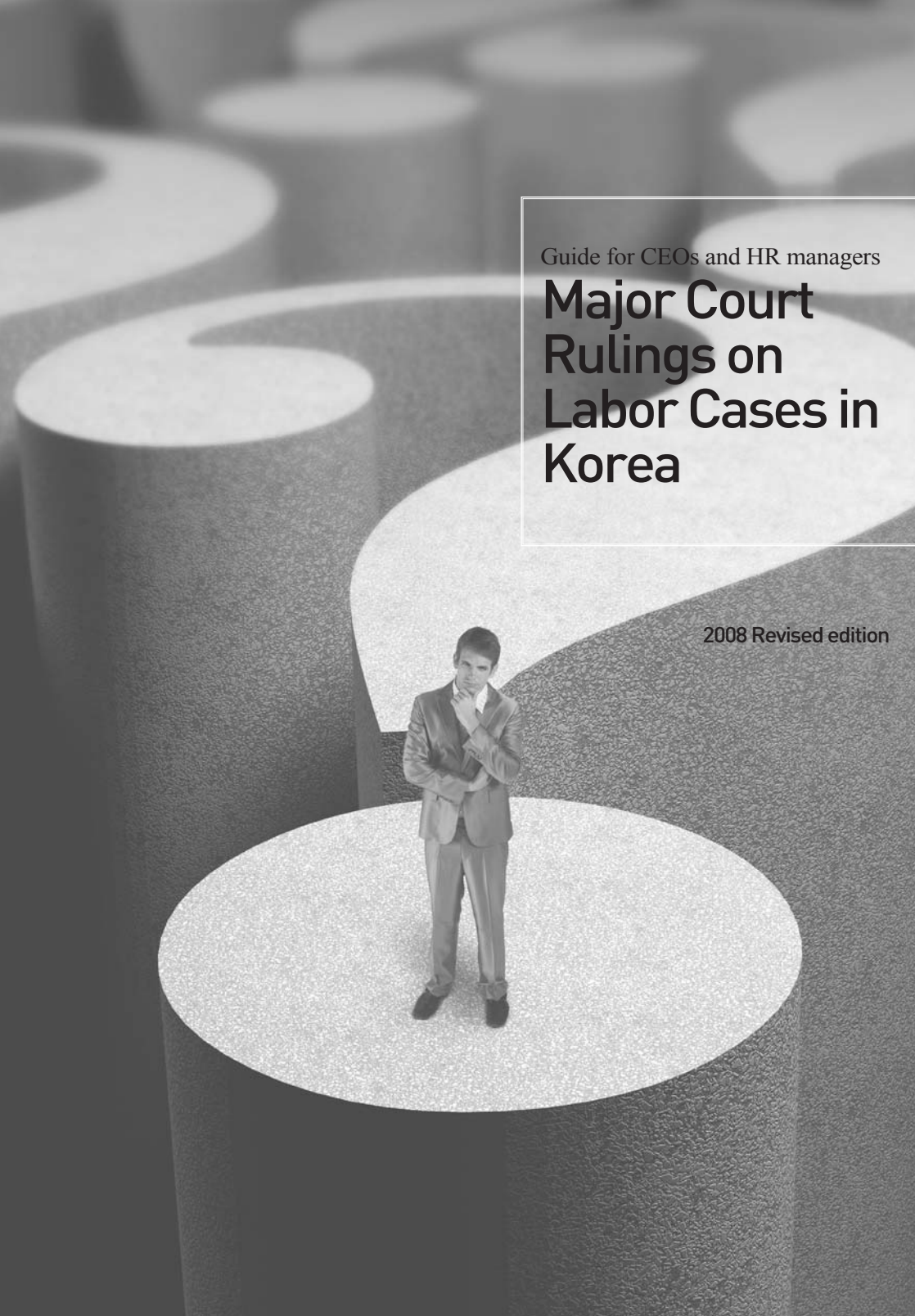

Guide for CEOs and HR managers

Major Court Rulings on Labor Cases in Korea

2008 Revised edition

Foreword

Invest KOREA is dedicated to performing various administrative support tasks to improve the business environment of foreign-invested companies.

Foreign investors who operate businesses abroad may experience difficulties due to unfamiliar systems, and social and cultural differences. In particular, it is labor-management relations that most clearly reflect the divisions within a society, culture, and ideology that requires a thorough understanding of local systems and regulations.

In efforts to help foreign-invested companies in managing any problems they might encounter in dealing with labor or personnel issues, Invest Korea has since 2003 been publishing Major Court Rulings on Labor Cases in Korea, which includes explanatory notes and practical tips on labor law provisions and relevant court rulings.

This 2008 edition, which is the second edition revised and expanded from the last edition in 2005, has reflected recent enactments and amendments of labor-related Acts and subordinate statutes in the explanatory notes, including the amendment of laws related to non-regular workers that came into effect in July 1, 2007.

In addition, past court rulings that are no longer valid due to the amendment of the Labor Act are deleted, and numbers of the latest court rulings are newly added.

I sincerely hope that this publication will be a great asset to foreign invested-companies and their human resource managers in helping them to better understand and deal with labor-related issues, and thus improve labor-management relations of foreign-invested companies.

Tong-Soo Chung
Head of Invest KOREA

Contents >>>

I. Individual labor relations

Contents >>>

Contents >>>

Ⅱ. Collective Labor-Management Relations

I. Individual labor relations

1. Application of the Labor Standards Act (LSA)
2. Basic Principle of the Labor Standards Act
3. Contract of Employment
4. Wage and Retirement Benefits
5. Hours of Work
6. Breaks, Holidays and Leaves
7. Rules of Employment
8. Personnel Transfers
9. Merger and Business Transfer
10. Disciplinary Measures
11. Dismissal (ordinary dismissal/disciplinary dismissal)
12. Dismissal for Managerial Reasons (massive layoff)
13. Employment Termination Other Than Dismissal
14. Employee Dispatch

1. Application of the Labor Standards Act (LSA)

1) Scope of application

Applicable legislation : Article 11 of the LSA (Scope of application)

① This Act shall apply to all businesses or workplaces in which five or more workers are ordinarily employed. This Act, however, shall not apply to any business or workplace which employs only relatives living together or to a worker who is hired for domestic work.

② With respect to businesses or workplaces which ordinarily employs fewer than five workers, only part of the provisions of this Act may be made applicable as prescribed by the Presidential Decree.

[Explanatory notes]

···› The LSA governs businesses or workplaces regularly employing five or more workers. Only part of the LSA applies to those employing four or less regular workers.

➡ How to calculate the number of regular employees

The "number of regularly employed workers" is calculated by dividing the total number of employed workers during the one month before the date that the cause for application of the law occurred (hereinafter referred to as "calculation period") by the number of working days during the same period. (Article 7-2. (1) of the Enforcement Decree of the LSA)

- The number of regularly employed workers = total number of employed workers during the calculation period ÷ the number of working days of the workplace during the calculation period.
- Even in cases where the number of regularly employed workers calculated during the calculation period at the relevant business or workplace is less than the minimum number stipulated in the law (five workers), if the number of working days which did not meet the minimum number stipulated in the law (for the five-plus workers) is less than 1/2 of the total working days during the calculation period, the Labor Standards Act still apply to the relevant workplaces.
- Where determining the granting of annual paid leave, one year before the date that the cause for application of the law occurred shall be the calculation period.

➡ Types of workers that are included in the total number of workers when calculating the "regularly employed workers"

(Article 7-2.(4) of the Enforcement Decree of the LSA)

- Included workers:
  - Every worker employed by a particular business at its workplace, regardless of employment types, including regular workers employed at the business or workplace concerned, fixed-term and part-time workers pursuant to Act on Protection, etc., of Fixed-term and Part-time Employees.
  - The employer's relatives who work at the workplace or for the business living together with the employer (this applies only when there is at least one worker who falls under any of the categories listed above).

-Excluded workers:
- Dispatched workers pursuant to Protection of the Dispatched Workers Act
- Contractors
- Service workers.

⋯▸ Non-profit organizations, such as social work groups, religious organizations, private schools, foreign-invested companies, legal service offices and apartment management offices are also within the scope of LSA application.

⋯▸ With regards to companies with four workers or fewer, part of the LSA provisions, such as those concerning the contract of employment, wage, working hours and work break, compensation for occupational accidents and notice of dismissal, are applied.

Laws applied for a business or workplace which ordinarily employs fewer than four workers

- Chapter I - General Provisions : Articles 1 through 13
- Chapter II - Labor contract : Articles 15, 17, 18, 19(1), 20 through 22, 23(2), 26 and 35 through 42
- Chapter III - Wages: Articles 43 through 45, and 47 through 49
- Chapter IV - Working Hours and Recess : Articles 54, 55 and 63
- Chapter V - Women and Minors : Articles 64, 65 (1) and (3) (restricted to pregnant women and persons under the age of eighteen), 66 through 69, 70 (2) and (3), 71, 72, and 74
- Chapter VI - Safety and Health : Article 76
- Chapter VIII - Accident Compensation : Articles 78 through 92
- Chapter XI - Labor Inspectors, etc.: Articles 101 through 106
- Chapter XII - Penal Provisions : Articles 107 through 116 (restricted to the cases where the provisions applied for a business or workplace which ordinarily employs fewer than 4 workers are violated among the provisions of Chapters I through VI, VIII, and XI)

[Court rulings]

···› Does the LSA apply to a company whose business is one-off or temporary in nature?

The LSA shall apply to all companies regularly employing five workers or more. This means that whether a business is conducted on a temporary basis or not cannot be criteria of LSA coverage. Therefore, once a one-off or temporary business employs five workers or more, the LSA shall apply. (Supreme Court ruling on Oct. 25, 1994: No. 94Da21979)

2) Employee

Applicable legislation : Article 2 of the LSA

"Employee" means a person, regardless of being engaged in whatever occupation, who offers work to a business or workplace for the purpose of earning wages.

[Explanatory notes]

···› A person becomes an employee, as defined in the LSA, only when he or she offers labor for the purpose of earning wages to a business or workplace, irrespective of the kind of job he or she belongs to.

···› The notion of 'employee' as defined in the LSA applies to:
- · the Industrial Accident Compensation Insurance Act;
- · the Industrial Safety and Health Act;
- · the Act on Promotion of Workers' Participation and Cooperation;
- · the Act on the Collection, etc., of Premiums for Employment Insurance and Industrial Accident Compensation Insurance;
- · Wage Claim Guarantee Act;
- · Employee Retirement Benefit Security Act; and
- · Act on the Protection, etc. of Fixed-term and Part-time Employees

[Court rulings]

···› What criteria should be referred to in order to determine whether a person is an employee as defined in the LSA or not?

In order to determine whether a particular person is an employee as defined in the LSA or not, it should be identified whether the person has worked for an employer at a business or workplace in return for pay while being subordinate to the employer, regardless of whether the contract of employment is in the form of the employment contract under the Civil Code or the subcontracting agreement. In order to determine whether there exists subordinacy between the person and the employer, the following should be considered:

- Whether the contents of work are determined by the employer; the person is governed by the rules of employer or other service (personnel) regulations; and the person, while being at work, is subject to specific and individual supervision or instructions by the employer;
- Whether the work start/finish time and the location of work are designated by the employer and the person is bound to such designation;
- Whether the person hires a third person to do the particular work in his/her place;
- Who owns office fixtures, raw material or work tools;
- Whether the wage given to the person is in exchange for the work he/she

has provided; the wage includes basic pay or fixed pay; and the income tax is withheld by the employer;
- Whether, and to what degree, the relationship continues and the person is attached to the employer;
- Whether the person is guaranteed employee status by the relevant laws and regulations concerning the social security institutions; and
- Economic and social conditions of the two parties (Supreme Court ruling on Nov 10, 2005: No. 2005Da50034)

3) Employer

Applicable legislation : Article 2 of the LSA

The term "employer" in this Act refers to a business owner or a person responsible for management of a business, or, with respect to matters related to employees, a person who works on behalf of a business owner.

[Explanatory notes]

···› "Employer" means a person who concludes a contract of employment with an employee and pays him/her a wage in return for his/her work while instructing or supervising him/her at work.

···› "Business owner" refers to an individual owner, in the case of a personal business, or a corporate body, in the case of a corporate business. "Person responsible for management of a business" refers to a person who, like a representative director of a corporation, is mandated by the business owner to manage all or part of the business.

···› In the meantime, a "person who works on behalf of a business owner" means a person who is given a certain scope of responsibilities and mandates with regards to determination of working conditions and instruction and supervision of the work being provided.

[Court rulings]

···› Are executive officials also employees as defined in the LSA?

Executive officials, including directors, are mandated by their employer to deal with a certain scope of business management. In general, they are not in an employment relationship that requires them to provide a given type of work under the supervision and control of the employer and receive a given amount of wage in return. In this sense, executive officials shall not be considered employees under the LSA, unless under some exceptional circumstances. (Supreme Court ruling on Dec. 22, 1992: No. 92Da28228)

···› When a director of a company is engaged in a given type of work and gets paid for such work by the employer, as well as performs the mandated job of handling business management, is it possible to classify him or her as an employee under the LSA?

The LSA defines an employee as a person who provides labor for an employer and receives payment in return for the work done. Accordingly, in the case where a director is engaged in a certain type of work and gets paid for such work, in addition to performing the mandated job, the director can be deemed an employee as defined in the LSA.
(Supreme Court ruling on May 12, 1992: No. 91Nu11490)

···› How is "Employer," as defined in the LSA, determined?

When determining if an employer is liable to fulfill obligations pursuant to Article32 (Advance Notice of Dismissal) and Article 36 (Settlement of Payments) of the LSA, overall labor relations, regardless of types of contract or contents of relevant laws, shall be considered. In this case, various factors listed above shall be considered as a whole. It is clear that the employees of ○○ played leading roles in determining the employment, wages, and the payment method, as well as the duties of the plaintiffs, and managed their attendances and holidays. Moreover, following the order of the employer of ○○, the plaintiffs had to display and make an inventory of not only the products of the supplier who pays the wages to them, but also the entire products delivered to the ○○ ; do cleaning; arrange warehouse items; and work as sales assistants at the marketplace outside the ○○ Mart. Based on the aforementioned legal principles, the plaintiffs are considered to be employees who are employed by the union and under its command and supervision, even though they have not concluded an explicit labor contract

with the union. Therefore, the defendant who is the representative (owner) of the ○○ shall be the employer who is liable for the obligation pursuant to Article 32 and 36 of the LSA.
(Supreme Court ruling on Dec 7, 2006: No.2006Do300)

⋯› A person responsible for the management of a business refers to a person who is entrusted with all or part of the business management, and acts on behalf of, or represents, a business owner.

"Employer," pursuant to Article 15 of the LSA refers to a business owner, or a person responsible for the management of a business or a person who acts on behalf of a business owner with respect to matters relating to workers. In this case, "a person responsible for the management of a business" refers to a person who is entrusted with the entire, or part of the, business management and acts on behalf of, or represents, a business owner; and "a person who acts on behalf of a business owner with respect to matters relating to workers" refers to a person who is entrusted with certain authority and responsibility by the business owner of determining working conditions including personnel, wages, welfare, labor management; giving instructions or supervising for business purposes.
(Supreme Court ruling May 11, 2006: No.2005Do8364)

2. Basic Principle of the Labor Standards Act

1) Guarantee of minimum labor standards

Applicable legislation : Article 3 of the LSA (Standards of employment conditions)

The conditions of employment provided herein shall be the lowest standards and the parties to employment relations, therefore, shall not reduce the conditions of employment under the pretext of compliance with this Act.

[Explanatory notes]

···› The provisions of the Labor Standards Act (LSA) are intended to guarantee and improve the minimum living standards of workers. In this light, no employer is allowed to set employment conditions below the prescribed labor standards or change existing employment conditions, without consent of the employee(s) affected, by derogating them below the prescribed standards.

···› A labor contract which contains employment conditions that do not meet the standards provided for in the LSA shall be null and void to that extent, and those conditions invalidated for the reason above shall be replaced by the corresponding standards provided for in the LSA (Article 15 of the LSA).

[Court rulings]

···› Is it legally possible to establish the conditions of employment below the minimum conditions provided for in the LSA, for example, when a collective agreement contains such reduced conditions or employees agree to accept those conditions?

In accordance with the LSA, a contract of employment containing employment conditions that do not meet the standards specified in the LSA shall be invalid with regard to the conditions. Therefore, even if those conditions are included in a collective agreement or agreed to by employees, they are still unjustifiable.

(Supreme Court ruling on Dec. 21, 1990: No. 90DaCa24496)

···› Is it justifiable for an employer and employees to revise wages downward through a mutual agreement?

If an employer and employees agree to reduce wages in an effort to revitalize the business, such downward wage adjustment is regarded as being based on a justifiable reason. In this case, employees may not claim the difference between the pre-adjustment wage and the reduced wage. (Seoul Appeals Court ruling on July 24, 1981: No. 81Da204)

2) Equal treatment

Applicable legislation: Article 6 of the LSA (Equal treatment)

An employer shall not discriminate against workers on the grounds of gender, nationality, religious beliefs or social status, in terms of the conditions of employment.

[Explanatory notes]

···› No employer may discriminate against workers in terms of employment conditions on the grounds of gender, nationality, religious beliefs or social status, without any other reasonable justification.

···› 'Act on the Gender Equality Employment and Support for Work-Family Balance' , which is aimed at promoting the social and economic status of working women, provides for gender equality in employment; maternity protection; vocational ability development for working women; and promotion of their employment.

[Court rulings]

···› Is it allowed to set different retirement ages for male and female workers of the same department?

Suppose a collective agreement provides that the retirement age is 55 for men and 53 for women although they are both working in the same department. Such provision is against Article 5 of the LSA and Article 8 of the Equal Employment Act and, therefore, is invalid.
(Supreme Court ruling on April 9, 1993: No. 90Da16245)

···› Is it legally possible to establish different retirement ages for men and women if such an action is in accordance with reasonable standards?

If the retirement age of female workers is different from that of male workers and such difference is based on the classification of job responsibilities or job positions, which in turn takes into account the nature and quality of the work provided, employment status and other conditions, the difference of retirement ages is not legally invalid.
(Supreme Court ruling on April 9, 1991: No. 90Da16245)

···› Wage differentials between occupations are not discriminatory treatment prohibited under the LSA.

Even in the case of employees working at the same workplace, it is the employer's authority to determine positions and duties of employees considering every aspect including types, characteristics, and difficulties of jobs and experience of employees, and to determine and pay the corresponding amounts.
(Supreme Court ruling on July 30, 1996: No. 95Da12804)

···› How can 'the same wage for the same work' be defined?

Article 8 (1) of the Labor Standards Act (LSA) provides that 'an employer shall pay the same wage for the work of the same worth at the same workplace'. 'Work of the same worth' refers to the same work, or essentially the same work, of comparable men and women at the same workplace, and includes the work which is, by objective job evaluations, essentially the same although different duties are involved. In order to determine whether two different employees are engaged in work of the same worth, overall considerations should be made about skills, effort, responsibility and working conditions that are required to perform the jobs and the employees' educational attainment, occupational experience and consecutive service period, as prescribed in Article 8(2) of the LSA. More specifically, 'skills' refers to the objective level of job performance ability based on qualifications, academic degrees, acquired experiences, etc.; 'effort' means labor intensity, that is, physical and mental effort required to perform the particular job; 'responsibility' refers to the nature, scope and complexity of the obligations inherent in the particular job, and the degree to which the employer depends on the particular job; and 'working conditions' means the

physical working environment which the employee concerned is normally exposed to while at work, such as noise, heat, physical and chemical risk, isolation and being cold or hot. (Supreme Court Ruling on March 14, 2003: No. 2002Do3883)

···› Employees hired in terms of the employer's obligation to hire national patriots or veterans

If regulations on the workforce number, requirements for new employment, salary, etc. are rationally determined considering all circumstances, including characteristics and types of work provided by employees at the concerned workplace; and supply and demand of manpower, the regulations may differ depending upon types of jobs and positions among employees. Therefore, just because personnel regulations determined by the employer based on such criteria are different or disadvantageous compared to those of other companies in the same industry, the regulations may not be considered invalid. Also, the employees will not be excluded from the application of the regulations on the grounds that they are hired following the employer's obligation to hire national patriots or veterans.
(Supreme Court ruling on Feb 26, 2002: No.2000Da39063)

3. Contract of Employment

1) Definition of "contract of employment"

Applicable legislation : Article 2 of the LSA

The term "contract of employment" in this Act means a contract signed to the effect that the signatory employee provides labor, for which the signatory employer pays a corresponding wage.

[Explanatory notes]

···› The contract of employment creates an employment relationship between the signatories; specifies how work and wage is to be provided; and establishes rights and obligations of the contracting parties (that is, the employer and the employee(s)).

···› For an employment relationship to be legally valid, there should be a contract of employment concluded, whether explicitly or implicitly, between the two parties concerned, or any other form of legally justifiable evidence.

[Court rulings]

···› Conclusion of contract of employment and application of rules of employment

The contract of employment is a consensual agreement. Therefore, in principle, the contents of the contract shall be confirmed through individual negotiation between employee and employer. However, these days, it is more common that a company which hires numerous employees standardizes and collectively prescribes the working conditions, etc., which constitute the contents of the contract of employment by stipulating them in the collective agreement and rules of employment. Therefore, it is considered that the employment relations are concluded between employer and employees who have concluded the contract of employment pursuant to the rules of employment unless agreed otherwise.
(Supreme Court ruling on Jan 26, 1999: No.97Da53496)

2) Form of the contract of employment

[Explanatory notes]

···› There is no requirement that a contract of employment should take a certain form, and a contract may be concluded either in writing or verbally.

···› When a contract of employment is concluded in writing, the title may be 'written contract', 'written agreement' or whatever else and there is no restriction on the form that the contract takes.

···› In case there is no written form of employment contract but it is proven that work has been provided and wage payment has been made in return, it is regarded that a contract of employment has been entered into for such exchange of labor and payment, verbally or as an established practice.

[Court rulings]

···› In case there is a de facto employment relationship, is a contractual employment relationship established between the two parties concerned?

···› The employer-employee relationship provided for in Article 756 of the Civil Law does not necessarily require a valid employment relationship between the two parties. Rather, even when a person performs some work for another person under his/her instruction and supervision and in compliance with his/her intention, the two persons are also in an employer-employee relationship.
(Supreme Court ruling on Sep. 30, 1994: No. 94Da14148)

3) Explicit statement of working conditions

Applicable legislation : Article 17 of the LSA [Statement of Working Conditions]

An employer shall clearly state wages, work hours, leaves pursuant to Article 55, annual paid leave pursuant to Article 60, and other working conditions prescribed by the Presidential Decree to the relevant workers at the time when he enters into a labor contract with them. In this case, the matters concerning constituent items, calculation methods and payment methods of wages, work hours, leaves pursuant to Article 55, and annual paid leave pursuant to Article 60 shall be stated in writing and shall be issued to the employee at the request of the employee.

[Explanatory notes]

···› In case of concluding the contract of employment, the employer shall state the matters listed below orally or in writing:
- Wage
- Working hours
- Paid days-off
- Annual paid leave
- Location of work and types of work to be performed
- Matters to be included in the rules of employment

···› However, it is necessary that components of the wage and the methods of calculating and paying the wages, working hours, paid days-off and annual paid leave should be stated in writing.

[Court rulings]

···› Period of extinctive prescription of claims for damages in case of violation of stated working conditions

The purpose of Article 22 and Article 23 is to prevent a situation where employees are compelled to work regardless of their will by offering prompt assistance to them, because it is not easy for the employees to free themselves from the binding power of a contract of employment-even though they have found the working conditions that the employer stated at

the time of the contract are different from the actual working conditions after the conclusion of the contract. Therefore, the right to immediately terminate the contract pursuant to Article 23 may not be exercised once a certain amount of time has lapsed after concluding the contract. In this case, based on the purposes and contents of the Acts, the period of extinctive prescription of claims for damages is judged as three years, pursuant to wage claims of Article 42 regardless of working conditions.
(Supreme Court ruling on Oct 10, 1997: No.97Nu5732)

4) Term of the contract of employment

Applicable legislation : Article 4 of the Act on Protection, etc.of Fixed-term and Part-time Employees (Employment of fixed-term employees)

① An employer may hire fixed-term employees for a period not exceeding two years (In the case of repeated fixed-term labor contracts, the sum of the periods of such contracts shall not exceed two years). However, an employer may hire fixed-term employees for a period in excess of two years in cases falling under any categories listed below (See explanatory note)

② Notwithstanding the fact that those grounds enumerated in the proviso of paragraph (1) do not exist or cease to exist, if an employer hires fixed-term employees for more than two years, the fixed-term employees shall be considered as workers who have made a labor contract with no fixed term.

[Explanatory notes]

···› As the Act on Protection, etc., of Fixed-term and Part-time Employees limits the period of employment of fixed-term employees to up to two years, the regulation on maximum period of employment contract (one year) of the LSA was abolished.

···› Parties to the employment contract may freely set a term of the contract within the period of employment of fixed-term employees (two years)

···› If an employer hires fixed-term employees for more than two years or the

sum of period of repeated fixed-term employment contracts exceed two years, the fixed-term employees shall be considered as workers who have made a labor contract with no fixed term. However, the limitation of period of employment contract shall be applied to the cases of concluding or renewing employment contracts, or extending the period of existing employment contracts after July 1, 2007.

Exception of limitation of period of employment contracts

(Article 4 of the Act on Protection, etc., of Fixed-term and Part-time Employees and Article 3 of the Enforcement Decree of the said Act)

An employer may hire fixed-term employees for a period in excess of two years in cases falling under any of the categories listed below:

- Where the period required to complete a project or particular task is defined;
- Where a fixed-term employee is needed to fill a vacancy until the concerned worker returns to work after the temporary suspension from duty, dispatch, etc;
- Where the period required for a worker to complete schoolwork or vocational training is defined;
- Where a fixed-term employment contract is made with the aged as defined in Article 2.(1) of the Aged Employment Promotion Act ;
- Where a fixed-term employee who has a doctor's degree (including doctor's degrees obtained overseas) works in the relevant field;
- Where a fixed-term employee who has a certificate of national technical qualifications pursuant to Article 9. (1).1 of the National Technical Qualifications Act works in the relevant field;
- Where a fixed-term employee who is a certified specialist pursuant to relevant laws of the fields listed below works in the relevant field.

1. Certified architect	2. Certified labor consultant
3. Certified public accountant	4. Licensed customs agent
5. Patent attorney	6. Attorney at law
7. Actuary	8. Claim adjuster
9. Certified public appraiser	10. Veterinarian
11. Tax accountant	12. Pharmacist
13. Chinese herbal medicine practitioner	14. Chinese herbal pharmacist
15. Chinese herbal medicine dispenser	16. Doctor
17. Dentist	18. Oriental doctor
19. Certified management consultant	20. Certified technology consultant
21. Commercial pilot	22. Air transport pilot
23. Air traffic controller	24. Flight engineer
25. Aviator	

[Court rulings]

···› With a contract term being fixed, how is the employment relationship terminated?

Once a contract term is determined, the employment relationship between the parties shall be automatically terminated, unless under exceptional circumstances, after the fixed duration is exhausted without any additional procedure, such as a notice from the employer.
(Supreme Court ruling on Feb 10, 2006: No.2005Du15762)

When the employer notifies an employee, before the maturity of a contract term, that the contract will be terminated on the given date and will not be renewed, such notification may not be regarded as a notice of dismissal.
(Supreme Court ruling on May 29, 1998: No. 998Du625)

5) Non-compliance with the conditions of employment

Applicable legislation : Article 19 of the LSA (Violation of conditions of employment)

If any of the conditions of employment set forth (in the contract) is found to be inconsistent with actual conditions, the employee concerned shall be entitled to claim damages resulting from the breach of the conditions of employment or may terminate the contract immediately.

[Explanatory notes]

···› In case the conditions of employment contained in the contract are not fulfilled in actuality, the employee concerned is entitled to request the employer for compliance with the employment conditions as specified in the contract, or to terminate the contract without delay.

···› For any damages resulting from such non-compliance, the employee may file a complaint for compensation to the Labor Relations Commission.

[Court rulings]

···› In which cases can damage claims be lodged with the Labor Relations Commission?

An employee may lodge a claim for damages pursuant to Article 23 of the former LSA with the Labor Relations Commission when the employer has caused damages to the employee by violating the working conditions (wages, working hours, and other working conditions) stated at the time of signing the employment contract. Even though the employer has caused damages to the employee by violating other regulations of the LSA (for example, Article 27.(1) of the said Act) and remedy order prescribed in the Trade Union Act, it cannot be considered as a violation of Article 23. Therefore, in this case, the employee cannot claim for damages pursuant to Article 23 to the Labor Relations Commission and the Labor Relations Commission does not have the authority to examine and decide upon such claims. (Supreme Court ruling on Feb 28, 1989: No. 87Nu496)

Damage claim to the Labor Relations Commission is not permitted in every case where there is a violation of the working conditions, but is permitted in those cases where the working conditions stated "at the time of signing the employment contract" are different from the actual working conditions. (Supreme Court ruling on April 12, 1983: No. 82Nu507)

6) Tentatively arranged hiring, work trial period and probationary period

(1) Tentatively arranged hiring

[Explanatory notes]

···› Tentatively arranged hiring refers to an employment contract where the company agrees to employ the applicants who are students at the time of their job application if they meet the requirement of "graduating from school" after a certain period of time, in order to secure the labor required for the operation of the company

···› In the case of tentatively arranged hiring, the application for the pre-employment test by the graduate-to-be shall be considered as the application, and the employer's notification of the tentatively arranged hiring shall be considered as the consent. Therefore, the employment contract is considered as concluded from the moment that the notification was sent.

···› When the employer who cancels his/her plan to employ a job applicant after tentatively arranged hiring, without giving a justifiable reason, this constitutes an employee dismissal specified in Article 30 of the LSA.

[Court rulings]

···› As a notification canceling the tentatively arranged hiring constitutes a dismissal notice, such cancellation is not valid unless the employer gives reasonable justification.

The employer sent the job applicants a final notice of successful application at the end of November 1997 and asked them to submit necessary documents for employment. Such notification and submission of required documents constitute a concluding of a contract of employment under which they would start to work on March 1, 1998 on the condition that they graduate from university in Feb. 1998. Accordingly, the notification by the employer on Aug. 18, 1998 that their tentative hiring was cancelled, was essentially a dismissal notice, and therefore invalid, if the employer has no reasonable justification for such cancellation.
(Seoul District Court Ruling on April 30, 1999: No. 98Gahap20043)

(2) Work trial period

[Explanatory notes]

···› "Work trial period" refers to a certain period of employment relationship during which a contract of employment is not concluded and the employer buys time to see if the prospective employee is right for the job.

···› The duration of the trial period is, in principle, determined by agreement between the employer and the employee. However, it is not acceptable to

prolong the period to the extent that is inconsistent with the intended purpose of the trial period. (In general, the trial period lasts more or less than 3 months, which is similar to the probationary period.)

[Court rulings]

···› When there is no explicit indication of a work trial period in a contract of employment, what is the status of the employee?

In the case in question, the rules of employment provide that a trial period can be optionally adopted for recruitment of an employee. Therefore, when a contract of employment is signed, whether a trial period will apply to the employee or not should be specified in the contract. If the contract does not contain any provision that a trial period will be used for the employee, it is acknowledged that the employee is hired as a regular employee, not on a trial basis. (Supreme Court ruling on Nov. 26, 1991: No. 92Da4914)

···› In what cases can an employer fire a work trial worker or refuse to employ him/her after the end of the trial period?

If both the employer and a worker agree that the latter will work first as a probationary worker for a given period of time and then can be employed as a regular employee only when the worker proves his/her qualifications during the probationary period, the probationary worker is deemed to be in "a relationship of trial employment," which means that the employer has the right to fire the worker during the probationary period. Therefore, given that the trial period is intended to determine, prior to hiring a person as a regular employee, whether the person is right for the job concerned in terms of his skill, personality and ability, the dismissal of a work trial worker is allowed on more occasions than the dismissal of a regular employee. However, the dismissal during a trial period should be based on an objective evaluation of the worker's behavior and ability, and is justifiable only when the reason given is objective enough and socially acceptable.
(Civil Dept. of Seoul District Court ruling on May 31, 1991: No. 90GaHap18673)

···› Judging from the circumstances including the performance evaluation system that the company conducted among employees who are in a work trial period, it is not considered that there have been valid reasons for cancellation of the trial employment contract.

1. Dismissal of employees who are in a work trial period, or refusal to

conclude a regular employment contract after the work trial period is considered as the employer's exercise of reserved right of cancellation. This right is more widely granted than the right of cancellation of regular employment contract, considering the purpose of the work trial system which is to observe and determine the eligibility of the employee concerned for the job based on work performance, quality, personality, and sincerity. However, even in this case, there shall be objective and reasonable justification for dismissal in accordance with social norms.

2. The defendant bank has asked each branch to allocate grade C and D to the allotted number of people and has asked some branch managers to rewrite the work performance records after the submission. The managers rewrote the records themselves in violation of the regulations on grading work performance, which stipulate that the grader and confirmer shall not be the same person. Also, the work performance records and the work performance statements did not clearly state how below par standard the employees' work performance was and how it affects the works. Therefore, it is not considered acceptable that the defendant bank had valid reasons for canceling the relevant employment contract concluded with the plaintiffs.
(Supreme Court ruling on Feb 24, 2006: No.2002Da62432)

···› Where the application of the work trial period to a new employee is prescribed as an option in the rules of employment:

In cases where the application of the work trial period to a new employee is prescribed as an option in the rules of employment, it shall be clearly stated in the contract of employment whether or not the period shall be applied to the concerned employee. In the event that the application of the work trial period is not stated in the contract of employment, it is deemed that the employee was employed as a regular employee, rather than as a trial employee. (Supreme Court ruling on Nov 12, 1999: No.99Da30743)

(3) Probationary period

[Explanatory notes]

···› The probationary period refers to a given period of time during which, after the employer and the worker signed a regular contract of

employment, the latter is intended to improve his/her adaptability to the job and performance at work.

···› Employees in a probationary period, just like regular employees, are fully protected by the provisions of the LSA, which means that probationary employees may not be dismissed unless justifiable reasons are given.

···› With regards to a probationary employee who has been in such period for less than 3 months, the employer may dismiss the employee, when there is a justifiable reason, without giving a 1-month advance notice for such dismissal (Article 35 of the LSA).

···› Wages of probationary employees can be lower than a regular employee based on the rules of employment or the contract of employment.

4. Wage and Retirement Benefits

1) Definition of "wage"

Applicable legislation : Article 2 of the LSA

The term "wage" in this Act means wages, salary and any other types of payment that an employer gives to an employee as remuneration for the work done, regardless of the title by which such payment is called.

[Explanatory notes]

···› The definition of wage under the LSA contains 3 factors: ① it should be paid to an employee by an employer; ② it should be paid as remuneration for the work done; and ③ it includes a range of payments whatever they may be called.

···› Only when a type of payment is acknowledged as wage can it be reflected in calculating and applying normal wage and average wage as well as insurance premiums that are linked to the amount of wage.

[Court rulings]

···› Is the payment for compensation for actual expenses included in the wages?

According to Article 18 of the LSA, "wage" means wage, salary and any other kind of money or valuables, regardless of the titles, which the employer pays to a worker as remuneration for work. However, the compensation for actual expenses paid to an employee to compensate for the additional expenses required to conduct works in special working conditions or environment cannot be considered as remuneration for work. Therefore, the payment for compensation for actual expenses is not included in wages. (Supreme Court ruling on Nov 9, 1990: No. 90DaKa4683)

Qualify as wage	Do not qualify as wage
-Meal expense (allowance), education expense, physical fitness expense, and family allowance that are paid in accordance with the collective agreement, the rules of employment or an established practice - Retirement pay and business suspension allowance - Bonus paid on a regular basis - Benefits in lieu of monthly or annual paid leave	- Payments made arbitrarily or favorably on special occasions of individual employees as a token of congratulation or condolence - Benefits paid in lieu of a 30-day dismissal notice - Payments made favorably on special days, such as the Company Foundation Day - Payments made to cover expenses of equipment purchase and business travel, and expenses for business expedience

⋯› If the money and other valuables are paid, regardless of the provision of labor, such compensation is not included in wages, even if paid regularly and continuously.

Since it is commonplace that wages paid to employees are usually provided regularly and continuously, if the occurrence of reasons for payment is not definite and the payment is provided temporarily, it can be considered that the payment is made regardless of the provision of work. However, the logic that the remuneration paid regularly and continuously only are related to provision of works and those paid irregularly and temporarily are unrelated to the provision of work is not always evident. Therefore, even if the payment is irregular, if it can be considered that the payment is made as a result of the provision of work based on other circumstances, it is included in wages. On the other hand, even if the payment is made regularly and continuously, if it can be considered that the payment is made regardless of the provision of work, it is not included in wages-even if the employer has the liability to pay pursuant to collective agreement, rules of employment, employment contract, etc.

(Supreme Court ruling on Aug 24, 2006: No.2004Da35052)

2) Normal wage

Applicable legislation: Article 6 of the Enforcement Decree of the LSA (Normal wage)

The term "normal wage" refers to the hourly-, daily-, weekly- or monthly-based, or contracted amount of payment which is predetermined for a given amount of work or total work and is to be made on a regular or uniform basis.

[Explanatory notes]

···› The notions of normal wage and average wage should be distinguished from the wage actually paid to an employee. They are the wage units which are used as a base when there is a need to calculate the wage or other wage-linked payments of a particular employee.

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

···› Normal wage is used as a base when there is a need to calculate the following:
- Pay for overtime, night or holiday work
- Benefit in lieu of dismissal notice
- Benefit in lieu of annual paid leave

➡ Normal wage applies to the following payments:

Category	Payment
Dismissal notice allowance(§ 26)	At least 30 days' normal wage
Overtime · night · holiday work premium (§ 56)	At least 50% of normal wage
Allowance in lieu of paid annual leave(§ 60 ⑤)	100% of normal wage or average wage
Allowance in lieu of statutory paid holidays or leave	100% of normal wage

[Court rulings]

···› Concept and scope of normal wage

In principal, payment which is to be made on a regular or uniform basis for a given amount of work or total work is considered as normal wage pursuant to the former LSA. Considering the purpose of legislation, and function and necessity of normal wage, in order to be considered as normal wage, the payment shall be included in regular payment which is to be made on a regular or uniform basis. Therefore, the wages changing upon the actual work performance cannot be considered as the regular wages and are not included in normal wages.
(Supreme Court ruling on Apr 24, 1998: No.92Da28421)

···› The meaning of 'uniform basis' in the definition of normal wage

According to the definition of normal wage, payment which is to be made on a 'uniform basis' can be interpreted as wages not only paid to 'every employees' but also paid to 'employees who met certain requirements or criteria' However, in this context, 'certain requirements' shall be 'fixed requirements' considering the concept of normal wage whose purpose is to calculate 'regular and average wage.'
(Supreme Court ruling on May 27, 1993: No.92Da20316)

···› Are family allowance, long service allowance, etc., included in normal wage?

Normal wage refers to the hourly, daily, weekly, monthly-based, or contracted amount of payment which is predetermined for a given amount of work or total work, and is to be paid on a regular or uniform basis. It is the fixed wage prescribed to be paid on a regular or uniform basis during the period of wage calculation as remuneration for work, depending upon the quantity and quality of work, irrespective of actual working days and amount of wage. Therefore, ex-gratia and irregular payment or payment made to some employees, regardless of the quantity and quality of work, is excluded from normal wages. If a company pays family allowance only to employees with a spouse, children, or parents living in the same house, this is a payment which is made regardless of the quantity and quality of work. Also, if a company pays a pre-determined amount depending on the period of continuous service only to employees who are in three years or more of continuous service as a long service allowance, this payment is an ex-gratia

allowance to give preferential treatment to the employees who are in continuous service for a long period of time, regardless of the quantity and quality of work. Therefore, family allowance and long service allowance cannot be included in normal wages.
(Supreme Court ruling on Oct 28, 1994: No. 94Da26615)

···› When the expenses for meals, transportation and physical fitness and the long service allowance have been paid to an employee on a regular and uniform basis, are those allowances included in the normal wage?

In the case in question, the employer has paid monthly allowances for meals and transportation at a given amount, and a regular physical fitness allowance of 50 or 100% of monthly basic pay. These allowances, which are paid to all employees in return for a given amount of work or total work on a regular and fixed-rate basis, are considered as normal wage. On the other hand, the long-term service allowance is offered on condition of "continuous service for a certain period of time." That is, whether this allowance is paid to a particular employee or not depends on the employee's performance at work. Accordingly, the long-term service allowance, which is not a fixed payment, is not classed as normal wage.
(Supreme Court ruling on May 10, 1996: No. 95Da2227)

···› The year-end special bonus and commuting allowances are wages paid regularly and uniformly and, therefore, included in normal wages.

The LSA defines "wages" as wages, salary and any other kind of money or valuables, regardless of their titles, which the employer pays to a worker as remuneration for work. In principle, money or valuables paid to a worker regularly and uniformly as remuneration for a given amount of work or total work, is considered as wages included in normal wages. However, judging from the purpose of the LSA, and the function and necessity of the normal wages, in order to be included in normal wages, it has to be fixed wages paid regularly and uniformly. Therefore, money or valuables which are not fixed wages, such as those paid irregularly and not uniformly, or the payment of which and the amount thereof depend on one's work performance, are not included in normal wages. In this case, "paid uniformly" not only means "paid to every worker" but also means "paid to workers meeting certain requirements or criteria," and these "certain requirements" shall be "fixed

terms" according to the purpose of the normal wages, which is to calculate the "fixed and average wages." In this light, the year-end special bonus and commuting allowances of the concerned case can be considered as fixed wages paid to workers regularly and uniformly as remuneration for work and, therefore, included in normal wages.
(Supreme Court ruling on Jun 28, 2007: No.2006Da1388)

···› Is it valid to make an agreement between labor and management to exclude an allowance that is supposed to be included in the normal wage?

If an agreement between labor and management is considered as valid to exclude an allowance that is supposed to be included in the normal wage, the purpose of regulations which prescribe the payment of additional allowances for overtime, night, and holiday work, and to pay normal wage to the discharged employee for a certain period of time will be disregarded. In this light, the agreement between labor and management to exclude allowances which are supposed to be included in the normal wage does not meet the criteria of working conditions stipulated in Article 22 of the LSA, and therefore, is invalid.
(Supreme Court ruling on Jun 15, 2007: No.2006Da13070)

3) Average wage

Applicable legislation : Article 2 of the LSA

The term "average wage" in the Act refers to the amount calculated by dividing the total amount of wage paid to a particular employee during three calendar months prior to the date on which the need of such calculation occurred by the total number of calendar days of the three calendar months. This shall also apply mutatis mutandis to an employee hired for less than three months.

[Explanatory notes]

···› For the purpose of average wage computation, the amount paid to reimburse actual costs or the temporary amount paid during the three months is excluded from the 'total amount of wage.' The 'days of the three months' here are calendar days of the three months, not the days

when the employee actually worked during the period.

···› If the resultant average wage is lower than the normal wage of the same employee, the latter shall take the place of the former (Article 2 (2) of the LSA)

Average wage applies to the following payments:

Category	Payment
Retirement allowance(§ 34)	At least 30 days' average wage for each year of consecutive service
Suspended work allowance(§ 46)	At least 70% of average wage
Allowance in lieu of annual leave(§ 60)	100% of average wage or normal wage
Occupational accident compensation(§ 79- § 84)	50~1,340 days' average wage
Wage cut(§ 95)	On each occasion of wage cut, the wage may not be reduced by over 50% of 1 day's average wage.

···› The following periods shall not be counted in calculating average wage:

- Unworked period due to medical care required as a result of occupational injury or illness;
- Unworked period due to a reason for which the employer is accountable;
- Probationary period of the employee;
- The period of time during legal industrial actions;
- Period of pre- or post-natal or childcare (parental) leave.

···› The following periods shall be included in calculating average wage:

- The period of time during which the employee is absent from work or he/she has his/her work suspended due to a reason attributable to him/herself (April 17, 1968: No. Geun-gi 14559-3029)
- The period during which the employee has his/her position revoked after he/she was arrested and indicted for a criminal offense. (Supreme Court Ruling on April 12, 1994: No. 92Da20309)

[Court rulings]

···› What is included when calculating average wage?

If a payment is made to an employee by his/her employer in return for his/her work; is made continually and regularly; is the employer's obligation under a collective agreement, the rules of employment, a wage agreement, a contract of employment or an established practice; and is uniformly made to all the employees meeting certain conditions, the payment shall be treated as a wage element that is counted in calculating average wage regardless of what it is called.
(Supreme Court Ruling on Feb. 11, 2003: No. 2002Da50828)

···› Is the motorist allowance included in average wage?

In the case in question, the motorist allowance is paid to employees of a certain position or higher who drive their own cars from home to work. This allowance is neither given to all employees nor directly or closely linked to the work done by an employee. Rather, it totally depends on the particular or coincidental situation of an employee, that is, whether he/she drives his/her own car to work. If the motorist allowance includes the transportation allowance, which is paid to all employees irrespective of their car ownership, the amount in excess of the transportation allowance is not seen as being paid in return for the labor provided. Therefore, the excess portion is not considered as average wage, even though the employer has paid the motorist allowance on a regular basis without checking whether actual costs had been incurred.
(Supreme Court ruling on May 12, 1995: No. 94Da55934)

···› When an employee was removed from his/her position because he/she had been detained and indicted on charges of committing a criminal offense, should the period of removal be counted in calculating his/her average wage?

Both the period during which the employee was removed from his/her position after he/she had been detained on charges of a criminal offense, and the wage paid during the period should be counted in calculating his/her average wage. If, as a consequence, the average wage becomes lower than his/her normal wage, the normal wage should replace the average wage for the purpose of calculating his/her retirement allowance.
(Supreme Court ruling on April 12, 1994: No. 92Da20309).

···› When an employee did night work or overtime work during the reference period of average wage calculation with the intention of increasing his/her average wage, should this period be included on the calculation?

In case the employee, shortly before his/her retirement and by intention, worked too many night or overtime work hours to be rightly included in the average wage calculation, such period should be excluded from the calculation. Instead, the wage of the preceeding three months should be used as a base for calculation of his/her average wage.
(Supreme Court ruling on Feb. 28, 1995: No. 94Da8631).

···› In case the rules of employment provided that even when an employee leaves the company in the middle of a month, he/she shall be paid a full month's wage, how does that provision influence the average wage calculation?

Even when the rules of employment contain such a provision, it should be interpreted simply as a favor by the employer towards retiring employees. For the purpose of calculating the average wage and the retirement allowance, however, a full month's wage should not be added to the wage of the last three months before the retirement date.
(Supreme Court ruling on May 12, 1995: No. 97Da5015)

···› If an employee, close to retirement, received a special business performance bonus, may the special bonus be counted in the average wage?

The employee received such special bonus, which was linked to business performance of the year, but it was given on a one-off basis when he was nearing retirement. However, it is not certain whether the employee would continue to receive such bonus on a regular basis. Moreover, the bonus was not paid as remuneration for the work done by the employee. Accordingly, the special performance bonus may not be counted in his/her average wage, which, in turn, is a base for calculation of his retirement allowance.
(Supreme Court ruling on Jan 20, 1998: No. 97Da18936)

···› If a company has paid special productivity incentives on a regular, continued, and uniform basis, such incentives are included in average wages.

Even though the company began to pay productivity incentives as a result of labor dispute mediation and made an agreement to pay the incentives once

based on its business performance, if the company has been paying the special productivity incentives on a regular, continued, and uniform basis regardless of business performance of the company or the employees, such incentives are included in average wages whose payment obligation is on the employer according to the contract of employment, custom of labor relations, etc. (Supreme Court ruling on Oct 23, 2001: No. 2001Da53950)

···› Are incentives included in average wage?

If a bonus is paid on a regular and continued basis and the amount is pre-determined, the bonus can be considered as a wage paid for remuneration for work. However, if the bonus is paid on a temporary basis, and reasons for payment are indeterminate, it cannot be considered as wage. In this case, the "incentives" paid to the employees cannot considered as wages paid for remuneration for work but can only be considered as a partial distribution of financial outcome that the amount of payment varies depending on the work performance and achievement of zero strikes. Therefore, in this case, the bonus is not included in average wage which is a base for calculation of retirement allowance.
(Supreme Court ruling on Feb 23, 2006: No.2005Da54029)

Examples of payments included in average wage and normal wage

(Ministry of Labor Regulation No. 551 (Nov 28, 2007)

Examples	Normal wage	Average wage	others
1. Basic wage predetermined to be paid for contractual working hours or legal working hours	○	○	
2. Fixed wage predetermined to be paid on a regular and uniform basis as daily, weekly or monthly for contractual working hours or legal working hours			
① Allowance paid under pre-designated conditions according to the importance of the job or position : Job allowance (for a job related to finance or revenues/expenditure), position allowance(for team head or director), etc.	○	○	
② Allowance paid to resolve the gap between positions or adjust to prices: price allowance, adjustment allowance, etc.	○	○	
③ Allowance paid to employees with skills, qualifications or licenses or those engaged in special work : skill allowance, license allowance, special work allowance, risky work allowance, etc.	○	○	
④ Allowance paid on a regular and uniform basis to employees working in a special location: remote area allowance, cold area allowance, etc.	○	○	
⑤ Allowance paid at a fixed rate, regardless of the days worked, to employees who drive/steer/ navigate a bus/taxi/truck/ship/airplane: driving allowance, air flight allowance, navigation allowance, etc.	○	○	
⑥ Allowance paid at a fixed monthly rate, regardless of job performance, in order to improve production skills and efficiency: production promotion allowance, efficiency allowance, etc.	○	○	
⑦ Wage or allowance corresponding to the payments in 1~6 above	○	○	

Examples	Normal wage	Average wage	others
3. Payments whose amount depends on the hours or days worked and payments made for other periods than the wage reference period			
① Extended work allowance, night work allowance, holiday allowance, monthly paid leave allowance, annual paid leave allowance, menstruation leave allowance paid pursuant to the LSA and Designation of Workers' Day Act, and holiday work allowance paid in return for work on holidays designated under the rules of employment, etc.		○	
② Allowance paid at a given rate only for the days worked: boarding allowance, flight allowance, navigation allowance, underground allowance, etc.		○	
③ Allowance paid on a regular basis depending on work performance to improve production technology and efficiency: production promotion allowance, efficiency allowance, etc.		○	
④ Allowance paid to promote preferential treatment or non-absence of employees who are in continuous service for a long time: full attendance allowance, consecutive service period or regular attendance allowance, etc.		○	
⑤ Day watch or night watch allowance paid in a predetermined amount under the rules of employment, etc.		○	
⑥ Bonus			
a. In case it is paid according to the conditions, rates or timing under the rules of employment, or paid to all employees in an established practice so that employees are expected to be paid: regular bonus, physical training expense, etc.		○	
b. In case it is never paid as an established practice but rather paid temporarily or indeterminately according to decision or goodwill of employer depending on business performance: distribution of business performance, productivity bounty, rewards, incentives, etc.			○

Examples	Normal wage	Average wage	others
⑦ Gratuity (tip): In case the employer controls and distributes it.		○	
4. Payments made to support employees' income or promote their welfare, regardless of the hours worked			
① Commute allowance, vehicle maintenance expense			
a. In case it is paid on a regular and uniform basis to all employees		○	
b. In case it is paid depending on days worked or to only part of the employees			○
② Company residence allowance, winter fuel allowance, winter kimchi allowance			
a. In case it is paid on a regular and uniform basis to all employees		○	
b. In case it is paid temporarily or to only part of the employees			○
③ Family allowance, schooling allowance			
a. In case it is paid on a uniform basis to all employees including one-person households		○	
b. In case it is paid depending on the family size or only part of the employees (paid under the name of study grant, education expense support, etc.)			○
④ Meals, meal allowance			
a. In case it is provided on a uniform basis to all employees according to the collective agreement, the rules of employment, etc regardless of days worked.		○	
b. In case it is provided depending on days worked			○

Examples	Normal wage	Average wage	others
5. Payments excluded in calculation of wage			
① Suspended work allowance, retirement allowance, dismissal notice allowance			○
② Payment given simply to support employees' income or promote their welfare: congratulatory money, condolence money, medical expense, occupational accident money, physical fitness expense, clothing expense, use of shuttle bus, dormitory or housing, etc.			○
③ Social security and compensation insurance contributions: employment insurance premium, health insurance premium, national pension, driver insurance			○
④ Payments given to disburse the money spent by the employees: business trip expense, information activity expense, business promotion expense, work tools expense			○
⑤ Payments made for a temporary or unexpected reason, or an indeterminate, indefinite or rare incidence: wedding allowance, death/injury/disease allowance, etc.			○
⑥ Facilities of company and repairing expense : tool damage or loss expense, etc.			○

4) Overtime, night, holiday work allowance

Applicable legislation : Article 56 of the LSA (Overtime, night and holiday work)

The employer shall pay additional remuneration of 50 percent or more of the normal wage rate, for overtime work, night work (work provided between 10 p.m. and 6 a.m.) and holiday work.

[Explanatory notes]

···› Overtime, night, holiday works refer to the hours in excess of the standard working hours: work hours in excess of 8 hours a day or 40 hours a week; night work done between 10 p.m. and 6 a.m.; and holiday work done on a Sunday or a public holiday.

···› The employer shall pay at least one and a half times the normal wage rate for overtime, night, holiday work.

[Court rulings]

···› Is the employer obliged to pay at a premium rate for the hours of work that are in excess of the contractual working hours, but are still within the limit of the LSA standard working hours (that is, excess hours of work within the framework of the standard hours)?

When an employee works more than the contractual hours but the extended hours are still within the framework of the LSA standard working hours, the excess hours are not regarded as overtime hours as defined in Article 55 of the LSA. Accordingly, the employer has no obligation to pay a premium rate for the excess hours.
(Supreme Court ruling on June 26, 1998: No. 97Da14200)

···› When a contract of employment provides for the so-called "inclusive wage," which includes all employee allowances and benefits in the monthly or daily rate, is the contract effective with regard to such provision on wage payment?

In principle, the employer, in concluding an employment contract, is required to set a basic pay rate by which to calculate employee benefits and allowances, say, for overtime, night or holiday work. Nevertheless, in case

the employer offered an inclusive wage, that is, a monthly or daily flat rate which includes all employee benefits and allowances, without setting a separate basic rate, such wage scheme is legally valid, on the conditions that the employer adopted the inclusive wage option after considering the nature of the particular work; the wage scheme is good for both the convenience of calculation and the employees' motivation to work; the employer obtained prior consent from the employees affected; the scheme is not disadvantageous to the employees in light of the collective agreement or the rules of employment; and all relevant things being considered, the scheme is justifiable. (Supreme Court ruling on April 25, 1997: No. 95Da4056)

···› Is the work done on a statutory public holiday also counted as "holiday work," for which the employer is obliged to pay at the 50% premium rate?

In case an employee worked, for an inevitable reason attributable to the employer, on a statutory public holiday which is not a weekly holiday, it is appropriate that the employee should be paid at a higher rate for the work than a normal rate. Therefore, the work done on a statutory public holiday that is included in the holidays under the collective agreement or the rules of employment, as well as the work done on a weekly holiday, is entitled to a premium rate of pay.
(Supreme Court ruling on May 14, 1991: No. 90Da14089)

···› Do the LSA provisions on overtime, night or holiday work pay also govern the employees who work every other day?

The employer in question alleged that, as for the employees who work 24 hours every other day, the actual overtime work hours should be halved for the purpose of pay calculation and the work done on a holiday is not entitled to a separate premium pay rate. However, there is no legal basis for such allegation. (Supreme Court ruling on July 22, 1997: No. 96Da38995)

···› When an employee worked overtime hours on a holiday, how is the premium pay calculated?

In case an employee did overtime work on a holiday, each of the additional pay rates for overtime work and holiday work should be added to the employee's normal rate.
(Supreme Court ruling on March 22, 1991: No. 90Da6545)

5) Payment of wage

Applicable legislation : Article 43 of the LSA (Payment of wage)

① Wage shall be directly paid in full to the employee in cash: however, if otherwise provided for by special clauses of laws and regulations or a collective agreement, part of the wage may be deducted or be paid by means other than cash.
② Wage shall be paid once or more per month on a given date.

[Explanatory notes]

···› The wage should be paid to the employee him/herself, not to his/her parents or a person with such parental authority, a guardian, an arbitrary proxy or a union.

···› The wage should be paid in full amount to the employee, which means that it is not allowed to deduct or reserve part of the wage in the name of a deposit for breach of contract, counterbalance of an advance loan, or obligatory savings.

Exceptions to the wage payment in full rule

The following may be deducted by the employer, notwithstanding the obligation of wage payment in full:
① Exceptions under laws and regulations: advance deduction of labor income tax; national pension contributions; and medical insurance contributions
② Exceptions under collective agreements: advance deduction of union membership dues (check-off system); and employee loans

···› Wage should be paid in circulating cash, except when laws and regulations or collective agreements contain special clauses in this regard.

···› Wage should be paid once per month or more frequently on a given date.

···› Attachment of wages of debtor (Civil Execution Law)
- In case where the monthly wage is KRW 1.2 million or less, full

attachment of the wage is restricted.

- In case where the monthly wage is more than KRW 1.2 million and KRW 2.4 million or less, the monthly wage, exclusive of KRW 1.2 million, may be subject to attachment.
- In case where the monthly wage is more than KRW 2.4 million and KRW 6 million or less, more than 1/2 of the monthly wage may be subject to attachment.
- In case where the monthly wage is more than KRW 6 million, the monthly wage, exclusive of "KRW 3 million +[{(monthly wage/2)-KRW 3 million}/2]", may be subject to attachment.

[Court rulings]

···› Should wage be paid directly to the employee, even when he/she transferred the right to his/her wage to another party?

Even though the employee handed over the right to his/her wage to a third party, the principle of wage payment to the employee is still effective-that is, the employer should pay wage to the employee him/herself. As a consequence, the transferee of the right, even when he/she obtained the right in a proper and effective manner, may not request that the employer pay the wage to the transferee. The same can be said about the case when a person to whom an employee has transferred his/her wage claims, or who is mandated to collect his/her unpaid wage, exercise the right to a corresponding portion of the property of the debtor employer.
(Supreme Court ruling on March 22, 1996: No. 95Da2630)

Even when the wage claims have been transferred to a third party, the employer should pay the wage directly to the employee him/herself, except in the case where the wage claim is seized.
(Supreme Court ruling on June 29, 1995: No. 94Da18553)

···› An employer may deduct from an employee' s wage claim only when the employer can give a justifiable reason on which such deduction is based.

Art.42(1) of the LSA stipulates that "payment of wages shall be directly made in full to workers in currency", which is intended to support the protection of the employee from endangering his/her economic livelihood by ensuring payment of the full amount of the wage. It is generally forbidden to unilaterally offset the wage claim of the employee with the

claims on the employee, however, if the claims on the wage of the employee were offset by the employer with the consent of the employee, and it is acceptable under rational and objective reasons that the consent was made on the free will of the employee, then it is viewed that it does not violate Art.42(1) of the LSA. Nevertheless, crucial judgment needs to be made about whether the consent of the employee was made on his/her own free will. (Supreme Court Ruling on Oct. 23, 2001: No. 2001Da25185)

···› When the employees, who were fully aware of the financial difficulties of the company, signed an agreement on bonus return, which was passed as a circular notice among the employees, is the bonus return effective?

In the case in question, a company-wide plan was set up to persuade the employees to return their bonus and the employees' agreement on bonus return was a product of the plan. Nevertheless, the employees were fully informed of the financial difficulties of the company and the urgent need of bonus return, before they were urged to consent the planned bonus return. Therefore, the bonus return is legally valid.
(Supreme Court ruling on April 11, 2003: No. 2002Da71832)

···› Are monies or other valuables additionally paid to overseas dispatched employees included in total wages which are the bases for average wage?

If the payments made to an overseas dispatched employee exceed those of a domestic employee of the same grade, this shall be considered as wages paid temporarily under the special working conditions of overseas service. Therefore, even though the rules of employment stipulate that such excessive amount of wages shall not be included in total wages which are bases for average wages when calculating the amount of retirement allowance of overseas dispatched employee, the rules of employment cannot be considered as invalid.
(Supreme Court ruling on Dec 9, 1990: No.90DaKa4683)

6) Retirement Benefits

Applicable legislation : Article 4 of the Guarantee of Worker's Retirement Benefits Act (Establishment of Retirement Benefits System)

① An employer shall establish at least one of the retirement benefit systems (retirement allowance system or retirement pension system) in preparation for the payment of the benefits to workers who resign. However, this shall not apply to the workers whose continuous employment period is less than one year, or the workers whose average working hours per week during four weeks are less than fifteen hours.

② No discrimination is allowed within a same benefit scheme in establishing the retirement benefit systems under the provision of paragraph (1).

③ In case an employer intends to select a retirement benefit system of a specific type or switch already selected type of the retirement benefit system to another type, the employer shall obtain the consent of the labor union (in case where there is a labor union organized with a majority of the workers in the business) or the consent of a majority of the workers (in case where there is no labor union organized with a majority of the workers in the business) (hereinafter referred to as the "workers' representative").

④ In case where an employer intends to change any of the terms and conditions of the already selected or switched retirement benefit system pursuant to the provision of paragraph (3), the employer shall hear the opinion of the workers' representative. However, in case where the employer intends to modify the system disadvantageously to the workers, the employer shall obtain the consent of workers' representative.

Applicable legislation : Article 8 of the Guarantee of Worker's Retirement Benefits Act (Establishment of Retirement Allowance System)

① An employer who intends to establish a retirement allowance system shall establish a system under which the employer pays the workers the average wage of at least thirty days for each year of their continuous employment.

② Notwithstanding the provision of paragraph (1), an employer may calculate and pay a worker the retirement allowance for the continuous

employment period at the request of the worker even before the retirement. In this case, the continuous employment period for the calculation of the retirement allowance after such interim payment shall begin at the time of the interim settlement.

[Explanatory notes]

···› Retirement benefit systems consist of "retirement allowance system" and "retirement pension system." Retirement benefit systems apply to a workplace with five or more regularly employed workers. In case of a workplace with four or less regularly employed workers, the retirement benefit systems shall be applied from the date between 2008 and 2010 as prescribed in the Presidential Decree.

···› An employer shall establish at least one of the retirement benefit systems in preparation for the payment of the benefits to workers who resign. The employer shall select the retirement pension system under the agreement between labor and management, or shall select the existing statutory retirement benefit system. If the employer establishes no retirement benefit system, it is deemed that the retirement allowance system has been selected.

···› Retirement allowance

- An employer shall give a retiring employee retirement allowance, which is equivalent to at least 30 days' worth of his/her average wage per consecutive year of service.
- Within the same business, the employer shall not apply different calculation methods or progressive rates for the purpose of retirement allowance computation on the basis of employee status, job, division and location of work.
- At the request of an employee, the employer may compute and pay retirement allowance even before the employees retirement, if such advance payment is allowed by the business conditions.

···› Retirement pension system

- An employer accumulates more than a certain amount of money in the financial institution that operates the retirement pension business so that

employees can receive monthly or yearly pension, or lump-sum pension for retirement.

- The consent of the workers' representative is required to introduce the retirement pension system. Therefore, an agreement between labor and management is essential. If the labor and management fail to reach an agreement, the existing retirement benefit system is maintained.

[Court rulings]

···› Is it justifiable to conclude a special agreement to waive the right to retirement allowance or not to file a civil suit over retirement allowance?

According to the Labor Standards Act, retirement allowance is a kind of wage that is paid to an employee whose service period is longer than one year, after-the-fact at the time when his/her employment is terminated. In other words, the claim to retirement allowance is generated when consecutive service ends up with retirement. In this light, any prior agreement to waive the right to retirement allowance or not to file a civil suit over retirement allowance is a clear violation of the LSA and, therefore, is null and void. (Supreme Court ruling on March 27, 1998: No. 97Da49732)

···› Is an employee entitled to claim retirement allowance even when there is no scheme of retirement allowance established in the company he/she is working at?

Even when there is no specific scheme of retirement allowance in the company or the collective agreement contains no particular provisions on retirement allowance, the employee, if he/she meets qualifying conditions, is entitled to retirement allowance.
(Supreme Court ruling on Nov. 8, 1991: No. 91Da27730)

···› Is an employer obliged to give retirement allowance, even in the case of resignation or disciplinary dismissal?

Retirement allowance shall be given without any reduction in the amount, irrespective of the cause of retirement or dismissal (that is, whether it is voluntary retirement, resignation or disciplinary dismissal due to a criminal offense). (Supreme Court ruling on April 11, 1972: No. 71Da1033)

···› Is inclusion of retirement allowance in daily wages allowed?

Even when an employee is paid on daily basis, he/she shall be treated as a regular employee if he/she has provided consecutive years of service. Retirement allowance is contingent on termination of the employment relationship (retirement), and the employer has no obligation to give retirement allowance while the employee is at work. Even if the employer alleged that he had included the retirement allowance in daily wages, the amount included has no effect of the retirement allowance as defined in the LSA. (Supreme Court ruling on March 24, 1998: No. 96Da24699)

···› In the case of repeated renewal of a contract of employment, how is the consecutive years of service calculated for the purpose of computing retirement allowance?

In case a contract of employment is repeatedly renewed at the same time of maturity of the immediately preceding contract or a contract with the same working conditions is concluded time and again for the same employee, all the periods of such repeated or renewed contract are counted as the duration of consecutive service for the purpose of computing retirement allowance. (Supreme Court ruling on July 11, 1995: No. 93Da26168)

···› Even if an employer and employees agreed to include the retirement allowance in monthly wages, and the employer made payments according to this agreement, such payment is not considered as valid retirement allowance.

Article 4 and Article 8. (1) of the Guarantee of Workers' Retirement Benefits Act stipulate that an employer shall establish at least one of the retirement benefit systems in preparation for the payment of benefits to workers who resign. The employer who intends to establish a retirement benefits system shall establish a system under which the employer pays the workers the average wage of at least 30 days for each year of their continuous employment. In this light, retirement allowance is contingent on termination of the employment relations, which is retirement, and the employer has no obligation to give retirement allowance while the labor contract is still in effect. Therefore, even if the employer, under the agreement with employees, has included the retirement allowance in monthly wages, and has made payments according to this agreement, such payment is not considered as valid retirement allowance pursuant to Article 8.(1) of the

Guarantee of Workers' Retirement Benefits Act.
(Supreme Court ruling on Nov 16, 2007: No.2007Do3725)

···› The agreement between an employer and employees to include the retirement allowance in monthly wages or daily allowances is invalid.

Since the right to claim for payment of retirement allowance is contingent on termination of the employment relations, which is retirement, the employer has no obligation to pay retirement allowance as long as the employment contract is in effect. Therefore, even though the employer has paid to workers monthly wages or daily allowance that includes a certain amount of money under the name of retirement allowance, it is not valid as payment of retirement allowance pursuant to Article 34 of the LSA. Also, the agreement to include the retirement allowance in monthly wages or daily allowances is prior relinquishment of the right to claim for payment of retirement allowance which is contingent on retirement. Therefore, the agreement is invalid as it violates Article 34 of the LSA which is compulsory law. In this light, the employer's rejection of paying retirement allowances to retired employees based on the unenforceable agreement stipulating the inclusion of the retirement allowance in monthly wages or daily allowances cannot be considered as a valid reason for not paying retirement allowance.
(Supreme Court ruling on Aug 23, 2007: No.2007Do4171)

7) Time-bound effect of wage claims

Applicable legislation : Article 49 of the LSA (Prescription of wage claims)

A wage claim under the provisions of the Act shall be terminated due to the prescription if not exercised within three years.

[Explanatory notes]

···› A wage claim has a negative prescription of three years: the wage here includes all types of wages as defined in the LSA, such as bonus, overtime pay, benefits in lieu of annual or monthly paid leave and retirement allowance.

···› With regards to interruption of the prescription of wage claims, the

general principle provided for in the Civil Law is applied. That is, the negative prescription of wage claims may be interrupted: at the claim by the creditor(s); by an order of attachment, provisional attachment or provisional disposition; or with the consent of the debtor.

[Court rulings]

···› When is the initial day of a wage claim, for the purpose of calculating the prescribed period?

The effective period of a wage claim begins on the first day when the right to the claim can be exercised. More specifically, a claim to bonus comes into being when the employee acquires the right to the bonus; while a claim to monthly or annual paid leave or benefits in lieu of monthly or annual paid leave arises on the day when the employee has finished his first month or first year of service. (Supreme Court ruling on May 13, 1980: No. 79Da2322).

···› Litigation for affirmation of nullity of dismissal and interruption of prescription of wage claims

In cases where the litigation for affirmation of nullity of dismissal is filed, the extinctive prescription of demand for wages is suspended.
(Supreme Court ruling on May 10, 1994: No.93Da21606)

Negative prescription of several claims

Claims	Effective period
Wage claim	3 years
Retirement allowance, other types of allowance	3 years
Annual paid leave	1 year
Work injury compensation	3 years
Employment certificate (career certificate)	3 years

Commencement of negative prescription annual or monthly

Claim	Initial day
Wage	The given date on which the wage is paid on a regular basis
Bonus	The day when the right to the bonus occurs
Benefits in lieu of annual or monthly paid leave	1 day after the day when it is determined that the leave will not be used, as one year has passed from the day when the right to the leave took effect
Retirement allowance	1 day after the day the employee retired

8) Business suspension pay

Applicable legislation : Article 46 of the LSA (Pay for business suspension)

① If a business is suspended for a reason attributable to the employer, he/she shall give the employees affected pay equal to 70% or more of the average wage throughout the period of business suspension. If the amount equivalent to 70% of the average wage exceeds the normal wage, the latter may be paid as a business suspension pay.

② Notwithstanding the provisions of paragraph ①, the employer who finds it impossible to continue business operation for an inevitable reason may, with the permission of the Labor Relations Commission, pay less than the limit specified in paragraph ① for business suspension.

[Explanatory notes]

···› If an employee cannot provide work for a reason attributable to the employer, the employee loses out on the usual income he/she received in return for his/her labor, which may be a threat to the minimum living of the employee and his/her family. Business suspension pay is intended to protect employees who are affected by business suspension.

···› The causes of business suspension attributable to the employer include: a

fire or other destructive accidents at the factory; no or little sales; lack of raw materials; business shutdown; a subcontractor's business suspension; bankruptcy; strike; and other business problems for which the employer is held responsible. In the case of business suspension for any of these reasons, the employer is obliged to give business suspension pay.

···› Notwithstanding the reasons attributable to the employer, in cases where it is impossible for the employer to continue to conduct business due to unavoidable reasons, the employer may pay less than 70% of the average wage under the permission of the Labor Relations Commission.

···› In the event of business suspension as a result of uncontrollable events including electricity failure caused by external reasons, natural disaster (floods, landslides, earthquakes, etc.), war, or incendiary fire caused by a third party, the employer is not obliged to give business suspension pay because the employer cannot be held responsible for the events.

[Court rulings]

···› In case an employee whose employer declared a business suspension found another paying job during the period of business suspension or acquired an "interim income" in another way, should the first employer give the employee business suspension pay?

Business suspension pay is intended to secure a minimum living for the employees affected by business discontinuance for a reason attributable to the employer. The notion of business suspension includes the cases when an individual employee, although he/she has an intention to provide work as specified in the worker contract, finds it impossible to do the work. In short, the provision on business suspension pay applies to the employee in question. Therefore, within the range of 70% of his/her normal wage (that is, business suspension pay rate), the interim wage may not be deducted. In other words, only the amount in excess of the business suspension pay rate may be deducted. (Supreme Court ruling on June 28, 1991: No. 90DaCa25277)

···› In case the employee left the company due to disciplinary dismissal during the period of business suspension and later returned to work, is the employer obliged to give business suspension pay to the employee?

When the employer dismissed the employee in question on the grounds of a breach of the rules of employment and the employee was absent at work, the former has no obligation to give the latter the business suspension pay for the period he was not at work. The same can be said about the case where the disciplinary dismissal was reversed by the decision of a competent authority and the employee has returned to work.
(Supreme Court ruling on Oct. 14, 1986: No. 86Do611)

9) Liquidation of money and other valuables

Applicable legislation : Article 36 of the LSA (Liquidation of money and other valuables)

If an employee dies or retires, his/her employer shall pay wages, damages or money and valuables in any other form, which the employer is obliged to pay the employee under the employment relationship, within 14 days of occurrence of the cause for such payment. Under special circumstances, however, the time limit may be extended by agreement between the two parties.

[Explanatory notes]

···› In case of an employee's retirement, the employer shall pay him/her wages, retirement allowance, damages or any other form of money and valuable within 14 days from the date the retirement takes effect. However, the time limit can be extended, if both parties agree to do so.

[Court rulings]

···› In case where the reasons for not being able to pay wages or retirement to retired employees were not considered as inevitable, an employer cannot evade the responsibility of his/her action.

In cases where the employer violates the obligation to pay wages, retirement allowance, etc., within the period stipulated in Article 36 of the LSA, the employer can be exempted from the obligation only when there are unavoidable reasons for the employer not being able to make payments within the stipulated period, judging from the social norms, such as financial difficulties due to business difficulties, even if the employer did his/her best

to make payments. The employer cannot be exempted from the obligation just because he/she couldn't pay the wages, retirement allowance, etc., due to financial pressure caused by business slowdown, etc. When judging if the employer had "inevitable reasons for not being able to pay wages, retirement allowance, etc. within the stipulated period," one of the standards for judgment can be whether there has been any measure that may be considered as quite acceptable by the employees from an objective point of view. Such measures include the employer making the utmost efforts to reimburse employees for wages, retirement allowance, etc., as soon as possible for the stabilization of the livelihood of retired employees, etc., a clearly stated reimbursement plan, and sincere discussion with the employees regarding the plan.
(Supreme Court ruling on Feb 9, 2006: No.2005Do9230)

5. Hours of Work

1) Standard hours of work

Applicable legislation : Article 50 of the LSA (Working hours)

① Working hours per week shall not exceed forty (40) hours, excluding the hours for work break.
② Working hours per day shall not exceed eight (8) hours, excluding the hours for work break.

[Explanatory notes]

···› Under the LSA, standard working hours are : 8 hours a day and 40 hours a week.

···› The working time, as defined in the LSA, usually refers to the time during which an employee provides an employer with the work described in the contract of employment, under the instruction and supervision of the employee. In general, the time consumed for preparation of work tools, pre-work meetings or post-work cleanup is counted as working time.

···› "Contractual working hours" means the working hours which the employer and employees have agreed on within the framework of the standard hours of work as prescribed in the LSA (Article 2 of the LSA).

[Court rulings]

···› In case an employee continues his/her usual work even while on day or night duty, or his/her work during the day or night duty is equal, in terms of quality and content, to his/her usual work, is the employee entitled to overtime, night or holiday work pay for the hours worked during day or night duty?

Generally, an employee on day or night duty is to stay on the company premises while doing regular rounds, receiving phone calls and communications or responding to any unexpected incident. Day or night duty work is usually lower in labor density than the work provided during

the ordinary time of work, and is mainly for security watch purposes. It is generally accepted that the day or night duty work is not a regular kind of work but simply a duty incidental to the contractual work and does not require a separate contract of employment. Therefore, the employer has no obligation to pay a normal wage rate, much less overtime, night or holiday work allowance, for the day or night duty. In practice, the payment for such duty is usually to compensate for the costs incurred. However, if an employee continues his/her usual work while on day or night duty and, moreover, his/her work during the duty is seen as equivalent to his/her usual work, both in terms of quality and content, the employee is entitled to overtime, night or holiday work pay for the duty hours.
(Supreme Court ruling on Jan. 20, 1995: No. 93Da46254)

···› When an employer and employees agree on a specific length of working hours within the framework of the standard working hours, what effect does the agreed hours of work have in practice?

"Contractual working hours per day," which is used as a reference in calculating the hourly rate of normal wage, refers to the length of working hours agreed on by the employer and employees within the limit of the standard working hours under Article 49 of the LSA. Contractual working hours take precedence over standard working hours in the event of calculation of the normal wage.
(Supreme Court ruling on July 26, 1991: No. 90DaCa11636)

···› If the waiting time, nap time or break is under the supervision and instructions of the employer, it is included in working time.

The LSA defines working time as the time during which an employee provides an employer with his/her labor as prescribed in the contract of employment under the supervision and instructions of the employer. Even the waiting time or nap time during usual working hours should be counted as working time if it was not a work break that the employee is free to use but was under the supervision and instructions of the employer.
(Supreme Court ruling on Nov 23, 2006: No.2006Da41990)

2) Extended hours of work

Applicable legislation : Article 53 of the LSA (Restriction on extended hours of work)

If the parties concerned reach agreement, the working hours stipulated in Article 50 may be extended by up to twelve hours per week.

[Explanatory notes]

···› "Extended hours of work" refers to the working hours longer than the standard working hours under the LSA, and maybe longer by up to 12 hours a week on the condition both parties agree to such extension.

···› In principle, the agreement on extended hours of work should be made by the employer and an individual employee. Even in case there is a collective agreement on extension of working hours, this fact does not restrict the right of individual employees to reach an agreement on working hours extension.

···› An employer who runs a business that falls under any of the following, if the employer and an employee representative make a written agreement, may extend the hours of work in excess of the 12 hours per week or change the time of work breaks (Article 59 of the LSA):

- Transportation, goods sales and storage and finance and insurance;
- Movie production and presentation, communications, educational studies and research and advertizing;
- Medical and health service; hotels and restaurants, incineration and cleaning; hairdressing; and
- Social work

[Court rulings]

···› How is "the agreement by the parties concerned" on working hour extension reached?

The LSA, apart from the 8-hour per day standard, allows an employer and an employee, in an exceptional case, to agree to extension of the standard working hours. In principle, "the agreement by the parties concerned" means the agreement between an employer and an individual employee. It is

not necessary to conclude such agreement whenever there is a need to do overtime work. Rather, it is possible to initially include a provision on overtime work in the employment contract.
(Supreme Court ruling on Feb. 10, 1995: No. 94Da19228)

···› Agreement on extension of working hours under the collective agreement

Article 42.(1) of the LSA, apart from the standard working hours following the eight-hours-per- day standard, allows the parties concerned to come to an agreement on the extension of working hours as an exceptional case. In this case, "the agreement between the concerned parties" refers to the individual agreement between an employer and an employee in principle. However, as long as the agreement does not deprive or restrict the individual employee regarding the right to agree on an extension of working hours, it is possible to make the agreement in the form of a collective agreement.
(Supreme Court ruling on Dec 21, 1993: No.93Nu5796)

3) Flexible work hours

Applicable legislation : Article 51 of the LSA (Flexible working hour system)

① An employer may, subject to the rules of employment, have his/her employee work for a particular week in excess of 40 hours or for a particular day in excess of 8 hours on average for a two-week period. In any case, however, no particular workweek may be longer than 48 hours.

② In case the employer reaches a written agreement with the employee representative on the following, he/she may have an employee work for a particular week in excess of 40 hours per week or 8 hours per day on average for a 3-month period. In any case, however, no particular workweek may be longer than 52 hours and no particular workday may be longer than 12 hours.

[Explanatory notes]

···› The flexible working hour system is intended to facilitate an effective use of workforce by allowing employers to rearrange working hours flexibly in response to daily, monthly or seasonal fluctuations in work loads.

···› A flexible schedule of working hours may be adopted for a 2-week period under the rules of employment or for a 3-month period by agreement between the employer and the employee representative.

[Court rulings]

···› When an employee who is under an agreed system of flexible working hours worked more than 8 hours on a particular day or more than 44 hours in a particular week, should the excess hours be counted as overtime work hours under the LSA?

As for the employee who is governed by a flexible working hour scheme agreed upon by the employer and the employee, the working hours under such flexible system should be regarded as standard. Therefore, even when the employee worked over 8 hours on a particular day or over 44 hours in a particular week, all the compensation he/she is entitled to is a shorter workday or workweek for a different day or week. Namely, such excess hours as mentioned above may not be seen as overtime work hours subject to a premium pay rate. (Supreme Court ruling on June 28, 1991: No.90DaCa14758)

4) Selective hours of work

Applicable legislation : Article 52 of the LSA (selective working hour system)

If an employer has made a written agreement with the employee representative in regard to an employee who can decide the start and finish time of his/her workday, subject to the rules of employment, the employer may have the employee work in excess of 8 hours on a particular day and 40 hours in a particular week, on the condition that, in any case, the average workweek shall not exceed 40 hours for a given period of 1-month or shorter.

[Explanatory notes]

···› The selective working hour scheme is a kind of flexible working hour system that permits an employee to decide the start and finish time of his/her workday for a given period of time, within the framework of the contractual working hours.

⋯› In order to adopt a selective working hour scheme, the employer should first determine the following in a written agreement with the employee representative:

- Scope of the employees affected (excluding employees 15 years of age or older but younger than 18 years of age);
- Pay reference period (1 month or shorter);
- Total working hours in a pay reference period;
- Compulsory start/finish time of a workday;
- Voluntary start/finish time of a workday, which are allowed to be selected by employees; and
- Other matters prescribed in the Presidential Decree.

6. Breaks, Holidays and Leaves

1) Work break

Applicable legislation : Article 54 of the LSA (Work break hours)

① An employer shall allow a work break of 30 minutes or longer for every 4 hours of work and a break of 1 hour or longer for every 8 hours of work.
② Employees are free to use work breaks for personal purposes.

[Explanatory notes]

···› The work break refers to the time that an employee is free to use for his/her own purpose, away from the employer's supervision or instruction, while he/she is still at work.
···› The work break should be 1 hour or longer for every 8 hours of work and is not counted in the hours worked.

[Court rulings]

···› When an employee distributes handouts among other employees as part of his/her union activity during his/her work break, is this a legitimate act?

Unless it is proven that such act of distributing handouts had a negative impact on the work of other employees, disturbed other employees in using their free time freely or put the workplace in disorder for another specific reason, such act is not deemed to be illegitimate just because the employee in question had not obtained an advance permission of the employer for such an act. (Supreme Court ruling on Nov. 12, 1991: No. 91Nu4164).

···› Should the waiting time of an intercity bus driver be counted in work breaks or working hours?

During the work break, as defined in the LSA, employees are completely free of the employer's instruction or supervision and are free to use the time for their own purpose. If the intercity bus driver's waiting time in question was counted as work breaks, his service hours would not be more than the standard hours of work. On the contrary, if the waiting time is regarded as included in the hours worked, his service hours would exceed the standard hours and, therefore, the

employer's instruction on the bus service schedule would be against the LSA provisions.(Supreme Court ruling on April 14, 1992: No. 91Da20548)

2) Holidays

Applicable legislation : Article 55 of the LSA (Holidays)

An employer shall allow his/her employee a 1-day or longer period of paid holiday per week on average.

[Explanatory notes]

···› A holiday here refers to a day on which an employee has no obligation to provide work under the collective agreement or the rules of employment. The weekly holiday is given to an employee who has worked a contractual number of hours or more in a particular week.

···› The weekly holiday is not necessarily a Sunday, but should be an uninterrupted 24 hours or more within a week.

[Court rulings]

···› Is an employer obliged to offer a weekly holiday to an employee who works every other day?

Under the LSA, an employer is required to provide a 1-day or longer paid holiday per week on average. This legal requirement applies to employees who work on alternate days (that is, those who work a consecutive 24 hours and take a rest for the subsequent consecutive 24 hours, repeating this working schedule) and is not confined to employees who work consecutive days. (Supreme Court ruling on Nov. 28, 1989: No. 89DaCa1145)

···› Is an employer obliged to offer a weekly holiday to an employee who works in shifts?

The LSA provides that an employer shall provide a 1-day or longer paid holiday a week on average. This provision also applies to employees on shifts who work two days and rest a third day.
(Supreme Court ruling on July 26, 1991: No. 90DaCa11636)

···› When a group of employees refuse to work on holidays although such holiday work has been a usual practice at the workplace, is such refusal a legally justifiable act?

If employees, as a collective action designed to get what they were after, refused to provide holiday work which had been an established practice at the workplace, such act is aimed at disturbing normal operation of the business and, therefore, should be regarded as an industrial act as defined in the Trade Union and Labor Relation Adjustment Act. (Accordingly, such act could be valid only when the employees had gone through the prescribed procedures for industrial actions.)
(Supreme Court ruling on Feb. 22, 1994: No. 92Nu11176)

···› Are legal holidays included in holidays?

Since legal holidays are not prescribed as companies' holidays in the Labor Act, legal holidays are not rightfully included in companies' holidays. Legal holidays become companies' holidays when the collective agreement, rules of employment, etc., stipulate such inclusion.
(Seoul District Court ruling on Jan 23, 1990: No.89KaHap42113)

3) Annual Paid Leave

Applicable legislation : Article 60 of the LSA (Annual Paid Leave)

① An employer shall grant 15 days' paid leave to a worker who has registered 80% or higher in attendance.
② An employer shall grant one day's paid leave per month to a worker whose consecutive service period is a shorter than one year, if the worker has offered work without an absence throughout a month
③ In case an employer grants a worker paid leave for the first one year of his/her service, the number of leave days shall be 15 including the leave prescribed in paragraph (2), and if the worker has already used the leave prescribed in paragraph (2), the number of used leave days shall be deducted from the 15 days of leave.
④ After the first year of service, an employer shall grant one day's paid leave for each two years of consecutive service in addition to the leave prescribed in paragraph (1) to a worker who has worked consecutively for 3 years or more. In this case, the total number of leave days including the additional leave shall not exceed 25.

[Explanatory notes]

···› An employer shall grant his/her employee annual leave on the days that the employee wants to use his/her annual leave. However, when the employer believes that allowing the use of annual leave on the days wanted would do great harm to his/her business, he/she may reschedule the timing of annual leave (Article 60. (5) of the LSA).

···› When an employee has not used the leave days saved within the year, he/she shall be paid for the unused days of leave at average or normal wage rate, as prescribed in the rules of employment.

···› At a business or workplace subject to the revised LSA, if employees have not used their annual leave despite the employer's strong commitment to promoting use of annual leave, the employer is exempted from the obligation to provide monetary compensation for the unused annual leave (Article 61 of the LSA).

- To qualify for such exemption, the employer should inform individual employees of the number of leave days unused within 10 days from the last three months before the 1-year period for use of leave is exhausted, and call on the employees, in writing, to schedule the use of leave and make a written notice on the schedule to him/herself.
- In case the employee, after receiving the employer's call for use of unused leave, fails to make a written notice on the scheduled use of leave no later than 10 days, the employer should schedule the use of leave and make a written notice on the schedule no later than 2 months before the 1-year period for use of leave is exhausted.

[Court rulings]

···› When the rules of employment contain a provision that "an employee who intends to use an annual paid leave shall obtain prior permission from the head of his/her department," is such a provision valid?

In case the rules of employment provided that an employee should report his/her intention to use an annual leave to the head of his/her department for prior permission of the CEO, it is understood that the requirement of prior report and permission was aimed to make proper use of the right reserved by the CEO to change the timing of annual leave, not to deny an employee the

right to designate the timing of annual leave. (Supreme Court ruling on June 23, 1992: No. 92Da7542)

···› Is an employer entitled to change the schedule of annual leave that his/her employee has submitted?

Under the LSA, in principle, an employer shall offer an annual leave at the time the employee designates. However, unlike monthly leave, the employer has the right to change the timing of annual leave if he/she finds it necessary to change the leave schedule because business operation is deemed to be disturbed to a large extent.
(Supreme Court ruling on Dec. 28, 2001: No. 2000Du7315)

···› When an employee applies for a monthly or annual leave without specifying the type of leave or the duration, is this a valid application of the LSA?

It is true that the right to a monthly or annual leave is automatically generated the moment an employee fulfills the requirements under the LSA. Nevertheless, in order to materialize the right, the employee should first exercise his/her right to designate the timing of the leave, by specifying what kind of leave and exactly when he/she wants to use it. If the employee failed to specify the above, the right to designate the timing has not been properly exercised and his/her application is not valid. In this case, the employer does not need to exercise the right to change the timing of the leave, as such right is generated on the condition of a legitimate designation of the leave schedule by an employee.
(Supreme Court ruling on March 28, 1997: No.96Nu4220)

···› When an employee tendered a resignation and entered the same company immediately after the process of his retirement was completed, all of which was done under the employer's instruction, was the employee's service period interrupted?

In the case in question, the employee, following the employer's instruction, tendered his resignation and, immediately after the process of his retirement was completed, was hired again by the same employer. If the employee continued to work for the employer without discontinuing the employment relationship in practice, his submission of the resignation letter is understood as an expression of ungenuine intention, as the employee had no real intention whatsoever to leave the company. In addition, the employer knows that the employee did not have a genuine intention to resign. In this light, his

act of tendering the letter of resignation does not have any effect on his retirement. Accordingly, for the purpose of calculating annual leaves, the date of his service commencement is the date when he entered the company for the first time. (Supreme Court ruling on May 10, 1988: No. 97DaCa2578)

···› When an employee called the company to ask that the duration of his non-attendance at work be counted as an annual leave and did not show up at the workplace, is this a valid exercise of his right to annual leaves, given that the rules of employment of the company provide for no specific procedures of annual leave application?

The employee in this case, who was a driver of a bus company, was unable to go to work due to his injury resulting from a fistfight with a colleague. He called the managers to say that he needed medical treatment for some time and ask that the period of his non-attendance at work should be counted as annual leave. Considering that the company provides for no specific procedures for annual leave application, the employee's phone calls were sufficient to evoke his right to use an annual leave. Moreover, there is no documented evidence to prove that the employer exercised the right to change the schedule of his annual leave. Therefore, it is deemed that he used his annual leave in a proper way, and the days he did not show up at work should not be counted as a period of absence.
(Supreme Court ruling on April 10, 1992: No. 92Nu404)

···› Does a retiring employee have the right to an annual leave by monthly proportions for the period of time which is short of a full year?

In this case in question, the employer has not set different reference periods of annual leave for different employees based on their different dates of service commencement. Rather, he has given an annual leave calculated in monthly proportions for the first year of each employee, and the reference period of annual leave for each of following years is from Jan. 1 to Dec. 31. This method of calculating the reference periods, however, does not give the retiring employee the right to claim an annual leave by monthly proportions for the period shorter than 1 year.
(Supreme Court ruling on Nov. 12, 1991: No. 91Da14826)

4) Monthly paid leave

Applicable legislation : Article 57 of the former LSA (Monthly paid leave)

① An employer shall provide a 1-day paid leave per month.
② In using the paid leave under paragraph ①, an employee, on his own volition, may choose to accumulate the leaves or divide the accumulated duration over 1 year.

[Explanatory notes]

···› Monthly paid leave applies to the business or workplace which employs less than 20 workers regularly, and to which the amended LSA has not applied. The former LSA with monthly paid leave shall apply to the above business or workplace until the date to be prescribed in the Presidential Decree within the period not going beyond the year 2011.

···› Under the above provision on monthly paid leave, every employer is required to provide a 1-day paid leave per month to an employee who has worked a contractual number of hours in a month. Unused monthly leaves can be saved for later use within 1 year, and the accumulated days can be split for use on several occasions.

···› The monthly paid leave should be offered to all employees who are governed by the LSA, whether they work on a temporary, part-time, daily or probationary basis.

···› As for the cases where an employee failed to work a contractual number of hours in a month, for example, because she was on maternity leave for the whole month, the employer has no obligation to offer a paid monthly leave to the employee.

···› The right to monthly leave is effective for one year from the date of occurrence, and when the monthly leave still remains unused after the assigned one year, the right to monthly leave is replaced by the right to benefits in lieu of the unused monthly leave.

[Court rulings]

···› When a considerable number of employees applied for monthly leave for the same period of time, if such act of collective nonattendance disturbed the normal flow of business operation, does this constitute an offense of business obstruction?

In case the employees in question applied for the monthly leave simply as a means of interrupting the business operation,without given reasonable justification for an industrial action, such act constitutes an offense of business obstruction. (Supreme Court ruling on Jan. 29, 1991: No. 90Do2852)

···› An employer may not change the monthly leave schedule of his/her employees.

According to Articles 57 and 59 of the Labor Standards Act, annual leave and monthly leave are different to each other in their requirements for accrual. For instance, it is provided that annual leave with pay shall be given on the days the employee wants to use it but the employer may change the schedule of annual leave if such use of annual leave is a critical detriment to the business. On the contrary, monthly leave with pay may be used in accumulation for one year and the accumulated days may be used in installments, and the employer may not change the schedule of monthly leave chosen by his/her employee, unlike in the case of annual leave with pay. (Supreme Court Ruling on Dec. 28, 2001: No. 2000Du7315)

···› In case an employee did not use a monthly leave, should the employer pay the employee benefits in lieu of monthly leave at a premium rate for the hours worked?

With regard to the benefit in lieu of unused monthly leave, the premium pay rate of 50% or higher is not applied to the hours worked.
(Supreme Court ruling on June 28, 1991: No. 90DaCa14758)

···› When does the right to benefits in lieu of monthly leave occur, and how long is it effective?

If an employee has not used his/her monthly leave after 1 year has elapsed from the date on which he/she acquired the right to monthly leave provided for in the LSA, the employee will lose the right to monthly leave but obtains a new right to benefits in lieu of the unused monthly leave. This right to benefits in lieu of monthly leave remains effective for three years, as is for

the right to other types of wage, and the commencement date of the right is one day after the date on which it was determined that the monthly leave would not be used if the time limit of one year had passed for the right to monthly leave. (Supreme Court ruling on June 29, 1995: No. 94Da18553).

5) Maternity leave

Applicable legislation : Article 74 of the LSA (Maternity protection)

① An employer shall grant a pregnant female worker 90 days of maternity leave before and after childbirth. In such case, 45 days or more shall be allocated after the childbirth.

② At the request of a pregnant female worker who has a miscarriage or still birth after 16 weeks of pregnancy, the employer shall grant her protective leave as prescribed in the Presidential Decree, except where the miscarriage is caused by an artificially induced abortion operation (excluding cases prescribed in Article 14(1) of the Mother and Child Health Act).

③ Of the leave under paragraphs (1) and (2), the first 60 days' leave shall be with pay, except that if maternity leave benefits, etc. are already paid pursuant to Article 18 of the Act on the Gender Equality Employment and Support for Work-Family Balance, the employer shall be relieved of the responsibility to the extent of such amount.

④ No employer shall put a pregnant female worker on an overtime duty, and if there is a request from the worker, the employer shall transfer to a light duty.

⑤ After the termination of maternity leave pursuant to paragraph (1), the employer shall return the relevant worker to previous work or work that pays the same level of wages as the previous work.

[Explanatory notes]

···› An employer shall provide a pregnant employee 90 days or longer of pre-natal and post-natal leave with pay.

···› As the first 60 days of the maternity leave should be with pay, the employer shall pay wages to the pregnant employee for the 60 days. As

for the remaining 30 days, the employee receives maternity leave benefits under the Employment Insurance Act.

···› For employees working at preferentially supported companies pursuant to Article 15 of the Enforcement Decree of the Employment Insurance Act (Mining: 300 persons or less; Manufacturing industry: 500 persons or less; Construction: 300 persons or less; Transportation, warehouse and communication industry: 300 persons or less; and Other industries: 100 persons or less), during pre and post-natal leave, the amount equivalent to 90 days' wages in total is provided through the employment insurance. However, since the maximum amount provided by the employment insurance for one month's wage is KRW 1.35 million, if the normal wage of the relevant employee exceeds KRW 1.35 million, the employer shall pay the difference.

[Administrative Interpretation]

···› In case a period of pre- and post-natal leave includes statutory holidays or contractual holidays, should the period be extended by that much?

Even when the period of an employee's maternity leave includes public holidays and contractual holidays, the employer is not obliged to increase the period by that much, but only has to offer 90 calendar days. Unless otherwise provided in a special clause, there is no obligation to provide additional days for the leave. (Administrative interpretation on July 28, 1987)

6) Menstruation leave

Applicable legislation : Article 73 of the LSA (Menstruation leave)

An employer shall, upon request of a female worker, grant her one-day menstruation leave per month.

[Explanatory notes]

···› As a menstruation leave is based on the women's unique physiological condition, every female employee is entitled to have the menstruation leave once a month at the request of the female employee, regardless of

her job classification, length of working time, attendance records, etc.

···› An employer has no obligation to pay wages for menstruation leave, unless decided otherwise by collective agreement, rules of employment, contract of employment, etc. Therefore, there is no compensation for not taking menstruation leave.

···› Paid menstruation leave shall be applied to a workplace where the 40 hours per week standard under the amended LSA in 2003 is not yet applied. Therefore, the employer has an obligation to pay wages for menstruation leave.

[Court rulings]

···› Is a female employee without menstruation still entitled to menstruation leaves?

The menstruation leave is intended to relieve female employees of their mental or physical uneasiness due to menstruation. In this light, as for female employees who do not have a menstruation period due to pregnancy, menopause or other reasons, the employer has no legal obligation to provide a menstruation leave. However, the burden lies with the employer to prove that a female employee has no menstruation and to pay the expense of a medical checkup. (Seoul District Court ruling: No. 92Na27668)

Working hours and leave: before and after revision

Category	1997 Act	2003 Act
Statutory standard working hours	44 hours a week/ 8 hours a day	40 hours a week/ 8 hours a day
Flexible work hours scheme	• On a monthly basis - May be adopted with written agreement by the employer and employees - Up to 12 hours a day, 56 hours a Week	• On a 3-month basis - May be adopted with written agreement by the employer and employees - Up to 12 hours a day, 52 hours a week
Annual leave and promotion for use of leave	• Monthly leave: 1 day a month • Annual leave - Length: 10 days for employees with consecutive service of 1 year or longer, and 8 days for those with 90% attendance or higher; an additional 1 day for each following year - Monetary compensation can be paid in lieu for the unused annual leave longer than 20 days.	• Monthly leave repealed • Annual leave: 15-25 days • 15 days for those with 80% attendance or higher of consecutive service of 1 year or longer and an additional 1 day for every following 2 years - 1 day a month for those with service shorter than 1 year • A new provision on promotion of use of leave
Optional compensational leave	• No provision	• May be adopted through agreement by the parties concerned - Optional leave in lieu of pay for extended work, night work or holiday work
Menstruation leave	• 1 day a month with pay	• 1 day a month without pay
Extended work ceiling	• Up to 12 hours a week	• Up to 16 hours a week on a 3-year temporary basis (Article 3 (1) of the Addenda of the LSA)

Category	1997 Act	2003 Act
Extended work pay premium	• Additional 50% or more	• Additional 25% for the first 4 hours on a 3-year temporary basis (Article 3 (2) of the Addenda)
Pay loss compensation	• No provision	• The pay level and normal wage hourly rate shall not be lower than before (Article 4 (1) of the Addenda)
Modification of collective agreement/ the rules of employment	• No provision	• Obligation to make effort to modify the existing collective agreement and rules of employment (Article 4 (2) of the Addenda)
Youth working hours	• Those aged 15 or older but younger than 18 - Up to 7 hours a day, 42 hours a week	• Those aged 15 or older but younger than 18 - Up to 7 hours a day, 40 hours a week
Coming-into-effect date	• N/A	• Finance, insurance, public sector, other businesses with 1,000 employees or more: July 1, 2004 • Businesses with 300 employees or more: July 1, 2005 • Those with 100 employees or more: July 1, 2006 • Those with 50 employees or more: July 1, 2007 • Those with 20 employees or more: July 1, 2008 • Those with fewer than 20 employees: before the end of 2011, in accordance with the Presidential Decree

7. Rules of Employment

1) Drawing up the rules of employment

Applicable legislation : Article 93 of the LSA (Preparation and submission of the rules of employment)

An employer regularly hiring 10 employees or more shall prepare the rules of employment containing the following matters and submit the rules to the Minister of Labor:

1. Matters pertaining to the start/finish time of workday, work breaks, holidays and leaves and work shifts;
2. Matters pertaining to the methods of determining, calculating and paying wages, the pay reference period, the payment frequency or date and the pay scale increase;
3. Matters pertaining to the methods of calculating and paying family allowances;
4. Matters pertaining to retirement;
5. Matters pertaining to retirement allowance, bonus, and minimum wage pursuant to Article 8 of the Guarantee of Workers' Retirement Benefits Act
6. Matters pertaining to expenses of employees' meals, work tools, etc.;
7. Matters pertaining to educational or training facilities for employees;
8. Matters pertaining to employees' maternity protection and supports for work-family balance including maternity leave and child-care leave.
9. Matters pertaining to safety and health at work;
9-1. Matters pertaining to improvement of workplace environment considering gender, age, physical conditions of employees
10. Matters pertaining to compensation for work and non-work injuries;
11. Matters pertaining to employee rewards and punishments; and
12. Other matters applicable to the particular workplace and all employees at the workplace.

[Explanatory notes]

···› The rules of employment refer to a set of rules unilaterally devised by an employer that are intended to apply to his/her employees with regard to their working conditions and rights and obligations at work.

···› Every employer who regularly hires 10 employees or more is required to draw up the rules of employment and report it to the Labor Minister.

[Court rulings]

···› Are the "personnel regulations" or the "service regulations" equal to the rules of employment?

The rules of employment refer to a set of rules or regulations designed by an employer to govern his/her employees' working conditions and conduct at work. It does not matter whether such rules are named "company regulations," "company rules," "service regulations" or "personnel regulations." (Supreme Court ruling on May 10, 1994: No.93Da30181)

···› Is it possible for an employee to draw up a separate set of rules of employment which would apply to a particular group of employees whose job sets them apart from other employees, in terms of job description or job status?

The rules of employment refer to a set of rules and regulations on right and obligations and working conditions, whatever it may be called. An employer may devise a separate set of clauses which are to apply to a particular group of employees who are unique in their job characteristics. In this case, the general rules and the special rules are combined together to form a single set of rules of employment at the workplace.
(Supreme Court ruling on Feb. 28, 1992: No.91Da30828)

It is not that the rules of employment should apply uniformly to all the employees of the same business, but that special clauses may be drawn up for a particular group of employees (say, for casual or part-time workers) whose job description or status is different from that of other employees.
(Supreme Court ruling on Feb. 25, 2000: No.98Da11628)

···› Who has the right to draw up and revise the rules of employment?

In principle, an employer has the right to draw up and revise the rules of employment and, therefore, the employer may draw up and revise the rules of employment as he/she wishes. Even though the collective agreement requires the consent, agreement, or opinion hearing of a labor union in cases where the rules of employment are being drawn up or revised, unless the working conditions of rules of employment are revised disadvantageous to employees compared to the former rules of employment, the rules of employment are not considered as invalid, notwithstanding drawing up and revising without such consent, agreement or opinion hearing.
(Supreme Court ruling on Jun 22, 1999: No98Du6647)

···› In case an employer once posted a collective agreement or the rules of employment at the workplace so that employees may be fully informed of the agreement or the rules, are the employees entitled to claim invalidity of part or all of the provisions or to resist their application?

If the employer posted the collective agreement or the rules of employment in a manner that employees could be well informed of the contents of the agreement or the rules, the employees' allegation for invalidity of the agreement or the rules or their refusal to be governed by them is not justifiable, even when the employer did not make a separate notification to the employees or the employees were not fully aware of what was contained in the agreement or the rules.

(Supreme Court ruling on June 23, 1992: No. 92Nu4253)

2) Amendment to the rules of employment

Applicable legislation : Article 94 of the LSA (Procedures for preparation of and amendment to the rules of employment)

With regard to preparing or amending the rules of employment, an employer shall consult a trade union if one representing a majority of the employees exists, or a majority of the employees if such a union does not exist. Provided, however, that the rules of employment are modified to the employees' disadvantage, the employer shall obtain consent of the employees.

[Explanatory notes]

···› In case an employer intends to revise part of the rules of employment to the disadvantage of his/her employees, he/she shall obtain consent from a majority of the employees in that regard.

···› On the other hand, as for the amendments not disadvantageous to the employees, the employer only has to consult a union representing a majority of the employees or, if there no such union exists, the majority of the employees.

[Court rulings]

···› Suppose the amendments to the rules of employment are favorable to some employees and, at the same time, unfavorable to other employees, should the employer obtain consent from the employees for such amendments?

In order to determine whether a revision of the provisions on retirement allowance is advantageous to the employees or not, it is necessary to examine not only a resultant change in retirement allowance rate but also a possible impact on basic pay rate which is closely linked to the retirement allowance rate. And the reference period for determining the above should be the time when the provisions on retirement allowance would be amended. If, as a result of such examination, it is determined that the revision is favorable to some employees but is not to others, the revision is deemed to be disadvantageous to the employees in general, as the revision may possibly result in tension among the employees over the revised provisions. Therefore, the employer should acquire consent from the employees who have been affected by the existing provisions on pay rates, and the employees' consent should be given in a way to determine a collective opinion. (Supreme Court ruling on Aug. 26, 1997: No. 96Da1726)

···› In the case of a revision of the rules of employment to the employees' disadvantage, how can the employees' consent be acquired?

The LSA, with a view to protecting employees, makes it an employer's obligation to draw up the rules of employment and provides the effect of statutory norms to the rules of employment. Any revision of the rules of employment to the employees' disadvantage requires their consent, which is to be reached in a way to determine a collective opinion. Without such consent from the employees who have been subject to the pre-revision provisions, the amended ones are not effective even for the employees who have given their individual consent to the revision.
(Supreme Court ruling on July 26, 1977: No. 77Da355)

···› What is "consent based on the collective opinion determined"?

"Consent based on the collective opinion determined," which is required for a revision of the rules of employment to the employees' disadvantage, is not necessarily reached in a meeting that brings all the employees together at the same place at the same time. Rather, it is also possible for employees, by

business, department or team, to get together to exchange their opinions without the employer's intervention or involvement. Then the results of the individual meetings can be combined together to determine a collective opinion. (Supreme Court ruling on Jan. 15, 1993: No. 92Da39778)

···› When an employer who wants to revise the existing rules of employment fails to obtain collective consent from the employees for the disadvantageous revision, are the revised rules still effective?

As the right to devise or revise the rules of employment lies with the employer, he/she is free to draw up or modify the rules of employment. Nevertheless, he/she is obliged to consult a union or a majority of the employees and, in the case of a revision to the employees' disadvantage, to obtain collective consent from the employees. Without such consent based on the employees' collective opinion, no amendments to the existing rules of employment would be effective to incumbent employees.
(Supreme Court ruling on Dec. 22, 1992: No. 91Da45165)

···› In case an unfavorable revision of the rules of employment was declared invalid to incumbent employees as the employer failed to obtain collective consent from them, is the revision effective to new employees who agreed to accept the revised rules of employment?

In this case, the revised rules may not apply to incumbent employees whose interests would be threatened by those revised rules and, instead, the pre-revision rules shall remain effective to them. However, new employees who have agreed to accept the revised rules of employment in their contract of employment shall be governed by the revised rules. Therefore, the allegation that even the new employees should be governed by the previous rules, not by the revised rules, is unfounded, given that the new employees have no vested interests that would be lost if the revised rules were applied. (Supreme Court ruling on Feb. 25, 2000: No.98Da11628)

···› In case the employees are divided into two groups in terms of application of the rules of employment, when the majority group gives consent to a revision of the rules of employment, is the minority group also governed by the revised rules?

In the case of the company in question, the employees are classified into two different groups, that is, white collar and blue collar employees, and the rules of employment have been differently applied to the two groups. The

employer intended to amend some provisions on retirement allowance and, as the revised rules seemed disadvantageous to the employees in comparison with the pre-revision rules, had to get consent from a majority of the employees who were subject to the previous rules. The employer succeeded in obtaining consent from the group of blue collar employees, who account for over 85% of the unionized workforce of the company, and, as a result, is allowed to apply the revised rules to blue collar employees. However, the revised rules are not effective with regard to the white collar employees who did not consent to the revision.
(Supreme Court ruling on Dec. 7, 1990: No. 90DaCa19647)

···› When a revision of the rules of employment is deemed to be reasonable, in light of the generally accepted ideas in this society, even though such revision is to the employees' disadvantage, does the employer need to seek consent of the employees affected?

It is necessary that an employer obtain consent from his/her employees for any revision of the employment rules when the revision is unfavorable to the employees who will be affected. A revision of the rules of employment without the collective consent of the employees affected is not valid, except when the revision is generally accepted as reasonable.
(Supreme Court ruling on Jan. 15, 1993: No. 92Da39778)

···› In case an employer acquired consent of the employee members of the labor-management council for a 'disadvantageous revision of the rules of employment,' is the employer exempted from his/her obligation to obtain collective consent of the employees affected?

The labor-management council is an in-company body that brings the employer and employees together with a view to promoting the common ground of understanding and co-prosperity, which is crucial to industrial peace at workplace. In this light, the labor-management council is clearly different in nature from the trade union. Unless it is proven by documented evidence that the consent from the employee members were a reflection of the opinions of the employees of each department the employee members represented, the employer should not treat the employee members' consent as equal to the collective consent from a majority of the employees.
(Supreme Court ruling on June 24, 1994: No.92Da28556)

···› An employer is required to seek the consent of the majority of the employees for a disadvantageous revision of the rules of employment, even in cases where the workplaces are scattered all over the country and there are numerous employees.

In cases where no labor union was established at the time of the revision of the rules, workplaces are scattered all over the country, and it is impossible to obtain the collective consent of all the employees through collective decision-making within a short period of time because the number of employees amounts to 1,893-even if the advantageous revision has passed deliberation and resolution of the board of directors following the articles of association of the company and managerial rules of board of directors-this is just the procedure required on the part of the employer. Therefore, the collective consent of the employees is still required.
(Supreme Court ruling on Jul 11, 1995: No.93Da26168)

3) Relations between rules of employment and collective agreement

Applicable legislation : Article 96 of the LSA (Observance of the collective agreement)

① The rules of employment shall not be incompatible with the collective agreement that applies to the workplace concerned.
② The Minister of Labor is authorized to order an amendment to rules of employment that seem, to the Minister, to be incompatible with laws and regulations or the collective agreement applicable to the workplace concerned.

Applicable legislation : Article 97 of the LSA (Effect of Violation)

If a labor contract includes employment conditions which are below the standards stipulated in the rules of employment, such nonconformity shall be null and void. In this case, the invalidated provisions shall be governed by the standards provided for in the rules of employment.

[Explanatory notes]

···› The rules of employment shall not contradict the collective agreement applicable to the same workplace, and if there are any provisions contained in the rules of employment that are contradictory to the

collective agreement, the Labor Minister may order an amendment or amendments to the rules of employment.

[Court rulings]

···› What is the difference between the collective agreement and the rules of employment?

The collective agreement concerns working conditions and other standards on treatment of employees, and should be in writing and signed by both parties, that is, the employer and the employee representative. Besides, the collective agreement is, in principle, effective only to unionized employees for a limited period of time. By contrast, the rules of employment are drawn up unilaterally by the employer and contain general rules and regulations on the employees' service and working conditions applicable to all employees at the workplace. (Supreme Court ruling on April 25, 1997: No. 96Nu5421)

···› In case the collective agreement was revised and, in particular, the amended clauses on dismissal criteria were disadvantageous to the employees in comparison to the provisions on dismissal criteria in the rules of employment, does the revised collective agreement exclude application of the rules of employment, in terms of dismissal criteria?

In accordance with the principle of autonomous agreement, an employer and a union may revise a collective agreement, whether such revision provides better or inferior working conditions than the previous agreement. Just because the revised agreement contains inferior working conditions cannot be a justifiable reason to invalidate the agreement, unless under exceptional circumstances: say, the agreement is not reasonable enough to justify the presence of a trade union. It seems that a collective agreement includes an agreement by both parties that the revised agreement supercedes the existing rules of employment even though the latter provide for better working conditions. All considered, the revised collective agreement excludes application of the rules of employment, in terms of dismissal criteria. (Supreme Court ruling on Dec. 27, 2002: No. 2002Du9063)

···› When the rules of employment include some clauses supplementary to the collective agreement, are those supplementary clauses effective?

In the case in question, the rules of employment contain clauses on disciplinary procedures, which are supplementary to the provisions of the

collective agreement, although the former is worded differently from the latter. In addition, the supplementary clauses were drawn up under the agreement with the union, after the collective agreement was signed. Therefore, the supplementary clauses of the rules of employment, which are not contradictory to the collective agreement, are effective. (Supreme Court ruling on July 16, 1993: No. 92Nu16508)

···› If an employer, after he/she has changed the provisions on retirement allowance in the rules of employment to the disadvantage of the employees without their consent by way of a collective decision making process, concludes a new collective agreement with the union to initiate the new provisions on retirement allowance, are the existing employees also governed by the new provisions?

A collective agreement is concluded between an employer (or an employer organization) and a trade union concerning working conditions and other matters arising out of the labor relationship. In case a union consents ex post facto to the proposed changes in working conditions including wage, working hours and retirement allowance or signs a collective agreement to initiate such changes, the effect of the consent or agreement applies to the union or non-union employees of the company concerned who start to work for the company after the agreement is made and who are supposed to be covered by the agreement. Even when an employer has changed the provisions on retirement allowance in the rules of employment to the detriment of employees without their consent through a collective decision making process, if the union and the employer reach a collective agreement on the changed provisions, those provisions shall apply to the existing employees who are covered by the agreement, whether or not the parties knew that the existing employees, who would have lost their vested interest with the new provisions in place, should have been governed by the previous provisions. (Supreme Court Ruling on March 11, 2005: No.2003Da27429)

···› Can the employer add new causes for dismissal to the rules of employment irrelevant to the reasons for dismissal prescribed in the collective agreement?

The employer may add new causes for dismissal to the rules of employment irrelevant to the causes for dismissal prescribed in the collective agreement, and may dismiss employees based on such causes. This can be done, unless it is clearly stipulated that the causes for and procedures of dismissal shall

conform to the collective agreement-such as "dismissal shall conform to the collective agreement, not to the rules of employment" or "dismissal for causes other than the ones stipulated in the collective agreement is invalid," or unless the regulations of the collective agreement and of the rules of employment conflict with one another on the causes or procedures for dismissal. In this light, even if the collective agreement stipulates causes for dismissal and disciplinary measures in detail, adding new causes for dismissal to the rules of employment is not considered to be contrary to the collective agreement. (Supreme Court ruling Jun 13, 1997: No.97Da13627)

8. Personnel Transfers

1) Job reassignment

[Explanatory notes]

···› Job reassignment refers to personnel transfer within the same company that entails a change in the job description or work location of an employee. An employer should give a justifiable reason for this kind of personnel transfer.

[Court rulings]

···› What are the criteria used to determine whether the employer's order of job reassignment is legitimate or not?

In principle, an employer is entitled to make an order of transfer in job descriptions or work location as such entitlement belongs to his/her right to personnel management. Therefore, an employer's order of job reassignment is effective, unless such order is against the LSA provisions, or is considered an abuse of the right. In determining whether an order of job reassignment is justifiable or not, a comparison and review should be conducted on its necessity for business and the resultant disadvantage to the employee affected. It should also be ascertained whether the procedures required under the principle of good faith were conducted in the process of job reassignment, and a discussion with employees should also be comprehensively considered. (Supreme Court ruling on Dec 22, 1998: No.97Nu5435)

···› To what extent should an employer's right to order job reassignment be acknowledged?

It may be that an order of job reassignment is an unfavorable measure, in that such order leads to a shift in terms of an employee's job description or location of work. However, as the right to job reassignment is reserved to an employer who has the right to personnel management, he/she is allowed to exercise his/her discretion to an extent which can be justified by the business purpose need. Accordingly, an employer's order of job reassignment is not regarded as invalid, unless it is proven that such order has violated the LSA provisions or is an abusive exercise of the employer's right.
(Supreme Court ruling on Feb. 22, 1991: No. 90DaCa27389)

···› When, as a consequence of an order of transfer in work location, the employee suffers an unfairly serious disadvantage in his/her everyday life, is the transfer order effective?

In the case in question, it does not appear that the employer's order of transfer in work location was necessary for business purpose. In addition, the employees affected suffered much inconvenience in their working life: for example, it is practically impossible for them to commute daily between their home and new place of work. Furthermore, the employer, who had a grudge against the employees over their union activities and broadcast interviews, made the order on a holiday without seeking consent of the employees affected. All considered, the employer's transfer order is an abusive exercise of his discretionary right and, therefore, is a violation of the LSA. (Supreme Court ruling on Feb. 17, 1995: No. 94Nu7959)

···› In cases where an employee refuses to provide work, in rejection of the invalid unfair job transfer, the employee may claim for wages which should have been paid if he/she worked at the former workplace.

In principle, an employer is entitled to make an order of transfer in job descriptions or work location, as such entitlement belongs to his/her right to personnel management. However, an employer's order of job reassignment is invalid when such order is in contravention of the LSA provisions or is considered an abuse of employer power. In case of such a job transfer which is invalid, even though the employee refuses to provide work at the transferred workplace in rejection of the transfer while claiming for the validity of the order, the employee may claim wages which should have been paid if he/she worked at the former workplace because the cause is attributable to the employer who issued such an order.
(Supreme Court ruling on Sept. 14, 2006: No.2006Da33531)

2) Job transfer

[Explanatory notes]

···› Job transfer occurs when an employee of a particular employer, while retaining employee status and the employment relationship with the original employer, is dispatched to a subsidiary company or associate

company of the employer and works under the instructions and orders of the employer at the subsidiary or associate company.

···› The employee who is ordered to transfer shall retain the employment relationship with the original employer and create an employment relationship with the employer at the subsidiary or associate company to which he/she has been transferred. Namely, the employee is being hired by both the original employer and the new employer.

[Court rulings]

···› Is a job transfer order valid without prior consent of the employee affected?

In the case of a job transfer between two independent incorporations of business, whether it is an inter-company job transfer or not, the order of such job transfer is not valid without prior consent of the employee concerned, even when the two incorporations are being run by one and the same employer. Namely, an employer has no authorization to order job transfer against the will of the employee affected.
(Supreme Court Ruling on Jan. 26, 1993: No. 92Nu8200)

3) Inter-company job transfer

[Explanatory notes]

···› Inter-company job transfer occurs when, after an employer and an employee terminate the employment contract, the employee concludes a new contract of employment with another employer; or an employer transfers his/her employer status in relation to a particular employee, to another employer.

[Court rulings]

···› An inter-company job transfer requires the consent of the employee concerned to come into effect unless there are special reasons for the job transfer.

An inter-company job transfer which transfers an employer from the company where he/she is employed to another company and makes him/her

work for the other company, unlike the transfer in job descriptions or location of work within the same company, is valid only when the employee has given his/her consent to it. Moreover-in the event of an inter-company job transfer between corporations which have close relations in their business organizations or activities and conduct social and economic activities together -if the company transfers an employee to another company of the same business group without the consent of the employee, and alleges that such practice of inter-company employee transfer was included, although implicitly, in its employment relationship, the company's allegation would be justified only when such practice is clearly approved by the business community as a general norm of the employment relationship and is willingly accepted by the employees as an established practice.
(Supreme Court ruling on Jan 12, 2006: No.2005Du9873)

···› When an employee has undergone an inter-company job transfer, is it possible for him/her to exercise his/her right to wages he/she acquired while working at the previous company towards the new company?

In this case, the new company agreed to treat the employee as working continuously for the previous company and provide him with the same status that he had held at the previous company. It seems that this agreement was intended to mean that his wage level and working conditions would be maintained at the same level and his service period would not be interrupted. However, it does not imply that the new company should pay the employee the wage or retirement allowance that the previous company is obliged to pay. (Supreme Court ruling on Dec. 22, 1992: No. 92Da36090)

···› In case an employee, who was under an inter-company job transfer received retirement allowance from the previous company on his own volition, when is the initial date of his service at the new company for the purpose of calculating retirement allowance?

In the case in question, the previous company ordered the employee to move to another company of the same business group and allowed him to choose to receive retirement allowance for the duration his service at the previous company or to carried over the service duration and the retirement allowance to the new company. It seems that the employee, by choosing to receive retirement allowance, chose to discontinue his service at the previous company, all on his own free will. Accordingly, in this case, his employment relationship with the previous company and the period of his service at the previous company cannot

be carried over to the new company, unless under exceptional circumstances. (Supreme Court ruling on Dec. 23, 1996: No. 95Da29970)

4) Leave of absence

[Explanatory notes]

···› Leave of absence refers to an employee's suspension from service when he/she cannot work for a reasonable reason. An employee on leave of absence is exempted or prohibited from doing work for a given period of time while his/her contract of employment is in force.

[Court rulings]

···› Judgment on the rightfulness of leave of absence

Even if the collective agreement or the rules of employment grant the right to order an employee's leave of absence when causes for leave of absence have occurred, the leave of absence can be justified only when the employee is unable to provide the work for a considerable amount of time, or is inadequate to provide the work, taking all aspects into consideration, including purpose and function of rules of leave of absence, rationality of exercising the right to order leave or absence, and social and economic disadvantages caused to the employee by the enforced leave of absence. (Supreme Court ruling on Nov. 13, 1992: No.92Da16690)

5) Release from one's position (order of placement on a waiting list)

[Explanatory notes]

···› As in the case of enforced leave of absence, release from one's position (order of placement on a waiting list) refers to an employee's suspension from service when he/she cannot work for a reasonable reason. An employee released from his/her position is exempted or prohibited from doing work for a given period of time while his/her contract of employment is still in force. The rightfulness of the release is judged

based on the causes for the release, violation of the procedures of the release, etc.

[Court rulings]

···› Legal nature of release from one's position (order of placement on a waiting list)

Release of an employee from his/her position is a temporary measure taken in order to prevent the difficulties in business that might be caused when the employee continues to provide his/her services, by temporarily releasing the employee from his/her position and prohibiting him/her from working when he/she lacks the ability to perform the job, shows poor work performance or work attitude, is under a disciplinary procedure, or is charged in a criminal case, etc. In this light, the release is different from a disciplinary measure taken to maintain the corporate order against the illegal actions of the employee in the past.
(Supreme Court ruling on Aug. 25, 2006: No.2006Du5151)

···› Is the personnel regulation valid that stipulates the automatic retirement of employee in cases where he/she has not been reinstated to his/her former position within a certain period of time after being placed on a waiting list?

In cases where there is a regulation in the personnel regulations, etc., stipulating the automatic retirement of an employee when he/she has not been reinstated to his/her former position within a certain period of time after being placed on a waiting list, the automatic retirement is considered as actual dismissal because the labor contract is terminated at the employer's will and against the employee's. Therefore, in order for the employer to take an action based on such regulation, justifiable causes prescribed in Article 30.(1) of the LSA are required.
(Supreme Court ruling on May 31, 2007: No.2007Du1460)

···› Validity of order of placement on a waiting list which lasted unfairly over a long period of time

Even though an employer made a valid order of placement on a waiting list based on the causes for placement on a waiting list under the relevant regulations, the period shall be determined considering all the circumstances, including the purpose and function of the regulations, rationality of the

maintenance of the order, and the social and economic disadvantages that the employee concerned might encounter as a result. If a company maintains the order irrationally and for an unfairly long period of time based on social norms even when there are no unavoidable reasons for maintenance, such as the concerned employee not being able to provide his/her services for a considerable period, or if it is impossible for the employee to provide the work, the order is invalid, unless there are any special reasons, because it cannot be considered that there have been any justifiable reasons.
(Supreme Court ruling on Feb. 23, 2007: No.2005Da3991)

9. Merger and Business Transfer

1) Merger

[Explanatory notes]

···› "Merger" refers to a process under the Commercial Code involving two or more companies under which, after part or all of the companies involved are extinguished without going through the process of property liquidation, the involved companies are integrated into a single surviving company or are reborn as a new company.

···› The company surviving the merger or the newly established company as a result of the merger shall take over the rights and obligations of the extinguished companies in an inclusive way.

···› Therefore, the contracts of employment signed by the merged companies should be carried over to the surviving or new company and the employees of the merged companies, after moving to the surviving or new company, are entitled to the same working conditions as they enjoyed at the extinguished companies.

[Court rulings]

···› Is the surviving or newly established company after a merger obliged to pay retirement allowances to the employees who previously worked for the extinguished companies?

In case, as a consequence of a merger, the employment relationship of the extinguished company (or companies) is taken over by the surviving or new company, the employees' status is also inclusively retained by the surviving or new company. Unless a new collective agreement is concluded or the rules of employment revised at the time of the merger in order to amend or adjust working conditions of the employees affected by the merger, it is considered that the surviving or new company also should take over the employees' right to retirement allowance as it was.
(Supreme Court ruling on March 8, 1994: No. 93Da1589)

···› Suppose the organizational or personnel structure of a company went through a structural change or a merger or acquisition (M&A) but has retained the same presence. If the employees of the company, after tending their resignation and receiving retirement allowance re-entered the company, all under the employer's instructions, is the service period of the employees interrupted or not?

If the company, even after it underwent a structural change in its personnel or organizational structure, is still existent and retains the same presence, the structural change merely involves a new employer and the employment relationship should be taken over by the new employer. In this case, if the employees had tended their letter of resignation and received retirement allowance on their own volition, this should have been treated as their agreement to the discontinuance in their service. However, in fact, the employees retired from the company and re-entered it under the employer' s instructions. That is, their act of submitting the resignation letter does not mean that they had a real intention to retire or agreed to an interruption of their service. Accordingly, the duration of their consecutive service has not been interrupted. (Supreme Court ruling on June 11, 1999: No. 98Da18353)

···› The status of employees of an extinct company in cases where the labor union of the surviving company takes the form of a union shop

Even though two or more companies have merged, collective labor relations or working conditions between the extinct company and its employees are taken over by the surviving company, until the conclusion of a new agreement which amends and agrees to unify the labor relations after the merger through the conclusion of a collective agreement between the surviving company and the labor union representing all the employees after the merger. Therefore, even if the labor union of surviving company takes the form of a union shop, the employees of the extinct company do not automatically become union members of the surviving company until the new agreement or collective agreement mentioned above is concluded between the surviving company and the labor union representing every employee, including employees of the extinct company.
(Supreme Court ruling on May 14, 2004: No.2002Da23185, 23192)

2) Business transfer

[Explanatory notes]

···› "Business transfer" is a term originally used in the Commercial Code that refers to the transfer of a body of business organization, that is, a personnel or organizational structure, under the agreement between the two parties to the transfer (that is, transferor and transferee).

···› A case of business transfer, as a general rule, involves the transition of the employment relationship, as well as that of operational properties of a company. In other words, the employment relationship, in principle, shall be also handed over to the transferee, unless there is a separate agreement between the transfer parties that part or all of employees will be excluded.

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

[Court rulings]

···› What is "business transfer"?

Business transfer refers to a process under which a body of business organization, namely, a personnel or organizational structure, is transferred while remaining unchanged in its nature. It is possible to transfer only part of the body of business organization. In any case, the personnel or organization structure should retain its integrity.
(Supreme Court ruling on July 27, 2001: No. 99Du2680)

···› If the parties to a business transfer concluded a separate agreement to exclude part of the employees affected from employment succession, is the agreement legally valid?

In principle, the parties are allowed to agree to exclude part of the employees from employment succession. However, this kind of agreement, which is

virtually not much different than employee dismissal, is valid only when one of the justifiable causes enumerated in Article 30 of the LSA can be presented for such exclusion. (Supreme Court ruling on Sep. 29, 1995: No. 94Da54245)

···› In the case of an inclusive succession of employment following a business transfer, are the employees who have raised a claim for dismissal also transferred?

The inclusive succession of employment under a business transfer contract only applies to employees who are working at the company concerned at the time of the contract and does not apply to employees who have raised a claim for dismissal. Since the agreement to exclude some of the employees affected from employment succession is not much different from employee dismissal, the agreement is valid only when justifiable reasons for dismissal pursuant to the LSA are presented.
(Supreme Court ruling on Sep 29, 1995: No.94Da54245)

···› In the case of an inclusive succession of employment following a merger, if the new rules on retirement allowance are disadvantageous to the employees in comparison to the previous rules that previously applied to them, are the new rules effective?

When the employment relationship is inclusively taken over by a new employer in the process of merger or business transfer, the status of the employees should remain the same. Therefore, the new rules on retirement allowance that are unfavorable to the transferred employees should not be applied to them, unless the new employer obtains a collective consent from them. Namely, the new rules are not effective in regard to the transferred employees, as they infringe on the vested interests of those employees. As a consequence, the employer has run a dual system of retirement allowance which includes two different retirement allowance options: one for the transferred employees and the other for the remaining employees. In this case, the dual system should not be treated as a violation of the ban on different rates for retirement allowance.
(Supreme Court ruling on Dec. 26, 1997: No. 97Da17575)

···› In case an employee retires after his/her employment was taken over by the transferee employer, how is the duration of his/her consecutive service calculated for the purpose of retirement allowance computation?

When a body of business organization is transferred to a different employer,

it includes a transfer of the employees, along with the organizational structure. In principle, the employment relationship of those employees is taken over, as it was, by the new employer (transferee employer). Accordingly, if a transferred employee retires after the transfer, the new employer is obliged to pay him/her the retirement allowance for his/her uninterrupted period of service. The same applies to the case where the transferee is the central government.
(Supreme Court ruling on Jan. 25, 1994: No. 92Da23834)

···› When an employee tended a resignation to the transferor company and entered the transferee company, all of which was a formality, but has been engaged in the same kind of work before and after the structural change, should it be considered that his consecutive service was interrupted by such resignation?

In the process of structural changes in a parent company and its affiliates, the employee who was working for one of the affiliates tended his resignation to the company and entered the parent company, as a formality of the process. In spite of such change, the employee has done the same kind of work all the while. As his submission of the resignation letter is not understood as an expression of genuine intention, his consecutive service is not interrupted by such resignation. (Supreme Court ruling on March 22,1991: No. 90Da6545)

10. Disciplinary Measures

1) Types of disciplinary measures

[Explanatory notes]

···› "Disciplinary measure" refers to a disadvantageous measure that an employer, with a view to maintain order at the workplace, takes against an employee who has violated laws or regulations, the collective agreement, the rules of employment or the contract of employment.

···› The severity of disciplinary measures should be determined in a reasonable way that is generally acceptable, according to the severity of the corresponding violation.

➡ Types of disciplinary measures

Type	Description
Warning	The employer gives a written or verbal warning to the employee concerned.
Reprimand	The employee concerned shall hand in a written explanation or apology for his/her wrongdoing.
Pay cut	Part of pay is subtracted. - The subtracted amount for each pay may not exceed 50% of 1 day's average pay. Moreover, no matter many times an employee is disciplined, the total amount subtracted may not exceed 10% of the whole pay during a particular pay reference period.
Suspension	The provision of work is suspended, although the employment relationship is retained. - Whether the days of suspension should be paid and counted in the length of service is dependent on the provisions in the collective bargaining agreement, the rules of employment, or the practices of the company.
Dismissal	The employer terminates the employment relationship with the employee concerned.

[Court rulings]

···› How can one determine whether a disciplinary measure taken by an employer is beyond his/her discretionary right to discipline employees?

In order to determine that a disciplinary measure taken exceeds the framework of the employer's right to discipline employees, it should be proven by all the relevant factors-including the cause (that is, the employee's wrongdoing) and the purpose of the disciplinary measure - that the measure is a clear abuse of the employer's mandate and, therefore, a violation of the law. (Supreme Court ruling on Dec. 8, 1998: No. 98Du1475)

···› Is it justifiable to relate the severity of disciplinary measures to whether or not the employee concerned has shown a sincere regret for his/her misdeed?

If the employer took different disciplinary measures in type and extent for the employees who had committed the same kind of misdeed, by considering whether or not the employees had shown a genuine repentance for their wrongdoing, it should be treated as a reasonable differentiation in accordance with the nature of the wrongdoing, not as a breach of the principle of equality or equitability.
(Supreme Court ruling on Aug. 20, 1999: No. 99Du 2611)

···› Is it always legitimate to dismiss an employee based on the causes of disciplinary dismissal enumerated in the rules of employment?

In case an employee was dismissed for a reason that is not given in the rules of employment or, although the reason of dismissal is included in the rules of employment, it does not seem that the employee's wrongdoing was so severe that it is extremely unfair or unjustifiable to maintain the employment relationship with the employee, the disciplinary dismissal should be treated as a clear abuse of the employer's right to discipline employees.
(Supreme Court ruling on Nov. 26, 1991: No. 90Da4914)

2) Causes of disciplinary measures

[Explanatory notes]

···› The details on causes and procedures of disciplinary measures are generally laid out in the collective agreement or the rules of employment.

Moreover, justifiability of a particular dismissal should be thoroughly examined, with the generally accepted notions being taken into full consideration.

···› The following shows causes of disciplinary measures attributable to employees that have been acknowledged as justifiable in court rulings:

- Unauthorized leave of absence, repeated early-leaving or tardiness, laziness, and other bad behaviors at work;
- Deliberate failure to provide contractual work, or deliberate provision of defective work;
- Instigation of or participation in unlawful industrial actions;
- Causing financial damages to the business or undermining the reputation of the company;
- Failure to obey a reasonable job-related instruction (say, on business trip, job reassignment or holiday work) from a higher-up;
- Disclosure of company secrets and confidential information;
- Undermining the company's reputation and failing to provide work, as a result of the employee's criminal offence;
- Committing a criminal offence or a misdeed at workplace: verbal violence at higher-ups, embezzlement, stealing, sexual harassment, etc.
- Forgery of his/her educational attainment or career history

[Court rulings]

···› Is an employee's misdeed in his/her private life a justifiable reason for a disciplinary measure by the employer?

The employer's right to discipline employees should be exercised only to maintain order at workplace to the extent that the business activities can be continued without a hitch. An employee's misdeed in his/her private life may be a just cause for a disciplinary measure only when it is closely related to the business activities or threatens to defame the company's reputation. (Supreme Court ruling on Dec. 13, 1994: No. 93Nu23275)

···› Can an employer dismiss an employee for the forgery of his/her educational or career history?

The reason an employer requires a job applicant to hand in a written history or a certificate of his/her educational attainment or professional career is not only to evaluate his/her vocational ability, but also to see if he/she is right for

the company in terms of his/her intelligence, experience, educational attainment, integrity and adaptability to the company and is reliable enough to build trust with the employer and contribute to maintaining order at the workplace. As it seems that if the employer had known the information on the employee's educational and professional history was forged, he would not have hired the employee, the employer's decision to fire the employee for his fraudulent act is not unfair.
(Supreme Court ruling on June 23, 2000: No. 98Da54960)

···› In case an employee violates his/her obligation to maintain ethical conduct to an extent that his/her violation adversely affects social evaluation of the company, the violation constitutes a justifiable reason for employee discipline.

In the case in question, the employee, who was in charge of equipment purchase, had a close private relationship with the president of a supplier company and even was offered a guaranteed payment of a large sum of money by the supplier. This close relationship has invited suspicion that the supplier received preferential treatment thanks to such inappropriate relationship, thus adversely affecting social reputation and business performance of the employer. This constitutes a critical and intentional violation of the employee's obligation to maintain ethical conduct and is a justifiable reason for dismissal under Article 12(2) of the rules of reward and punishment at the company. Furthermore, in light of social practices, such violation is an offense that makes it impossible to continue the employment relationship with the employee. Even admitting that the payment guarantee was due to the close relationship that started before the employee was hired by the employer and no specific irregularities in relation to the guarantee were revealed, it is not deemed that the dismissal is too harsh to be within the scope of the employer's discretional rights.
(Supreme Court Ruling on Dec. 14, 2001: No. 2000Du3689)

3) Procedures of disciplinary measures

[Explanatory notes]

···› In case a disciplinary procedure (for example, a review at the meeting of the disciplinary committee, or the employee's opportunity to defend

him/herself) is specified in the collective agreement or the rules of employment, any disciplinary measure should be in compliance with the said procedure. The principle is that a violation of the specified procedure renders the disciplinary measure concerned null and void.

[Court rulings]

···› Procedures of disciplinary measures stipulated in the collective agreement or rules of employment

Disciplinary measures applied contrary to the procedures stipulated in a labor-management agreement or collective agreement, or applied under unfaithful procedures of disciplinary measures are invalid.
(Supreme Court ruling Jul 9, 1991: No.90Da8077)

···› In case an employer takes a disciplinary measure against an employee without asking the employee to show up to defend him/herself, and a procedure is not specified in the rules of employment or another company regulation on disciplinary measures, what happens to the status of such disciplinary measure?

If the rules of employment or another company regulation do not provide for any particular procedure, such as the request for the employee concerned to make an appearance at a disciplinary committee meeting to defend him/herself, the disciplinary measure that the employer has taken without going through such procedure is effective.
(Supreme Court ruling on Sep. 30, 1994: No. 93Da26496)

···› In observance of the collective agreement providing that the employer, before taking a disciplinary measure against a unionized employee, shall give him/her a chance to defend him/herself and also ask the union representative to attend a disciplinary meeting to state the union's opinion, the employer offered the employee concerned and the union the said opportunity. However, the employee and the union representative did not show up. In this case, is it possible to take disciplinary measures against the employee?

According to the collective agreement, it is not that it is necessary for the employee to defend himself, but that the employer should offer him/her a chance to do so. As the employee did not use the opportunity to defend him/herself, although the employer gave such opportunity, or did not apply

for such opportunity, a notice to the employee is all that the employer needs to proceed with the disciplinary procedure. Similarly, as the union representative failed to make an appearance at a meeting of the disciplinary committee even after the employer s notification, the meeting could justifiably go on without representation of the union.
(Supreme Court ruling on Sep. 28, 1993: No. 91Da30620)

···› When the collective agreement provides for an employer's obligation to get prior consent of the union before dismissing a unionized employee for a cause of discipline, and the union refused to consent to the dismissal by abusing its right to such refusal, should the dismissal be treated as invalid?

The union's right to prior consent, which is provided for in the collective agreement, should be reasonably exercised in accordance with the good-faith principle. In case there is a distinct and objective reason for disciplinary dismissal of an employee and the employer has made sincere efforts to obtain advance consent of the union to the dismissal, if the union continues to refuse to consent to the dismissal without giving a justifiable ground or reason for such refusal, it should be deemed that the union is abusing its right to advance consent or gives up exercising the right. Accordingly, in that case, the employer's failure to obtain prior consent from the union does not render the dismissal ineffective.
(Supreme Court ruling on Sep. 28, 1993: No. 91Da30620)

···› Can an illegal action committed after the cause of disciplinary measures for the relevant case has occurred be taken as reference for the disciplinary decision of the case concerned?

Disciplinary decision against the employee who is presumed to have created causes for disciplinary measures shall be left to the discretion of the person who may impose disciplinary measures. In this case, the contents and nature of the causes for the disciplinary measures the concerned employee's conduct, work performance, and past record; and illegal actions committed after cause of disciplinary measure for the relevant case have occurred, though they are not taken as causes for disciplinary measures, can be taken as a reference for the disciplinary decision on the case concerned. However, only in cases where it is considered the person who may impose disciplinary measures has abused his/her discretionary rights by taking unreasonable disciplinary measures judging from social norms, the measures are regarded as invalid. (Supreme Court ruling on Sep 3, 1999: No.97Nu2528,2535)

···› Even though an employee was present at the disciplinary committee hearing and the disciplinary committee of review, and defended himself/herself without raising an objection to the measure, it does not mean that the defect in the procedure of the disciplinary measure has been resolved.

According to the factual grounds and records confirmed by the original court, the defect is not resolved during the procedure of review because there also has been a defect in the procedure for organizing the disciplinary committee of review. Also, since the defect in the procedure for organizing the disciplinary committee of review was grave, the defect cannot be resolved on the grounds that the employee was present at the disciplinary committee and the disciplinary committee of review and defended himself/herself without raising an objection.
(Supreme Court ruling on Aug 21, 2008: No.2008Du7724)

···› In case where the rules of employment, etc., stipulate organizing a disciplinary committee with the same number of people from labor and management, the disciplinary committee members of the labor side may not be appointed arbitrarily without reflecting the opinions of employees.

If the rules of employment, etc., stipulate that a disciplinary committee should be organized with the same number of people from labor and management, the purpose of this stipulation would be to guarantee procedural fairness by appointing disciplinary committee members from among employees and securing the employees' rights to participate and to observe any abuse of their right to take disciplinary action. Therefore, it cannot be considered that the disciplinary committee members of the labor side may be appointed arbitrarily without reflecting the opinion of employees, except for special cases such as the disciplinary committee members of the labor side, having until then been representing the employees and their opinions, even though there were no explicit stipulations on the qualification of disciplinary committee members and appointment procedures in the rules of employment.
(Supreme Court ruling on Nov. 23, 2006: No.2006Da48069)

4) Remedies for unfair disciplinary measures

Applicable legislation : Article 28 of the LSA (Application for remedy for unfair dismissal, etc.)

① If an employer dismisses a worker unfairly (dismissal, leave of absence, suspension from office, transfer, wage reduction, and other disciplinary punishments), the worker may apply for remedy to the Labor Relations Commission.

② The application for remedy under paragraph (1) shall be made within three months from the date on which the unfair dismissal, etc. took place.

[Explanatory notes]

···› An employee who reasonably believes that the disciplinary measure (pay cut, suspension, job transfer, dismissal, etc.) taken against him/her is unjustifiable may file the case before the Labor Relations Commission within 3 months from the date when the disciplinary measure in question was taken

···› Apart from bringing the case before the Labor Relations Commission for an administrative remedy, the employee may file a complaint to a court of law, requesting that the disciplinary measure be ruled as invalid.

[Court rulings]

···› Does an employer's non-compliance with the disciplinary procedure automatically constitute an offense under the LSA penal provisions that is subject to criminal punishment?

Even when the employer failed to undergo a given procedure for disciplining employees and his/her disciplinary measure, as a consequence, was rendered invalid, his/her failure to comply with the procedure does not constitute a criminal offense under the LSA penal provisions, unless it is proven that the employer intentionally omitted the procedure in order to take an unfair disciplinary measure against a particular employee. Moreover, the employer is deemed to have committed a criminal offence only when it is determined that the employer misused or abused his/her right to discipline employees to an extent that, in light of the generally accepted ideas in the society, such misuse or abuse may be subject to criminal punishment. (Supreme Court ruling on Nov. 24, 1995: No. 95Do2218)

11. Dismissal(ordinary dismissal/disciplinary dismissal)

1) Causes of dismissal

Applicable legislation : Article23 of the LSA (Restrictions on dismissal, etc.)

① An employer shall not dismiss, lay off, suspend or transfer an employee, reduce wages or take another punitive measure against an employee, without giving a justifiable reason.

② An employer shall not dismiss any employee during a period of temporary service suspension for medical treatment of an occupational injury or disease or within 30 days thereafter. In addition, an employer shall not dismiss any female employee during her pre-natal or post-natal leave or within 30 days thereafter.

[Explanatory notes]

···› "Dismissal" refers to an employer's unilateral act carrying the legal effect of terminating the employment relationship with an employee for the future period.

···› Dismissal can be classified into: 'disciplinary dismissal' when an employee is held responsible for a severe violation of work regulations; 'dismissal for economic reasons' for an urgent economic reason attributable to the employer; and 'ordinary dismissal' when there is an inevitable reason, other than specified above, to terminate the employment relationship.

···› A 'justifiable reason,' although it may differ from case to case, should be attributable to the employee concerned, in light of the generally accepted ideas in this society.

[Court rulings]

···› If an automatic retirement scheme, as provided for in the collective agreement or the rules of employment, is, in nature, employee dismissal, should the employer be able to give a justifiable reason as mentioned in the LSA for any case of automatic retirement?

Even if the employer specified a certain cause of automatic retirement and

set a different procedure for automatic retirement than that for ordinary or disciplinary dismissal, the employer's unilateral termination of the employment relationship constitutes a case of dismissal, which should be governed by the LSA provisions restricting employee dismissal. Accordingly, in order for a case of automatic retirement to be effective, the employer should give a justifiable reason under Article 30 of the LSA, and when the employer cannot justify such a case, the employee concerned may file a complaint against the employer to the court of law.
(Supreme Court ruling on Oct. 26, 1993: No. 92Da54210)

···› Even if a dismissal complies with the reasons for disciplinary dismissal, as stipulated in the collective agreement or the rules of employment, a dismissal under the collective agreement or the rules of employment is not always rightfully justifiable.

Even if a dismissal conforms to the reasons for the disciplinary dismissal stipulated in the collective agreement or the rules of employment, such a dismissal is not always justifiable. It can be justified when the reasons for dismissal attributable to the employee are so grave that the employer cannot continue the employment relationship, judging from the social norms. The level of gravity shall be determined after reviewing all the circumstances, including the purpose and character of the relevant business of the employer; workplace conditions; the position and job description of the employee concerned; the cause and circumstance of the wrongdoing; any possibility that the wrongdoing might affect the hierarchy of the company; the work attitude of the employee, etc.
(Supreme Court ruling on Jun 15, 2006: No.2005Du8047)

···› Can each and every cause of dismissal stipulated in the rules of employment be a 'justifiable reason' mentioned in Article 30 of the LSA?

A 'justifiable reason' refers to a reason attributable to an employee which, it is generally accepted, makes it impossible to maintain the employment relationship with the employee. The causes of dismissal set forth in company regulations (including the rules of employment) may be a justifiable reason for dismissal, unless the causes violate the LSA provisions, upon which they are rendered invalid.
(Supreme Court ruling on April 24, 1992: No. 91Da17931)

···› An employer instructed his/her employees to tender their resignation en

bloc and the employees, because they had no choice, tendered a letter of resignation. Some of them were then removed from office but others were not. Is this selective acceptance of the resignation legally effective?

This constitutes the employer's unilateral termination of the employment relationship and, therefore, a case of unfair dismissal.
(Supreme Court ruling on Feb. 9, 1993: No. 91Da44452)

···› In case the rules of employment or the collective agreement provides for a limited number of causes for disciplinary measures, is it justifiable for the employer to take a disciplinary measure against an employee for a reason not specified in the rules of employment or the collective agreement?

No employer is allowed to discipline an employee for a reason not included in the rules of employment or the collective agreement, once a limited number of causes for disciplinary measures are specified.
(Supreme Court ruling on Dec. 27, 1994: No. 93Da52525)

···› In case an employer came up with causes for dismissal other than those specified in the collective agreement and inserted them in the rules of employment, is any dismissal under the new provision a contradiction to the collective agreement?

The fact that an employer dismissed an employee by referring to a new cause in the rules of employment, which is not related to the causes in the collective agreement, does not automatically lead to a contradiction to the collective agreement, except when the collective agreement also provides that "the employer shall dismiss an employee only under the collective agreement" or "the employer shall not dismiss for a reason that is not included in the collective agreement," or the provisions on causes and procedures of disciplinary measures in the rules of employment and the collective agreement are contradictory to each other.
(Supreme Court ruling on June 13, 1997: No. 97Da13627)

···› In cases where an employee has carried out several suspicious action deserving disciplinary measures

Where the employee has several facts of suspicion for disciplinary measures, the reasonableness of disciplinary dismissal shall be judged not just from each fact or part of facts but from overall facts that could verify whether the causes are serious enough to terminate the labor contract, based on social

norms. Therefore, when judging the reasonableness of dismissal, overall facts of suspicion shall be considered.
(Supreme Court ruling on Sep 20, 1996: No.95Nu15742)

···› In cases where an employer dismisses an employee from his/her position, is it possible to include causes irrelevant to the original cause of dismissal when judging the reasonableness of dismissal?

If an employer dismisses an employee due to a reduction of personnel due to downsizing, the employer cannot justify the dismissal giving other reasons such as involvement in a personnel scandal, dereliction of duties, lack of job performance ability, etc., that are irrelevant to the original cause of dismissal in its contents and nature.
(Supreme Court ruling on Jun 9, 1992: No.91Da11537)

···› Repeated sexual harassment of female employees using one's authority is clearly intentional, and the extent of the violation is severe and grave; and therefore, the dismissal of the plaintiff is considered as valid.

The plaintiff's behavior involved sexual harassment-including sexually offensive words and behaviors which can be considered as disgraceful conduct using his authority or indecent acts by force, and severe enough to aggravate the working environment. Moreover, it cannot be considered that such behavior of the plaintiff was accidental or was conducted for the sake of harmony and unity at the workplace. In this light, the employer' s disposition of disciplinary dismissal against the plaintiff is valid because the sexual harassment by the plaintiff was "evidently intentional and its extent of violation was severe and grave."
(Supreme Court ruling on July 10, 2008: No.2007Du22498)

···› Notwithstanding the violation of the Protection of Communications Secrets Act (in adopting evidence), if the illegal action of the employee is so serious that the company would not be able to continue the employment relations with the employee as it damages the trust between the company and the employee, then the disciplinary dismissal would be considered valid.

The evidence adopted by the original court is the stenographic record of the tape-recording of the plaintiff's conversation with a person whose name is withheld. Since it is a recording of "conversations between others that are

not made public," pursuant to the Protection of Communications Secrets Act, the recording may not be used as evidence pursuant to the said Act. However, the illegal action by the plaintiff amounts to grounds that are so serious that the company would not be able to continue employment relations with the employee as it damages trust between the company and the employee. Therefore, judging only from the facts which the original court lawfully approved, the disciplinary dismissal against the plaintiff by the intervener company is valid.
(Supreme Court ruling on Jun 26, 2008: No.2007Du22344)

···› In cases where an employee is sentenced to probation for intentional repeated drunken and unlicensed driving, the dismissal against the employee is valid.

In cases where an employee is sentenced to probation for intentional repeated drunken and unlicensed driving, such behavior warrants sufficient reasons for dismissal. Judging from the social consensus which demands heavier penalties for drunken and unlicensed driving, censure by society toward drunken and unlicensed driving is no lighter than that toward traffic accidents caused by negligence.
(Supreme Court ruling on Nov 15, 2007: No.2005Du4120)

···› A disciplinary dismissal against an employee who has planned and led an unlawful strike is not considered to be unreasonable.

The plaintiff's demands are not working-environment-related matters but rather related to management and personnel matters. Even if the strike-which contravened the regulation that prohibits strikes for 15 days when the dispute is referred to the arbitration-was evidently illegal, the plaintiff interrupted the employer's conduct of business by planning and leading the strike during this period and did not follow the "return-to-work" order. Such actions amount to reasons for disciplinary measures pursuant to the personnel regulations of the employer's company. Judging from the facts that the plaintiff had planned and led the strike as a chairperson of the countermeasure committee for the settlement of strike; abandoned his/her job without following the return-to-work order; damaged the employer's property; caused people inconvenience by going on the illegal strike; and disturbed the hierarchy in the company by using abusive language to his/her boss, the trust between the employer and the plaintiff no longer exist for the reasons attributable to the plaintiff and the company is not able to continue

the employment relationship. Therefore, the dismissal against the plaintiff by the employer is not considered as too severe or against the principle of equity. (Supreme Court ruling on Feb 23, 2006: No.2005Du14767)

2) Procedures of dismissal

Applicable legislation : Article 27 of the LSA (Written Notification of Reasons for Dismissal)

① If an employer intends to dismiss a worker, the employer shall notify the worker of reasons for dismissal and the date of such dismissal in writing.
② The dismissal of a worker shall take effect only after the written notification is given to the worker pursuant to paragraph①.

[Explanatory notes]

···› If an employer intends to dismiss an employee, the employer shall notify him/her of the reason and the date of dismissal in writing. According to the LSA amended and entered into effect on July 1, 2007, in cases where an employer intends to dismiss an employee, the employer shall notify him/her of the reason and the date of dismissal in writing and the dismissal shall take effect only after the written notification is given to the employee. Therefore, in cases where the employer gives notice orally, by telephone, or by SMS, e-mail, the dismissal shall not take effect.

···› Dismissal shall be conducted in accordance with legal procedures. As the law does not stipulate procedures for dismissal, except for the written notification of reasons for dismissal, the procedures shall conform to the regulations prescribed in the collective agreement or rules of employment. In cases of violation of such procedures, the dismissal is considered to be invalid, even though the reasons for dismissal are valid. However, if the rules of employment, etc., do not stipulate the procedures regarding the presence of the employee concerned, an opportunity for him/her to state an opinion, etc., the dismissal without such procedures is considered to be valid.

[Court rulings]

···› Dismissal in violation of restrictions on procedures of dismissal

In cases where a collective agreement, rules of employment, or rules of disciplinary measures stipulate the involvement of a representative of labor union in a disciplinary committee hearing and gives the employee concerned an opportunity to be present at the disciplinary committee hearing and to present the materials for explanation and clemency, disciplinary dismissal in violation of such procedures is invalid.
(Supreme Court ruling on Jul 9, 1991: No.90Da8077)

···› If a board of directors and a management committee dismiss employees without giving the man opportunity to defend themselves, it is an abuse of discretionary authority of disciplinary procedures, amounting to a violation of the laws.

Matters that might affect the rights and duties of employees shall be handled by the agencies separate from the business related agencies, such as a board of directors, in order to guarantee the procedural reasonableness by ensuring fair disciplinary procedures. The employer's dismissal of the employees concerned through a meeting of the board of directors and the management committee was a violation of the disciplinary procedures. Also, the rules of employment of the employer's company stipulate that the person concerned should have had the opportunity to defend himself/herself when a disciplinary measure is taken against him/her. Even though it is at the board's discretion whether or not to give the employee the opportunity to defend himself/herself, it is important to offer such an opportunity, because the objective truth may be verified and procedural reasonableness of the disciplinary measures may be guaranteed through the opportunity. Therefore, the board of directors and the management committee's dismissing employees without giving them an opportunity to defend themselves is an abuse of discretionary authority of disciplinary procedure, which is a violation of the law.
(Supreme Court ruling on Feb 26, 2006: No.2005Du14806)

···› In cases where the procedures for dismissal, including the presence of the employee concerned, opportunity to state an opinion, etc., are not stipulated in the rules of employment, etc.

When dismissing an employee, if the dismissal procedures, including the

presence of the employee concerned, opportunity to state an opinion, etc., are not stipulated in the rules regarding disciplinary measures, including rules of employment, the dismissal without such procedures is considered valid. (Supreme Court ruling on April 9, 1991: No.DaKa27402)

···› In cases where a request for attendance at a disciplinary committee hearing is posted on the bulletin board of the company as the employee concerned ignored the request.

If a company posted a request for attendance at a disciplinary committee hearing on the bulletin board of the company because the employee concerned ignored the request for attendance at a second disciplinary committee after requesting postponement of the first disciplinary committee hearing against him/her, it is considered that the company has properly notified the attendance to the employee and given the employee enough opportunity to state his/her opinion. Therefore, the disciplinary procedure is considered valid. (Supreme Court ruling on April 14, 2006: No.2006Du1715)

···› In cases where prior agreement is required in cases of dismissal under the collective agreement, the dismissal without following the correct procedure is considered invalid.

Article 30. (1) of the former LSA, which stipulates that an employer shall not dismiss an employee without any reasonable justification, prohibits dismissals in principle. However, the regulation grants the employer the right to dismiss an employee to a limited extent in exceptional cases by allowing dismissals only in cases where there is reasonable justification for dismissal. If the employer has agreed to limit the right to dismiss through a labor-management negotiation, and the prior agreement in cases of dismissals is stipulated in the collective agreement signifying that the employer would exercise the right to dismiss only when the labor union consents, the dismissal without such procedure is considered invalid. However, even if the prior agreement is required under the collective agreement, it does not mean that the employer's right to dismiss can be exercised only when the labor union consents regardless of any justification. In cases where the labor union abuses the right to prior consent or it is considered that the labor union renounces the right to prior consent, the employer may exercise the right to dismiss without the consent of the labor union. In this case, the abuse of right to consent may include cases where the labor union performs an act of treachery; the dismissal procedure of the

employer side is affected as a result of the act of treachery; the employee concerned causes enormous damage to the company by conducting grave illegal activity; it is evident that the illegal activity conforms to the reasons for disciplinary measures the company fails to reach a prior agreement in spite of the company's faithful and sincere efforts to reach an agreement with the labor union as the labor union objects to the agreement without giving any rational reasons or grounds.
(Supreme Court ruling on Sept. 6, 2007: No.2005Du8788)

···› In cases where collective agreement stipulates that a personnel change of union officials requires the consent of the labor union

In cases where the collective agreement of the company stipulates that a personnel change of union officials requires the consent of the labor union, disciplinary measures without such agreement are considered invalid in principle. (Supreme Court ruling on March 28, 1995: No.94Da46763)

···› Dismissal without the consultation process with the labor union as stipulated in the collective agreement

If the collective agreement stipulates, "The labor union acknowledges that the company has every right to implement personnel management. However, personnel management concerning dismissal, leave of absence, and job reassignment shall be implemented after the consultation with labor union," then it seems reasonable to consider such regulations of the collective agreement as requiring an employer notify the labor union in advance of the contents of personnel management or disciplinary measures against union members so that the labor union can be allowed an opportunity to present its opinion on the fair personnel management or disciplinary measures and to require the employer to refer to the opinion when making a disciplinary decision. Therefore, even if the employer conducts personnel management without the due consultation process, the validity of such measures is still in effect.
(Supreme Court ruling on April 23, 1996: No.95Da53102)

3) Term of notice

Applicable legislation : Article 26 of the LSA (Advance notice of dismissal)

An employer shall give advance notice to an employee at least 30 days before dismissal (including dismissal for an economic reason). If the 30-day notice is not given, 30 days normal wage or more shall be paid in lieu.

[Explanatory notes]

···› In order to prevent employees from getting into financial trouble as a result of an unexpected and sudden job loss, it is provided by the law that the employer shall give a dismissal notice to the employee at least 30 days in advance.

···› However, summary dismissal (dismissal without an advance notice) is possible in case the business cannot be sustained for an unavoidable reason such as a natural disaster, outbreak of war, or other cases of force majeure (an Act of God), or when the employee has deliberately caused a serious disturbance to the business or inflicts financial damages on the company.

➡ Causes of summary dismissal, attributable to the employee

(Article 4 of the Enforcement Regulations of the LSA)

1. In case an employee took a bribe for allowing an inflow of flawed products from a supplier that has disturbed the production process of the company
2. In case an employer caused a traffic accident by making another person to drive commercial vehicle
3. In case an employee provided confidential information on business to another competitor company that has adversely affected the business
4. In case an employee made up or disseminated ungrounded facts or masterminded unlawful collective actions that have caused a considerable disturbance to the business
5. In case an employee took advantage of his/her job position or committed breach of trust to misappropriate, embezzle or use company money for private purpose for a long time (e.g., embezzling the proceeds from operating a company vehicle)
6. In case an employer stole or carried out products or raw materials illegally
7. In case an employee engaged in personnel management, treasury or accounting manipulated the records or produced fraudulent statements that caused damages to the business
8. In case of deliberate destruction of company equipment or properties
9. Other cases where the act involved is reasonably regarded as disturbing the business or causing financial damages to the company

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

(Article 35 of the LSA)

- Daily employees who have not worked for a 3 consecutive months
- Employees hired for a pre-arranged period of time lasting 2 months or less
- Salary employees who have worked for less than 6 months
- Employees hired for seasonal work for a pre-arranged period of time lasting 6 months or less
- Employees under probationary period (of 3 months or less)

[Court rulings]

···› Even when there is no justifiable reason for dismissal, can an employer dismiss an employee simply by giving prior notice?

With regard to the contract of employment for an infinite term, just like in the case of a fixed-term contract, the employer may terminate the employment relationship by giving an advance notice only when he/she can present a justifiable reason as provided for in Article 30 of the LSA. Accordingly, an advance notice of dismissal is not the only requirement for a legitimate termination of the employment relationship.
(Supreme Court ruling on Oct. 10, 1990: No. 89Do1882)

···› When an employer fails to comply with the requirement of prior notice, is the dismissal still in effect?

Even when the employer did not comply with the prior notice requirement, such non-compliance has no influence on the legality of the dismissal so long as the dismissal was based on justifiable grounds.
(Supreme Court ruling on Nov. 27, 1998: No. 97Nu14132)

4) Remedies for unfair dismissal

Applicable legislation : Article 28 of the LSA (Application for remedy for unfair dismissal, etc.)

① If an employer dismisses a worker unfairly (dismissal, leave of absence, suspension from office, transfer, wage reduction, and other disciplinary punishments), the worker may apply for remedy to the Labor Relations Commission.

② The application for remedy under paragraph (1) shall be made within three months from the date on which the unfair dismissal, etc. took place.

[Explanatory notes]

···› An employee who reasonably believes that he/she was dismissed unfairly may bring the case before the Labor Relations Commission and, in addition, may file the case before a court of labor by requesting that the alleged unfair dismissal should be declared invalid.

···› The request for remedy to the Commission shall be made within 3 months from the date when the dismissal in question was taken. The Commission, upon receipt of the request, makes inquiries and investigations to determine whether the measure in question can be justified or not.

···› In case the Commission finds the dismissal to be unfair, the Commission orders the employer to take a remedial action: the dismissed employee is reinstated and the amount equivalent to the wage is paid for the unworked period due to dismissal.

···› When the Labor Relations Commission issues a remedy order, if the employee does not want to be reinstated to his/her former position, the Labor Relations Commission may order the employer to pay the employee the amount equivalent to the wages that he/she could have been paid if he/she had provided the work during the period of dismissal (monetary compensation).

[Court rulings]

···› In case, while an employee's request of remedy for unfair dismissal to the Labor Relations Commission is in process, his/her suit filed before the court of law for the same case has been lost, is it possible to go on with the remedial process at the Labor Relations Commission?

If the court of law judged that it found no reason to justify the employee's allegation of unfair dismissal and the judgment was final, it is established that the dismissal in question was not unfair. Therefore, there is no need to proceed with the procedure for remedy and the employee's interest of remedy has been eradicated.
(Supreme Court ruling on July 28, 1992: No. 92Nu6099)

···› If an employer, who is a party to the second review of a case of alleged unfair dismissal at the Labor Commission, refused to accept the Commission's decision and filed a suit before the court of law to reverse the decision, who has the burden of proof to show that the dismissal in question was fair?

In the case of a suit over the Labor Relations Commission's second decision on alleged unfair dismissal under Article 33 of the LSA, the burden of proof for legitimacy of the dismissal is on the party who insists that the dismissal is fair (that is, the employer). Even when the court, excluding the employer's argument for legitimacy of the dismissal, acknowledged the employer's fault, the court did not go against the principle of pleading.
(Supreme Court ruling on April 27, 1999: No. 99Du202)

···› In case an employee's allegation of unfair dismissal goes against the good-faith principle, what happens to the employee's right to file a suit over the dismissal?

At the time the employees were dismissed, they did not make any objection to the dismissal and received retirement pay from the employer. Then, one year and 7 months later, they tried to file a suit over the dismissal, claiming that the dismissal is invalid. Hence, the employees' application is not accepted, as their act is contradictory to the principle of faith and trust.
(Supreme Court ruling on April 12, 1991: No. 90Da8084)

···› In case an employee had filed a suit over alleged unfair dismissal before receiving retirement pay, does the fact that the employee later

received the retirement pay mean that he admitted to the validity of the dismissal?

If the employee received retirement pay and did not make any objection to his dismissal nor submit a written agreement that he would not make any objection, he may not file a suit over the dismissal against the employer. However, the employee had filed such suit before receiving the retirement pay. In this case, it does not seem that he admitted to the validity of the dismissal. (Supreme Court ruling on March 31, 1992: No. 90Da8763)

···› In cases where it is evident that the abuse of right to dismiss cannot be tolerated based on sound social norms and rules, the abuse is regarded as an illegal activity causing emotional distress to the other party. Therefore, such abuse is considered an illegal activity against employees.

In cases where it is evident that the abuse of the right to dismiss cannot be tolerated according to sound social norms and rules, such as an employer intentionally creating nominal reasons for dismissal in order to get rid of the employees from the workplace, or dismisses the employees for such nominal reasons, even if there are not any justifiable reasons for dismissal; the employer dismisses the employee for reasons which evidently do not conform to the reasons for dismissal stipulated in the rules of employment, etc., or cannot be considered as the justifiable reasons even if it is easy to notice such circumstances, such dismissals are not only invalid as it cannot be justifiable under the Article 30.(1) of the LSA but also illegal as it is an illegal activity causing emotional distress to the other party. Therefore, in order for dismissals to conform to illegal activities, any requisite mentioned above shall be met. (Supreme Court ruling on Dec. 28, 2007: No.2006Da33999)

···› When an employer, in obedience to the court ruling on invalidity of the dismissal, has the employee concerned return to work, is the employer allowed to assign the employee to a different kind of work than prior to the dismissal?

If the employer, after considering the personnel management decisions that had been already made on the premise that the dismissal was effective; his/her needs for business purpose and changes in the working environment, assigned the employee a reasonable kind of work, it is seen that the employee was properly reinstated, even when the work was different from that prior to dismissal. The employee's refusal to accept the new kind of

work would constitute a cause of disciplinary dismissal.
(Supreme Court ruling on July 29, 1994: No. 94Da4295)

···› When an employee, who was dismissed for an inevitable reason during business suspension attributable to the employer, found a paying job at another company, can the former employer deduct the so-called 'interim earnings' from the wage he is obliged to pay to the former employee?

An employee who is dismissed for an unavoidable reason during business suspension attributable to the employer is also entitled to claim his/her wage for the period of business suspension. If the dismissed employee acquires income from a paying job at another company during the period, the income is seen as a benefit resulting from his/her being exempted from the duty of work for the former employer. Accordingly, the former employer may deduct an amount equivalent to the benefit (so-called interim earnings) from the wage he/she should pay to the former employee.
(Supreme Court ruling on Dec. 13, 1991: No. 90Da18999)

···› When an employer's decision to dismiss an employee is judged by the court of law to be ineffective and, as a result, the employer is responsible for the unpaid wage, what does the term 'unpaid wage' mean?

In case an employer is responsible for unpaid wage for the period the employee was removed from his/her job, the employee may claim the amount that he/she would be entitled to unless his/her service had not been discontinued. Therefore, the unpaid wage includes not only the wage at a normal rate, but also overtime work pay and the allowance linked to his/her service duration. (Supreme Court ruling on Dec. 31, 1991: No. 90Da18999)

···› Is it possible for an employee to claim for not only normal wage but also the total amount included in total wages when an employer's decision to dismiss the employee is judged to be invalid by the court of law?

In cases where an employer's decision to dismiss an employee is judged to be invalid by the court of law due to causes attributable to the employer, the employer may claim the total wage that he/she would have been paid if he/she continued to provide his/her services pursuant to Article 538.(1) of the Civil Act. In this case, the total wage refers to the wage stipulated in Article 18 of the LSA. Therefore, it shall be considered that wages which are included when calculating the average wage are all included in total wage

and total wage is not necessarily limited to average wage. In this light, in cases where the employee did not provide his/her services during the period when the employee was dismissed or placed on a waiting list due to causes attributable to the employer, the order to pay the amount equivalent to three months' wages before being placed on a waiting list, including extended work allowance, holiday work allowance, daytime extended work allowance, and nighttime extended work allowance as a benefit in return, is considered as valid. (Supreme Court ruling Dec 21, 1993: No.93Da11463)

···› In cases where unfavorable measures, including dismissal, take effect after a certain period of time

According to Article 82. (2) of the Trade Union and Labor Relations Adjustment Act that is applied mutatis mutandis under Article 33. (1) and 33.(2) of the LSA, application for remedy for unfavorable measures, including dismissal of the employee without a justifiable reason, shall be made within three months from the date of occurrence of the unfavorable measure concerned (in cases where any such practice is in progress, from the date of its termination). In this light, in cases where the unfavorable measures take effect after a certain period of time, the three-month period is calculated from the effective date of the measure.
(Supreme Court ruling on Jun 14, 2002: No.2001Du11076)

12. Dismissal for Managerial Reasons (massive layoff)

1) Urgent necessity for dismissal for managerial reasons

Applicable legislation : Article 24 of the LSA (Restrictions on dismissal for managerial reasons)

① If an employer wants to dismiss employees for a economic reason, there shall be an urgent managerial need to do so. In such cases as business transfer, acquisition or merger aimed to avoid financial difficulties, it shall be deemed that there is an urgent managerial need.

[Explanatory notes]

···› The requirements for a justifiable dismissal for economic reasons are: ① there should be an urgent economic need; ②the employer shall make every effort to avoid employee dismissal; ③ the dismissal shall be done under reasonable and fair criteria; and ④the employer shall make consultations in good faith with the union or the employee representative(s).

···› In the past, an "urgent managerial necessity" referred to a crisis so serious that the company had to dismiss employees to save the company from bankruptcy. However, recently, it is acknowledged that there exists an "urgent managerial necessity" if there are justifiable objective reasons for layoff, including change of types of work, introduction of new technology, structural change in the industry caused by technology innovation, etc.

[Court rulings]

···› Should the requirement of an "urgent economic reason" be confined to the need to evade bankruptcy of a business?

In practice, workforce cut for 'an urgent economic reason' has been carried out not merely to overcome the poor performance of a business but also to change work organization or introduce new technologies with a view to improving productivity or restoring or strengthening competitiveness, or to keep up with the innovations and structural changes in the industry. Namely,

the dismissal for an economic reason has been conducted on the grounds of technological needs as well as managerial needs. Accordingly, the requirement of 'an urgent economic reason' should not be interpreted to mean that only the need to keep the business afloat is justifiable. Rather, it seems that when workforce reduction is reasonable in objective terms, there is 'an urgent economic reason for dismissal.'
(Supreme Court on ruling Dec. 10, 1991: No. 91Da8647)

···› Is dismissal of employees for an economic reason allowed when a union's strike temporarily prevents a normal business?

The fact that the union's strike made it impossible to maintain normal business operation does not give the employer the right to close the business for 'an urgent economic need.'
(Supreme Court ruling on Jan. 26, 1993: No. 92Nu13076)

···› In case some workplaces of a business are closed but the others of the same business are still in operation, is it possible to dismiss all the employees of the closed workplaces, citing an urgent economic need as the reason for dismissal?

When there are some workplaces in operation, although others are closed, this constitutes a business curtailment, not a complete closure. Therefore, the employer may not dismiss all the employees at the closed workplaces just because the workplaces are closed.
(Supreme Court ruling on Jan. 26, 1993: No. 92Nu3076)

···› Can an "urgent managerial necessity" be decided based on the business balance of only one department of company?

An "urgent managerial necessity" shall be decided based on not just the business balance of only one department or workplace where the employees work but the overall managerial circumstances.
(Supreme Court ruling May 13, 1990: No.89DaKa24445)

···› In cases where two corporations that are running the same kind of business lay off employees simultaneously or lay off employees of a certain business sector of one corporation.

In cases where two corporations that are running the same kind of business lay off employees simultaneously or lay off employees of a certain business sector of one corporation, it should be determined by each corporation that

conducts the layoff whether there has been any "urgent managerial necessity" as a justifiable reason for the layoff. However, if one corporation's business sector is separate and independent from that of the same corporation in terms of human resources, material resources and location; each business sector's finances and accounting is separated each business sector has its own labor union; and managerial circumstances are different to each other, the "urgent managerial necessity" can be determined separately for each business sector. On the other hand, in cases where two corporations or two business sectors of each different corporation are running the same kind of business and they are simultaneously reacting to the economic situation that the business confronts; their human resources and material resources are not strictly separated and a unified labor union that equally negotiates with both corporations is established, the "urgent managerial necessity" of the two corporation or two business sectors of each different corporation can be comprehensively determined.
(Supreme Court ruling on Sept.22, 2006: No.2005Da30580)

···› Is workforce reduction as a result of the decision to contract out a part of the business in order to resolve economic difficulty in that part allowed?

The company, after suffering a 4-year long deficit in a particular business department, decided to contract out the department in an effort to solve the deficit problem and, as a consequence, dismissed the employees working in the department. In this case, it is acknowledged that such employee dismissal was done for an urgent economic need.
(Supreme Court ruling on Dec. 22, 1995: No. 94Da52119)

···› Is it justifiable to dismiss a chauffeur exclusively working for an executive official just because the executive position, along with the job of an exclusive chauffeur, has been eliminated?

The employer removed some executive positions and their exclusive chauffeur jobs in an effort to streamline the business operation. Then, the employer, after making proper effort to minimize employee dismissal, giving a prior notice and making sincere consultations, dismissed the chauffeurs under the personnel regulations. This dismissal is fair and reasonable, in light of the peculiarity of why the employees were hired and how they worked. (Supreme Court ruling on Jan. 29, 1991: No. 90Nu4433)

2) Measures for avoiding dismissal

Applicable legislation : Article 24 of the LSA (Restrictions on dismissal for managerial reasons)

② An employer shall make every effort to avoid dismissal of employees and shall select employees to be dismissed under reasonable and fair criteria of dismissal. There shall be no discrimination on the grounds of gender.

[Explanatory notes]

···› An employer should make every effort to avoid dismissal of an employee before actual layoff. It means the employer should take every possible measure to minimize the number of laid-off workers including the rationalization of management and work patterns, the prohibition of new recruitment, use of temporary leave of absence and voluntary retirement programs, enforcement of paid/unpaid leave of absence, vocational training, change to shift working systems, etc.

[Court rulings]

···› What does "making every effort to avoid the dismissal of employees" mean?

"Making every effort to avoid the dismissal of an employee" means that an employer should take every possible measure to minimize the number of laid-off workers, including the rationalization of management and work patterns, the prohibition of new recruitment, use of temporary leave of absence and voluntary retirement programs, transfer, etc.
(Supreme Court ruling on Jan. 15, 2004: No.2003Du11339)

···› Methods and extent of efforts to avoid dismissal of employees

The methods and extent of efforts to avoid the dismissal of employees are not settled or fixed. These measures may vary depending on the extent of the financial crisis of the company concerned, the managerial reasons for layoffs, and the number of employees by positions. If the employer has consulted in good faith with the labor union or workers' representative regarding the methods to avoid the dismissal of employees and reached an agreement, this should also be considered as efforts to avoid the dismissal of employees. (Supreme Court ruling on July 9, 2002: No.2001Da29452)

···› If a company dismisses employees in a simple and extreme way, even though the company had enough time to prepare for the measures to avoid dismissals and decide on criteria to select employees to be dismissed, such dismissal cannot be considered as valid.

The company's criteria to select employees to be dismissed were unreasonable and unfair as the company had dismissed all the employees who were engaged in XX works of 00 factory whose contract was canceled at the request of the plaintiff company, without selecting employees to be dismissed among employees of the entire workplace just because they have the lowest possibility of conducting regular operations due to the legal strike. In addition to the lack of efforts to avoid dismissal, it does not seem that there has been urgent managerial necessity serious enough to offset the deviation of criteria to select employees to be dismissed. Also, the company has dismissed the employees who were engaged in XX works of 00 factory in a simple and extreme way, even though the company had enough time, two months from the date of cancelation of contract and order to place the employees on a waiting list until the date of dismissal of the employees, to prepare for the measures to avoid dismissals and criteria to select employees to be dismissed. In this light, even if each circumstance comprising "urgent managerial necessity" is comprehensively considered, the dismissal against the employees is not considered as valid.

(Supreme Court ruling on Jul 28, 2006: No.2004Du1001)

3) Rational and fair criteria for dismissal

Applicable legislation : Article 24 of the LSA (Restrictions on dismissal for managerial reasons)

② An employer shall make every effort to avoid dismissal of employees and shall select employees to be dismissed under reasonable and fair criteria of dismissal. There shall be no discrimination on the grounds of gender.

[Explanatory notes]

···› Employees to be dismissed should be selected under reasonable and fair criteria of dismissal. If the criteria of dismissal are stipulated in the collective agreement, rules of employment, etc., the selection of

employees to be dismissed shall conform to the criteria-as long as the criteria are considered as reasonable, based on common social ideas. If the criteria of dismissal are not stipulated, the employer shall determine the reasonable and fair criteria at the time of layoff and select employees to be dismisses under the criteria.

···› The criteria of dismissal shall be concrete and objective and shall adequately accommodate the livelihood protection of employees (the length of his/her service, family circumstances, and health) and company profit (work performance, quality, efficiency, adaptability, and reward and punishment)

[Court rulings]

···› What are reasonable and fair criteria of dismissal?

Reasonable and fair criteria of dismissal are also not settled or fixed. The criteria vary depending on the intensity of the financial crisis that the employer is facing, managerial reasons for layoff, a department that is subject to layoff and organization of the department, social and economic situations at the time of layoff, etc. If the employer has faithfully consulted with the labor union or workers' representative regarding the criteria of dismissal and reached an agreement, these efforts should be taken into consideration when judging whether the criteria are reasonable and fair. (Supreme Court ruling on Jul 9, 2002: No.2001Da29452)

···› If a company has first notified non-regular workers of the expiration of their contracts, or has canceled the employment relationship for unavoidable managerial reasons, the dismissal can be considered as valid, even if the layoff did not satisfy the required conditions for layoff.

In cases where an employer intends to dismiss employees for managerial reasons, there shall be urgent managerial necessity, and the employer shall try his/her utmost to avoid the dismissal; select the employees to be dismissed based on reasonable and fair criteria; and notify the labor union organized with the majority of the employees or the employees' representative of the dismissal method, criteria, etc., no later than 60 days before the date of dismissal and consult in good faith with the employees. In this case, "urgent managerial necessity" is not necessarily limited to cases where a company tries to avoid bankruptcy, but also includes cases where

personnel cutbacks are made to prepare for a possible future crisis which are considered as reasonable from an objective viewpoint. Therefore, if a company has terminated employment relations by notifying the expiration of contract to non-regular workers first or canceling the employment relations for unavoidable managerial reasons, the dismissal can be considered as valid even if the layoff did not satisfy the required conditions for layoff, because it does not seem that there have been nonobjective and unreasonable criteria for dismissal. (Supreme Court ruling on Feb 24, 2006: No.2005Du16499)

4) Labor-management consultation

Applicable legislation : Article 24 of the LSA (Restrictions on dismissal for managerial reasons)

③With regard to the possible methods for avoiding dismissal and the criteria of dismissal, an employer shall give a 50-day notice of dismissal to a union representing the majority of the employees in the business or workplace concerned (or to a person representing the majority of the employees, if such union does not exist) and have sincere consultations with the union (or the representative).

[Court rulings]

···› In case the collective agreement provides that the employer should reach agreement with the union on any dismissal for an economic reason, if the union kept resisting the proposed lay-off for an economic reason, without giving a justifiable reason for such resistance, is the lay-off that the employer carried out with no agreement with the union legally effective?

There was an urgent economic reason that can justify massive lay-off, and the employer made good-faith consultations with the union in advance and did his best to minimize dismissal. Given this, it seems that the union, which refused to agree to the planned lay-off without giving a justifiable reason for such refusal, abused its right to refuse to
agree with the employer, admitting that the collective agreement requires a bilateral accord on dismissal for an economic reason. As the employer failed to reach agreement with the union because of a reason attributable to the

union, the lay-off is effective.
(Seoul Administrative Court ruling on March 17, 2000: No. 99Gu20694)

···› Even though an employee representative does not meet every qualification for a representative who has the support of the majority of the employees, if it can be considered that the employee is a representative who is able to reflect the opinions of employees in substance, it can be considered that the procedural requirements have been met.

According to Article 31.(3) of the LSA, an employer shall notify the labor union of the methods to avoid dismissal and criteria for dismissal, etc., in cases where there is a labor union organized with the majority of the employees, or the employee who represents the majority of the employees (employee representative) in cases where there is no labor union organized with the majority of the employees, and shall consult with them in good faith. The purpose of such procedural requirements for layoffs is to guarantee the satisfaction of substantial requirements for dismissal prescribed in Article 31.(1) and (2), and to conduct unavoidable layoff through mutual consultation between the two parties. In cases where there is no labor union organized with the majority of the employees, even though the counterpart (labor union) does not meet every qualification for a representative who represents the majority of the employees, if it can be considered that the employee is the representative who is able to reflect the opinions of employees in substance, it is regarded that the procedural requirements are met.
(Supreme Court ruling on Jan 26, 2006: No.2003Da69393)

···› Is Article 31(3) of the LSA (Article 24.(3) of the law in force) an effective provision?

The purpose of Article 31(3) of the LSA, which requires an employer to inform the employee representative of the ways to avoid dismissal and the dismissal criteria no later than 60 days before the date of dismissal, is to offer maximum time needed by the employer to deliver the dismissal notice (depending on the location and number of employees affected) and by the employee(s) to respond to the notice as well as by the employee representative to conduct good-faith consultations. However, compliance with the 60-day term of notice is not a precondition to justifiable dismissal for economic reasons. Therefore, in a particular case of dismissal for

economic reasons, unless the time given for the process for notification to implement dismissal was not sufficient to complete the process properly and if other requirements for such dismissal were fully met, the dismissal is valid. (Supreme Court Ruling on Nov. 13, 2003: No. 2003Du4119)

➡ Requirements and procedures of dismissal for managerial reasons

Urgent business need

- Financial crisis due to persistent business difficulties
- Introduction of technologies
- Business transfer/merger

■ Examples of justifiable cases
- Some departments were eliminated due to suspension or reduction of production.
- The organizational structure was revised to streamline the business management.
- The company suffered persistent business difficulties as a result of repeated labor disputes.
- Due to the financial deficit, part of the business was contracted out and, consequently, there was workforce redundancy.
- As the fire at the contractor company prevented normal operation of the subcontractor company, the latter had no choice but to cut workforce.

■ Examples of unjustifiable cases
- Cases where it does not seem that the company had a managerial crisis, as in the event of the company employing new workers after the layoffs
- Some workplaces were closed due to business difficulty resulting from the strike by the union.
- While cutting workforce, the employer bought a new office.
- Cases where only some, not all, business sectors of the company have incurred deficits

Effort to avoid dismissal

- Cut in overtime work; simultaneous use of leave
- Labor cost reduction by curtailing working hours (pay)
- New recruitment freeze/no renewal of contracts for temporary jobs
- Job redeployment, employee dispatch outside the company
- Temporary shutdown (suspended work)
- Honorary retirement program, etc.

■ Examples of justifiable cases
- The office size was reduced, executive officers' wages were frozen and non-regular employees were recommended to retire.
- New recruitment was suspended and an honorary retirement program was initiated.
- Employees were recommended to convert to another kind of occupation.
- Working hours were reduced and the cars of executives were sold while other measures were taken to rationalize business management.
- New recruitment was suspended when the dismissal for economic reasons was carried out.

■ Examples of unjustifiable cases
- The employer did not carry out a voluntary retirement or voluntary leave program, or did not make effort to reduce labor costs.
- At a time when workforce would be reduced due to retiring employees, the employer carried out the dismissal.
- The employer did not use a voluntary retirement program but rather increased workforce.

Reasonable and fair selection of workers to be dismissed

- Those whose livelihoods will be less affected by the dismissal
- Those who have made a smaller contribution to the company
- Those with a low degree of belonging to the company

■ Examples of justifiable cases
- Cases where a company dismisses employees with no proficiency in English when employees with high English proficiency are required for conducting business efficiently
- Cases where a company selects employees to be dismissed based on criteria such as average work performance, reward and penalty, skill-level, etc.
- Cases where a company installs fully automated machine technology at the workplace and dismisses the surplus employees accordingly

■ Examples of unjustifiable cases
- The selection criteria specified in the collective agreement were not satisfied.
- The employees of the jobs or positions which were not affected by the organizational restructuring were dismissed.
- The employees were dismissed just because they were close to retirement age.
- Those living in remote areas were dismissed just because they lived far away.
- In selecting the employees to be dismissed, the employer didn't take into account the subjective conditions of the employees.

Good-faith consultation

-Consultation with the union or employee representative
-Exchange of opinions or alternatives concerning the effort to avoid dismissal or the selection criteria

■ Examples of justifiable cases
- Non-union employees were dismissed after the employer fully consulted with the union.
- Although the union gave a different instruction, the employer made full consultation with the union branch, which could justify the dismissal.
- Dismissal was discussed at several meetings of the labor-management council.

■ Examples of unjustifiable cases
- The employer didn't consult with the employees just because no union existed.
- The employer notified the affected employees of the dismissal only a few days prior to dismissal.
- The employer met only once with the employees to be dismissed.

13. Employment Termination Other Than Dismissal

1) Retirement due to age

[Explanatory notes]

···› Under the 'age-limit retirement system,' an employee has his/her employment relationship terminated when he/she reaches a certain age, regardless of his/her ability to work or willingness to leave the company. The certain age is also called 'retiring age.'

···›The retiring age may be determined autonomously by the parties concerned. However, if the age is too young to gain a general acceptance in society, it may be declared invalid.

[Court rulings]

···› If the rules of employment set the retiring age of female operators at 43, is this provision effective?

Article 5 of the LSA bans any gender-based discrimination in employment without reasonable justification. The personnel regulations (the rules of employment) of the corporation in question set an upper age limit for female operators at 43, which seems to have resulted in retirement of female employees at a much earlier age than male employees. This practice is a violation of the LSA provisions banning gender-based discrimination in employment, and the retiring age of female operators is invalid.
(Supreme Court ruling on Dec. 27, 1988: No.85DaCa657)

···› When does the given retiring age commence?

The method for determining the commencement date of the given retiring age is set forth in the collective agreement or the rules of employment. If no such mention is made in the collective agreement or the rules of employment, the date when the employee reaches the given retiring age is referred to as the commencement date.
(Supreme Court ruling on June 12, 1973: No. 71Da2669)

···› In cases where an employer has maintained employment relations with an employee after he/she had reached the retirement age

If an employer has maintained employment relations with an employee after he/she has reached the retirement age with the consent of the employer without fixing a term, the employer may not terminate the employment relations just because the employee has passed the retirement age or is advanced in age, without specific justifiable reasons. Therefore, in order to dismiss the employee concerned, there shall be justifiable reasons pursuant to Article 30.(1) of the LSA.
(Supreme Court ruling on Dec 12, 2003: No.2002Du12809)

2) Resignation and mutual termination of contract

[Explanatory notes]

···› Employment relations terminate when an employer dismisses an employee; an employee resigns from the company; and both parties agree to terminate the contract.

···› If an employee expresses his/her intention to resign, this shall be considered as a notification of cancelation of the contract, terminating the relevant employment contract unless there are any special reasons. If one month has elapsed from the date that the employer receives the letter of resignation (in cases where the remuneration has been fixed on a set periodical basis, after one full period from the date of completion of the current period), the relevant employment contract is terminated. (Article 660.(2) and (3) of the Civil Act). Once the intention of resignation is notified to the employer, the employee may not withdraw it without the consent of the employer, even before the assigned period.

···› In cases of mutual termination of contract, the employment contract is terminated when an employer consents to an employee's request to terminate the employment contract. The resignation through mutual termination of contract comes into effect when the employer accepts the employee's request to resign and the employee is notified of the acceptance. The employee may withdraw the request to resign before he/she is notified of the employer's acceptance of the request.

[Court rulings]

···› If an employee is forced to tender his/her resignation against his/her free will, is such resignation effective as a requested retirement?

In case an employer forces an employee to submit his/her letter of resignation and terminates the employment relationship in the form of retirement at his/her own request, it should be regarded as the employer's unilateral termination of the employment relationship, namely, dismissal. If no justifiable reason is given by the employer for the dismissal, it constitutes a case of unfair dismissal.
(Supreme Court ruling on Jan. 26, 1993: No.91Da38686)

···› Once the intention of resignation, which cannot be considered as mutual termination of contract, is notified to the employer, the employee may not withdraw it without the consent of the employer.

If an employee expresses his/her intention to resign, this shall be considered as the notification of cancellation, terminating the relevant employment contract, unless there are any special reasons. Judging from the various circumstances including the facts confirmed by the original court; the content of the letter of resignation according to the record of the original court; the cause and reason to submit and write the letter of resignation; and the reason to withdraw the resignation, the plaintiff's submission of the letter is not regarded as a request for the mutual termination of contract, but it is instead regarded as the notification of the termination of employment contract in principle. Therefore, in this case, once the employer is notified of the intention of resignation, the plaintiff may not withdraw it without the consent of the employer even before the period prescribed in Article 660(3) of the Civil Act. (Supreme Court ruling on Sept. 5, 2000: No.99Du8657)

···› In case an employee tenders a letter of resignation, when does such resignation have the effect of terminating the employment relationship?

A letter of resignation indicates the employee's intention to terminate his/her employment relationship. The resignation takes the effect of terminating the employment relationship when the employer accepts the resignation and agrees to a requested retirement or, under the Civil Code, when one month or one payment reference period has elapsed from the date when the employer received the employee's letter of resignation.
(Supreme Court ruling on July 30, 1996: No. 95Nu7765)

···› In case an employee specifies a date of employment termination in the letter of resignation, is it possible for the employer to terminate employment immediately?

The employee tendered his resignation on Aug. 26, 1991, saying in the letter of resignation, "I request this resignation be accepted as of Sep. 25, 1991." Nevertheless, the employer terminated his employment as of Aug. 28, 1991. The employer's termination, which did not comply with the employee's request, would be rendered invalid in itself. However, the employee, without raising any question about such termination of employment, received retirement pay on Sep. 9, 1991 and, in doing so, admitted to the employment termination. In this light, it seems that the employment relationship has been terminated in a legitimate manner.
(Supreme Court ruling on June 30, 1995: No. 94Da17994)

···› Once the agreement to terminate the labor contract was made, one party concerned cannot withdraw from the agreement arbitrarily.

In cases where an employee submits a letter of resignation to request a termination of employment relations, the employee can cancel such resignation at any time before the employer accepts the employee's request of termination of the employment relations and informs the employee of such acceptance. However, if the employee and the employer have agreed to terminate the labor contract, it can be considered that there has been an agreement on the termination, because acceptance of the employee's request of termination of the employment relation is confirmed at the time of the agreement. Therefore, in this case, one party concerned cannot withdraw from the agreement arbitrarily, and this also applies even if the employer and the employee have agreed at the time of the agreement to terminate the labor contract after a certain period of time.
(Supreme Court ruling on Aug. 9, 1994: No.94Da14629)

···› When both parties have agreed on an honorary (early) retirement, is it possible for one party to withdraw from the agreement without consent from the other party?

Under the honorary retirement scheme, an employee applies for honorary retirement and the employer, after reviewing the application, agrees to terminate the employment relationship. The status of honorary retirement does not commence on the date when the employee is chosen for honorary retirement, but on a designated date for honorary retirement. Namely, upon

the specific date, the honorary retirement goes into effect and the employer is obliged to pay retirement pay. Once both parties have agreed on an honorary retirement, neither party may withdraw from the agreement without consent from the other. (Supreme Court ruling on July 7, 2000: No. 98Da42172)

···› When employees agreed to discontinue their employment relationship in consideration of financial difficulty of the company, such discontinuance of the employment relationship is valid.

In the case in question, the former employees were initially reluctant to accept the proposed resignation. But after considering the general economic conditions at that time, the planned business restructuring at the company, the voluntary retirement conditions offered by the employer, and the benefits they would receive and losses they would endure from continuing the employment relationship, they tendered a resignation believing that it was the best decision to make at that time. That is, the discontinuation of the relationship between the employer and employees was valid, as the employees expressed their intention and the employer accepted the intention. (Supreme Court Ruling on April 22, 2003: No. 2002Da65066)

···› Submission of a letter of resignation reflecting one' s intention that dismissal at his/her own request by submitting a letter of resignation, rather than dismissal, is the utmost measure in order to be employed by another company, is considered as valid resignation.

In this case, even if the employee did not truly wish to submit the letter of resignation, the submission of the letter reflects the employee's intention that dismissal at his/her own request by submitting the letter, rather than dismissal, is the utmost measure in order to be employed by another company, because the employee's dismissal was expected as a result of disciplinary procedures which were in progress at that time. Therefore, the employment contract between the plaintiff company and the employee is considered legally terminated through the mutual termination of contract as the plaintiff company accepts the employee's intention of resignation. (Supreme Court ruling on Apr 14, 2006: No.2006Du1074)

···› If a company notified an employee of his/her dismissal when the company and the employee have already concluded a conditional agreement on his/her voluntary resignation, it is not regarded as a dismissal in accordance with the LSA.

The plaintiff company has concluded a conditional agreement to allow the employee a preparation period for the re-employment or business start-up to paying the same amount of wage that the employee has been paid for a certain period of time, on condition that the employee resigns voluntarily after the termination of the period. Since the plaintiff has observed the agreement, it is considered that the employee resigned automatically under the agreement. In this light, the plaintiff's notification of dismissal to the employee is only the notice that confirms the automatic resignation of the employee and, therefore, such dismissal is not considered as a dismissal in accordance with the LSA. (Supreme Court ruling on Dec 27, 2007: No.2007Du15612)

3) Automatic retirement

[Explanatory notes]

···› 'Automatic retirement' refers to retirement or termination of the employment relationship which automatically takes effect on the date when a given cause is generated or on a date agreed by both parties.

···› Death, retiring age or contractual maturity of an employee automatically leads to termination of the employee's employment relationship. However, if such termination is essentially a case of dismissal, the employer shall give a justifiable reason for the employment termination.

[Court rulings]

···› In case the collective agreement sets forth specific causes for automatic retirement, can the employer terminate employment on the grounds of such causes?

Even when the collective agreement provides for causes of automatic retirement, any case of retirement under the provision, except for an automatic termination of employment due to death, retiring age or contractual maturity of an employee, shall be deemed as dismissal, which is subject to the restrictions in Article 30 of the LSA. The fact that a cause of retirement under the collective agreement has occurred cannot fully justify the retirement. (Supreme Court ruling on Oct. 29, 1996: No. 96Da21065)

⋯› If automatic retirement follows a different procedure from that of disciplinary dismissal, what happens to the status of automatic retirement?

Even in case the employer sets forth, for example, in the rules of employment, specific causes of automatic retirement and differentiates its procedure from that of disciplinary or ordinary dismissal, if the case of automatic retirement constitutes the employer's unilateral termination of employment, it is deemed as a dismissal case, effective only when the employer can give reasonable justification for it.
(Supreme Court ruling on Oct. 26, 1993: No. 92Da54210)

14. Employee Dispatch

1) Types of work permitted for dispatched (leased) employees

Applicable legislation : Article 5 of the Act Relating to Protection, etc. for Dispatched Workers (Types of work subject to employee dispatch)

① Jobs permitted for worker dispatch shall be those jobs judged suitable for that purpose given their nature and the expertise, skills or experiences they require, and prescribed by the Presidential Decree, but excluding direct production jobs in the manufacturing.

② Notwithstanding the provisions of paragraph ①, in case where there is a vacancy due to child birth, illness, injury, etc., or the need to temporarily/occasionally secure manpower, worker dispatch may be permitted.

[Explanatory notes]

···› Under the employee dispatch scheme, a worker who is employed by a temporary service agency may perform work, while maintaining the employment relationship with the agency employer, under the control and instructions of a user employer who concludes a contract with the agency employer over dispatch (lease) of the employee.

···› Employee dispatch is permitted in 32 types of work as designated by the Presidential Decree or in the cases of job vacancies or a temporary or occasional need to secure more workforce.

➡ Types of work not permitted

- Work on a construction site
- Loading/unloading work at harbors or railways (as prescribed in the Harbor Transport Business Act and the Railroad Transport Business Act)
- Work of seamen (as prescribed in the Seamen act)
- Harmful and dangerous work (as prescribed in the Industrial Safety and Health Act)
- Work for a certain period after a massive lay-off
- Work suspended during industrial actions

[Court rulings]

···› Is it possible to lease foreign employees?

As prescribed in Article 5 of the LSA, an employee shall not be discriminated on the grounds of his/her nationality. Similarly, the requirement of approval by the Labor Minister for employee dispatch is primarily intended to protect employees. In this light, there is no reason to exclude foreign employees from application of the Act Relating to Protection, etc. for Dispatched Workers.

(Supreme Court ruling on Sep. 29, 2000: No. 2000Do3051)

2) Length of service for dispatched employees

Applicable legislation : Article 6 of the Act Relating to Protection, etc. for Dispatched Workers (Length of dispatched period)

① The length of a dispatch period shall not exceed one year, except for when the case falls under the paragraph ② of article 5.

② Notwithstanding the provision of paragraph ①, if there is an agreement between the sending employer, the using employer and the dispatched worker, the period may be extended. In this case, the extended period, if extended once, shall not exceed one year, and the total dispatch period, including the extended period, shall not exceed two years.

[Explanatory notes]

···› The period of employee dispatch may not be longer than one year, in principle. However, the length of service may be extended up to one more year, as long as the agency employer, the user employer and the dispatched employee agree to do so.

Types of work and length of service permitted for dispatched employees

Types of work permitted	Length of service permitted	Additional remarks
Types of work requiring expertise, skills, experiences or nature of job that are designated in the Presidential Decree	1 year or less	Extendable up to 1 more year by agreement among the 3 parties
Job vacancies due to child birth, sickness or injury	Time needed to cover the vacancy	
A temporary or occasional need to secure more employees	3 months or less	Extendable up to 3 more months by agreement

⋯› If a using employer falls under any of the following categories, then he/she should directly employ the dispatched worker concerned (Article 6-2 of the Act Relating to Protection, etc., for Dispatched Workers):

- Where using dispatched workers for two or more years for tasks which do not fall under the categories of dispatched worker service when the employer does not even have reasons for using dispatched workers temporarily (such as childbirth, illness, injury, etc.)
- Where using dispatched workers for tasks which are not permitted to use dispatched workers (construction works, etc.)
- Where using dispatched workers exceeding the permitted period (two years) or using dispatched workers exceeding the period permitted to use the temporary dispatched workers
- Where using dispatched workers dispatched from an unauthorized company exceeding two years

[Administrative Interpretation]

⋯› After using a dispatched worker for more than two years, can a user employer hire the worker on a contract or temporary basis, rather than on a regular basis?

Since the amended Act Relating to Protection, etc., for Dispatched Workers

only stipulates the direct employment obligation of the employer and does not stipulate the types of employment, no fixed-term or fixed-term employment contract can be concluded. (Administrative interpretation, non-regular workers policy team-2424, June 26, 2007)

Types of work allowed for the dispatch of workers

Korean Standard Classification of Occupations	Type of work	Additional remarks
120	Computing professionals	
16	Administration, Business and Finance Professionals	Excluding administrative professionals (161)
17131	Patent professionals	
181	Archivist, librarian and related information professionals	Excluding librarians(18120)
1822	translators and interpreters	
183	Writers and creative or performing artists	
184	Motion Picture, Theater and Broadcasting Related Professionals	
220	Computer Related Associate Professionals	
23219	Electrical Engineering Technicians n.e.c.	
23221	Communications Engineering Technicians	
234	Draught Persons, Included Cad	
235	Optical and Electronic Equipment Operators	Limited to assistants Excluding Clinic Pathology Technicians (23531), Radiography Technicians (23532), Medical Equipment Operators n.e.c. (23539)
252	Education Associate Professionals Besides Formal School Education	

Korean Standard Classification of Occupations	Type of work	Additional remarks
253	Education Associate Professionals n.e.c	
28	Artistic, entertainment and sporting associate professionals	
291	Administrative Associate Professionals	
317	Office Assistant Clerks	
318	Library, mail and related clerks	
3213	Debt collectors and related workers	
3222	Telephonists and Telephone Number Service Clerks	Excluding cases where the works of telephonists and telephone number service clerks are the main business of concerned company
323	Customer Related Clerks	
411	personal care givers	
421	Cooks	Excluding the cooks of tourism hotels prescribed in Article 3 of the Tourism Promotion Act
432	Travel guides	
51206	Petrol pump attendants	
51209	Retail Trade Salesmen n.e.c.	
521	Telemarketers	
842	Motor vehicle drivers	
9112	Building cleaning persons	
91221	Janitors	Excluding security business pursuant to Article 2.1 of the Security Industry Act
91225	Parking Place Concierges	
913	Deliverers, Porters, Meter Readers and Related Workers	

Note: The Korean Standard Occupational Classification hereof is based on Notice No. 2000-2 of the National Statistical Office of Korea.

Ⅱ. Collective Labor-Management Relations

1. Establishment and Operation of Trade Unions
2. Collective Bargaining
3. Collective Agreement
4. Industrial Actions
5. Mediation of Labor Disputes
6. Unfair Labor Practices

1. Establishment and Operation of Trade Unions

1) Requirements for establishment of trade unions

Applicable legislation : Article 2, Subparagraph 4 of the Trade Union and Labor Relations Adjustment Act (TULRAA) (Definition)

The term 'trade union' refers to an organization or associated organization of workers which is formed in a voluntary manner upon the workers' initiative for the purpose of maintaining or improving working conditions, or promoting their economic and social status.

[Explanatory notes]

···› A trade union is an exclusive organization of workers, which is aimed at maintaining or improving working conditions including wages and working hours, and shall be operated in a democratic manner.

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

···› An organization which falls into any of the following is not recognized as a trade union (Article 2, Subparagraph 4 of the TULRAA):
- In case the employer or an employer representative who always acts in the interest of the employer is allowed to join the organization;
- In case the main part of the expenditure of the organization is financed by the employer;
- In case the organization is mainly aimed at mutual aid, community activities or other welfare purposes;
- In case non-employee workers are members of the organization, provided that 'a dismissed worker who has filed his/her dismissal case before the labor relations commission' shall not be regarded as a non-employee worker until the National Labor Relations Commission (NLRC) gives a decision on the case; or
- In case the organization is mainly aimed at political activities.

[Court rulings]

···› What is the TULRAA definition of a 'worker' who is entitled to organize or join a trade union?

The TULRAA defines the term 'worker' as a person who, being subordinate to an employer, works for the employer and receives wages in return, whatever the subordinate relationship with the employer is called (say, employment, subcontracting, commissioning or an untitled contract). In order to determine whether the person is subordinate to the employer or not, it is necessary to examine what is really happening between the two: if the person is at work under the employer's control and instruction; if wage is given in return for the work; and what kind of work is being provided. (Supreme Court ruling on May 25, 1993: No.90Nu1731)

···› How can we determine whether or not a particular person is "acting in the interest of the employer"?

A person who, in relation to the employees of the business, acts in the interest of the employer or represents the employer's interest, is the person who is given a certain mandate and responsibility to determine working conditions and personnel matters or make orders or instructions on work. In order to determine whether a particular person has such mandate and responsibility, his/her actual and specific duties, rather than his official position or title, should be examined.
(Seoul Appeals Court ruling on Oct. 28, 1997: No. 97La94)

···› Those who are unemployed or are searching for work may also join a trade union.

The 'workers' referred to in the provision of subparagraphs 1 and 4 (d) of Article 2 of the Trade Union and Labor Relations Adjustment Act include those who are temporarily unemployed or are searching for a job, as well as those who are actually hired by a particular employer, because the former is also entitled to the three basic working rights. In this light, the female worker who is a member of the regional union in the case in question and is searching for a job shall be regarded as a 'worker' for the purpose of the Act.(Supreme Court Ruling on Feb. 27, 2004: No. 2001Du8568)

···› In case a certain union is reduced to a single member, is the union acknowledged as a bargaining party?

One of the requirements for a union is collectivity, which means that a union should group more than one person together and be organized and operated in accordance with a specific set of self-rules. Unlike a jurisdictional person, a union which has been reduced to a single member has lost its collectivity and, therefore, has no adversarial capacity, except for the purpose of liquidation. (Supreme Court ruling on March 13, 1998: No. 97Nu19830)

2) Establishment and membership of trade unions

Applicable legislation : Article 5 of the TULRAA (Establishment of and admission to trade union)

Employees are free to establish or join a trade union, except for public servants and teachers who are governed by other enactments.

[Explanatory notes]

···› There is no restriction on the structural type of a trade union, and employees are free to organize a union at the company-, industrial sector- or occupation-level, as long as it includes more than one member.

···› The status as a union member is terminated upon the member's death; his/her being disqualified; his/her withdrawing or being expelled from membership; or the union's dissolution.

➡ Postponement of approval of multiple trade unions

As the provision regarding the prohibition of multiple trade unions under the former LSA has been rescinded, it is now permissible to establish multiple trade unions in one workplace. However, in order to prevent the confusion due to the establishment of multiple trade unions, when a trade union exists in one business or workplace, a new trade union which has the same organizational jurisdiction as the existing trade union shall not be formed before December 31, 2009 (Article 5 of the Addenda of the Trade Union and Labor Relations Adjustment Act)

[Court rulings]

···› Can a person who is not subordinate to the employer organize a company-level union at the employer's company?

The employer and the employees belonging to a union at the employer's company should be related to each other by employment subordinacy. Accordingly, a person who is not subordinate in employment to the employer may not form a legitimate trade union, as defined in the TULRAA, at the employer's company.
(Supreme Court ruling on May 26, 1992: No. 90Nu9438)

···› Is it legally possible to organize a trade union at an occupational level in a limited regional area?

The TULRAA neither confines the structure of a trade union to a company-level structure nor limits the coverage of a union in terms of regional areas. This means that employees may establish an occupation-level union by limiting its coverage to a specific regional area.
(Supreme Court ruling on Feb. 23, 1993: No. 92Nu7122)

···› Is a trade union free to join or withdraw from an associated organization of trade unions?

Just as a qualified employee can organize, join or depart from a trade union on his/her own volition, a union is also free to join or withdraw from an associated organization as long as such decision is made in an independent and democratic way. (Supreme Court ruling on Dec. 22, 1992: No. 91Nu6726)

···› It is not legally allowed for a union to extend its union membership to the employees of an independent business by restructuring itself.

The employees who retired from Company A and moved to a new Company B reached a resolution that they would remain as members of the union of Company A. This means that they decided to operate one union for two different companies. However, the resolution is not valid, because, if a union of a particular company restructures itself to extend its membership to the employees of another company, the union has lost oneness in its structure of membership. (Supreme Court Ruling on May 10, 2002: No. 2004Da1649)

···› What does "one business or workplace" mean, where the establishment of multiple labor unions is restricted?

The case "where there already exists a trade union at a certain business or workplace" as prescribed in Article 5 (1) of the Addenda concerns such case at the company level. Nevertheless, when a branch or chapter of a regional, sectoral or occupational union is deemed as corresponding to a company union since it represents the employees of a business or workplace with independent working conditions for its employees, has an independent bylaw and an executive body, operates as an independent organization and conducts collective bargaining and reaches a collective agreement independently about the matters concerning the organization and its members, the restriction above shall also apply to this organization. (Supreme Court Ruling on July 22, 2004: No. 2004Da24854)

3) Report on establishment of a trade union

Applicable legislation : Article 10 of the TULRAA (Report on union establishment)

Any person who intends to establish a trade union shall submit a report attached by the by-laws to the Minister of Labor (in cases where the trade union takes the form of an associated organization and is a unit trade union spanning not less than two areas in the Special City, Metropolitan cities, Provinces and Special Self-Governing Provinces) to the Special City Mayor, relevant Metropolitan City Mayors, and relevant Provincial Governors (in case the trade union is a unit trade union spanning less than two areas of the Si/Gun/Gu) and to relevant Governors of Special Self-Governing Provinces and relevant heads of Si/Gun/Gu) (in the case of other trade unions).

[Explanatory notes]

···› For the purpose of an organization being recognized as a trade union, the organization shall submit a written report on its establishment to the competent authority and obtain a certificate of union establishment.

Report on union establishment to competent authority

Type of union	Competent authority
- An associated organization of unions - Unit labor unions covering two or more special metropolitan cities, metropolitan cities, and provinces and special self-governing provinces	Minister of Labor
Unit labor union covering two or more cities, counties or districts-Si/Gun/Gu (self-governing Gu)	Mayor of special metropolitan city/ Mayor of metropolitan city/Provincial governor
Other trade unions	Governors of Special Self-Governing Provinces and heads of Sis/Guns/Gus

···› The competent authority, after it receives the written report on union establishment, reviews the legality of the organization as a union and then, based on the results of the review, decides to issue a union establishment certificate, ask for supplements or revisions, or turn down the report. (Article 12 of the TULRAA)

Review by the competent authority

Decision after review	Description
Issuance of the union establishment certificate	When the competent authority finds the organization to fully comply with legal requirements, it shall issue the union establishment certificate with three days from the receipt of the report. ※ In case the certificate is issued, the date of receipt of the report is the date of union establishment.
Request for supplements or Revisions	In case the union rules are not appended, any required entries are omitted or part or all of what is stated is not true, the competent authority shall ask the organization to submit the report again after the requested supplements or revisions have been made within 20 days from the request.
Return of the report	In case the organization concerned falls under any of the disqualifying conditions above, does not comply with the request for supplements or revisions, or its coverage of employees overlaps with that of the existing union within the same workplace, the report submitted is turned down.

···› A trade union which has fully complied with the requirements for union establishment and has received the establishment certificate after undergoing the required procedure is entitled to the following (Articles 3, 4 and 7 of the TULRAA):

① Using the title of a trade union;
② Requesting the Labor Relations Commission to mediate a labor dispute;
③ Requesting the Labor Relations Commission to remedy an unfair labor practice;
④ Making it an incorporated body by registering at the competent office;
⑤ Being exempted from taxation for its union activities (excluding profit-making programs), in accordance with the tax code; and
⑥ Immunity, for justifiable industrial actions, from civil and criminal liabilities

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

[Court rulings]

···› What is the rationale of the law provisions on the requirement of union establishment report?

The fundamental reason that the TULRAA provides for a required report on union establishment lies in the need of the competent authorities to protect and guide trade unions to ensure that trade unions are organized into an effective and orderly system and are operated as a independent and democratic organization. (Supreme Court ruling on Oct. 14, 1997: No. 96Nu9829)

···› Under the labor laws in force, is membership to an associated organization of trade unions a requirement for establishment or existence of a trade union?

The fact that the TULRAA provides that 'the name of an associated organization with which it is affiliated' shall be given when a would be union hands in a report on union establishment, does not require the membership to an associated organization as a precondition for establishment and operation of a union. In any case, the provision above should not be interpreted as a requirement for union establishment or operation. Moreover, no organization, in drawing up a report on union

establishment, is obliged to give the name of the associated organization to which it belongs. (Supreme Court ruling on Feb. 12, 1993: No. 91Nu12028)

···› If the competent authority did not issue a union establishment certificate, request for supplements or revisions of the report, or turn down the report, what is the effect of the competent authority's inaction?

Although it is true that the competent authority is required to issue a union establishment certificate within three days from receipt of the establishment report, it does not follow that, if there is not any request for supplements or revisions in the report or return of the report within the days, the union is deemed to have fulfilled the requirements for union establishment even without the establishment certificate issued.
(Supreme Court ruling on Oct. 23, 1990: No. 89Nu3243)

4) Immunities from civil or criminal liabilities

Applicable legislation : Article 3 of the TULRAA (Restriction on claims for damages)

No employer may claim damages against a trade union or an employee in case he/she has suffered damage due to the collective bargaining or industrial action under this Act.

[Explanatory notes]

···› A trade union is immune from civil or criminal liabilities in the event of a legitimate activity of collective bargaining or industrial action. However, it will be liable to damages or penalty under the Civil or Criminal Code for an illegitimate act of collective bargaining or industrial action.

···› The provisions of Article 20 of the Criminal Code shall apply to justifiable activities of a trade union that are done in the course of collective bargaining, industrial actions, etc. to achieve the purpose of Article 1 of the TULRAA. However, under no circumstances shall an act of violence or destruction be construed as being justifiable. (Article 4 of the TULRAA)

[Court rulings]

···› What are the criteria by which to determine whether a union activity is justifiable or not?

A union activity is justifiable when: it is reasonably regarded as an activity of the union or is authorized or approved, explicitly or implicitly, by the union; it is aimed at maintaining or improving working conditions, promoting the economic and social status of employees and bringing the employees closer to one another; it is done outside of working time, except when the collective agreement otherwise prescribes or the employer has approved union activities during working time; and, if it is conducted within the premise of the company, it complies with the rules and restrictions based on the employer's right to control the facilities at the workplace and is not an act of violence or destruction. (Supreme Court ruling on April 10, 1992: No. 91Do3044)

···› If a union member distributed leaflets including untruthful facts on company premises, does such an act infringe on the employer's right to facility control?

The union worker in question did not get prior approval from the employer for the leaflets distributed. In addition, the leaflets contained untruthful facts that are feared to distance the employees from the company and the employer. Furthermore, he scattered the leaflets around the factory in secret, instead of handing them out to employees, which thus infringed on the employer's right to facility control and threatened to disrupt order at the workplace. Even the fact that it was done at the time of campaign for the election of union delegates cannot justify the act.
(Supreme Court ruling on June 23, 1992: No. 92Nu4253)

···› Suppose some of a union's members are against a certain decision or policy of the union. Is an activity performed to express such opposition also a union activity?

If certain union members did not accept the decision or policy of the union and, in a way to express such opposition, took an action, for example, by handing out printed matters criticizing the decision or policy, such action is arbitrarily initiated by those union members, not taken under the agreement of the union members. Accordingly, such action is not seen as a union activity, except when there is a particular reason to regard it as either being inherent in the union activities or having been approved, whether explicitly

or implicitly, by the union itself.
(Supreme Court ruling on Sep. 25, 1992: No. 92Da18542)

5) Full-time union officials

Applicable legislation : Article 24 of the TULRAA (Full-time union officials)

① Union workers are entitled to conduct duties only for the trade union, without providing the work specified in their contract of employment, if the collective agreement prescribes so or the employer agrees to it.

② Those who are engaged in duties only for the union in accordance with paragraph ①(hereinafter referred to as 'full-time union officials') may not be remunerated in any kind by the employer for the duration of their tenure as a full-time union official.

[Explanatory notes]

···› Under the 'full-time union official' system implemented with the permission of the employer or by means of the collective agreement, employees who are union members, especially, union office-holders can be fully engaged in union work, being exempted, for a given period of time, from part or all of their obligation to provide work for the employer while retaining their status as an employee under the contract of employment.

···› An employer may not pay wages to union full-time officials after Dec. 31, 2009. Any employer who violates this ban commits an act of unfair labor practice. (Article 6 of the Addenda to the TULRAA)

···› Once an employee's term of full-time union official expires, the employer shall restore him/her to the position or the work where he/she had left for the performance of union duties. If the employer refuses to do so, or applies wages and working conditions for promotion, pay scale, etc. to the disadvantage of the employee in comparison with his/her comparable employees, the employer commits an act of unfair labor practice.

[Court rulings]

···› How is the appointment and treatment of full-time union officials determined?

The TULRAA does not specify: whether or not a particular workplace adopts the full-time union official scheme, how many full-time officials are appointed, how long the term in office is, or under what procedure the term in office is commenced and terminated. Therefore, all the above should be determined by the employer and the union. If there is no separate discussion on those things by the two parties, it is desirable that the determination be based on the usual practices at the particular workplace.
(Seoul District Court ruling on Oct. 2, 1992: No. 91GaHap21907)

···› Are full-time union officials subject to the company rules on employees' obligation to attend the company?

Full-time union officials are not fully excluded from the rules of employment (or the company rules), as the employment relationship between them and their employer is fundamentally maintained while they are work full time for the union. Except when the collective agreement includes a special clause on full-time union officials or there is an established practice at the particular workplace where full-time union officials are exempt from the employees' obligation to attend the workplace, full-time union officials are also governed by the company rules on attendance at workplace. For full-time union officials, attendance at workplace means attendance at the union office which is a usual place of their work. If a full-time union official fails to make attendance at workplace without undergoing a given procedure required by the company rules or obtaining the employer's prior permission, the non-attendance constitutes an unauthorized leave of absence at work.
(Supreme Court ruling on July 28, 2000: No. 2000Da23297)

···› Is a full-time union official entitled to bonus payments?

It is considered that full-time union officials have a similar status to employees who are suspended from work because the officials retain their status as employees of the company but are not required to work, in accordance with the employment contract. Therefore, even in case an employer pays wages to full-time union officials, they are not always entitled to bonus payments or benefits in lieu of monthly or annual paid leave. However, if the collective

agreement provides for such entitlements for full-time union officials, they may claim bonus payments by means of the collective agreement.
(Supreme Court ruling on Nov. 10, 1995: No. 94Da54566)

···› The amount of money paid to a full-time union official pursuant to a collective agreement, etc., by an employer cannot be considered to be a wage.

Even though a full-time union official has a basic labor-management relationship with an employer and retains his/her status as an employee, the full-time union official is more like a suspended employee because the full-time union official is exempted from the obligation to provide work to the employer and the employer is exempted from the obligation to pay wages to the employee. Therefore, even if the employer pays a certain amount of money to the full-time union officials pursuant to a collective agreement, etc., this amount cannot be considered to be a wage which is remuneration for work. (Supreme Court ruling on Sept. 2, 2003: No.2003Da4815)

···› In case a full-time union official suffers an injury or develops a disease while acting on behalf of the union, is the injury or disease regarded as an injury or disease at the workplace?

If an employee took office as a full-time union official with the employer's consent, retained the status as an employee under the contract of employment at the time of occurrence of the injury or disease, and the injury or disease resulted from his mental or physical exhaustion due to the union work, the injury or disease should be treated as an injury or disease at work that is compensable under the Labor Standards Act, unless under exceptional circumstances. However, in case a full-time union official suffers an injury while he/she is acting for an associated organization of trade unions or for another affiliated union which has no relation to his employer's business, or when the union is engaged in illegal union activities or industrial actions, such injury cannot be regarded as a work injury. (Supreme Court ruling on June 28, 1996: No. 96Da12733)

···› If, upon expiration of the collective agreement, an employer ordered an employee who served as a full-time union official to return to his original position but the employee refused to obey, can the employer dismiss the employee on the grounds of disobedience?

With the expiration of the collective agreement, the provisions on full-time

union officials were not effective any more. As no special clause had been made that the provisions on full-time union officials would remain effective until a new collective agreement was adopted, the employee, who was no longer a full-time union official, should have obeyed the employer's order to return to the original position. It seems that the employer properly exercised his right to personnel management when he dismissed the employer, contrary to the employee's allegation that the employer had abused his right although he cited 'disobedience to the employer's order at work' as a reason of dismissal. In this light, the dismissal is not deemed as an act of unfair labor practice. (Supreme Court ruling on June 13, 1997: No. 96Nu17738)

···› In cases where a full-time union official was ordered to return to his/her original position due to a no-confidence action against him/her, if he/she did not followed the order, it is considered to be absence without leave.

If the full-time union official has lost his/her position as the secretary general of the labor union due to a no-confidence action against him/her, the order to return to his/her original position by the defendant company based on this reason is valid. Therefore, disobedience of this order is considered as absence without leave. (Supreme Court ruling on May 27, 1992: No.91Da29071)

···› Even though a collective agreement stipulates the full-time union official system, the obligation to provide work cannot be exempted before the appointment without any specific reasons.

The full-time union official system is provided for the convenience of the labor union and is permitted only when the employer approves it under a collective agreement, etc. Therefore, the system cannot be considered as a working condition concerning the treatment of employees stipulated in a labor contract concluded between the employer and employees. In this light, even though a collective agreement stipulates the full-time union official system, the system cannot regulate the labor contract of the employee without any specific reasons-for example, where exemption of the obligation to provide work is obvious, even without the appointment by the employer, because the collective agreement specifies the time that a specific employee such as a representative of a labor union is appointed as a full-time union official or where such a custom is established. Accordingly, the obligation to provide work cannot be exempted before the appointment.
(Supreme Court ruling on April 25, 1997: No.97Da6926)

6) Dissolution of a trade union

Applicable legislation : Article 28 of the TULRAA (Cause of dissolution)

A trade union shall be dissolved for any of the following reasons:
1. Occurrence of a cause of dissolution prescribed by its rules;
2. Merger or split;
3. Resolution by a general meeting or council of delegates to dissolve the union; or
4. Decision by the competent authority, with the resolution of the Labor Relations Commission, to dissolve the union when it has no executive officials and has not been active for one year or longer.

[Explanatory notes]

···› 'Dissolution of a trade union' refers to commencement of the process by which the union is exterminated. In case the union is a juridical person, it retains its rights and obligations for the purpose of liquidation even after it is dissolved.

···› A resolution with regards to structural changes, including merger, split and dissolution, of a trade union shall be passed by the affirmative votes of at least two-thirds of the members present at a general meeting where a majority of all members are present. (Article 15, paragraph 2 of the TULRAA)

···› When a union has no executive officials and has not carried out any activity for 1 year or more, the competent authority may ask the Labor Relations Commission to resolve that there exists a cause of dissolution of the union. If the Commission makes such resolution, the union is treated as being dissolved as of the date of the resolution. (Article 13, Paragraph 1 of the Enforcement Decree of the TULRAA)

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

[Court rulings]

···› In case a union which had acquired a union establishment certificate received an order of union dissolution, does it still possess adversarial capacity?

The union in question did not register as a juridical person after it had acquired the union establishment certificate. However, it is considered as an incorporated body that has an adversarial capacity for the purpose of liquidation, even after it received the order of union dissolution.
(Seoul Appeals Court ruling on Jan. 22, 1968: No. 67Gu83)

···› If a business was split into two businesses, which have been transferred to two different employers, what happens to the union of the now-defunct business?

In general, when a business has been divided into two and transferred to more than one employer, the trade union at the now-defunct business has lost its basis for existence. However, in the case of business transfer that enables the union to retain the same structure even after the transfer, the union may remain unchanged. Accordingly, what should be examined to determine whether a trade union can or cannot exist after a business transfer is: what the legal nature of the contract of business transfer is; whether the union maintains the same structurally; and whether the union existing at the transferee company has overlapping coverage.
(Administrative interpretation on July 19, 2000: No. Nojo 01254613)

···› Change of labor union organization

Judging from the effect that a labor union after the change of organization succeeds the status as a party to the property relationship and to the collective agreement of the labor union before the change, the change of labor union organization is acknowledged as far as the actual identity of the labor union before and after the change is identical.
(Supreme Court ruling on July 26, 2002: No.2001Du5361)

2. Collective Bargaining

1) Parties to collective bargaining

Applicable legislation : Article 29 of the TULRAA (Authority to negotiate agreement)

① The he representative of a trade union has the authority to bargain with an employer or an employers' organization and to conclude a collective agreement on behalf of the union or the union members.

② A person who has been mandated by a trade union or by an employer or an employers' organization to bargain and conclude a collective agreement, may exercise the mandated authority, subject to the scope of mandate, on behalf of the trade union or the employer or the employers' organization.

[Explanatory notes]

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

···› The parties to collective bargaining are the union and the employer, and the union representative has the authority to conclude a collective agreement, as well as the authority to negotiate with the employer.

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

···› Neither the employer nor the union may neglect or refuse to conduct a collective negotiation requested by the other party without a giving a justifiable reason. (Article 30, Paragraph 2 of the TULRAA)

[Court rulings]

···› In case a collective agreement provides that the union representative, after concluding a collective agreement with the employer, should

bring it before a general meeting of union members for resolution, is the provision legally valid?

If the union representative or another authorized person is required to put before a general meeting of union members a collective agreement that is negotiated with the employer, it would be a deathblow to the right of the union representative or the authorized person to conclude a collective agreement. Namely, the right to conclude a collective agreement would be reduced to a merely nominal right. In this light, such provision is against the purpose of the TULRAA in force.
(Supreme Court ruling on November 26, 2002: No. 2001Da36504)

···› When a unit (company-level) union has mandated its right to collective bargaining to an associated organization to which it belongs, is the union's right to collective bargaining lost for the time being?

"Mandating the authority to collective bargaining" means that a union authorizes a person or organization other than the union representative to negotiate with the employer on behalf of the union and for the good of the union and union members. Even without a separate procedure of declaring an end to the mandated authority, the union's right to collective bargaining always exists in concurrence with the authorized party's right. In other words, even when a unit union has mandated its right to collective bargaining to an associated organization, the union's right to collective bargaining is retained.
(Supreme Court ruling on Nov. 13, 1998: No. 98Da20790)

···› Who is "an employer obliged to bargain collectively"?

The TULRAA provides that "the representative of a trade union or another party authorized by the union has the authority to bargain with an employer or an employers' organization and to conclude a collective agreement on behalf of the union or the union members." This implies that "an employer who has an obligation to bargain collectively" means an employer to whom the unionized employees are subordinate in employment.
(Supreme Court ruling on Sep. 5, 1997: No. 97Nu3644)

···› Is a branch or a chapter of a trade union able to conduct an independent collective negotiation or conclude a collective agreement?

As long as the branch or chapter of the union is an independent organization with an independent set of rules and a governing body, it may carry out an

independent collective negotiation or sign a collective agreement over the matters peculiar to the organization and its member employees. This is not affected by whether or not the branch or chapter has reported its establishment in accordance with Article 7 of the TULRAA.
(Supreme Court ruling on Jan. 18, 2008: No. 2007Do1557)

···› In a collective agreement, the party concerned on the employer' s side is an "employer, or the organization," and the "employer" refers to the individual entrepreneur (in case of individual enterprise) or the corporation or the company (in case of a corporation or company).

In a collective agreement, the party concerned on the employer side is an "employer or the organization", and the "employer" refers to an individual entrepreneur (in case of an individual enterprise) or the corporation or the company (in the case of a corporation or company). However, in most cases, the bargaining agent of the employer is the person who is in charge of management or the interest representative of the employer. In this light, in cases where the collective agreement is concluded by the employer's signing the contract after the representative has proceeded with the collective bargaining, the collective agreement is considered as valid.
(Supreme Court ruling on Aug. 27, 2002: No.2001Da79457)

···› In the case of a company in liquidation, a person entitled to conclude the collective agreement for the employer' s side is the court-appointed administrator

In cases where the decision on commencement of company reorganization was made, the right to operate the company business, and to manage and dispose of the property shall be within the exclusive jurisdiction of the court-appointed administrator in accordance to the Article 53 (1) of the Company Reorganization Act. In this light, the administrator, not the CEO, of the company in liquidation is in the position of employer in the labor-management relations. Therefore, in this case, a person entitled to conclude the collective agreement on behalf of the employer's side is the court-appointed administrator, not the CEO.
(Supreme Court ruling on Jan 19, 2001: No.99Da72422)

2) Matters subject to collective bargaining

[Explanatory notes]

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

···› The matters subject to collective bargaining include: those related to working conditions; those collective in nature, and those which may reasonably be dealt with by the employer; although there are no explicit law provisions on these matters.

···› In principle, the exclusive rights of the employer, that is, the prerogatives concerning management and personnel arrangement, are not included in the matters subject to collective bargaining. However, in case an employer's exercise of his/her managerial prerogative affects or is closely associated with working conditions of the employees, the prerogative may be negotiated within the setting of collective bargaining.

···› An employer may refuse to sit in on a collective negotiation requested by the employees if the negotiation is intended for a matter not included in the list of negotiable subjects.

Matters subject to collective bargaining

Matters	Definition
Compulsory subjects	-Matters concerning where an employer is obligated to accept a request for collective bargaining by employees -Unjustifiable rejection/negligence of collective bargaining is regarded as unfair labor practices -Matters related to decisions on working conditions, including wages, working hours, holidays, vacations, accident compensation, industrial safety, etc. (Normative parts) ※In general, compulsory subjects are considered as matters which may be achieved by industrial action.
Optional subjects	-Matters that the employer is not obligated to accept concerning a request for collective bargaining but may be included in a collective agreement through voluntary negotiation -Even if the employer rejects or neglects the negotiation, it is not regarded as an unfair labor practice ※Matters related to collective labor-management relations, including a labor union' s activities, deduction of union dues, etc. (Obligatory part)
Forbidden subjects	-Matters that the employer cannot handle or that violate the compulsory regulations, or public order and good morals -Even if the collective agreement is concluded, the part which includes the forbidden subjects is considered as invalid. -Exclusion from the application of general binding force of the collective agreement, exemption or reduction on the Grade A earned income tax, release of detainees, abolishment of retirement allowance system, compulsion of certain religion, assistance of expenses regarding labor union, etc.

[Court rulings]

···› Is a dispute over matters other than working conditions also subject to arbitration?

The labor law defines an industrial dispute as 'a dispute arising out of the divergence between labor and management about working conditions, including wages, hours of work, employee benefits, and dismissal.' In light of this definition, a dispute arising from a disagreement about a matter other

than working conditions is not an industrial dispute. Unless in exceptional cases, such dispute is not subject to an arbitration award.
(Supreme Court ruling on Feb. 23, 1996: No. 94Nu9177)

···› Is the right to decide on structural changes due to removal or integration of departments also subject to collective bargaining?

The right to bring changes to work organization or the business structure in step with removal or integration of some departments is included in the employer's prerogatives concerning business management. Accordingly, the right cannot be negotiated at a collective bargaining table, and no action that is aimed at negotiating the nonnegotiable can be justifiable.
(Supreme Court ruling on Jan. 11, 2002: No. 2001Do1687)

···› When a company intends to abolish a certain department, should the employer negotiate with the union before making a final decision to abolish the department?

The company in question decided to remove its department for facility control because it suffered a growing deficit in that department as it received fewer orders for facility control and failed to renew the contract with its usual customer due to the high labor cost. This decision was made as part of the employer's effort to bring structural changes for an economic reason. The decision itself cannot be a subject of collective bargaining.
(Supreme Court ruling on March 25, 1994: No. 93Da30242)

···› Is dismissal for economic reasons subject to collective bargaining?

Dismissal for economic reasons is based on the employer's right to take a measure for a business purpose. If the union claims that the employer should not dismiss employees for an economic reason, this is attempt to restrict the employer's right to business management. Therefore, the dismissal for economic reasons cannot be negotiated at the setting of collective bargaining. (Supreme Court ruling on April 24, 2001: No. 99Do4893)

···› Deciding whether or not to implement restructuring, including layoffs, is not subject to collective bargaining

A high level managerial decision is required by the employer on whether or not to implement restructuring of the company, including layoffs, and the merger or abolition of business units. Therefore, this cannot be subject to collective bargaining. Unless exceptional circumstances exist, including

restructuring with dishonest intention and there are no urgent managerial needs or other rational reasons, if a labor union embarks on industrial actions against the enforcement of restructuring itself, the object of the industrial actions cannot be justified, even if it is accompanied unavoidably be changes in the employees' positions or working conditions.
(Supreme Court ruling Feb. 26, 2002: No.99Do5380)

···› In case a matter is included in the employer's prerogatives concerning business management and, at the same time, is closely related to working conditions of his/her employees, is the matter subject to collective bargaining?

In the case in question, the collective agreement provides that the employer should get prior consent from the union about fixed service of regular bus drivers, bus service schedule, on-call driver schedule or daily-hired driver schedule. Those matters above are closely associated with working conditions of the employees (bus drivers), although they are part of the employer's right to business management. In addition, it does not seem that including them in collective bargaining would fundamentally undermine the employer's right. Accordingly, they may be negotiated at a bargaining table.
(Supreme Court ruling on Aug. 26, 1994: No. 93Nu8993)

···› Is it legal for an employer, on his/her own volition, to allow the union to intervene in personnel management of union members by means of the collective agreement?

In general, the right to personnel management is an employer's exclusive power. However, an employer may limit the right on his/her own volition. When the employer allows the union to take part in personnel management of union members in the collective agreement he concluded with the union, the union's involvement in personnel management is effective to the extent that the provision is intended to allow such involvement.
(Supreme Court ruling on Sep. 25, 1992: No. 92Da18542)

···› Even if a labor union makes a demand that the company cannot accept, this is a matter that should be settled by consensus, through a collective agreement.

Even though the labor union makes a demand that the plaintiff company cannot accept, this is a matter that should be settled by consensus, through mutual agreement. It cannot be concluded that the object of industrial

actions is unreasonable just because the labor union makes an excessive demand. (Supreme Court ruling on Jan. 21, 1992: No.91Nu5204)

3) Methods of collective bargaining

Applicable legislation : Article 30 of the TULRAA (Principles of bargaining, etc.)

① A trade union and an employer or an employers' organization shall bargain, in good faith and sincerity, with each other and make a collective agreement, without abusing their rights in the meantime.

② A trade union and an employer or an employers' organization shall not reject or neglect, without giving a justifiable reason, bargaining or concluding a collective agreement.

[Explanatory notes]

···› "Methods of collective bargaining" refer to the requirements concerning the specific timetable and location of collective bargaining, number of participating negotiators and their behavior at the time of bargaining. These requirements should be determined within the framework of the generally acceptable practices.

···› Both the union and the employer are obligated to negotiate in good faith with a view to reaching agreement and not to abuse their rights in the course. The employer, unlike the union, commits an act of unfair labor practice when he/she refuses to conduct collective bargaining, without giving a justifiable reason.

Any of the following violates the obligation to bargain in good faith

- In case a party begins by declaring that it has no intention to reach agreement;
- In case a party delays the commencement of collective bargaining deliberately or extends the scheduled time limit without reasonable justification;
- In case a participating negotiator has no real power to negotiate agreement;
- In case a party brings forth an unacceptable precondition and insists that it would not sit at the bargaining table if the precondition is not met first;
- In case a party refuses to sign a collective agreement in writing, without reasonable justification;
- In case a party unilaterally sets a time limit for a particular round of bargaining and leaves the location of bargaining just because the time is up, even though the bargaining is still in process; or
- In case a party unilaterally limits the number of negotiators or requires participation of too many negotiators.

[Court rulings]

···› In case the regulations of a union provide that the (draft) collective agreement should be put before a general meeting of union members for a prior approval or ex post facto ratification, can the employer justifiably refuse to conduct collective bargaining?

In the case in question, the employer - reasoning that even if he had negotiated agreement with the union negotiators, the agreement might have been rejected at a union general meeting-could not rely on the union negotiators, who had no real power to make a final decision, to be faithful in bargaining. For this reason, he did not make sincere efforts to negotiate an agreement. In response, the union staged an industrial action, in protest to the employer's non-compliance to the good-faith principle. Given the union regulations that weaken the power of negotiators and the employer's acceptable reasoning, the industrial action is not deemed as justifiable in its purpose, timing and procedure.
(Supreme Court ruling on May 12, 2000: No. 98Do3299)

···› It is unreasonable not to be present at a collective bargaining meeting held on the date and time set by the labor union without giving any notice before the set date.

In cases where there are predetermined procedures or common practices for setting the date and time for collective bargaining between labor and

management, the date and time shall be set accordingly. However, in cases where there are no predetermined procedures or common practices, if the labor union set the date and time (hereinafter referred to as "proposed date by labor union") and request the employer to participate in collective bargaining, the employer may request the labor union to change the date in the event that he/she has justifiable reasons for it, such as incases where the employer needs more time in order to prepare for the bargaining, etc. In this case, even though the employer was not present at the collective bargaining meeting on the proposed date by labor union, the employer' s rejection of the collective bargaining can be justified, regardless of the labor union's acceptance or rejection of the employer's request to change the date. However, in cases where the employer refuses to participate in the collective bargaining while requesting to change the date without any justifiable reasons, even though the labor union does not accept the request, or the employer refuses to participate in the collective bargaining without expressing any opinion on the date and time proposed by the labor union until the proposed date, it cannot be considered that the employer has complied in good faith with the request for negotiation. Therefore, the employer' s rejection of the collective bargaining cannot be justified in this case. (Supreme Court ruling on Feb. 24, 2006 No. 2005Do8606)

3. Collective Agreement

1) Conclusion of a collective agreement

Applicable legislation : Article 31 of the TULRAA (Drawing up of the collective agreement)

A collective agreement shall be in writing and signed, with their seals affixed, by both parties.

[Explanatory notes]

···› A "collective agreement" refers to a written agreement between a labor union and an employer on the rights and responsibilities of the parties concerned, including working conditions, treatment of employees, labor union activities, etc.

···› The signatories to a collective agreement shall report the conclusion of the agreement to the competent authority within 15 days from the date of the agreement conclusion. The competent authority, if it finds that the agreement includes an unlawful provision, may, with the resolution of the Labor Relations Commission, order an amendment of the provision. (Article 31 of the TULRAA)

···› For the purpose of "signing with a seal affixed," a handwritten or printed name with a seal affixed or a handwritten or printed name with a thumb print affixed are both acceptable.

···› The report of a collective agreement to the competent authority should be made under joint signature of both parties. However, the report is not a requirement for the effect of the agreement. Namely, a collective agreement, even though it is not reported to the competent authority, may be effective.

[Court rulings]

···› If a collective agreement is neither written nor signed by the parties but is concluded orally or by the phone, what happens to the effect of the agreement?

Article 31, Paragraph 1 of the TULRAA makes it clear that a collective agreement should be in writing and be signed by both parties with their seals affixed. The rationale of the paragraph is to retain the genuineness of the agreement by ensuring that both parties clarify the agreement and confirm their intentions so that the agreement does not leave any room for a later dispute. In this light, no collective agreement that has not fully met the given form may be effective.
(Supreme Court ruling on May 29, 2001: Nos. 2001Da5422 and 15439)

···› Is a collective agreement signed but sealed with thumb prints also effective?

The legal requirement that a collective agreement should be in writing and signed by both parties is intended to make the agreement genuine and clarified with regard to the collective and continuous relationship between the parties. As it does not seem that the failure to affix the imprint of a seal undermines the intention above, a collective agreement shall not be rendered invalid just because it is appended by thumb prints, instead of seal imprints.
(Supreme Court ruling on March 10, 1995: No. 94Ma605)

···› Is a collective agreement signed with printed names, not with handwritten names also effective?

The legal requirement that a collective agreement should be in writing and signed by both parties is intended to make the agreement genuine and clarified with regard to the collective and continuous relationship between the parties. As it does not seem that the failure to sign an agreement with handwritten names undermines the intention above, a collective agreement shall not be rendered invalid just because it is signed with printed names, instead of handwritten names. (Supreme Court ruling on Aug. 27, 2002: No. 2001Da79457)

···› Are the intentions expressed in a collective agreement all acknowledged as being genuine?

The court of law should acknowledge existence and genuineness of the intentions expressed in a collective agreement, unless there is clear and persuasive evidence disproving such existence or genuineness, so long as the agreement is concluded in a justifiable way.
(Supreme Court ruling on April 14, 1987: No. 86DaCa306)

2) Effective period of the collective agreement

Applicable legislation : Article 32 of the TULRAA (Effective term of collective agreement)

① No collective agreement shall have a valid term exceeding two years.
② In cases where a collective agreement does not specify a valid term or has a valid term exceeding the period stipulated in paragraph ①, the valid term shall be two years.
③ Unless otherwise provided in a separate agreement, if no new collective agreement is concluded by the expiry of the existing agreement even though the parties have continuously engaged in collective bargaining before and after the expiry date, the existing collective agreement shall remain effective for up to three months after its expiry date. If no conclusion is made on a new collective agreement after the expiration of the extended effective term, the existing agreement shall be applicable only if the existing agreement specifically provides that it shall remain in effect until a new collective agreement is concluded, provided, however, that any one party concerned may terminate the collective agreement by giving notice to the other party six months in advance.

[Explanatory notes]

···› In accordance with the upper limit of two years for the effect of a collective agreement, the effective term may be shorter than the statutory valid term of one year, but may not be longer than two years. A collective agreement which specifies more than two years as the effective term is effective only for two years.

[Court rulings]

···› What is the purpose of the upper limit for the effective period of a collective agreement?

If a collective agreement were allowed to remain effective for an excessively long period of time, it would probably be removed from economic or social changes in the reality and, consequently, would serve as an unnecessary restriction to both parties. Furthermore, it would be contradictory to the

fundamental purpose of the collective agreement, which is to maintain or improve working conditions and stabilize labor relations. Accordingly, in order to keep a collective agreement relevant with reality and adjustable in response to the changing environment, it is necessary to put an upper limit on the effective term. (Supreme Court ruling on Feb. 9, 1993: No. 92Da27102)

···› In cases where an automatic extension of the effective term of a collective agreement is stipulated, when does the extended effective term of the collective agreement expire?

The purpose of Article 35.(3) of the former TULRAA (32.(3) of the current TULRRA) is to prepare for those cases where a company does not have a regulation stipulating that the existing collective agreement shall remain valid when the collective bargaining to make a new collective agreement is still in progress after the expiry of the effective term of an existing agreement. Therefore, if the regulation concerning the automatic extension of the effective term of a collective agreement exists in the existing collective agreement, the regulation of the TULRAA listed above shall not be applied and the extension period shall not be limited to only an additional three months after the expiration pursuant to Article 35.(3) mentioned above. (Supreme Court ruling Feb. 9, 1993: No.92Da27102)

···› Even if the collective agreement becomes null and void, the parts which include wages, retirement allowances, working hours, and individual working conditions are still applied to the employer and employees as a part of the employees' individual employment contracts.

Even if the collective agreement becomes null and void, the parts which include wages, retirement allowances, working hours, and individual working conditions are still applicable to the employer and employees as a part of the employees' individual employment contracts, unless a new collective agreement or rules of employment that replace the null and avoid collective agreement are concluded or is drawn up, or the consent of individual employee is obtained. In this light, the same shall apply to reasons for dismissal and dismissal procedures of the collective agreement. (Supreme Court ruling on Dec. 27, 2007: No. 2007Da51758)

3) Contents and effect of the collective agreement

Applicable legislation : Article 33 of the TULRAA (Validity of terms and conditions)

The provisions in the rules of employment or a contract of employment that are not in compliance with the working conditions and other standards concerning employee treatment specified in the collective agreement shall be null and void.

[Explanatory notes]

···› The collective agreement consists of two main parts: the first concerns wages and other working conditions and employee treatment (normative part), while the other is about the rights and obligations of the employer and the trade union (obligatory part).

➡ Normative part and obligatory part of the collective agreement

	Description
Normative	Wage rates, wage payment methods, hours of work, holidays and leaves, retirement pay, bonus, other employee benefits, work rules, disciplines, dismissal, etc.
Obligatory	Peace obligation, conveniences for union activities, collective bargaining, (union, closed or open) shop, industrial actions, en bloc deduction of union dues (check off), etc.

···› With regard to the normative provisions, the Constitution has the strongest effect, followed by laws, the collective agreement, the rules of employment and a contract of employment, in order of force. On the other hand, the obligatory provisions are effective only to the union and the employer that are signatories to the collective agreement.

···› When part of an individual contract of employment or the rules of

employment is in conflict with the collective agreement, the contract or the rules of employment is not entirely invalid. Rather, for the part that is rendered invalid, the corresponding provisions of the collective agreement shall apply.

···› In cases where a new collective agreement is concluded, the new collective agreement shall be applied even if it has disadvantageous regulations compared to those of the previous collective agreement.

[Court rulings]

···› If a collective agreement provides for less favorable conditions than the rules of employment, is such provision effective?

When a collective agreement is devised or revised to include less favorable conditions than the existing rules of employment set forth for the same subject, the new or revised agreement implies that both parties have agreed to exclude application of the rules of employment for the subject. In the case in question, it is deemed that the revised collective agreement excludes application of the rules of employment with regard to dismissal criteria. (Supreme Court ruling on Dec. 27, 2002: No. 2002Du9063)

···› In case a collective agreement includes a provision for which the Labor Standards Act has been revised, is the provision in the collective agreement still effective?

As a result of the revision of the Labor Standards Act, the standard working hours per day for underground workers is changed to eight hours, just like that of ordinary workers, and the time consumed to go in and out of the underground worksite is counted as working time. Unless the corresponding provisions of the collective agreement are less favorable to employees than the revised provisions of the LSA, the LSA revision does not influence the effect of the provisions in the collective agreement.
(Supreme Court ruling on Dec. 14, 1993: No. 93Da43477)

···› Can an employer dismiss his/her employees based on a dismissal cause which is specified in the rules of employment but is not in the collective agreement?

An employer may draw up the rules of employment, subject to the applicable laws and regulations, including the LSA. In addition, an employer

has the right to include in the rules of employment dismissal causes that are not specified in the collective agreement, so long as they are concerned with employee offenses that destabilize the order at workplace. Therefore, an employer may insert new dismissal causes in the rules of employment and dismiss his/her employees based on any of the new causes.
(Supreme Court ruling on June 14, 1994: No. 93Da26151)

···› If a collective agreement provides that "the employer should consult the union, in advance, over any personnel shift of union executive officials," is this provision effective?

In case a collective agreement requires for an advance consultation with the union about personnel matters of union executive officials, union delegates and full-time union officials, the provision should apply to the personnel matters, including disciplinary dismissal, of union executive officials, union delegates and full-time union officials, unless in exceptional cases. It does not follow, however, that a case of disciplinary dismissal of a union executive official, etc., is always null and void without the advance consultation. (Supreme Court ruling on Sep. 22, 1992: No. 92Da13400)

···› If a collective agreement includes a clause on individual employees' waiving claims to their wages, is the agreement valid?

As the wages, retirement pays or bonuses to which individual employees already have the right are their personal properties, they are at the disposal of the employees. Therefore, a trade union, unless with consent or mandate from individual employees to do so, cannot waive or delay the right to wages, etc., just by means of a collective agreement with the employer.
(Supreme Court ruling on Sep. 29, 2000: No. 99Da67536)

···› When an employer, after concluding a collective agreement, has devised a set of regulations on employee discipline under agreement with the union, are the discipline regulations effective?

If a set of regulations on employee discipline have been agreed on by the trade union and are not contradictory but supplementary to the corresponding provisions in the collective agreement, the regulations are effective, even though they are not exactly the same, in the way of expression, as those in the collective agreement.
(Supreme Court ruling on July 16, 1993: No. 92Nu16508)

···› In case a collective agreement provides for a union shop system in which any employee is a member of the union, should the employer dismiss an employee who has departed from the union?

Under the union shop system, which is intended to strengthen the bond among the union members, a precondition for employment is to join the representative union. If a collective agreement includes a clause on union shop, the employer is obliged to dismiss an employee who has walked out of the union, even if there is no additional clause on such obligation. However, the employer's obligation to dismiss an employee departing from the union is simply his/her obligation under the collective agreement. It cannot be always said that the employer's non-compliance with the obligation constitutes his/her unfair intervention in or domination over the union, which is an act of unfair labor practice.
(Supreme Court ruling on March 24, 1998: No. 96Nu16070)

···› In case a trade union concludes a collective agreement including working conditions less favorable to employees, is the agreement valid?

In accordance with the principle of independence and autonomy in collective bargaining and agreement, a trade union and an employer may conclude a collective agreement that provides for better or lower working conditions. Unless the working conditions included are too low to be reasonable or to be in compliance with the purpose of a trade union, a collective agreement may not be deemed as ineffective just because it includes lower working conditions. In order to determine whether a collective agreement is reasonable enough or not, all surrounding conditions, such as the general contents of the agreement, the developments leading to agreement conclusion and the employer's financial situation, should be thoroughly examined.
(Supreme Court ruling on Sep. 29, 2000: No. 99Da67536)

···› When a collective agreement specifies a certain group of employees who are not entitled to join the trade union and, therefore, are excluded from its coverage, the collective agreement shall not be deemed as invalid just for that reason.

According to the provisions of Articles 5 and 11 of the Trade Union and Labor Relations Adjustment Act, a worker is free to organize or join a trade union, and the coverage of union membership is determined by the bylaws of the union concerned. Therefore, a worker, subject to the union bylaws,

may join the union and obtain membership to the union. In principle, a collective agreement between an employer and a union, unless it stipulates that it shall cover a specific range of workers, shall govern all members of the union. However, in case the parties to collective bargaining agree in the collective agreement to exclude a particular range of workers from the coverage of the agreement, the exclusive provisions of the agreement shall not be invalidated even when the specified range of workers is contradictory to the range of workers eligible to union membership under the union bylaws.(Supreme Court Ruling on Jan. 29, 2004: No. 2001Da5142)

···› In cases of concluding collective agreements that change the criteria to decide on working conditions advantageous to employees retroactively

In cases where the labor union has concluded a collective agreement which retroactively consents to criteria that determine working conditions including wages, working hours, and retirement allowances, or grants such criteria, the changed collective agreement only applies to the members of labor union or employees who work at the relevant company when the collective agreement comes into effect. However, it does not apply to employees who have retired before the conclusion of the collective agreement, even if the working conditions have changed advantageous to the employees. (Supreme Court ruling on April 23, 2002: 2000Da50701)

···› Collective agreement that unifies employment relations after a merger

Even if the previous rules of employment, etc., continue to apply as the employment relations are taken over through the merger, if the new agreement, which unifies the employment relations by changing and adjusting it, is concluded through the conclusion of a collective agreement, etc., between the labor and management after the merger, the new collective agreement, etc., shall be applicable.
(Supreme Court ruling on Oct. 30, 2001: No.2001Da24051)

4) General binding force of the collective agreement

Applicable legislation : Article 35 of the TULRAA (General binding force)

In case a collective agreement applies to a majority of the regular employees working for the same kind of job at the same business or workplace, it shall apply to other employees working for another kind of job at the same business or workplace.

Applicable legislation : Article 36 of the TULRAA (Geographical binding force)

In case two thirds or more of the employees of the same kind of job employed in the same regional area are subject to the same collective agreement, the competent authority of the regional area may, with the resolution of the Labor Relations Commission, upon
the request of one or both parties to the collective agreement or ex officio, make a decision that such collective agreement shall apply to other workers of another same kind of job and their employers in the same regional area.

[Explanatory notes]

General binding force at a company level

···› "General binding force of a collective agreement at a company level" means the extension of the effect of a collective agreement which is concluded by a trade union over to non-union employees at the same business or workplace.

···› When a collective agreement is concluded by a trade union that represents a majority of the regular employees working for the same kind of job (comparable employees), the provisions of the collective agreement on wages, hours of work, holidays and leaves, and disciplines are also effective for the employees working for another kind of job.

···› If a collective agreement applies to less than half of the employees, due to new recruitments or walkouts from the union, the general binding force of the collective agreement is automatically terminated.

General binding force at a regional level

···› "General binding force of a collective agreement at a regional level" means the extension of the effect of a collective agreement which is concluded by a trade union over to non-union employees and other employers in the same regional area.

···› "Two-thirds or more of the employees" means that the collective agreement applies to two-thirds or more of the total comparable employees in the same regional area.

[Court rulings]

···› 'Workers in the same kind of job' stipulated in Article 35 of the Trade Union and Labor Relations Adjustment Act

'Workers in the same kind of job' stipulated in Article 35 of TULRRA refer to the employees to whom the collective agreement is expected to be applied. However, a person who is not qualified to be a member of the union pursuant to regulations such as collective agreement cannot be considered as an employee to whom the collective agreement is expected to be applied. Therefore, this person is not included among workers in the same kind of job under the general binding force of collective agreement.
(Supreme Court ruling on Feb. 12, 2004: No.2001Da63599)

···› In cases where a "collective agreement" does not classify the occupations in the scope of application

In the case in question, the collective agreement provides that any employee may join the trade union and be governed by the collective agreement, whether he/she is an engineer or not. This means that ordinary employees are also "comparable employees" that are subject to the collective agreement. Given that the union has represented a majority of the regular employees, the collective agreement is applicable to ordinary employees, irrespective of whether they are union members or not.
(Supreme Court ruling on Dec. 10, 1999: No. 99Du6927)

···› In case an employee is hired on a short-term contract basis but the contract has been renewed several times, is he/she a "comparable employee" of the regular employees?

"Comparable employees regularly employed" refers to all the comparable employees that, in practice, are continuously working at the workplace, whatever their job is called or their employment status is, or whether their contract term is fixed or infinite. The employee, although employed on a short-term contract basis, has been continuously working as a result of the repeated renewal of the contract. In addition, the collective agreement does not limit its coverage, which means that it applies to all the jobs at the workplace. Therefore, any employee at the workplace is regarded as a comparable employee subject to the collective agreement.
(Supreme Court ruling on Dec. 22, 1992: No. 92Nu13189)

···› Is a collective agreement applicable to an employee who, under the collective agreement, is unqualified to join the union?

In the case in question, the employee, unlike other regular employees, has worked as a part-timer and had his contract renewed annually until his retirement. In light of the collective agreement, the employee is not qualified to join the union and the collective agreement is not applicable to him. Accordingly, the employee is not regarded as a "comparable employee" subject to the collective agreement.
(Supreme Court ruling on April 28, 1987: No. 86DaCa2507)

···› Is a security guard a comparable employee of production employees?

A security guard is working a job of supervision or watch, which is not comparable at all to that of production workers, in either job description or status. Therefore, a security guard is not a comparable employee that is governed by the collective agreement.
(Supreme Court ruling on Dec. 22, 1995: No. 95Da39618)

···› 'Employees covered by one and the same collective agreement' refers to the employees for who the collective agreement is originally intended to cover, and thus, are included in the coverage of the agreement.

The phrase 'employees covered by one and the same collective agreement', one of the requirements needed for general binding force of a collective agreement under Article 35 of the Trade Union and Labor Relations Adjustment Act (TULRAA), refers to the employees for who the collective agreement is originally intended to cover and, thus, are included in the coverage of the agreement. Accordingly, in cases where a collective

agreement does not limit its application to a specific group of employees, the 'employees covered by one and the same collective agreement' means all members of the union that is a signatory to the agreement. Meanwhile, when a collective agreement specifies that it shall cover only a certain group of employees, the 'employees covered' means the specified group of employees. (Supreme Court Ruling on May 12, 2005: No. 2003Da52456)

···› The joint resolution made by the employer and the union stipulating that employees would return their bonuses and holiday benefits is not binding to non-union employees, if the union, at the time the resolution was made, did not represent a majority of the total number of employees.

The union and the employer signed a joint resolution stipulating that employees would return their bonuses and holiday benefits to the employer, which changed the provisions of the existing collective agreement concerning employee bonuses and holiday benefits. However, as the union did not represent a majority of the total number of employees who are qualified to join the union at the time when the joint resolution was reached, the resolution cannot have general binding force as prescribed in Article 35 of the Trade Union and Labor Relations Adjustment Act. Accordingly, the joint resolution and the consequently revised provisions of the collective agreement are not binding to non-union employees.
(Supreme Court Ruling on May 12, 2005: No. 2003Da52456)

···› If a trade union in a certain regional area has its own collective agreement, is it still subject to the general binding force of the collective agreement at the regional area?

In case a specific union within a certain regional area has concluded its own collective agreement, the union and its members are immune from the regional binding force of the predominant collective agreement, while the collective agreement of the union is in force. Similarly, the union is not prohibited from renewing its collective agreement or conducting collective bargaining or collective actions to improve working conditions for its members. (Supreme Court ruling on Dec. 21, 1993; No. 92Do2247)

5) Termination of the collective agreement

[Explanatory notes]

···› A collective agreement shall have its effect terminated in the case of expiration of its valid term, cancellation, rescission or removal of the agreement, or modification in the parties.

···› Since a collective agreement is concluded through the expression of will by the labor and management, if there are any errors in the collective agreement, or if it is concluded by fraud or by force, the collective agreement may be canceled by the one side. Also, if one party commits violations grave enough to forfeit the significance of the agreement or by mutual consent concluded between the two parties, the other party may cancel the agreement.

···› In cases of change of organization , in principle, the collective agreement is retained as long as the company' s identity is considered to be the same. In cases of merger, even if the merged company no longer exists, its rights and responsibilities are inherited by the merging company inclusively and, therefore, the collective agreement is retained. In cases of business transfer, the opinions may vary, but it is generally deemed that the collective agreement is taken over or retained as long as there is no agreement otherwise.

···› In the case of liquidation, a collective agreement is terminated, along with the trade union, immediately after the process of liquidation. Meanwhile, in the case of a structural change, the collective agreement is retained as long as the new union is equal to the previous one in terms of the purpose, self-regulation and membership.

[Court rulings]

···› If a union representative commits an illegal collective act, contrary to the agreement the union concluded with the employer, is the effect of the agreement invalidated?

In the case in question, the employer and the union representative reached

agreement that the union would be punished for another illegal collective act. However, the union representative later led the union members in taking an illegal act twice, each for a different cause. At this moment, it seems that, under the previous agreement, the employer may take a disciplinary measure against the union members concerned and the effect of the agreement is invalidated. (Supreme Court ruling on Sep. 30, 1994: No. 94Da21337)

···› In case, after an employer and a trade union have concluded an agreement, one party has committed a serious violation of the agreement, can the other party terminate the agreement?

The employer agreed that the accused employees would be restored to their original jobs upon release even though they were sentenced to imprisonment. Meanwhile, the union apologized to the employer for the damage that the union's illegal collective acts had inflicted and promised not to commit any further illegal act of obstructing the business operation. Afterwards, however, union members submitted a form of 2-day leave and did not show up at work, in protest to the employer's decision to put the detained employees on suspension of service. As a result, the plant operation was completely stopped for two days. In addition, an ad hoc union meeting was held to urge the union members to halt plant operation. This is a clear violation of the agreement between the union and employer. Therefore, the employer may terminate the agreement, on the grounds of the union's violation of the agreement. (Supreme Court ruling on May 8, 1992: No. 91Nu10480)

···› Upon expiration of a collective agreement, are the provisions on the employment relationship such as working hours or wages invalidated?

When a collective agreement is concluded, its provisions on working conditions and other standards for employee treatment are incorporated into the employment relationship of individual employees. Therefore, even after expiration of the collective agreement, the normative provisions on working conditions, etc., will remain effective. In addition, as the provisions on personnel management and dismissal are also included in the normative part of the collective agreement, those provisions also continue to be effective, even after termination of the agreement, until a new collective agreement takes effect. (Supreme Court ruling on Jan. 14, 1994: No. 93Da968)

4. Industrial Actions

1) Definition of industrial action

Applicable legislation : Article 2 of the TULRAA (Definition of industrial actions)

The term "industrial actions" means actions which are done by a party to the labor relations to obstruct a normal operation of the business with a view to achieving their ends, such as strike, sabotage and lock-out, and counteractions in response to those actions.

[Explanatory notes]

···› An industrial action is a collective action by the trade union to undermine the regular functioning of the business operation. An individual employee's refusal to do work as a way of expressing his/her complaint of working conditions is not treated as an industrial action.

···› "Normal operation of the business" refers to the work being provided under the employer's legitimate control and instruction. Any refusal (as a collective act) to provide the work described as a contractual obligation constitutes an industrial action.

···› "Labor dispute" is a dispute between a trade union and an employer or an employers' organization, arising out of disagreement over wages, working hours, employee welfare, dismissal and other working conditions.

[Court rulings]

···› Is it justifiable to collectively refuse to work during the working time?

The employees' collective refusal to work during the working time is, unless it is deemed as illegal for another reason, may be simply their failure to comply with the obligation to provide work. However, if such refusal to work prevents a regular functioning of the business but is not a legitimate industrial action, it may constitute a criminal offense of business obstruction.

(Supreme Court ruling on April 23, 1991: No. 90Do2771)

···› Can a refusal to work extended hours is an industrial action?

Even though the extended work is performed with the mutual consent of the parties concerned, if the regular functioning of the business was undermined as the employees were instigated to refuse to extended work which has been performed regularly, it will be considered as an industrial action.
(Supreme Court ruling Feb. 27, 1996: 95Do2970)

···› Can a collective refusal to work on a holiday be treated as an industrial action?

If employees, with the aim of getting their demands through, refuse to do the holiday work that they usually did, such refusal is an industrial action as it undermines the regular functioning of the business.
(Supreme Court ruling on Dec. 26, 1997: No. 97Nu8427)

···› When nurses used monthly leave at the same time and worked without their uniforms on, does this constitute an industrial action?

The union, for the purpose of carrying its point, instructed union members (nurses) to use a monthly leave at the same time. This is an act of work-to-rule, which is a kind of industrial action. In addition, their working in plain clothes is also an industrial action, as they are required to wear uniforms for the reasons of sanitation and a need to signify their position.
(Supreme Court ruling on June 14, 1994: No. 93Da29167)

···› In case union members occupy part of the company premise and prevent outsiders from coming into the area, is this considered an industrial action?

The union members occupied the front door and the aisle leading to the office of the company head at the main building of the plant. They also sang and chanted during the lunch breaks and at nighttime, preventing outsiders from coming into the main building and doing a great damage to the normal functioning of the plant. In this case, their occupation and sit-ins are regarded as industrial actions. (Supreme Court ruling on Jan. 15, 1991: No. 90Nu6620)

···› Is a sit-in on the road in front of the company an industrial action?

About 1,100 employees of the company got together on the road in front of the company and chanted their demands for wage increase, undermining the normal operation of the company. This is seen as an industrial action.
(Supreme Court ruling on April 13, 1990: No. 90Do162)

2) Industrial actions by the trade union

Applicable legislation : Article 37 of the TULRAA (Basic principles of industrial actions)

Union members shall not take part in any industrial action that is not led by the trade union.

[Explanatory notes]

···› An industrial action of the employees can be justified when it is led by the party that is able to conduct collective bargaining or sign a collective agreement, namely, the union. Accordingly, an individual employee, a temporary organization of employees or a temporary body for industrial actions alone may not be a justifiable player in an industrial action.

···› In accordance with the special law on the defense industry, the employees who are engaged in the work of water supply, electricity or production of defense goods at such defense companies as designated in the law may not take part in an industrial action.
(Article 41, Paragraph 2 of the TULRAA)

···› "Employees mainly engaged in the work of producing defense goods" refers to the employees who are involved in the work that is necessary to make defense goods, such as manufacturing, processing, assembling, upkeep, reproducing, remodelling, function checkup, gassing, heat processing or painting.
(Article 20 of the Enforcement Decree of the TULRAA)

[Court rulings]

···› A party for legal industrial action

An industrial action by the employees can be justified when it is led by the party that is able to conduct collective bargaining or sign a collective agreement, namely, the union.
(Supreme Court ruling on Oct. 25, 2001: No.99Do4837)

···› A party to industrial action as a party to collective agreement

An industrial action is a last resort on which a union can rely in order to ensure favorable working conditions in negotiating a collective agreement. Accordingly, an industrial action is permitted only when it is aimed at a matter that is subject to collective bargaining and is taken by the party to the collective bargaining and agreement.
(Constitutional Court ruling on Jan. 15, 1990: No. 89HeonGa103)

···› Can an industrial action by a labor organization with no right to collective bargaining be justified?

1. ○○○ labor organization recognizes employees to be dismissed as members of the organization even though they are not considered as employees anymore and has the same organizational jurisdiction as the existing trade union. In this light, ○○○ labor organization cannot be considered a labor union under the Labor Union Act and cannot be a legal party to the industrial action as it does not have right of collective bargaining. Therefore, the industrial action by the ○○○ organization cannot be justified in its subject, purpose and means.
(Supreme Court ruling on Feb. 11, 1997: No.96Nu2125)

2. Since ○○ council is not a party to industrial action founded through legal procedures, the council is only a voluntary association which does not have the right to collective bargaining. Therefore, the industrial action by ○○ council cannot be considered to be legal industrial action.
(Supreme Court ruling on Jan. 26, 1996: No.95Do1959)

3) Purpose of industrial actions

Applicable legislation : Article 1 of the TULRAA

The purpose of this Act is to maintain or improve working conditions and to promote the economic or social status of employees by securing the employees' right to organize, bargain collectively or act collectively, as is embodied in the Constitution, and to contribute to the maintenance of industrial peace and the development of the national economy by preventing or resolving industrial disputes through a fair coordination of the relations.

[Explanatory notes]

···› An industrial action shall be aimed at achieving the union's demands on wages, hours of work, dismissal and other working conditions.

···› In cases where there are several purposes of industrial action and some of them are not justifiable, the legitimacy of the purposes shall be judged by the reasonableness of the main purpose or genuine purpose of the industrial action.

···› Matters belonging to managerial decisions cannot be subject to industrial action even if is unavoidably accompanied by change of status or working conditions of employees.

[Court rulings]

···› Is it justifiable to take an industrial action in protest to dismissal (massive lay-off) for economic reasons or integration or abolition of business departments as part of the restructuring process?

A decision to dismiss employees for an economic reason or remove or reduce business departments for the restructuring purpose is exclusively up to the employer and, in principle, such decision may not be subject to collective bargaining. Unless the employer intends to carry out the restructuring process for an unfair reason (other than an urgent need for business purpose, etc.), no industrial action taken by the union to protest the restructuring is justifiable, even though the action is aimed at improving working conditions and the status of the employees.
(Supreme Court ruling on Dec. 11, 2003: No. 2001Do3429)

···› Right to decide on change of organization, division of work duties, etc., is subject to right of management, and therefore cannot be subject to collective bargaining.

Right to decide on change of organization following the merger and abolition of an organization, division of works, etc., is subject to the right of management which belongs to the employer and the employer's decision shall be respected. Therefore, such right cannot be subject to collective bargaining. In this light, the industrial action whose purpose is to achieve matters that cannot be subject to collective bargaining is not justified.
(Supreme Court ruling on Jan. 11, 2002: No.2001Do1687)

···› Is it possible to take an industrial action in a way to urge the government to revise laws or regulations?

The right of resistance may be exercised by people in order to secure their rights and freedom only when it is proven that the State has infringed on their fundamental rights embodied in the Constitution to an extent that denies the presence of the Constitution and when the victimized cannot achieve their demand with other lawful remedial means. This right, however, may not be used to protest the National Assembly's enactment or revision of laws or regulations, even when the parliament had mistakenly failed to follow the given procedures for law enactment or revision. Namely, no industrial action may be taken with the aim of revising laws or regulations. Besides, even a rally or demonstration that is held to call for a correction of the mistake made in the process of law enactment or revision may not be immune to criminal liabilities if it fails to comply with the procedure specified in the law on rallies and demonstration.
(Supreme Court ruling on Sep. 5, 2000: No. 99Do3865)

···› When an industrial action is taken to protest against the restructuring of the company including lay-off, the merger and abolition of business units, etc., can such actions be justified?

A high-level managerial decision by the employer is required on whether to implement restructuring of the company, including layoff, and the merger and abolition of business units. Therefore, this cannot be subject to collective bargaining. Unless there exist exceptional circumstances, including restructuring with dishonest intention and no urgent managerial needs or other rational reasons, if a labor union embarks on industrial action against the enforcement of restructuring itself, the object of the industrial action cannot be justified even, though the unavoidably accompanied by a change of employees' positions or working conditions.
(Supreme Court ruling Dec. 26, 2003: No.2001Do3380)

···› When an industrial action is taken to protest dismissal for an economic reason, can such action be justified?

The industrial action in question was taken to block the restructuring process, including massive lay-off for an economic reason and it was a clear infringement on the employer's prerogatives in business management. There is no evidence that proves that the restructuring has been carried out for no

justifiable reason. Given this, the industrial action is not justifiable. (Supreme Court ruling on Feb. 11, 2003: No. 2000Do4169)

···› When a trade union's demand for wage increase has resulted in a labor dispute and industrial actions, which have undermined the regular functioning of the business, can the industrial actions be justified?

A trade union may take industrial actions, with a view to interfering with the business operation, when it finds itself in a labor dispute and sees it necessary to take such actions in order to achieve its ends. It cannot be said that an industrial action is unjustifiable just because it prevents normal operation of the business.
(Supreme Court ruling on May 26, 2000: No. 98Da34331)

···› Is it justifiable to take an industrial action in order to get the demand on payment of compensation through, even when the payment is not one of the issues subject to collective bargaining?

In the case in question, the business transfer was a result of the employer's decision to change the business structure. In addition, as the proceeds from the transfer did not come from business activities, the decisions on use of the proceeds may not be negotiated at a bargaining table. Nevertheless, the union, under the leadership of some union officials, demanded the payment of compensation and resorted to industrial actions with a view to getting its demand through. All things considered, the industrial actions are not justifiable. (Supreme Court ruling on May 8, 2001: No. 99Do4659)

···› Measures for corporate governance taken by an employer to improve the competitiveness of the company, such as restructuring or mergers, are not subject to industrial action.

An employer is free to perform the business or operation of his/her own choosing, to make decisions for such business or operation, and to change (expand or reduce in size or convert to another sector) the business or operation or dispose of (close or transfer) it. Namely, these freedoms and rights of employers are protected by the Constitution. Measures for corporate governance taken by an employer to improve competitiveness of the company, such as restructuring or mergers, are not subject to industrial actions, unless the measures are taken for an inappropriate purpose, not for any urgent managerial needs or other justifiable reasons. Accordingly, an

industrial action taken in protest against a reasonable measure for corporate governance is not valid in its purpose.
(Supreme Court ruling on Nov 13, 2003: No.2003Do687)

···› If an industrial action is done for several purposes, some of which are unjustifiable, what happens to the validity of the industrial action?

In case an industrial action is taken for several purposes, some of which are unjustifiable, the main purpose of the industrial action should be examined in order to determine whether the action is justifiable or not. If it is established that the industrial action would not have been taken without the unjustifiable purpose(s), the action cannot be justified.
(Supreme Court ruling on Jan. 21, 1992: No. 91Nu5204)

4) Procedures of industrial actions

Applicable legislation : Article 41 of the TULRAA (Restriction and ban on industrial actions)

No industrial action may be conducted unless a majority of union members have voted for the industrial action by a direct, secret and unsigned ballot.

[Explanatory notes]

···› Industrial action can be justified only when it is taken following the procedures such as procedures of mediation, approval of labor union members, etc., prescribed in the regulations and when it is taken as the last resort after collective bargaining negotiations have been held in good faith.

···› No industrial action may be taken unless it is preceded by the mediation process. (Article 45 of the TULRAA)

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

dispute period of 15 days, the two parties are not prevented from taking an industrial action during the following days.

···› The trade union, when it intends to wage an industrial action, shall make an advance report in writing to the competent authority and the local Labor Relations Commission, specifying the date and location of the industrial action and the number of participants.

[Court rulings]

···› When an industrial action is taken without voting by union members, is it justifiable?

The law provision requiring that an industrial action should be brought before the voting of union members is intended to promote an independent and democratic operation of the union and to ensure that the union is prudent enough in making any decision that might bring disadvantages to the union members involved. No industrial action that was taken without the requirement of voting being fulfilled can be justified, unless it is objectively established that there was an unavoidable reason to omit the required procedure. (Supreme Court ruling on Oct. 25, 2001: No. 99Do4837)

···› When a trade union informed the employer of its plan to hold an ad hoc meeting for voting on industrial actions during the usual working time, is such voting justifiable?

The trade union in question notified the employer, in writing, that it would hold an ad hoc meeting, during the working time, for voting on industrial actions. It seems that the voting was conducted during the working time to make sure that as many union members as possible could take part in the voting. The ad hoc meeting, consisting of the 3-hour vote accompanied by 1-hour of recreation time, is, as a whole, a justifiable act to which the union is entitled. (Supreme Court ruling on Feb. 22, 1994: No. 93Do613)

···› If industrial action is taken following the procedures, including applying for the mediation of labor dispute and voting on industrial action, its reasonableness cannot be denied only because the requirement of a written report procedure was not observed.

Article 17 of the Enforcement Decree of the Trade Union and Labor Relations Adjustment Act requires the submission of a written report of

industrial actions regarding the place, date, the number of participants in, and the method of the industrial action. The purpose of this regulation is to prescribe the detailed and formal procedures of industrial action and, therefore, the written report is not an essential factor for the industrial action to be justified. In this light, if an industrial action is taken following the procedures including applying to the mediation of labor dispute and voting on industrial action, its reasonableness cannot be denied only because the requirement of a written report procedure was not observed.
(Supreme Court ruling on Dec. 28, 2007: No. 2007Do5204)

···› In cases where a labor union applies to the Labor Relations Commission for labor dispute mediation, is it impossible for the labor union to take an industrial action before the Labor Relations Commission agrees to take on the mediation?

Industrial actions should be taken preceded by the mediation procedure. However, this does not necessarily mean that the industrial action can be justified only when it was taken after the Labor Relations Commission's decision to take on the mediation. If the mediation procedure is completed after the application for labor dispute mediation by the labor union, or the mediation period has expired before the completion of mediation, it is deemed that the mediation procedure is completed, and therefore, the labor union can take an industrial action. (Supreme Court ruling on Dec. 26, 2003: No.21Do1863)

···› Except for the case of a general strike, industrial actions taken by a branch or chapter of a regional, sectoral or occupational trade union are lawful in terms of procedures if a majority of the members of the union branch or chapter gave consent to such industrial actions.

An industrial action taken by a branch or chapter of a regional, sectoral or occupational trade union is procedurally justifiable except in the case of a general strike and if a majority of the union branch or chapter have given consent to the industrial action. Namely, such industrial action does not require consent from a majority of the total members of the union including the branches or chapters that have no relation to the industrial action. (Supreme Court Ruling on Sep. 24, 2004: No. 2004Do4641)

···› When an industrial action is contradictory to the peace obligation, is it justifiable?

If a union takes an industrial action, by going back on the peace obligation that requires either party to a collective agreement not to be engaged in an

industrial action for the purpose of any change in the collective agreement while the agreement is in force, the industrial action undermines the essential function of the collective agreement: a peaceful and independent regulation of labor relations. Furthermore, the action is against the good-faith principle which is crucial to stable labor relations. Accordingly, the union's industrial action cannot be justified. (Supreme Court ruling on Sep. 30, 1994: No.94Da4042)

5) Methods of industrial actions

Applicable legislation : Article 42 of the TULRAA (Prohibition of violent acts, etc.)

① No industrial action may be taken in the form of violence or destruction, occupation of the facilities for production, or other equally important business activities that are prescribed in the Presidential Decree.

② No industrial action may be taken to discontinue or close safety protection facilities at the workplace or to interrupt their normal operation or maintenance.

[Explanatory notes]

···› Industrial action shall be taken in such a manner that causes damages to the employer by ceasing to provide work in whole or in part and shall follow the principle of fairness based on the principle of good faith in labor-management relations.

···› Under no circumstance may a violent or destructive act be justified. However, in cases where violent or destructive activities are caused by some of the labor union members, regardless of the labor union's intention, the reasonableness of such activities shall be judged separately from that of industrial action as a whole.

···› An industrial action should be aimed at a temporary suspension of the business. Even while the labor dispute is in progress, the work of preventing damage to work facilities or degeneration or decomposition of raw materials should not be discontinued.

➡ The following shows "the facilities equal in importance to production facilities that the union is forbidden to occupy" as mentioned in Article 42 of the TULRAA

- Electric or electronic facilities or communications facilities;
- Cars on the railways (including city railways) or tracks thereof, or ships under construction or repair or at anchor (except when a seaman under the Seamen Act gets on board the ship concerned);
- Aircraft, aviation security facilities or the facilities for aircraft landing or take-off or for transport of passengers and cargo;
- Locations for storage or warehousing of materials with the risk of exploding, such as gunpowder and explosives, or the toxic substances as mentioned in the Control of Harmful Chemical Substances Act.

[Court rulings]

···› Is it justifiable, during the period of industrial dispute, for union members to obstruct the work of other employees and engage in acts of violence toward them?

In the case in question, the union took industrial actions in protest to the employer's decision to lay off employees for an economic reason, immediately after it underwent the mediation by the Labor Relations Commission just as a formality. Given that the employee lay-off for an economic reason is not subject to collective bargaining, the industrial actions are not legitimate. Furthermore, the union members, while engaged in industrial action, used verbal or physical violence to derail other non-participating employees from their work, leaving some of them injured and part of the office furniture destroyed. All things considered, the union cannot justify the industrial actions, in terms of either the means or the manner in which they were carried out. (Busan Appeals Court ruling on May 3, 1999: No. 99No34)

···› Facilities installed to protect workplace safety

'Facilities installed to protect safety in the workplace' stipulated in Article 42.(2) of the TULRAA refer to the facilities that protect the lives and safety of people. Every circumstance, including types of the workplace concerned and functions of the relevant facility should be taken into consideration concretely and comprehensively when deciding whether the facility is included in the facilities installed to ensure workplace safety
(Supreme Court ruling Sept. 30, 2005: No.2002Du7425)

···› Is an act of picketing justifiable as a supplement to the strike?

As usual, a strike may be supplemented by picketing or a sit-in or stay-in at the company premises in order to ensure or strengthen the effectiveness of work discontinuance. Picketing itself is a justifiable action, so long as strike participants persuade, by a verbal or literary means, the employees who are not participating in the strike or intend to continue their work to join the strike. If a physical or verbal violence or a threat to use physical violence is made in the course of picketing, it cannot be justified.
(Supreme Court ruling on July 14, 1992: No. 91Da43800)

···› When union members occupy the company premise in a full-scale and exclusive way for a prolonged period of time, is this a justifiable industrial action?

The union's occupation of the company premise is justifiable only when it is a partial occupation, not excluding the employer's occupation. The union leaders, however, called upon 660 union members to occupy the company offices and drive away the employees at work. This is an unjustifiable act of forceful disturbance of the employees' service.
(Supreme Court ruling on Jun. 11, 1991: No. 91Do383)

6) Countermeasures by employer to the industrial actions

(1) Lock-out

Applicable legislation : Article 46 of the TULRAA (Requirements for lock-out)

① An employer may execute a lock-out of the workplace only after its trade union commences industrial action.
② In the case of a lock-out under paragraph ①, an employer shall report it in advance to the Administrative Authorities and the Labor Relations Commission.

[Explanatory notes]

···› " Lock-out" is an industrial action that can be taken by an employer as a means of reaction to the industrial action by the union. With a lock-out in place, the employer may refuse to accept the labor of the employees, with

a view to protecting business facilities and management rights from the union's industrial action.

⋯› Just like any industrial action by the union, the lock-out may not involve any act of violence or destruction, and may not lead to disturbance, suspension or shutdown of the safety protection facilities at work.

Procedures and effects of lock-out

Procedures of lock-out	- The employer shall make a public notice on the start of a lock-out before refusing to receive the labor of employees. - The employer shall report the planned lock-out to both the competent authority and the regional Labor Relations Commission in advance. - Even during the lock-out, the employer may not close a union office or employee accommodations
Requirements for legitimacy of lock-out	- Only after the trade union has staged an industrial action may the employer conduct a lock-out. Any lock-out preceding the union's industrial action is illegal. - If the lock-out remains in place even after the end of the union's industrial action, the lock-out is regarded as 'offensive' and its legitimacy will be lost. - As for an industrial action which is clearly unlawful, the employer is advised to resort to legal proceedings, not to a lock-out.
Scope of lock-out	- When the union's industrial action covers the entire company, the employer is allowed to implement a company-wide lock-out. However, in case the industrial action is waged only for a part of the company, the employer may not conduct an offensive and across-the-board lockout that suspends work throughout the company. - However, if the union's industrial action for a certain part of the company makes it impossible to continue operation in all other part of the company, the employer is permitted to conduct a full-scale lock-out.
Effects of lock-out	- In the case of a justifiable lock-out, the employer is immune to the obligation to pay wages. However, this exemption does not apply to the case of an illegitimate (preemptive or offensive) lock-out. - Once a fair lock-out is in place, the employer may order the union members to be evicted from the workplace. A union member who refuses to observe the order is guilty of non-compliance with an eviction order.

[Court rulings]

···› Can an employer conduct a lock-out as a counteraction to the union's work-to-rule?

In this case, the union demanded wage increase although the average wage at the company is higher than that of any other competitor company. The result was breakdown of the wage bargaining. process The union resorted to work-to-rule as an industrial action, which was immediately followed by the employer's lock-out. Given that the employer's lock-out occurred only three days after the union's industrial action, the lock-out cannot be justified. (Supreme Court ruling on May 26, 2000: No.98Da34331)

···› Preemptive and offensive lock-out

In cases of preemptive and offensive lock-out for the purpose of weakening the labor union movement, etc., but not for the purpose of defending against the industrial action of employees, it is not considered to be a legitimate lock-out. (Supreme Court ruling June 13, 2003: No.2003Du1097)

···› In the case of an unfair lock-out, is it possible for employees to go in and out of the company premises?

An employer may use lock-out as a justifiable industrial action only when, in consideration of the employer's and the union's behaviors at a bargaining table, the purpose and methods of the union's industrial action and the resultant damage on the employer, it is acknowledged as a reasonable means by which to react to the union's industrial action. If the employer's lock-out turns out to be unfair, the employees' travel in and out of a certain part of the company premises, if they would be otherwise allowed to do so, would not constitute an offense of unlawful entry. (Supreme Court ruling on Sep. 24, 2002: No. 2002Do2243)

···› Once an employer has taken a lock-out in a proper way, is he/she able to request the employees to retreat from the company premises?

Even when the employees have already occupied part or all of the company premises in a legitimate manner, the employer gets to recover his/her real right to the company premises once he/she has conducted a justifiable lock-out in response. Accordingly, the employer is entitled to request the employees to leave the company premises. If the employees stay on the premises, refusing to accept the eviction request, they commit an offense of non-compliance with an eviction request.
(Supreme Court ruling on Aug. 13, 1991: No. 91Do1324)

(2) Replacement workers

Applicable legislation : Article 43 of the TULRAA (Restriction on hiring by employer)

① No employer shall hire persons who are not related to their business operations, or use replacements during a period of industrial action so as to continue workers which have been stopped by industrial actions.
② No employer shall, during a period of industrial action, contract or subcontract out work which has been suspended because of the industrial action concerned.

[Explanatory notes]

···› The purpose of the limitation of strike replacement is to guarantee the labor union's lawful right of collective action. Therefore, in cases where the industrial action is not lawful, even if the employer hires workers who are not related to the business concerned or replaces the strikers, or gives a contract or subcontract for works which are suspended due to industrial action, it is not regarded as a violation of the laws.

···› Limitation of strike replacement is not applied to essential public service business, and an employer may hire or use replacements or contract or subcontract out the work as long as the proportion of replacement workers do not exceed 50/100 of strike participants of the business or workplace concerned. (Article 43.(3) and (4) of the TULRAA, and Article 22-4 of Enforcement Decree of the said Act)

[Court rulings]

···› Replacement of strike workers

In cases where an employer hires new workers to replace striking workers before the labor union actually takes an industrial action, and replaces the striking workers with the new workers during the industrial action, it is a violation of Article 15 of the former Labor Disputes Adjustment Act (Supreme Court ruling Nov. 28, 2000: No.99Do317).

···› Is strike replacement valid in cases of illegal industrial actions?

Industrial actions pursuant to Article 32 of the TULRAA refer to legitimate

industrial actions only. If the industrial action by the labor union is not legitimate, even if the employer hires workers who are not related to the relevant business or replaces the strikers, it is not a violation of the said Act. (Administrative interpretation on Nov. 17, 2001: No.HyeopRyeok 68140-560)

7) Industrial action and wage payment

Applicable legislation : Article 44 of the TULRAA (Ban on the demand for wage payment during the period of industrial action)

① An employer has no obligation to pay wages for the period of industrial action to the participating employees who did not provide labor during the period.

② A trade union may not take an industrial action in order to demand wage payment for the period of industrial action or to achieve such demand.

[Explanatory notes]

···› In accordance with the principle of "no work, no pay," an employer has no obligation to pay wages for the period of industrial action to the employees who did not provide labor during the period because they participated in the industrial action.

···› No trade union may demand wage payment for the period of industrial action or take an industrial action in a way to get the demand through.

➡ Whether to pay wages to employees who did not take part in the industrial action during the period of closure of operations.

In order to determine whether an employer should pay wages to the employees who provided labor instead of taking part in the industrial action, it should be considered if their labor provided actually made it possible to continue the business operation. If the employer has rejected utilizing employees who did not take part in the industrial action, even though he/she may make them provide labor, this amounts to a reason attributable to the employer. Therefore, it is judged that the employer should pay the business suspension allowance pursuant to Article 45 of the LSA to the employees. (Administrative interpretation on Sept. 9, 1997: No.HyeopRyeok 68140-368)

[Court rulings]

···› Can an employee demand wages for the period of industrial action during which he/she did not provide work because he/she participated in the industrial action?

During the period of industrial action, a participating employee has his/her obligation to provide work under the contract of employment suspended, and his/her right to wage, which is given in return for the obligation to provide work, is also suspended for the period, unless otherwise prescribed in the collective agreement, the rules of employment or another agreement between the employer and employees.
(Supreme Court ruling on Oct. 25, 1996: No. 96Da5346)

8) Legitimacy of and responsibility for industrial action

Applicable legislation : Articles 3 (Restriction on claims for damages) and 4 (Justifiable activities) of the TULRAA

Article 3. No employer may claim damages against a trade union or participating employees in case he/she has suffered damage due to the collective bargaining or industrial actions done under this Act.

Article 4. The provisions of Article 20 of the Criminal Code shall apply to justifiable activities made in the course of collective bargaining or industrial action, which are conducted to achieve the purpose of Article 1 of the TULRAA. However, under no circumstances may an act of violence or destruction be construed as being justifiable.

[Explanatory notes]

···› In cases where the employees undertake collective bargaining, industrial action, etc., in order to maintain or improve their working conditions, criminal liability (Article 20 of the Criminal Act (Justifiable Act) and civil liability (liability to compensate for damage) are exempted, as long as the action has legitimacy.

···› With the exception of a criminal caught on the spot, employees shall not

be detained on the grounds of violation of the TULRAA during the period of industrial action. (Article 39 of the TULRAA)

[Court rulings]

···› In case an industrial action is justifiable, is the party responsible subject to civil or criminal liabilities?

Although an industrial action, as it usually leads to impediment of the business, seems likely to constitute several offenses under the law, it is immune to civil or criminal liabilities as long as it can be justified. (Constitutional Court ruling on July 16, 1998: No. 97HeonBa23)

···› When a dismissed employee occupies a building of the company he once worked for, is such an act justifiable?

The dismissed employee, along with 570 other striking employees, stormed into the main building of the company he had worked for, and in doing so, forcefully pushed away about 400 employees who were trying to stop the striking employees from coming into the building. It does not seem that such act of occupation was legitimate. Furthermore, the building occupation prevented about 600 employees from engaging in their work, which is not an unavoidable result of the strike. All considered, the dismissed employee committed offenses of unlawful entry and business obstruction.
(Supreme Court ruling on June 2, 1990: No. 90Do672)

···› To what extent may an employer demand damages for business discontinuance resulting from an unlawful industrial action?

From the viewpoint of jurisprudence, an employer may demand damages for the loss of product sales income that would have been earned if the business had not been discontinued by the industrial action; and for the loss of the fixed costs (e.g., rents, taxes, utilities, depreciation expenses, insurance premiums, etc.) that he had to pay even while the business was interrupted. (Supreme Court ruling on Dec. 10, 1993: No. 93Da24735)

···› To what extent does the agreement on liability immunity cover?

In case an employer has agreed not to hold the strike participants responsible for the damage done during the strike, the agreement covers not only the acts done during the strike, but also the acts done to prepare or induce the strike. (Supreme Court ruling on Jan. 28, 1994: No. 93Da49284)

···› When union executive officials played a leading role in an illegal industrial action by planning the industrial action and instructing or guiding the participants, is it possible to hold individual officials responsible for the illegal action?

Given that union executives did what they did on behalf of the union, the union is liable to pay damages to the employer for the loss caused by the illegal industrial action. In addition, the union executives are responsible, as individuals, for the leading role they played in planning, instruction and guidance.

(Supreme Court ruling on March 25, 1994: Nos. 93Da32828 and 32835)

···› Even if the rank and file members of the labor union stop providing work services during the industrial action, it does not necessarily mean that they shall take the responsibility for joint illegal acts with the labor union or union officials.

With regard to rank and file members of labor union, as opposed to the union officials who actually led the industrial action by organizing and directing it, the employees' right of organization should be guaranteed as a constitutional right, because an industrial action is collective action which is realized only when the actual collective action is taken by the members. Consequently, asking the members individually to judge the reasonableness of the industrial action may harm the employees' right of organization. It would thus be difficult to expect them to continue to provide work in disobedience of an order by the labor union and union officials. Therefore, even if they stopped providing work services during the industrial action by order of the labor union, etc., it does not necessarily mean that they shall take the responsibility for joint illegal acts with the labor union or union officials. However, in cases where the work and its process are specific- even if the matters that the employee should observe when he/she suspends the work are predetermined in order to prevent the danger, damage, etc., that might be caused as a result of the suspension, the damage has been caused or expanded as the concerned worker suspends the work without observing such matters - the employee has a responsibility to compensate the employer for the damage as he/she has proximate casual relations, even if he/she is a rank and file member of the labor union.

(Supreme Court ruling on Sept. 22, 2006: No.2005Da30610)

5. Mediation of Labor Disputes

1) Mediation

Applicable legislation : Article 53 of the TULRAA (Commencement of mediation)

The Labor Relations Commission shall conduct the proceedings of mediation without any delay when either party to the labor relations submits a request for mediation to the Commission. The parties concerned shall undertake, in good faith, the proceedings of mediation.

[Explanatory notes]

···› Mediation refers to a set of procedures in which the Labor Relations Commission, which is a third party, promotes the negotiation in a fair manner so that the parties concerned may voluntarily meditate the dispute and resolve it.

···› 45 of the TULRAA allows no industrial action without mediation procedure (mediation preceeding principle). Therefore, when the industrial action is taken, the relevant parties shall notify the counterpart in writing and apply to the Labor Relations Commission for mediation.

···› The mediation process shall be completed within 10 days in the case of ordinary services, or within 15 days in the case of public services, from the date of application for mediation. The mediation duration, however, may be extended by up to 10 days in the case of ordinary services or up to 15 days in the case of public services, if both parties agree to do so. (Article 54 of the TULRAA)

···› Since the parties concerned are not obligated to accept the proposal of mediation by the mediation committee, acceptance of the proposal depends on the parties concerned. In cases where the relevant parties accept the proposal, it is considered that the industrial action is settled, and the accepted proposal has the same force as the collective agreement.

···› In general, mediation follows the public mediation procedures through the Labor Relations Commission. However, mediation may follow the private mediation procedures through a third party if the procedures are

prescribed in the collective agreement or the mutual agreement on the procedures is concluded.

[Court rulings]

···› Is it justifiable for union employees to slow down in their work and distribute unauthorized handouts during the cooling-off (or mediation) period?

The requirements for industrial actions are that: the union should make an advance report on occurrence of the industrial action; it should go through a given cooling-off period in advance; and a majority of union employees should give their votes for such industrial action in a secret, direct and unsigned ballot. Nevertheless, the union in this case failed to meet these requirements before resorting to the industrial actions in question: singing together at work, celebrating May Day during working time without the employer's permission, and handing out unauthorized leaflets within the company premises. These acts are not seen as justifiable union activities. (Seoul Appeals Court ruling on Oct. 11, 1990: No. 89Gu15781)

···› Is a trade union allowed to take an industrial action without undergoing the mediation period?

In case a union takes an industrial action without making the required report on the industrial action or going thorough the cooling-off period for mediation, the industrial action cannot be justified.
(Supreme Court ruling on Aug. 18, 1992: No. 92Do437)

···› When a union took an industrial action during the cooling-off period without the voting of union employees and the industrial action did damage to the employer, is the industrial action justifiable?

The industrial action in question is a result of the abuse of the right to industrial actions, and cannot be justified.
(Supreme Court ruling on May 15, 1990: No. 90Do357)

···› If, while a union is in an industrial dispute, one more issue is added to the list of disputed issues, is the union required to make an additional report and to go through the cooling-off period again?

In the case in question, the union and the employer failed to resolve their differences over working conditions and a labor dispute ensued. The union

made an advance report on commencement of industrial actions and completed the cooling-off period before it resorted to industrial actions. As long as the union fully met the requirements for industrial actions, it had no obligation to repeat the procedures even when another issue was added to the list of disputed issues. (Supreme Court ruling on Nov. 10, 1992: No. 92Do859)

···› With regard to the 'mediation preceeding system', a strike staged after the administrative guidance by the Labor Relations Commission is not illegal.

In case a union files for mediation of labor dispute by the Labor Relations Commission, it may initiate an industrial action after the mediation process is completed or the given time for mediation has expired without the mediation being completed. Namely, it is not required that an industrial action should start only after the Commission has made a mediation proposal. (Supreme Court Ruling on June 26, 2001: No. 2000Do2871)

···› In the case of labor dispute involving a single nationwide union, what Labor Relations Commission has jurisdiction over the case?

The union in question is headquartered in Seoul where the company is based, and has union branches at about 30 local businesses of the company across the nation. The union conducted cross negotiations with the employers of the local businesses, only to fail to reach agreement. It seems proper that the union should submit the request for mediation to the Regional Labor Relations Commission that has jurisdiction over the union branch concerned.
(Administrative interpretation on June 20, 1997: No. HyeopRyeok 681410-245)

···› When is the initial date of the mediation period for the purpose of calculating the period?

The TULRAA does not specify from when the mediation period starts. If the relevant provisions of the Civil Code are applied, the initial date is one day after the application for mediation arrived at the Labor Relations Commission.
(Administrative interpretation on Dec. 19, 1991: No. NoSa32281-18309)

···› In case the parties to industrial dispute accepted the mediator proposal but did not comply with the proposal, what effect does the proposal have with regard to the parties?

The mediation committee is required to come up with a mediator proposal after hearing both parties and making necessary investigations. It is up to the parties to reject or accept the proposal. However, once the proposal is accepted

by both parties, any failure to comply with the proposal is subject to penalties. (Administrative interpretation on Aug. 2, 1988: No. NoSa32281-11704)

2) Arbitration

Applicable legislation : Article 62 of the TULRAA (Commencement of arbitration)

The Labor Relations Commission shall conduct the proceedings of arbitration in any of the following cases:

1. In case both parties to an industrial dispute make a joint request for arbitration;
2. In case either party makes a request for arbitration by reference to the collective agreement.

[Explanatory notes]

···› Arbitration is a process in which one party or both parties settle the industrial action by following the measure proposed by the Labor Relations Commission(arbitration award).

···› Pursuant to Article 62 of the TULRAA, arbitration commences when both parties concerned have requested arbitration when any one of the parties concerned has requested arbitration in accordance with the provisions of a collective agreement when the one party or both parties concerned have requested arbitration in cases of emergency adjustment pursuant to Article 80 of TULRAA; or when the chairman of the Labor Relations Commission decides to refer a dispute to arbitration.

···› Unlike meditation, arbitration is a measure that has binding force. Therefore, the parties concerned shall follow the arbitration award, and the finalized arbitration award has the same effect as a collective agreement.

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

···› [Filing administrative suit] In case either party reasonably believes that the ruling of the National Labor Relations Commission on the arbitration award of the Regional Labor Relations Commission or the Special Labor Relations Commission, or the arbitration award by the National Labor Relations Commission, is unlawful or beyond the mandate, the party may file an administrative suit within 15 days from the date when the ruling or the arbitration award was delivered.

[Court rulings]

···› Scope of industrial actions which are subject to arbitration award

A dispute due to a difference of opinions between the parties concerned regarding matters, besides working conditions of employees that are stipulated in an employment contract concluded between the employer and the employees, is not regarded as a labor dispute as prescribed in Article 2 of the former Labor Disputes Adjustment Act. Unless any other exceptional circumstances exist, such dispute is not subject to arbitration award. (Supreme Court Oct. 10, 1997: No.97Nu4951)

···› Can an employer or a union apply for arbitration over an issue concerning union activities during working time or full-time union officials?

In principle, the arbitration process is conducted with regard to a matter over which the parties to labor relations are divided when the parties are in a labor dispute. Besides, a labor dispute is defined by the law as a dispute by the parties to labor relations over working conditions, including wage, working hours, employee benefits and dismissal. In this light, if the parties are in a dispute over any issue other than working conditions, the dispute is not a labor dispute as defined by the law. Accordingly, unless under exceptional circumstances, the dispute over union activities during working time or full-time union officials may not be referred to arbitration.
(Supreme Court ruling on Feb. 23, 1996: No. 94Nu9177)

···› The arbitration award by the Regional Labor Relations Commission can be challenged only when the award is deemed to be unlawful or beyond the coverage of the specific dispute

Article 38. (2) of the Labor Disputes Adjustment Act stipulates that a party to the labor dispute concerned may file an administrative suit against the arbitration award when it is believed that the arbitration award is unlawful or

beyond the mandate. Therefore, a party concerned may challenge the arbitration award only when the party reasonably believes that the arbitration award is unlawful because, for example, the way the award was drawn up is illegal or what is included in the award is not compatible with the provisions of the LSA or the award concerns something beyond the coverage of the specific dispute. No party may refuse to accept the arbitration award just because the award is not in their favor.
(Supreme Court ruling on Jul. 14, 1992: No. 91Nu8944)

···› Who can file an administrative suit against the ruling that the National Labor Relations Commission made after review of the ruling by the Regional Labor Relations Commission?

Any party to the labor dispute concerned may file an administrative suit against the arbitration award or ruling by the National Labor Relations Commission when it is believed that the arbitration or ruling by the Commission is unlawful or beyond the mandate. A trade union is also included in the parties to the labor dispute.
(Supreme Court ruling on March 22, 1966: No. 65Nu126)

···› If an arbitration award which retroactively amends the criteria for working conditions advantageous to employees is confirmed, does this also apply to employees who are retired before the confirmation of the arbitration award?

A collective agreement is concluded between a labor union and an employer or an employer organization on the working conditions and other matters may be caused in the labor-management relations. In cases where the labor union retroactively agrees with the employer on the criteria for working conditions including wages, working hours, retirement allowances, etc., or concludes a collective agreement approving such criteria, the agreement or the approval only applies to the union members or employees who are working at the company after the enforcement of the collective agreement, but does not apply to employees who are retired before the conclusion of the collective agreement. The same applies to cases where the working conditions are amended in such a way that is disadvantageous to employees. Since the arbitration award has the same force as a collective agreement, the same legal principle applies to the arbitration award.
(Supreme Court ruling on June 9, 2000: No.98Da13747)

···› Is it possible to refuse to accept the decision by the Regional Labor Relations Commission when referring a certain case of labor dispute to arbitration?

When a case of labor dispute is referred to arbitration, the parties to the labor dispute are forbidden to take an industrial action for 15 days from the date when the case is referred to arbitration, and any violation of the ban is subject to criminal liabilities. In addition, if the union or union members take an industrial action during the 15-day period, they will have to pay damages to the employer for the loss resulting from the unfair industrial action. In short, the decision to refer a labor dispute case to arbitration is an administrative measure that is intended to create legal effects to which the parties are bound. Therefore, the trade union may refuse to accept such decision of the Regional Commission.
(Supreme Court ruling on Sep. 15, 1995: No. 95Nu6724)

···› In what cases is it possible to challenge the arbitration award?

A party concerned may challenge the arbitration award only when the party reasonably believes that the arbitration award is unlawful because, for example, the way the award was drawn up is illegal or what is included in the award is not compatible with the provisions of the LSA or the award concerns something beyond the coverage of the specific dispute. No party may refuse to accept the arbitration award just because the award is not in their favor. (Supreme Court ruling on Oct. 10, 1997: No. 97Nu4951)

6. Unfair Labor Practices

1) System for remedy of unfair labor practices

[Explanatory notes]

···› "Unfair labor practice" refers to an employer's unfair act of doing something that is disadvantageous to an employee for his/her proper union organization and activities or intervening in or dominating the union.

···› The purpose of a system for the remedy of unfair labor practices is to create and establish labor-management relations based on fair rules by preventing unfair violation of the basic legal rights of labor by the employer and protecting the labor union or individual employees.

[Court rulings]

···› Criteria for judging unfair labor practices

In order to judge whether an employee has been dismissed due to his/her fair practice for labor union affairs, the cause of dismissal that the employer claims; details on the fair practice that the employee has performed for the labor union affairs; the time that the employer is dismissed; relations between the employer and the labor union; disciplinary measures taken against union and non-union members for the same case; conformity to existing custom; the employer's words, actions, and attitudes toward union members; and other circumstances that the intention of unfair labor practices maybe presumed should be compared and reviewed.
(Supreme Court ruling on Nov. 9, 1999: No.99Du4273)

···› Is transfer or disciplinary dismissal included in "unfavorable measures"?

In order to judge whether the transfer or disciplinary dismissal of an employee is an unfavorable measure due to the employee's fair practice concerning labor union affairs, a comparison and review is necessary regarding the following aspects: the time that the employer is dismissed; relations between the employer and the labor union; disciplinary measures taken against union and non-union members for the same case; legitimacy of causes; conformity to existing customs other circumstances through which the intention of unfair labor practices could be presumed; and decline in labor union activities after

the measure is taken. If the order for transfer of the employee is a necessity for the company as a part of regular personnel changes based on the procedures stipulated in the regulations on job transfer of employees and criteria for personnel changes considering a career, ability, and places in connection with the employee, even if the order for transfer of the concerned employee was made during the labor-management consultation period and the employee was one of the member of collective bargaining committee of labor union side, the order for transfer of the employee is not included in "unfair labor practices" and the disciplinary dismissal against the employee who disobeyed the order and was absent without leave is valid.
(Supreme Court ruling on Dec. 8, 1992: No.91Nu11025)

···› If a justifiable reason for disadvantageous treatment is recognized, unfair labor practice is not constituted even if the intention of unfair labor practice is presumed.

An unfair labor practice can be constituted when there exists an employer's intention of unfair labor practice, such as anti-union intent or motive. However, if a justifiable reason for disciplinary measures against the employee is recognized, even if it is deemed that the employer was displeased with the employees' labor union activities or the employer had an anti-union intent, such disadvantageous treatment is not considered as unfair labor practice because the reason for the disadvantageous treatment cannot be considered as a mere excuse. (Supreme Court ruling on June10, 2004: No.2004Du2882)

···› Violation of dismissal procedures and unfair labor practices

Even if circumstances such as violation of disciplinary procedures stipulated in the collective agreement can be used as a reference in judging whether the employer had an intention to conduct an unfair labor practice, it is not a decisive factor rightly affecting the adjudication of unfair labor practice, apart from whether the violation of disciplinary procedures can be considered sufficient cause for nullification of the dismissal.
(Supreme Court ruling Jan. 15, 1993: 92Nu13035)

2) Types of unfair labor practices

(1) Discriminatory treatment

Applicable legislation : Article 81 of the TULRAA (Unfair labor practices)

An employer commits an act of unfair labor practice if he/she has done any of the following subparagraphs:

1. Dismissal of or discrimination against an employee on the grounds that the employee has established or joined or intends to establish or join a trade union, or has performed a justifiable activity for the union;
5. Dismissal of or discrimination against an employee on the grounds that the employee has taken part in justifiable collective activities, or has reported the employer's violation of the provisions in this Article to the Labor Relations Commission, testified about such violation or presented documentary evidence to the competent authority.

[Explanatory notes]

···› Discriminatory treatment refers to an employer's action of disadvantaging an employee due to the employee's joining in or organization of a labor union;participating in lawful collective action or other lawful labor union activities reporting or testifying on the unfair labor practice to the Labor Relations Commission; or submitting evidence of the practice to the Labor Relations Commission. In other words, discriminatory treatment is constituted when the employee participates in lawful labor union activities (cause) and the employer gives disadvantages to the employee (result of an action) due to such activities (casual relationship).

[Court rulings]

···› When an auditor of a trade union played a leading role in non-approval of the union chairman, can the employer dismiss the auditor-employee on the grounds of his leading role?

The auditor, along with other union officials, tended his letter of resignation from the union officialdom as a way to express non-approval of the union chairman who had agreed to set the employee wages at a lower level than those at other comparable companies. In response, the union chairman called

an ad hoc general meeting to reveal his intention to quit the job of union chairman. Given that, the auditor's acts should be regarded as justifiable for the union, and the employer's dismissal of the auditor-employee on the grounds of his leading role would constitute an act of unfair labor practice. (Supreme Court ruling on Oct. 23, 1990: No. 89Nu2837)

···› In case an employer fires an employee who staged a sit-in without the union's resolution or instruction, does the employer commit an act of unfair labor practice?

The employee staged a sit-in and, in doing so, obstructed the business. Furthermore, the sit-in was not under the union's resolution or instruction, but was simply on the employee's own initiative. The employer's decision to dismiss the employee on the grounds of the unauthorized sit-in does not constitute an act of unfair labor practice. (Supreme Court ruling on Nov. 13, 1990: No. 89Nu5102)

···› When an employer made his employees continue to work during working time when a general meeting of the union was scheduled to take place and suspended the service of an employee who had posted printed copies on the bulletin board without authorization, did the employer commit acts of unfair labor practice?

The collective agreement in force provides that union work should be done outside of working time and that the union or employees, when it or they want to use the bulletin board within the company premises, consult the employer about the content, time and duration and methods of the posting. Given this, the employer did not interfere with the union's activities when he instructed the employees to continue their work instead of participating in the union general meeting. In addition, the employer suspended the service of the employee, in accordance with the rules of employment, who had posted the copies that were critical about the collective agreement already in force, thus not complying with the given procedure of posting and being against the union's instruction. This is not an act of unfair labor practice either. (Supreme Court ruling on May 28, 1991: No. 90Nu6927)

···› If there is a gap in job promotion between unionist employees and non-unionist employees, is this an act of unfair labor practice?

In order to prove that a non-unionist employee is discriminated against in promotion, in comparison with comparable unionist employees even though both employees are under the scheme of performance-based promotion, it should be proven that both are equal in job ability and performance. Even when

there is a gap in job promotion, on average, between unionist employees and non-unionist employees, it cannot be asserted that such gap means an unfair labor practice. (Supreme Court ruling on Feb. 10, 1998: No. 96Nu10188)

···› In case an employer promotes an employee who is entitled to join the union to a higher position, which prevents him/her from joining the union, is this an act of unfair labor practice?

In order to determine whether such job promotion constitutes an act of unfair labor practice, it is necessary to consider the timing of the promotion, its impact on the union activities, necessity of the promotion for business purpose, the employee's job ability, reasonability of the promotion, etc. If the employer's decision to promote the employee to a higher post was based on reasonable criteria of personnel management and the principle of equitability, the promotion is not an unfair labor practice, given that the employee had refused to accept the promotion.
(Supreme Court ruling on Oct. 27, 1992: No. 92Nu9418)

···› If, upon expiration of the collective agreement, an employer ordered an employee who served as a full-time union official to return to his original position but the employee refused to obey, can the employer dismiss the employee on the grounds of disobedience?

With the expiration of the collective agreement, the provisions on full-time union officials are no longer effective As no special clause had been made that the provisions on full-time union officials would remain effective until a new collective agreement was adopted, the employee, who was no longer a full-time union official, should have obeyed the employer's order to return to the original position. It seems that the employer properly exercised his right to personnel management when he dismissed the employer, contrary to the employee's allegation that the employer had abused his right although he cited 'disobedience to the employer's order at work' as a reason of dismissal. In this light, the dismissal is not deemed as an act of unfair labor practice. (Supreme Court ruling on June 13, 1997: No. 96Nu17738)

···› When an employer dismissed an employee who was not a full-time union official based on what he had done during working time, is this an unfair labor practice?

The dismissed employee, without prior consultation with the employer, encouraged other unionist employees to sign up for non-approval of the union

chairman and union branch heads during the working time, although he was not a full-time union official; did not obey the instructions of the team leader; and verbally abused and intimidated his higher-up. None of those acts seem justifiable for union work. Accordingly, the disciplinary dismissal is not an act of unfair labor practice. (Supreme Court ruling on Sep. 5, No.95Nu61)

···› If an employer, with a view to interfering with union activities, transfers a unionist employee to another location of work where it is not easy to perform union work, is this an act of unfair labor practice?

The employee in question played a leading role in expanding union membership and worked more than 20 years in the production department. He was first transferred to a job in the public affairs department, for which he had no experience, and was then removed to a remote office where he was not entitled to several employee benefits and hardly could do the union work as there were only three or four employees working. Unless the employer proves the necessity of such job transfer for business purposes, the transfer constitutes an unfair labor practice. (Supreme Court ruling on Dec. 10, 1991: No. 91Nu3789)

···› If a company refuses to allow the worker concerned to continuing working due to his/her participation in a strike or active labor union activities, such rejection is regarded as an unfair labor practice.

In general, a company is not obligated to accede to an employee's request for extended work or holiday work. However, if the company rejects the extended work, etc., of the concerned worker due to his/her participation in strike or active labor union activities, such rejection can be considered as unfair labor practice because it may give financial or operational disadvantages to the employee. (Supreme Court ruling on Sept.8, 2006: No.2006Do388)

···› Several months after the union handed out printed materials containing its demand for a pay hike, the employer and the union signed a wage agreement which included a considerable part of the union demand. Shortly after that, the employer conducted disciplinary job transfers for the union employees who had handed out the printed materials several months prior. This disciplinary measure is an act of unfair labor practice.

In this case, the act of handing out printed materials is a justifiable activity for the union operation and it is not an offense that would entail employee disciplines under the rules of employment. The employer did not take issue with the previous cases where employees handed out printed materials

during working hours. However, shortly after the employer signed a wage agreement which reflected much of the union demand that was specified in the printed materials handed out several months before, the employer instructed disciplinary job transfers for the employees who had handed out the printed materials, and dismissed some of the employees who refused to follow the instruction. All considered, the disciplinary measures were intended to showcase unfavorable treatment against the employees for their union activities and the reasons given by the employer for such disciplines were superficial ones. Accordingly, the disciplinary job transfer is an act of unfair labor practice, and the disciplinary dismissal on the grounds of disobedience to the employer instruction is a form of unfair dismissal. (Supreme Court Ruling on April 27, 2001: No. 99Du11042)

···› A simple verbal statement of intended unfavorable treatment in the future is not an 'act of unfavorable treatment'

1. According to subparagraph 1 of Article 81 of the Trade Union and Labor Relations Adjustment Act, an employer commits an act of unfair labor practice "when he/she dismisses an employee or treats the employee unfavorably just because the employee has joined or tries to join a trade union or the employee has done justifiable deeds for the union activities". An employer who commits this offense is penalized under the provision of Article 90 of the Act. The 'act of unfavorable treatment' for the purpose of Articles 81 and 90 refers to an act (apart from dismissal) that is to the disadvantage of the employee concerned in legal or economic terms, such as suspended work, job transfer, redeployment or pay cut, and is realized in practice. In this light, it is not deemed that a simple verbal statement of intended unfair treatment of an employee is 'an act of unfair treatment' as defined above, although such statement might be an act of dominating or intervening in the union activities or operation (the act of unfair labor practice contained in subparagraph 4 of Article 81 of the same Act).
2. In the case in question, the company president told the union chairman to disorganize the union and told the union vice-chairman to tender a resignation. Meanwhile, the director of the company told union members that they could not work in their team, if they did not walk out of the union. However, these verbal statements by the company president and the director do not constitute acts of unfavorable treatment since they were not realized in practice.
   (Supreme Court Ruling on Aug. 30, 2004: No. 2004Do3891)

···› If an employee did not work for 50 days of the working period and received three warnings for disobeying the return-to-work order thereafter, the company need not continue the employment relations with the employee.

The company has warned the plaintiff several times that he should faithfully perform the work for which he/she is responsible because he/she is not a full-time union official. However, as a result of a performance review, it was found out that the plaintiff did not work at all for 50 days of the 239-day working period. Even after that, the plaintiff received three warnings for disobeying the return-to-work order and did not perform the work for a considerable time. Judging from such facts, and the fact that seven other part-time officials who are managers of labor union chapters were no longer subjected to disciplinary measures, such as warning or reprimand, for delinquency of duties after the performance review, it is considered that the reasons for dismissal attributable to the plaintiff are so grave that the company cannot continue the employment relations judging from accepted social norms, and the dismissal is not contrary to the principle of equity. Therefore, the dismissal is considered as valid. (Supreme Court ruling on Jun 15, 2006: No.2003Du5600)

···› The meaning of "justifiable act for the operations of labor union"

"Justifiable act for the operations of labor union," as stipulated in Article 39.(1) of the former TULRAA refers to the justifiable activities of a labor union. However, even if it is not the organizational activity of a labor union following the resolution or specific order of a labor union, if it can be considered as the activity of a labor union in its nature or it is deemed that the activity obtained implicit delegation or approval, the activity of the employee should be considered as a justifiable act for the operations of a labor union. (Supreme Court ruling on June 13, 1995: No.95Da1323)

(2) Yellow-dog contract

Applicable legislation : Article 81 of the TULRAA (Unfair labor practices)

An employer commits an act of unfair labor practice, if he/she has done any of the following subparagraphs:

2. Employment of a worker on the condition that the worker should not join a union, should withdraw from a union or should join a particular union.

[Explanatory notes]

···› A "Yellow Dog Contract" is employing a worker on the condition that he/she should not be a member of a labor union, should secede from the union, or should become a member of a certain labor union. It also may correspond to a "Yellow Dog Contract" if the employer is employing workers on the grounds that they should not engage in labor union activities, even if he/she become a member of a labor union or converting a non-regular worker who is a member of a labor union to a regular worker on the grounds that he/she should secede from the union.

···› A "Yellow Dog Contract" is not limited to a written contract but also includes an oral contract. A "Yellow Dog Contract" is invalid as it violates Article 33.(1) of the constitution and Article 81 of the TULRAA.

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

[Court rulings]

···› In case the rules of employment provide that the employer may dismiss an employee who has been expelled from the union, is the provision valid?

The rules of employment in question provide that the employer, upon the request of the union, may dismiss an employee who has been expelled from the union. This provision enables the employer to dismiss an employee just on the grounds of expulsion from the union, and sets the affiliation with the union as a precondition of employment. Therefore, the provision is not valid. (Supreme Court ruling on Nov. 28, 1987: No. 97DaCa2646)

···› Is it permissible to conclude a collective agreement that sets as a precondition of employment the affiliation with the union which represents less than two-thirds of the employees?

Unless a trade union represents two-thirds or more of the employees, the union and the employer may not sign a collective agreement that provides for compulsory affiliation with the union as a precondition of employment. (Supreme Court ruling on April 4, 1997: No. 96Nu3005)

···› In case a collective agreement provides for a union shop system in which any employee is a member of the union, should the employer dismiss an employee who has departed from the union?

Under the union shop system, which is intended to strengthen the bond among the union members, a precondition for employment is to join the representative union. If a collective agreement includes a clause on union shop, the employer is obliged to dismiss an employee who has walked out of the union, even if there is no additional clause on such obligation. However, the employer's obligation to dismiss an employee departing from the union is simply his/her obligation under the collective agreement. It cannot be always said that the employer's non-compliance with the obligation constitutes his/her unfair intervention in or domination over the union, which is an act of unfair labor practice. (Supreme Court ruling on March 24, 1998: No. 96Nu16070)

···› Under the union shop system, is it possible for a trade union to refuse to admit an employee who had previously walked out of the union but wants to re-enter the union?

The trade union and the employer in question concluded the union shop agreement, under which any employee automatically will be a union member with passage of three months from his/her first day at work; and the employer shall dismiss, without delay, an employee who refuses to join the union or has withdrawn from the union. In this case, the union is not allowed to refuse to admit an employee, without a justifiable reason, even though the employee had withdrawn from the union before. Any restriction on or rejection of re-entry to the union would be an abuse of the right or an violation of the good-faith principle. (Supreme Court ruling on Oct. 29, 1996: No. 96Da28899)

(3) Refusal or neglect to conduct collective bargaining

Applicable legislation : Article 81 of the TULRAA (Unfair labor practices)

An employer commits an act of unfair labor practice, if he/she has done any of the following subparagraphs:

3. Reject or delay concluding a collective agreement or conducting collective bargaining, without reasonable justification, with the union representative or a person who has been authorized by the union to negotiate an agreement.

[Explanatory notes]

···› Refusal or neglect to conduct collective bargaining, which is considered to be an unfair labor practice, includes refusing to conclude the agreement, not only at the stage of collective bargaining but also at the stage of conclusion without any justifiable reasons; and maintaining an attitude not reflecting good faith while conducting the collective bargaining in a perfunctory manner.

···› An employer has an obligation to try to settle the dispute by dealing with it in good faith (providing evidential material) and proposing an alternative plan to the labor union's demand or claim, but does not have an obligation to agree to the labor union's demand or to concede.

[Court rulings]

···› When does an employer commit an unfair labor practice of refusing or neglecting to conduct collective negotiations?

An employer commits an unfair labor practice, not only when he/she rejects or neglects conducting collective negotiations without giving any reason, but also when he/she cannot give an objective and justifiable reason for his/her refusal or negligence or, from an objective viewpoint, he/she has not carried out collective bargaining in good faith even though he/she believes that he/she has a good reason to refuse to conduct the bargaining or that he/she has been faithful at the negotiating table. Meanwhile, in order to determine whether the reason given by the employer for rejection or negligence is justifiable or not, it is necessary to take into consideration all relevant factors, such as union negotiators; time and place of negotiating demanded by the union; the issues subject to bargaining; and the employer's behavior towards collective bargaining. If the result is that, from the circumstantial evidence, it is not possible to expect him/her to sit at a negotiating table, the reason given by the employer will be regarded as justifiable. (Supreme Court ruling on May 22, 1998: No. 97Nu8076)

···› If an employer has refused to conduct collective bargaining with the labor union in violation of the court judgment having executive force or provisional disposition, such refusal constitutes an illegal act against the labor union.

Even if an employer refuses to conduct collective bargaining without any

justifiable reasons, such refusal is not immediately judged as an illegal act fulfilling the conditions for illegal acts. However, in cases where the refusal cannot be tolerated in accordance with the sound social norms or reasonable social rules judging from the facts - including the cause, purpose, procedure, and circumstance of the refusal and the result caused by it - then the refusal is considered to be an unfair labor practice which is a violation of the right to collective bargaining and therefore, the refusal constitutes grounds for an illegal act. In this light, if the employer has refused to conduct collective bargaining with the labor union in violation of the court judgment having executive force or provisional disposition stating that the employer shall not refuse to conduct collective bargaining without any justifiable reasons, such refusal cannot be tolerated according to the sound social norms or social rules and is regarded as an unlawful act that violates the labor union's right to collective bargaining. Therefore, such refusal constitutes an illegal act against the labor union.(Supreme Court ruling on Oct. 26, 2006: No. 2004Da11070)

···› When an employer rejects or neglects carrying out a negotiation with a union negotiator who has no power to make a final decision, does the employer commit an act of unfair labor practice?

If a union representative or a union negotiator (authorized by the union) makes it clear that a collective agreement will be finalized only after the draft agreement between him/her and the employer is brought before the union general meeting and is approved by a majority of the union members, the employer has a justifiable reason to reject or neglect conducting such negotiation because it is possible for union members to vote against the agreement with the employer and deem all the negotiating effort meaningless. Accordingly, the employer's rejection or negligence of a negotiation with a union negotiation with no power to sign the final collective agreement does not constitute an act of unfair labor practice. (Supreme Court ruling on Jan. 20, 1998: No. 97Do588)

···› In case an employer dismissed an employee who led the effort to commence collective bargaining, citing a dismissal cause that had occurred a while ago, is it considered that the employer dismissed the employee to omit collective

First, the employer dismissed the employee after he started to do the union work, although the dismissal cause suggested by the employer had existed before. Second, the employer evaded collective bargaining without giving a

justifiable reason. Third, the employer dismissed the employee only one day before the collective bargaining was scheduled to take place, and the consequence is that no negotiation could be carried out. All things considered, it seems that the dismissal was primarily due to the employee's engagement in union activities. Therefore, the dismissal is an act of unfair labor practice. (Seoul Appeals Court ruling on March 30, 1989: No.87Gu1510)

···› Refusing to conduct collective bargaining on annualized pay, without giving any justifiable reason, is an act of unfair labor practice.

In this case, annualized pay is subject to collective bargaining or union consultation, as there is no reason why the provisions of the rules of employment about annualized pay shall not apply to union employees. Accordingly, the employer may not refuse to conduct collective bargaining or prior consultation with the union about annualized pay without giving a justifiable reason. The employer in question, however, failed to comply with the obligation and thus, committed an act of unfair labor practice as prescribed in subparagraph 3 of Article 81 of the Trade Union and Labor Relations Adjustment Act.
(Supreme Court Ruling on March 12, 2004: No. 2003Du11834)

(4) Domination, intervention and financial support

Applicable legislation : Article 81 of the TULRAA (Unfair labor practices)

An employer commits an act of unfair labor practice, if he/she has done any of the following subparagraphs:
4. Domination of or interference with the formation or operation of a trade union by the employees, or wage payment for fulltime union officials or financial support for the operation of a union.

[Explanatory notes]

···› Domination, or intervention, refers to an employer's every act of unduly interfering in a labor union's organization and operation, which should be decided by the employees independently. In other words, it refers to the employer's act of controlling or interfering in the labor union's organization and operation by using controlling power and influence on the labor union's decision.

···› Financial support for the operation of a labor union by an employer includes

payment of expenses for organization of the labor union, payment of operating expenses, payment of wages to full-time union officials, payment of business trip expenditure for the labor union's operations. However, excluded are the cases where the employer allows workers to consult or bargain with him/her during working hours; where the employer contributes funds for the welfare of the workers; or for prevention and relief of economic misfortunes or other disasters where the employer provides the labor union an office of a minimum size; and where the employer makes a payment of wages to full-time union official until Dec.31, 2009. (Article 81 of TULRAA)

[Court rulings]

···› If an employer dismisses an employee due to his/her involvement in the union establishment, does the employer commit an act of unfair labor practice?

The employer in question tried to dissuade the employees who led the effort to organize a union from establishing such union and, in a related movement, instructed them to go on a business trip on short notice. He went as far as to dismiss all of them, even though some of them obeyed the instruction while some others failed to follow the instruction because they were not notified of the instruction. As a result, the effort to organize employees came to nothing, and the employer has filled the vacancy with new workers who are obedient to the employer. All things considered, it seems that, in practice, the employer dismissed those employees because they had tried to establish a union. The dismissal constitutes an unfair labor practice. (Supreme Court ruling on Oct. 13, 1990: No.88Nu7729)

···› Is the violation of employees' right of organization a prerequisite to constitute unfair labor practices?

The purpose of the provision of Article 3.4 of the former TURLAA is to protect the establishment and continuation of the labor union and to prevent the labor union's activities from being interfered with due to the unfair exercise of the right of personnel management. Therefore, it is not easy to conclude that the purpose of the regulation is only to protect the establishment and continuation of the labor union. Accordingly, it is considered that the violation of employees' right of organization is not always required to constitute unfair labor practices of domination and intervention pursuant to Article 39.(4) of the former TULRAA.
(Supreme Court ruling on May 7, 1997: 96Nu2057)

···› If an employer transfers employees to a different location of work in order to prevent them from joining the union and doing union work, is the employee transfer an act of unfair labor practice?

The reason given by the employer for such employee transfer was to fill vacancies at the location to which they were transferred. The real reason, however, was to prevent them from joining the union and engaging in union activities. Therefore, the transfer is an act of unfair labor practice. Furthermore, the dismissal of those employees for the reason that they failed to follow the transfer instruction also constitutes a case of unfair dismissal. (Supreme Court ruling on Nov. 13, 1992: No. 92Nu9425)

···› Is it unfair for an employer to order a full-time union official to give up the union position and return to his previous job, with a view to making it difficult for him to continue the union work?

The employer, who is opposed to the union activities by the full-time union official and other unionists, ordered the full-time union official to return to his previous position in order to make it difficult for him to remain engaged in the union activities. This order, which is not a fair decision based on the employer's exclusive right to personnel management, constitutes an act of unfair labor practice. (Supreme Court ruling on May 28, 1991: No. 90Nu6392)

···› When the company executives induced the union members to decide to oppose the work-to-rule action of the union, is such act an unfair labor practice?

The president and the managing director of the company in question had separate meetings with some of the union members to persuade them to work as usual instead of resorting to work-to-rule. The consequence was that some union members opposed the proposed work-to-rule and decided to work in the same way as usual. It seems that the company executives have committed an unfair act of interference with the union operation.
(Supreme Court ruling on Dec. 10, No.91Nu636)

···› In case an employer makes a speech before the employees in order to weaken the union activities, is such address an unfair labor practice?

The company president in question made an address at the closing of the business year, saying that the union should not have come into being; that, in light of the organizational structure of the company, there were limitations on the union activities; that he hoped the union would not be a source of tension

and dispute any more; and that he did not want to get all the employees to resign from the company and fill the vacancy with new employees. It is admitted that his address was intended to confirm his opposition to the union and to weaken the basis of the union. Making such an address is an act of unfair labor practice. (Supreme Court ruling on May 22, 1998: No. 97Nu8076)

···› Employer's expression of opinion and unfair labor practices

An employer clearly has the freedom of speech to express his/her opinion orally, or by internal broadcasting, bulletin, letter, etc. However, if it is deemed that the employer had an intention of domination over and intervention in the labor union's organization, operation, and activities, judging from the contents of the opinion: then the circumstances, time, place and manner in which the opinion was given; and its effect on the operation and activities of the labor union, it is considered to be an unfair labor practice of dominating or intervening in employees' organization and operation of the labor union. (Supreme Court ruling on Sept. 8, 2006: No.2006Do388)

···› Is it unfair for an employer to refuse to issue a certificate of current service to an employee who needs to submit the certificate to run for the position of union delegate?

The employee in question applied for a certified copy proving his incumbency for submission to run for the position of union delegate, but the person in charge did not issue the certified copy until the last moment, saying that the employer (company president) was away with his official seal. As a result, the employee could not run for the union delegate position. It seems that such failure to issue a certificate of service was intended to prevent the employee from running for the elective position. Therefore, it is an act of unfair labor practice. (Supreme Court ruling on June 23, 1992: No. 92Nu3496)

···› Recording behaviors of employees who participated in a strike and denying the employees access to the union homepage is an act of unfair labor practice because it is an act of intervening in or dampening union activities.

1. The employer in the case in question monitored and recorded behaviors of the employees who had participated in the strike in order to use the records as a basis for employee discipline, identify the structural force of the trade union and strengthen his control over those employees. The records contained daily evaluations on their propensity based on whether they were

in favor of the activities or opinions of the union, as well as daily analyses on individual employees' behaviors at work. Furthermore, the executive officers often told the union employees that the behavior records and the employee classification would be decisive in determining the extent of employee disciplines. All considered, it is highly likely that the employees, who felt quite uneasy and concerned about disciplinary measures yet to be finalized, could not be as active in working for the union as before. In this light, the employer committed an act of dominating or intervening in union activities by recording employee behaviors and thereby discouraging them from performing union activities.

2. After the strike in question came to an end, the employer denied his employees access to the union's homepage. This act, which is beyond his right to control the business facilities, undermined union activities and constitutes an act of unfair domination and intervention, notwithstanding the fact that the homepage included content that defamed the employer and the executive officers even after the end of the strike.
(Supreme Court Ruling on July 9, 2004: No. 2003Guhap 32916)

3) Procedures for remedy of unfair labor practices

Applicable legislation : Article 82 of the TULRAA (Application for remedy)

① Either an employee or a trade union may make an application for remedy to the Labor Relations Commission, when he/she or it reasonably finds that his/her or its right has been infringed on by unfair labor practices of the employer.

② Application for remedy under paragraph ①shall be made within three months from the date when such unfair labor practices have been committed (or from the last date of such unfair labor practices, in case such practices were continuous for a period of time).

[Explanatory notes]

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

⋯› Apart from the remedy procedure at the Labor Relations Commission, an employee or a union may file a suit before the court of law in an effort to invalidate the effect of the alleged unfair labor practice and to ensure compensation for the damage inflicted on him/her or it.

⋯› The effect of remedy orders, dismissal decisions or review decisions made by the Labor Relations Commission shall not be suspended by an application for review to the National Labor Relations Commission or by the initiation of an administrative suit. (Article 86 of the TULRAA)

➡ Procedures for remedy of unfair labor practices

① Application for remedy
In case an employee reasonably believes that his/her right has been infringed on by the employer, the employee or the trade union may file a request for remedy to the Labor Relations Commission within three months from the day when such unfair labor practice took place.

② First ruling by the Labor Relations Commission
The Regional Labor Relations Commission, upon arrival of the application for remedy, shall carry out an investigation into factual aspects of the case and conduct an inquiry of the parties concerned and, based on the results of the investigation and the inquiry, may issue an order for a remedial action (restitution) by the employer or decide to dismiss or return the application for remedy.

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

③ Second ruling by the Labor Relations Commission
In case one of the parties disobeys the order for a remedial measure or the decision to dismiss the application made by the Regional Labor Relations Commission or the Special Labor Relations Commission, the party may ask the National Labor Relations Commission to review the case within 10 days from the date of receiving the notice of the order or decision.

④ Administrative filing
One of the parties concerned that finds the second ruling of the National Labor Relations Commission unacceptable may bring an administrative suit, in accordance with the Administrative Litigation Act, within 15 days from the date of receiving the notice of the ruling.

[Court rulings]

···› Is it possible for a trade union to apply for remedy for an allegedly unfair labor practice that was done while the union was in the making?

If the application for remedy concerns an allegedly unfair labor practice that was done against an employee for his involvement in union foundation, the union has the right to such application.
(Supreme Court ruling on Jan. 25, 1991: No. 90Nu4952)

···› In cases where the litigation for confirmation of nullity of dismissal is dismissed, remedy benefits that the employee has received due to unfair labor practices are nullified.

In cases where an employee applied for remedy of unfair labor practices, claiming that the disadvantageous treatment such as dismissal against him/her conforms to unfair labor practice, if the litigation for confirmation of nullity of dismissal, etc., that the employee filed against the employer separate from the application for remedy is dismissed and the judgment is decided while the remedy process is still in progress, it is considered that the employer's disadvantageous treatment such as dismissal, etc., against the employee is justified. In this light, the Labor Relations Commission may not issue a remedy order on the grounds that the disadvantageous treatment amounts to an unfair labor practice, and therefore, it shall be regarded that the remedy benefit is nullified. In such a case, the litigation to seek the revocation of the National Labor Relations Commission's adjudication that rejected the employee's application for review by the National Labor Relations Commission by maintaining the Local Labor Relations Commission's decision, or rejected the application for remedy of unfair labor practice by revoking the Local Labor Relations Commission's remedy order, is considered as illegal because the interest of litigation does not exist.
(Supreme Court ruling on April 23, 1996: No.95Nu6151)

···› In case a written application for remedy for an unfair dismissal or unfair labor practice does not specify "what the applicant wants to be remedied," what remedial measures could be taken?

The Labor Relations Commission has a discretionary right to order certain remedial measures that the Commission finds reasonable and justifiable, based on the factual aspects given by the applicant. If the written application includes specific facts that prove an unfair labor practice or an unfair

dismissal or disciplinary measure such as service suspension, job transfer or pay cut, it should be considered that the applicant has also requested remedial measures for such unfair act by submitting those factual aspects, even when the applicant has not specified any remedial measure wanted. (Supreme Court ruling on May 11, 1999: No. 98Du9233)

···› If a disciplinary measure that was once brought to the Labor Relations Commission for remedy has since been changed, is it possible for the Commission to review the original disciplinary measure to order a remedial measure?

The procedure of remedy for unfair labor practices shall begin with the arrival of an application for remedy at the Labor Relations Commission. In addition, the review by the Commission is limited to the specific facts that are given by the applicant as evidence of an unfair labor practice. Accordingly, when a disciplinary measure has been changed since it was brought to the review by the Commission, the disciplinary measure as it was can no longer be subject to the review by the Commission. In order to place the disciplinary measure under the review by the Commission, the applicant needs to modify the original application to include the changed measure. (Supreme Court ruling on April 7, 1995: No. 94Nu1579)

···› If an employee applies for remedy for unfair labor practice, claiming that the employer has done more than one kind of unfair labor practice, should the Labor Relations Commission make multiple decisions or orders with regard to the application?

In case an applicant suggests only one kind of allegedly unfair labor practice, the Labor Relations Commission shall make only one corresponding order or decision, even though such order or decision may include multiple remedial measures, each of which can be taken separately. However, in case the applicant comes up with factual aspects of multiple kinds of unfair labor practice, the Labor Relations Commission should make plural corresponding orders or decisions. (Supreme Court ruling on April 7, 1995: No. 94Nu1579)

···› If an employee claims an unfair labor practice as prescribed in Article 39.(1) of the former TULRAA, the burden of allegation and proof is on the employee.

Article 39.(1) of the former TULRAA defines "dismissal of workers or acts of giving disadvantages to workers on the ground that they have participated

or intended to participate the labor union; that they have intended to organized the labor union; or that they have performed justifiable activities for the labor union's affairs–as types of unfair labor practices. Therefore, it constitutes the unfair labor practice in terms of 39.(1) of the said Act only when the employer dismisses or gives disadvantages to the concerned employee for a "justifiable act for the operations of the labor union."Also, in this case, the burden of allegation and proof is on the employee who claims the unfair labor practice.
(Supreme Court ruling on Sept. 10, 1996: No.95Nu16738)

···› In cases where an applicant did not respond to notice of attendance on two or more occasions

In cases where an applicant who has applied for remedy of unfair labor practices did not respond to notice of attendance on two or more occasions, the Labor Relations Commission may reject the application, excluding the cases where the applicant was not able to be present on the notified date for the reasons which are not attributable to him/her.
(Supreme Court ruling on Feb. 27, 1990: No.89Nu7337)

···› Does a remedial order by the Labor Relations Commission have an effect in terms of private laws?

The remedy procedure at the Labor Relations Commission is aimed at protecting the rights of employees from unfair labor practices, in accordance with public laws, and the procedure has no direct influence on the relationship between the employer and the employee(s) concerned in terms of private laws. The employee shall file a civil suit, apart from the application for remedy, in order to claim that the unfair labor practice has infringed on his/her rights under private laws.
(Supreme court ruling on Dec. 13, 1988: Nos. 86Da204 and 86DaCa1035)

Guide for CEOs and HR managers

Major Court Rulings on Labor Cases in Korea

Date of Publication: December 2008
Publication: Invest KOREA, 300-9, Yomgok-dong, Seocho-gu, Seoul, Korea
Design: NCCAD Tel: 02-545-3634
Priting: Hwasin Tel: 02-2277-0624

Contents Information

TEL: 02-3460-7644
FAX: 02-3460-7946