

2015 Labor and Employment Outlook in Korea



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Presented by W. J. Kim of Kim & Chang



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I. Key Labor and Employment Issues in 2014 and 2015

Ordinary Wage

LEGAL CONCEPT

- “Ordinary Wages”: Wages paid regularly, uniformly and on a fixed basis for a worker’s prescribed labor
- Ordinary Wage is used to calculate the amount of **statutory compensation for overtime, nighttime or holiday work, and unused annual leave**

Controversial Items

- Fixed Bonus

- Family allowance
- Position allowance

- Meal allowance
- Mobile allowance
- Holiday (*Sullal / Chuseok*) allowance
- Vacation allowance
- Gift allowance

- Group insurance premium support
- Personal pension plan premium support

Ordinary Wage

SUPREME COURT RULING

Kabul Autotech, Dec. 2013

- “Ordinary Wage” shall include “hourly wages, daily wages, weekly wages, monthly wages, or contractual wages that are paid regularly, uniformly and on a fixed basis to a worker for his/her prescribed labor”
- “Good faith” preclusion

Ordinary Wage – Supreme Court Ruling (*Continued*)

Agreement (or customary practice) to exclude from Ordinary Wage



Need to protect benefit of bargain

Wage increase based on company revenue



Common understanding

Agreement on “total amount” of wages considering overtime work, etc.



Windfall

In light of the above circumstances, if an additional claim for payment “creates significant difficulties to the business” or “place the very existence of the company at risk” = claim precluded

Ordinary Wage

RECENT LOWER COURT RULINGS

Changwon District Court, Feb. 2015

*Renault
Samsung*

*Hyundai Motor
Company*

*Hyundai Heavy
Industry*

- The court ruled that a “fixed bonus”, **paid only to those currently employed (but not paid to those who left employment prior to the payment date), does not fall under Ordinary Wage**, because the payment is not “fixed”
- This decision affirms the Kabul Autotech ruling that the condition of being employed on the payment date negates the “paid on a fixed basis” element

Ordinary Wage

RECENT LOWER COURT RULINGS

Seoul Central District Court, Jan. 2015

Renault Samsung

*Hyundai Motor
Company*

*Hyundai Heavy
Industry*

- The court held that a “fixed bonus”, **paid only to those employees who worked 15 or more days in a given period**, does **not fall under** Ordinary Wage, because the payment is not “fixed”
- This decision also affirms the Kabul Autotech ruling, in that imposing a payment condition requiring employees to have worked at least a certain number of days during a given period negates the “paid on a fixed basis” element

Ordinary Wage

RECENT LOWER COURT RULINGS

Ulsan District Court, Feb. 2015

Renault Samsung

*Hyundai Motor
Company*

*Hyundai Heavy
Industry*

- The court held that both “term allowance (bonus)” (“기간상여”), which is **not paid to employees who were absent for more than 34 days during a two month-period**, and “yearly allowance (bonus)” (“연간상여”), which is **not paid to those employees who took early leave for more than 112 days during a one-year period, but is proportionally paid to those employees who took leaves of absence or who were on temporary suspension during the one-year period, fall under Ordinary Wage**
- Conflicts with the Kabul Autotech ruling? - subject to appellate court decision.



Split lower court decisions

Ordinary Wage

How Are Companies Dealing With This?

Many companies have entered into agreements with labor unions or employees to include all or part of fixed bonuses into the calculation of ordinary wage

*Company A
(Chemical)*

- agreed to include 600% (out of total 800%) of fixed bonus into Ordinary Wage
- also agreed not to make claim for retroactive payment of difference

*Company B
(Auto part)*

- agreed to include 400% (out of total 600%) of fixed bonus into ordinary wage

*Company C
(Auto part)*

- agreed to change 500% (out of total 600%) of fixed bonus to discretionary incentive bonus

(However, some employees announced that they would file lawsuits)

Ordinary Wage

TAKEAWAYS

- Assess controversial items (e.g., fixed bonus)
- Consider new compensation scheme
- Prepare negotiation strategy to encourage adoption of new compensation scheme
- Proactively engage in discussions with union/employees
- Eliminate unnecessary overtime, nighttime, and holiday work, and improve productivity



Third-Party Workers Working at A Company (사내하도급)

RECENT SUPREME COURT RULINGS

Hyundai Motor Company

- The Supreme Court held that the workers employed by the service providers working at HMC **had** “employee status” with HMC
- Stated that the arrangement between HMC (service recipient) and the service providers was worker dispatch (as opposed to genuine outsourcing/subcontracting of work).

VS

The Korea Railroad

- The Supreme Court held that the KTX train crew members employed by the service provider , and who worked in the KTX trains (of the Korea Railroad) , **did not have** “employee status” with the Korea Railroad
- Stated that the arrangement between the Korea Railroad and the service provider was work outsourcing/subcontracting (as opposed to worker dispatch)

Third-Party Workers Working at A Company



Factors to Consider

- Whether the service recipient exercised **substantial supervision and control** (e.g., giving direct or indirect instructions) over the workers of the service provider
- Whether the workers of the service provider were in fact **incorporated into the workforce of the service recipient and directly engaged in joint or identical work** with the workers of the service recipient
- Whether the service recipient **exercised authority over the workforce management** of the service provider (e.g., hiring decisions, training, education, evaluations, attendance, leaves)
- Whether **the scope of work** performed by the workers of the service provider **is limited to the specific scope** set forth in the subcontracting contract
- Whether the work performed by the workers of the service provider requires **expertise and technical skills** and can be **distinguished from** the work done by the workers of the service recipient
- Whether the service provider maintains **independent facilities or business organization** in providing the contracted services

described in the HMC Supreme Court Decision

Third-Party Workers Working at A Company

IMPLICATION

Once third-party workers are deemed employees of the service recipient company, the service recipient company may be

- Subject to criminal liability (illegal worker dispatch)
- Liable for the difference between the wages such third party workers received from their employer and the wages similarly-situated employees of the service recipient company received
- Upon such third party workers' request, the service recipient company is obligated to hire them as its own employees



Statutory Retirement Age

STATUTORY RETIREMENT AGE

Companies are required to set workers' retirement age at 60 years or older

Effective From

- Companies with 300 or more full-time employees, January 1, 2016
- Companies with fewer than 300 full-time employees, January 1, 2017



Higher costs and less flexibility for companies

Statutory Retirement Age

*COMPANIES NEED TO CONSIDER COST-SAVING MEASURES,
SUCH AS A 'WAGE PEAK SYSTEM'*

Procedural Requirement → Employee Representative Consent

- To the extent adopting a wage peak scheme requires the rules of employment to be disadvantageously changed, employee representative's consent must be obtained
- However, given the new statutory requirement, there is no incentive for employee representative to consent

Reduction in Working Hours

TRADITIONALLY

Government's interpretation has been "work performed on a holiday (exceeding 40 hours per week) should not be counted as overtime work"

RECENTLY

Many lower courts have ruled that such holiday work should also be counted as overtime work - thus, a 50% premium should be added to compensation and should be counted as overtime work for purposes of the 12 hour/week of overtime work permitted under the law



Supreme Court will decide soon?

Reduction in Working Hours

IN THE MEANTIME,

Government plans to significantly reduce working hours in Korea (currently 2,193 hours/year) by 2020

Current Maximum: 68 hours/week



Proposal: 52 hours/week

40

hours of regular work
per week (Mon-Fri)

12

hours of overtime work
per week

16

hours of holiday work

40

hours of regular work

12

hours of overtime work
(including holiday work)

Provided that if employee representative agrees, additional hours/week may be added

“Non-Regular” Workers – Fixed-Term Contract

RECENT HIGH COURT RULING

Seoul High Court, Nov. 2014

- The court ruled that fixed-term employees have “the right to expect expiring (normally 2-year) fixed-term contract to be renewed”
- Under certain circumstances, companies may not refuse to renew a fixed-term contract even when the contract has expired based on the principle of "right to expect contract renewal" → *refusing to do so may be deemed a wrongful dismissal*

“Non-Regular” Workers – No Discrimination

LEGAL CONCEPT

No discrimination against non-regular workers

- Law prohibits discrimination against “non-regular” workers, such as fixed-term or part-time employees, compared to “regular” (permanent, full-time) workers engaged in the same or similar work

GOVERNMENT ACTION

- The government has announced that it will strictly enforce (by way of labor audits) the law to prevent discrimination against “non-regular” employees



Changes in Labor and Employment Law (2015)

Tax Treatment of Incentive Bonus Contributed into DC Plan

- No favorable tax treatment (applicable to retirement income) will be given, unless certain legal conditions are met - e.g., all eligible employees agree on the same contribution rate



Effective from

- February 3, 2015

Reduced Working Hours for Childcare

- Can be used during the period that is twice (formerly, equal to) the remainder of statutory childcare leave (maximum of one year), up to a 2-year total period
- Employees are allowed up to 3 periods of reduced working hours (formerly, up to 2 periods)



Effective from

- July 1, 2015

Workplace Nursery Requirement

- Applies to companies with 500 or more full-time employees (or, 300 or more full-time female employees)
- Must establish a nursery at the workplace (or use local nursery facilities)

Effective from

- January 1, 2015

Penalty

- (From January 2016): Fine up to KRW 100 million (can be imposed twice per year, up to KRW 200 million total fine per year), plus administrative order



Fair Hiring Requirement

- Upon applicant's request, a company must return documents submitted by the applicant
- Companies are required to retain the documents for a certain period of time



Effective from

- Companies with 300 or more full-time employees, January 1, 2015
- Companies with 100 to 300 full-time employees, January 1, 2016
- Companies with 30 to 100 full-time employees, January 1, 2017

Penalty

- Fine up to KRW 3 million, plus administrative order



III. Recent Government Labor and Employment Policy

Government Labor and Employment Policy

GOVERNMENT DIRECTION OF LABOR POLICY

- Labor market structural improvement
 - Discourage discriminatory treatment based on types of employment
 - Reform wage system (wage peak system, etc.)
 - Reduction of long working hours
- Strengthen momentum towards achieving 70% employment rate
- Renovation of Occupational Safety and Health System

Government Labor and Employment Policy

GOVERNMENT ENFORCEMENT OF LAW

- Stricter compliance enforcement
- Broaden the scope of what constitutes unfair labor practice; reinforce criminal punishment → labor office/ prosecutors office's role (e.g., search and seizure)
- Regional labor audit → “targeted” audit

Government Labor and Employment Policy

TRIPARTITE COMMITTEE

5-Item Agenda

- Dual structure of labor market
- Wages (Ordinary Wage), working hours, retirement age, etc.
- Establish labor, employer and government partnership
- Establish social safety network
- Other issues: improve productivity and renovation of workplace

Thank you

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KIM & CHANG

39, Sajik-ro 8-gil, Jongno-gu, Seoul 110-720, Korea

Tel: +82-2-3703-1114 Fax: +82-2-737-9091 / 9092 E-mail: lawkim@kimchang.com Website: www.kimchang.com