts work in employment |
| Termination of the status | 1 day after the employee leaves the company | - | 1 day after the employee leaves the company | 1 day after the employee leaves the company |
| Premium rate (2008 except Health Insurance) — Worker | Total wage x 0.45%(for unemployment benefits) | None | Standard monthly wage x 4.5% | Standard monthly wage x 2.385% (2007) |
| Premium rate (2008 except Health Insurance) — Employer | Unemployment benefits: 0.5% of total wage<br>Job security program and vocational development program: 0.25 to 0.85% (different rates based on number of employees) | Total wage x 17.8/1000<br>(Differs from sector to sector) | Standard monthly wage x 4.5% | Standard monthly wage x 4.5% |
| Benefits offered | Unemployment benefits, job security program, vocational ability development program, etc. | Medical care benefits, shutdown benefits, disability benefits, survivor benefits, etc. | Old age pension, disability pension, survivor pension, etc. | Medical care expenses, physical checkup, funeral expenses, etc. |
| Governing Body | Ministry of Labor<br>(Korea Labor Welfare Corporation) | | Ministry of Health and Welfare(National Pension Corporation) | Ministry of Health and Welfare<br>(National Health Insurance Corporation) |

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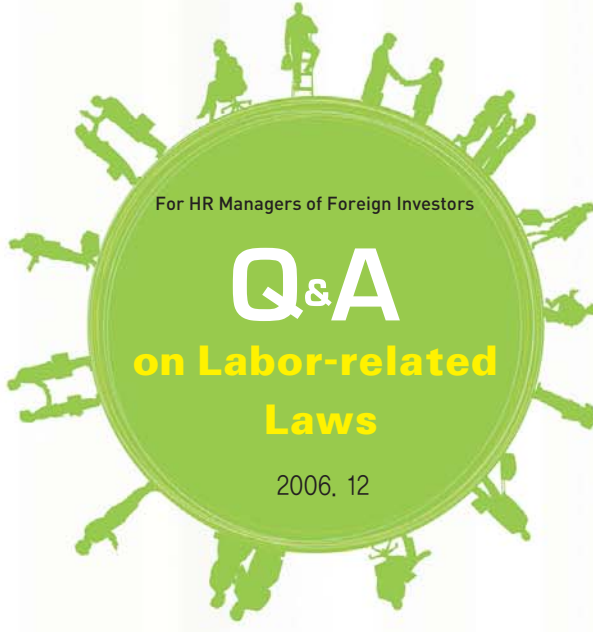

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