

Criteria for Determining “Employee” Status

I. Introduction

Nowadays, there are many kinds of jobs becoming available and people working under service or freelance contracts, but those who are engaged in such jobs are not recognized as employees to whom labor laws apply. In one particular case¹, a large private institute (hagwon) hired instructors under contracts for ‘teaching services’, and treated them as independent business owners with freelancer status, a determination which led to serious labor disputes later on. In cases where an instructor works as an independent business owner and not as an employee, he is ineligible for various protections under labor law such as regulations regarding wages and annual leave, protection from unfair dismissal, and compensation from social security insurances for work-related accidents. However, in cases where an instructor has been determined as an employee, all labor law protections apply. Therefore, instructors look for coverage under labor law, while institute owners seek to avoid employee status for their instructors, due to the additional expenses and the risk of collective action by those instructors.

For these reasons, a clear determination of employee status can resolve labor disputes, and so hereby I would like to review the criteria for determining employee status in terms of legal provisions, expert opinions, and judicial rulings.

II. Judgment of Employee Status

1. Concept

Article 2 (1) of the Labor Standards Act stipulates that the term “worker” in this Act refers to a person who offers work to a business or workplace to earn wages, regardless of the kind(s) of job he/she is engaged in. The concept of “employee” includes the following factors: 1) it is not determined by the kind(s) of job he/she is engaged in; 2) the person works at a business or workplace; 3) the person offers work to earn wages. In understanding this concept, wage is put at the center, while the key point to be considered is whether a subordinate relationship exists between the work provider and the work user. That is, “employee” means “a person who offers work to earn money through a subordinate relationship”.²

A subordinate relationship is one where a person hired by the employer provides work to the employer, and under the employer’s direction and orders, carries out the tasks the employer wants done. So, an employee who offers work to earn wages can be translated as “a person offering work under a subordinate relationship with an employer.”³ The views of “subordinate relationship” by scholars can be classified into two groups: 1) interpretational and 2) law-based.

¹ Supreme Court ruling on June 11, 2015, 2014da88161: CDI’s unpaid severance pay case.

² Jongryul Lim, 「Labor Law」, 13th edition, 2015, Parkyoung sa, page 32.

³ Kaprae Ha, 「Labor Law」, 27th edition, 2015, Joongang Economy, page 102.

2. Scholarly views

(1) Interpretational

This view claims that the current judicial ruling regarding the criteria for determination of employee status has some difficulty in understanding because its criteria are enumerated with factual evidence in parallel order. To overcome this problem, the criteria should be categorized into substantial signs and formal signs from which employee status can be determined as existing or not.⁴ Such substantial signs include whether there is command and control, the relationship between the work offered and the current business, and the work provider's situation. The formal signs refer to items whose existence depends on the employer's decisions, which include whether income tax and social security insurance premiums are paid, whether personnel evaluations for the person are performed, and whether the person has a contractual duty to receive permission before getting a second job.⁵ That is, this view holds that employee status can be determined through the substantial signs, and formal signs can be excluded from the factors that determine a subordinate relationship.

(2) Law-based⁶

This view holds that the concept of 'employee' should be interpreted in accordance with the related legal provisions. Korean labor law has the definition of employee in Article 2(1) of the Labor Standards Act ("the LSA"), and any judgment of employee status should begin with the interpretation of this provision. The LSA definition of 'employee' contains four determining factors; ① the status can be determined "regardless of the kind of job"; ② the person offers work "to earn wages"; ③ the person offers work "at a business or workplace"; and ④ "the person offers work". Of these four factors, "status can be determined regardless of the kind of job" is not directly related to establishing employee status, and so will not be included for consideration. First, the employee provides work to earn wages. "The term 'wages' in the Labor Standards Act means wages, salaries and any other money and valuable goods an employer pays to a worker for his/her work, regardless of how such payments are termed." (Article 2(5) of the LSA) Therefore, it is sufficient to prove that wages are paid in return for work, but there is no limit on how such payments are termed. Therefore, even though wages were paid per unit of work performance, without considering the unit for the number of working hours, as long as they are paid in return for labor service, such payment can be regarded as wages. Second, "at a business or workplace" means that the employee provides work on the employer's business premises or workplace. Even though there are no particular instructions regarding working hours, place, and method of work, the person is assigned to the labor area with tangible work duties. Third, "the person offers work" means that the employee provides work to the employer, which is known to be a subordinate position. The employer's

⁴ Sungtae Kang, "Different types of employment, and judgment of employee status under the Labor Standards Act", 『Labor Law Study』 No. 11 ho, 2000, p. 35

⁵ Sungjae Yoo, 『Legal arrangement according to the variety of employment types: employee status in non-traditional employment』, Korea Legislation Research Institute, 2003.

⁶ Jonghee Park, "Employee concept according to the Labor Standards Act", 『Labor Law Study』, No. 16 ho, 2003, pp. 74-76

instructions can include instructions regarding time, place, and type of work provided. In determining employee status, all three of these factors do not have to be present, but whether the employee was supervised and under the employer's instructions or not must consider all of them.

3. Judicial ruling

(1) Criteria of the judicial ruling

The Supreme Court gave clear criteria for determination of employee status in a lawsuit case involving a full-time instructor at a private institute: first, employee status may exist regardless of the type of contract; second, the criteria for determination of a subordinate relationship are enumerated to 12 items; third, the conditions suggested as signs of employee status shall be determined as decisive or not by considering whether the employer can unilaterally decide whether those conditions exist. These criteria are used to determine employee status, and they are stipulated in the following paragraph.

The Supreme Court⁷ ruled, "Whether a person is considered an employee under the Labor Standards Act shall be determined by whether, in actual practice, that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages, regardless of the contract type such as an employment contract or a service contract. Whether or not a subordinate relationship with the employer exists shall be determined by collectively considering: ① whether the rules of employment or other service regulations apply to a person; ② whether that person's duties are decided by the employer, and ③ whether the person has been significantly supervised or directed during his/her work performance by the employer; ④ whether his/her working hours and workplaces were designated and restricted by the employer; ⑤ who owns the equipment, raw materials or working tools; ⑥ whether the person can be substituted by a third party hired by the person; ⑦ whether the person's service is directly related to business profit or loss as is the case in one's own business; ⑧ whether payment is remuneration for work performed or ⑨ whether a basic or fixed wage is determined in advance; ⑩ whether income tax is deducted for withholding purposes; ⑪ whether work provision is continuous and exclusive to the employer; ⑫ whether the person is registered as an employee by the Social Security Insurance Act or other laws, and the economic and social conditions of both sides. Provided, that as whether basic wage or fixed wage is determined, whether income tax is deducted for withholding, and whether the person is registered for social security insurances could be determined at the employer's discretion by taking advantage of his/her superior position, the characteristics of employee cannot be denied because of the absence of these mentioned items."

"The above criteria are not applied formally or uniformly, but in the event facts equivalent to the above items exist, it should be determined after reviewing whether these facts were decided by the employer's superior position or required naturally by such job characteristics."⁸

⁷ Supreme Court ruling 2004da29736, on December 7, 2006: Full-time instructors' employee status

⁸ Supreme Court ruling on May 11, 2006, 2005da20910: Ready-mix truck driver case.

(2) Understanding the judicial judgment

In reviewing the court's criteria for determining employee status, three key items need to be explained. First, when determining whether employee status exists, the judicial ruling is decided by the definition provision of Article 2 (Paragraph 1) of the Labor Standards Act. "In determining employee status under the Labor Standards Act, this shall be determined by whether the person has provided work to the employer through a subordinate relationship for the purpose of earning wages at the employer's business or workplace." This judicial ruling includes a definition of the term, 'employee', which means a person providing work in return for wages through a subordinate relationship with the employer.

Second, the court ruled, "Whether a person is considered an employee under the Labor Standards Act shall be determined by whether, in actual practice, that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages, regardless of the contract type, such as an employment contract or a service contract." This judicial ruling shows that employee status shall be recognized not based upon the formal type of contract made between two parties, but by the substantial relationship in actual practice.

Third, the judicial ruling shows that status as an employee under the Labor Standards Act shall be determined by whether the person provides work through a subordinate relationship or not, and in order to confirm such subordinate relations, several signs are listed and estimated collectively. In particular, these signs can be divided into 12 items, which can be compared and analyzed for similarity to employee characteristics and for similarity to employer characteristics. After reviewing which characteristics are more evident in the relationship in question, determination of whether employee status exists shall be made.

III. Conclusion

The scholarly view and judicial view are consistent in the following criteria: 1) In employment relations, employee status shall be determined by whether there is a subordinate relationship between the parties or not (judgment by subordinate relations); 2) whether there is a subordinate relationship between the parties or not shall not be determined by the type of contract or title, but by actual facts of the labor provision relations (judgment based upon actual relations); and 3) the actual facts of the labor provision relations shall be determined in consideration of an overall collective evaluation of all items (overall consideration). Accordingly, employee status according to subordinate relations shall be determined after considering practical facts of the employment and reviewing them overall. Judicial ruling states that the criteria for ruling on employee status shall not be determined by the format of employment relations, and shall not consider as important in judgment whether the person paid corporate tax or was registered for the social security insurances, which can easily be decided by the employer due to his/her superior position. These points emphasize that employee status shall be determined by employment relations in actuality.

Restrictions on Replacing Workers on Strike

I. Introduction

Article 33 of the Constitution guarantees three basic rights of labor to enhance working conditions, and the Labor Union & Labor Relations Adjustment Act (hereinafter referred to as “the Labor Union Act”) was established towards guaranteeing those rights in practical terms. Labor unions and employees are free from civil and criminal liability for justifiable industrial action and shall not be treated unfavorably in personnel management.

Labor unions can acquire better working conditions through collective agreements, and while engaging in collective bargaining with the employer, they can request better wages, working hours, and welfare, etc. At the beginning of collective bargaining, employers often reject union demands because labor costs directly affect overall production costs. Labor unions then collectively refuse to provide labor service in order to achieve their demands, and obstruct normal business operations. The employer counteracts this with the no-pay-no-work principle, which deprives the employees participating in strikes from receiving their wages. This confrontation between labor union and company then leads to conclusion of an adjusted agreement, called the collective agreement.

Here, if the employer is allowed to hire persons unrelated to business operations or use replacements during a period of industrial action – if contracting or subcontracting out is allowed - so as to continue work which has been stopped by that industrial action, a strike will not affect an employer as much as planned and the labor union will be discouraged from going on strike and therefore more easily agree to employer proposals. In order to prevent practical infringement of this right to take industrial action, it is stipulated in the Labor Union Act that hiring new employees or outsourcing jobs which have been interrupted by industrial action is not permitted. Therefore, provisions restricting replacement of workers during strikes are protections designed to maintain the balance of power between the labor union and the employer.

Here, I would like to concretely review the concept and content of these restrictions on the replacement of workers involved in strikes, and essential public services where this replacement is allowed.

II. The Concept of Restrictions on Employee Replacement

Article 43 of the Labor Union Act regulates that no employer shall hire persons unrelated to their business operations, or use replacements during a period of industrial action so as to continue work which has been stopped by industrial action. This includes contracting or subcontracting work out (Paragraph (1) and (2)). Penal provisions are implemented in the event of violations. Article 16 of Act on the Protection, etc. of Dispatched Workers (Employee Dispatch Act) also regulates that a sending employer shall not dispatch an employee to a workplace where industrial

action is underway to perform the work stopped due to such industrial action.

The purpose for restricting employee replacement during a period of industrial action is to protect the employee right to strike according to the Constitution, in practical terms. Restrictions on employee replacement are institutional mechanisms designed to guarantee effectiveness of industrial action by a labor union, and are also unavoidable in realizing the principle of equality in collective bargaining. If an employer is allowed to take unrestricted counteraction against a labor union's industrial actions, those industrial actions lose all effectiveness as a tool for the union to achieve its goals. This is the reason why restrictions are necessary regarding the hiring of persons unrelated to business operations.⁹

III. Scope of Restrictions on Employee Replacement

1. The meaning of "Persons unrelated to business operations"

Judicial rulings on the concept of business generally explain that "business" refers to an independent company organization operating continuously and organically in one managerial body such as an individual business or corporate entity.¹⁰ Subsidiaries within a larger company are considered different businesses. However, a particular company with headquarters in one city and plants or branch offices located in other areas is regarded as one business.

"Person unrelated to business operations" means that persons who are related to business operations can be used as replacements during a period of industrial action. This means that it is possible to continue the work stopped during industrial action, with union members not participating in the strike, non-union members, and other employees who are related to the company's business operations.

2. Restrictions against hiring new employees

Article 43 (1) regulates that no employer shall hire persons who are not related to that employer's business operations, or use replacements during a period of industrial action so as to continue work which has been stopped by that industrial action. In this case, there are two representative judicial rulings.

(1) An employer hired new persons before a period of industrial action, with the intent of continuing to perform the work of strikers during the period of industrial action. This case violated Article 43 of the Labor Union Act.¹¹

(2) An employer hired new persons gradually to fill vacated positions. Even though these persons were used to continue the work stopped by later industrial action, this replacement was justifiable exercise of the employer's personnel management rights as they were not hired specifically to replace the workers taking industrial action.¹²

⁹ Heesung Kim, "A study on the restrictions on employee replacement during a period of industrial action", 『Labor Law Studies』, Korean Labor Law Studies Association, June 2010, pg. 229.

¹⁰ Supreme Court ruling on August 20, 1998: 88 da 18365.

¹¹ Supreme Court ruling on November 28, 2001: 99 do 317.

¹² Supreme Court ruling on November 13, 2008: 2008 do 4831.

3. Conditions for justification of counteractions by a labor union

Judicial rulings on the conditions for justification of labor union counteractions against replacement by an employer during a period of industrial action can be divided into justifiable replacement and illegal replacement.

(1) The court determined obstruction of business as a violation in cases where the labor union members entirely and exclusively occupied company premises to block the employer's justifiable replacement for work stopped due to industrial action.¹³

(2) As long as strikers did not use violence or destruction or threatening actions to block an employer's illegal replacement of workers to continue work stopped due to industrial action, the court ruled that considerable counteractions are acceptable.¹⁴

4. Applicability to illegal industrial action

The provision placing restrictions on replacement may be applicable to justifiable industrial action only. Since there are provisions protecting labor union members from civil and criminal charges during industrial action according to the Labor Union Act, the employer can continue business operations by using replacements to do the work stopped due to illegal industrial action. That is, an employer can hire new persons or use employee replacements to prevent damage caused by a labor union's illegal industrial actions.¹⁵

However, in reality there are many cases where determining whether industrial action is justifiable or not is complicated and cannot easily be determined outside of a courtroom. In cases where an employer hires new persons or uses as replacements those unrelated to business operations on the assumption that a strike is illegal, this can infringe on a labor union's right to take industrial action. Therefore, employee replacement should be prohibited in principle in cases where the justification for industrial action is unclear, but used in cases where the industrial action clearly has no justification.¹⁶

5. Prohibition against contracting or subcontracting work out during periods of industrial action

Article 43 (2) of the Labor Union Act makes it very clear that no employer shall, during a period of industrial action, contract or subcontract out work which has been suspended because of that industrial action. Provided, in cases where a subcontractor company's labor union takes industrial action and the subcontractor company cannot carry out the duties assigned under the service contract with the contractor company, the contractor company can terminate the service contract or continue the interrupted work with its own direct employees, and hire new employees or make a subcontract agreement with other companies. There are no related judicial rulings,¹⁷ but

¹³ Supreme Court Ruling on October 7, 2005: 2005 do 5351.

¹⁴ Supreme Court Ruling on July 14, 1992: 91 da 43800

¹⁵ Jongyul Lim, 『Labor Law』, 13th Edition, 2015, Parkyoungsa, pg. 32.

¹⁶ Heesung Kim, *ibid.*, pg. 247.

¹⁷ Dongwoo Kim, "Content and coverage of the prohibition against employee replacement during a period of industrial action", 『Labor Law』, September 2015, Joongang Economy

government guidelines interpret that such replacement actions are not in violation of the provision to prohibit employee replacement.

In a related case, a district (*gu*) office and a cleaning company entered into a service contract for the cleaning company to collect household trash in that district. When the cleaning company's labor union took industrial action and stopped work, the *gu* office was allowed to collect the trash using its own employees and have other cleaning companies carry out this duty. This was determined as not in violation of the Labor Union Act's related provision because the *gu* office was not the employer of the subcontract workers involved.¹⁸

6. Prohibition against employee dispatch

Article 16 of the Employee Dispatch Act regulates that a sending employer shall not dispatch an employee to a workplace where industrial action is underway to perform the work stopped due to such industrial action. If employee dispatch is allowed, it has the same effect as replacing the workers engaged in industrial action with persons unrelated to business operations. This kind of replacement is prohibited, whether by the using employer or the sending employer. Provided, this provision was designed to prohibit new employees from being used to replace striking workers during a period of industrial action, but using dispatched employees who are currently dispatched at the workplace to carry out work stopped at the same workplace by industrial action is permitted.

IV. Employee Replacement for Essential Public Services

1. Concept

Article 43 (3 and 4) of the Labor Union Act regulates that the provisions of paragraphs (1) and (2) shall not apply to an employer of essential public services who hires persons unrelated to the business concerned or uses replacements, or contracts or subcontracts out the work only during a period of industrial action. In this case, the employer may hire or use replacements or contract or subcontract out the work as long as the proportion of the replacement workers does not exceed 50/100 of the strike participants of the business or workplace concerned (implemented January 1, 2008).

2. Requirements

"Essential public services" are those public services where stoppages and discontinuance may endanger the lives of the general public, or considerably undermine the national economy, and whose replacement presents a hardship: 1. Railroad services; 2. Water, electricity, gas supply, oil refinery and supply services; 3. Hospital services; 4. Bank of Korea; and 5. Telecommunication services. Since compulsory mediation for essential public services has been abolished, all personnel filling jobs in essential public services (besides the minimum to be maintained) are entirely permitted to take industrial action. However, in order to guarantee the public interest, partial employee

¹⁸ Government Guideline: Cooperation 68140-173, issued May 6, 1997.

replacement is permitted as long as the number of replacement workers (who can be new hires, existing workers, or workers used by a company receiving a contract or subcontract for the work) does not exceed 50/100 of the strike participants of the business or workplace concerned.

3. Effect

In cases where industrial action is taken in essential public services, employee replacement is permitted on a limited basis to positively minimize the risk to the general public or the national economy. These exceptions, such as the minimum services to be maintained and permitting employee replacement, were introduced in return for abolishment of the mandatory mediation system and as a way to provide a balance between labor protection and the public interest. ¹⁹

V. Conclusion

The restrictions on replacing employees during industrial action are designed to protect, in practical terms, the three basic rights of labor in line with an employer's ownership rights. These restrictions on employee replacement are: 1) only applicable to operations during the industrial action, 2) forbid hiring of new employees unrelated to business operations, and 3) are permitted also during justifiable industrial action. This provision has received criticism that prohibiting replacement of employees to do the work stopped during periods of industrial action restricts an employer's ownership right and allows serious damage to business operations. However, in reality if unrestricted employee replacement is allowed, strikes would have no meaning to or effect on the employer. This would make the basic rights of labor meaningless. Therefore, Article 43 of the Labor Union Act is necessary to realize the principle of a balance of power between labor and management in determining working conditions.

¹⁹ Hyungbae Kim, Jisoon Park, 『Lectures on Labor Laws』, 4th edition, 2015, Shinjosa, pg. 567.

Agreement by Labor, Management & Government on Improving the Labor Market – Tripartite Commission agreement of Sunday, Sep 13, 2015

I. Vitalizing Youth Employment through Cooperation between Labor, Management & Government

1. Efforts to expand youth employment

- As a way forward through the expected youth employment crisis over the coming three years, large companies and state-owned companies shall make efforts to increase new employment of the youth. The government shall ensure the provision of policy support for those companies hiring young applicants, such as with subsidies for employment, tax exemptions for job creation, exemptions from tax audits, providing long-term assistance for small and medium-sized companies (hereinafter referred to as “SMEs”), and providing favorable evaluation when choosing companies bidding for public contracts.
- By increasing investment and adjusting wages and working hours, Labor, Management and Government (Hereby referred to as “the Tripartite”) shall actively endeavor to develop a win-win employment ecosystem between the generations through expanding youth employment opportunities. In particular, management will make use of financial savings from introduction of peak wage systems towards employing more young applicants. Companies shall make further efforts to increase employment of the youth by refraining from voluntarily increasing the salaries of their high income directors and employees, and management will also share in equal efforts.
- In order to promote youth entry into SMEs, the Tripartite will lessen the gap in wages and benefits between large companies and SMEs, promote the competitiveness of SMEs and improve their working conditions, and actively support the best SMEs, such as future-oriented small companies.
- In order to promote business start-ups by the youth and increase their employment opportunities, the government will assist them through venture loan systems that benchmark domestic and overseas examples for technology-based startups. The government will also enlarge the scope of companies to which the Employment Impact Assessment will apply, to increase the effects of job creation.

2. Reinforcement of social support

- By means of reinforcing the public support of social enterprises, cooperative associations, startups, and public social services where youth like being employed, the youth shall be encouraged to find opportunities to engage in social activity.
- In order for the youth to receive systematic employment support from their school years, the school and job center shall work in cooperation, and it is necessary to expand and reorganize the employment success package centered upon the youth. In particular, opportunities need to be extended for participation in job training programs to increase employment of students in the humanities, arts and sports.

3. Employment promotion consulting body for the youth

- The Tripartite will create a separate consulting body of relevant government agencies, labor and management representatives, and labor specialists at the earliest possible juncture as a way of promoting youth employment in a concrete way.

II. Correcting the Dual Structure of the Labor Market

- As a means of reducing the dual structure of the labor market, the Tripartite will suggest a target for reducing the gap in wages and working conditions between large companies and SMEs, implement joint projects to accomplish targeted goals, and monitor implementation under cooperation between labor and management.

1. Mutual growth by means of win-win cooperation between contractors and subcontractors, and between large companies and SMEs

1-1 Vitalizing benefit sharing

- Labor and management at large contractors shall not pass on the cost of salary increases to subcontractor SMEs, and shall work towards mutual growth by improving competitiveness in terms of wages and benefits.
- Tax-related incentives will be given through this win-win cooperation between large companies and SMEs as they work to improve working conditions of subcontractor employees.
- The government will improve the mutual growth index, promote excellent models of benefit sharing, and look on participating companies favorably when those companies apply for policy funding and R&D subsidies. The government will also cultivate a joint countermeasure system between contractors and subcontractors, and expand its support of joint training.

1-2 Burden sharing by each member of the Tripartite

- The Tripartite will vitalize welfare projects for SMEs and irregular employees through the use of an intra-company labor welfare fund and introduction of a joint labor welfare fund between SME suppliers. The government will provide various tax benefits for contributions to those funds. In addition, the Tripartite will increase the labor welfare promotion fund and reinforce stability for irregular and low income employees.
- The top 10% of directors and employees, in terms of income, will refrain from increasing their salaries voluntarily, and use the resulting savings (plus additional contributions by each company) to enable the Tripartite to push ahead with improving working conditions for irregular and SME supplier employees. Labor and Management will make efforts to greatly expand the burden sharing and win-win employment movement, while the government will reinforce its support of win-win employment incentives and improve the taxation and social security system in accordance with this employment-friendly trend.

1-3 Strengthening the Tripartite partnership for win-win cooperation

- The Tripartite will create social responsibility action rules for win-win cooperation, and reward companies involved in excellent examples of such cooperation.
- The Tripartite will develop a system to vitalize labor and management participation and cooperation towards improvement of employee productivity and benefits, and expand on exemplary win-win cooperation between contractors and subcontractors.

1-4 Establishing fair trade orders and vitalizing the market economy

- Contractors will refrain from burdening subcontractors with the cost of the contractors' low prices, while the government will support revitalization of the Coordination Council to Adjust Supply Prices. In addition, the government will vitalize the mandatory reporting system for unfair transactions, provide bidding restrictions to prevent unfair transactions, improve the payment system for subcontractors, protect anonymous informants, and promote the use of standard contracts.
- In order to correct the negative impacts of the "lowest bidder" system, the overall review bidding system applicable to public procurement contracts will be gradually expanded.
- The government will provide improvements such as through a classification system where standard wages are paid according to type of business and work.
- The government will refrain from price controls so as to avoid damaging companies in terms of their ability to employ, pay wages, and improve service quality.

2. Employing irregular employees and improving the discrimination correction system

2-1 Establishing healthy order in employment

- The Tripartite will prohibit unreasonable discrimination, hire regular employees for regular and continuous jobs as much as possible, refrain from using too many irregular employees just to save on labor, and work to reduce the number of irregular employees voluntarily in the mid to long term.

2-2 Leading role of the public sector

- The government will lead improvements to the employment structure by extending the current plans to convert the status of irregular employees currently engaged in regularly continuous work to regular employment (65,000 by 2015). The government will also vitalize its subsidy program to support private companies that hire irregular and regular employees.
- The government will strictly enforce guidelines to state-owned companies that are changing outsourcing companies engaged in cleaning, security, meal services, etc. for the sake of employee job security and working conditions, and review methods to promote long-term subcontracting.

2-3 Improving effectiveness of the discrimination correction system

- The government will strengthen auditing to correct discrimination and introducing a system of punitive penalties and compensation.

2-4 Strengthening protection of irregular employees

- Labor and management will implement measures for job security and improvement of

working conditions for irregular employees, and work to enact relevant legislation as quickly as possible. The government will enforce labor auditing in order to prevent the use of “passion pay” (lower pay than minimum wage), unfair dismissal of employees during or upon expiry of their probationary period, etc.

2-5 Promoting job security for short-term employees

- The Tripartite will implement a joint fact-finding investigation, receiving opinions from specialists along with participation by relevant labor and management, and then prepare options for reflecting agreed items in regular National Assembly Session.
- Additional topics to be discussed: effective term and the number of contract renewals for short-term employees, the jobs for which dispatch is permitted, fields where irregular employment shall not be offered (such as those involving safety and the protection of life), the labor union’s power of attorney to apply for correction of discrimination, clarification of criteria to distinguish between dispatch and outsourcing, restrictions against dispatch being non-applicable to the top 10% of employment positions in terms of income, application of severance pay, etc.

3. Vitalizing the labor market

- Labor and management shall maintain job security by proactively coping with environmental changes, make personnel management efficient to minimize manpower reductions, and to make efficient operation possible of labor market internals such as wages and working hours.

3-1. Job security through establishment of reasonable HR management principles

- Labor and management shall create a culture of employing regular and direct employees as much as possible, and establishing reasonable HR management principles to provide security for existing employees and increase employment of new young people.

3-2 Clarification of standards and procedures for termination of employment contracts

- The Tripartite shall work on measures to improve all aspects of employment contracts through participation with labor, management, and relevant specialists to improve labor practices in personnel operations. Before the introduction of these improvements, the Tripartite shall establish an equitable evaluation system to minimize disputes and prevent abuse of the new system, and clarify the standards and procedures regarding establishment and termination of employment contracts according to law and judicial precedent. The government shall not unilaterally implement any measures but shall engage in sufficient consultation with labor and management.

3-3 Strengthening efforts for job security in times of managerial dismissal

- In cases where reduction of employment becomes necessary for managerial reasons, management shall make efforts to minimize such reductions through preventive measures such as wage and working hour adjustments, job transfers, business suspensions or leaves of absence, occupational training, etc. Labor shall work together with these efforts, and government shall improve its support by reorganizing the employment security project.

3-4 Clarifying procedures required for managerial dismissal

- Efforts to avoid dismissal shall be concretely stipulated in detail, with examples, in the Labor Standards Act, and a reemployment system shall be implemented in reality.

III. Strengthening the Social Security Net

1. Eradicating blind spots in social security insurances and improving effectiveness

- To expand application of the social security insurances and promote subscription eligibility for the premium subsidy program (Doo Ri Nu Ri project) shall be adjusted and applied effectively to businesses.
- Eligibility for social protection shall be gradually given to low income, self-employed business owners.
- The Tripartite will consult together regarding application of Industrial Accident Compensation Insurance for accidents occurring during commute times, occupational injury for emotional labor, etc. Labor and management will participate in the policy-decision process and operation of Employment Insurance and Industrial Accident Compensation Insurance.
- The government will implement general accounting support for the maternity protection project within Employment Insurance.
- Labor and management shall actively participate in establishing employment policies and in the operation of Employment Insurance to ensure their effectiveness and representativeness.

2. Improving the unemployment benefits system and operation

- The government will prepare comprehensive measures for improvement of the unemployment benefits system towards strengthening stability for unemployed people and to promote their reemployment. These measures shall improve effectiveness by extending the unemployment benefit period, increasing the level of benefits, expanding the scope of eligible recipients, widening the definition of “unemployment”, and strengthening support for reemployment. The necessary financial resources for these items will be shared with the burden between the labor and management.

3. Improving the employment support program for the socially disadvantaged

- To support effective employment of the socially disadvantaged, financial subsidies to participants shall be increased, the employment vitalization program shall be made more substantial, and the manpower and physical infrastructure of the job center shall be strengthened.
- Korean-type unemployment assistance, called “Tomorrow Hope-Seeking Project” will be used more effectively, and the scope of coverage and level of subsidies improved.

4. Protecting socially disadvantaged workers and improving their income

- Increasing household disposable income will promote stability for lower-income families and vitalize the domestic market. Continued efforts will be made to improve

taxation and the social security system to reflect the employment-friendly trend.

- The Tripartite will actively cooperate to ensure establishment of 3 basic employment principles: prevention of unpaid wages threatening the livelihood of socially disadvantaged employees and early settlement of those wages, the use of written employment contracts, and compliance with the minimum wage.
- The Tripartite will jointly endeavor to have included in the Labor Standards Act and the Wage Claim Guarantee Act support for employees who have not been paid.
- The Tripartite will establish comprehensive measures to improve the infrastructure for labor inspections, remedy for infringed rights, strengthen the public-private cooperation framework and improve working process.

5. Minimum wage

- The Tripartite will establish mid and long term targets and increase the minimum wage to make it possible for the minimum wage system to contribute to distribution of income. Labor and management will implement a joint campaign to comply with the minimum wage, and the government will strengthen punitive action for violations and widen the labor auditing infrastructure.
- To determine a scientific and reasonable minimum wage, the Tripartite will consult together and propose comprehensive improvements on points of dispute such as statistical standards based upon the research of low income employees, the scope of wages included, part time employees working less than 15 hours per week, regional or industry-specific minimum wages, etc. by the end of May 2016.
- The Tripartite will propose comprehensive improvements after reviewing the effect of the current Earned Income Tax Credit (EITC) and considering the income compensation programs for low income employees such as the minimum wage and national basic livelihood security systems.

6. Strengthening support for working couples

- To support working mothers, the government will improve the availability of childcare by gradually increasing national public childcare facilities to 30% of the total childcare facilities available, requiring transparency from private childcare facilities, improving security for children and working conditions of caregivers, etc. Support will also be strengthened in areas where there is actual demand, such as for working couples.

7. Strengthening a demand-tailored employment benefit service

- In the interest of tailoring towards actual demand, the government will increase public employment services to the OECD average in terms of professional counselors, employment support programs and computer networks, and also advance civilian employment services through public-private partnerships.
- The government will consistently expand the employment plus welfare centers, then integrate job centers in the mid to long term in a way that they become "one stop" service centers, and provide integrated services between the employment & welfare computer networks and employment support programs.

8. Creating a society where occupational skills are vitalized

- To decrease various social evils such as polarization due to academic cliques and excessive certificates, and to cultivate a society where vocational skills are respected, the government will gradually expand NCS-based recruiting methods to state-owned agencies, and then to private companies.
- The government will cultivate a system where employees can work and study at the same time, extend this to high school and university students, and prevent discrimination against working students.
- The government will vitalize a joint labor-management occupational skill development project so that labor and management can actively participate in regional councils focused on human resource development.

IV. Resolution of Three Issues to Eliminate Uncertainty

1. Clarifying the ordinary wage system

1-1 Towards resolution of conflicts and disorder at many companies regarding issues related to ordinary wage, the Tripartite has decided to legislate the concept of ordinary wage and clarify standards regarding excluding allowances paid according to wage characteristics on the basis of the Supreme Court ruling of December 18, 2013.

(1) Definition

- The term “ordinary wage” means all kinds of money that the employer has determined to pay to the employee periodically and uniformly for his/her contractual work, regardless of how such payments are termed.

(2) Excluding allowances

- Ordinary wage will not include allowances to be paid differently according to individual employee's particular situations or regardless of the work quantity or quality. Details will be defined in Enforcement Regulations.

*** Exemplary allowances to be regulated in Enforcement Regulations**

- ① Insurance premiums for employee health, security for the aged, and safety.
- ② Bonuses not yet fixed in terms of whether to pay or how much to pay according to employee achievement and other additional conditions.
- ③ Allowances to be paid later according to company business performance.

1-2 Labor and management will work together to simplify wage compositions and clarify payment conditions to prevent time-consuming disputes regarding payments included in ordinary wage, maintaining stability in employee income, and contributing to company productivity.

2. Revising laws and systems to reduce actual working hours

2-1 To decrease the practice of long working hours and advance the labor culture, the Tripartite will actively work together to reduce working hours to 1,800 hours per year on average for all industries by the end of 2020.

- The Tripartite will work together to legislate working hour issues as soon possible,

improve the labor culture to assist married couples and reduce working hours, and extend the productivity-improvement movement throughout society.

2-2 Holiday work included in extended work

- Holiday working hours are included in extended working hours, as one week covers 7 days, and weekly working hours will be 52 hours (40 hours in weekly standard working hours + 12 hours in extended working hours).

2-3 Gradual application

- Holiday work will be included in extended work one year after revision of law, applying gradually in four steps, one step per year.

1st step: companies employing 1000+; 2nd step: companies employing 300~999; 3rd step: companies employing 100~299; and 4th step: companies employing 5~99.

2-4 Special extended work

- After holiday work is included in extended work, special extended work (more than 52 hours/week) will be permitted, but to prevent abuse, restrictions shall be included such as establishment of permitted reasons (increase of orders, etc.), procedures (written agreement with the employee representative), and maximums (8 hours per week). This special extended work will be allowed for 4 years first after holiday work is fully included into extended work in application. This special extended work system will be reviewed again to decide whether it will be maintained or not.

2-5 The government will subsidize SMEs in facility investment and labor costs due to business difficulties and reduced wages in accordance with the rapidly reduced working hours.

2-6 Reducing the scope of industries allowed to use special extended working hours

- Industries allowed to use special extended working hours are reduced from the current 26 to 10, with maximum working hours and minimum recess hours for the remaining 10 to be reconsidered and prepared along with business surveys and consultation within the Tripartite Commission by the end of May 2016.

2-7 Improvements to exceptional application of working hours

- Proposals for improvement of exceptional application of working hours (such as only for companies employing fewer than 5 employees, agriculture, etc. will be prepared through business surveys and consultation within the Tripartite Commission by the end of May 2016.

2-8 Supplemental measures for reducing actual working hours

- The Tripartite will reduce actual working hours and resolve blind spots, while labor and management will operate a working hours system automatically within the total working hours. However, labor and management shall not abuse working hours in the

name of “protecting employee health”.

2-9 Flexible working hours system

- The unit period when calculating flexible working hours is one month (according to rules of employment), and 6 months (with consent of both labor and management), but is applied from the time permission for the special extended work has expired.

2-10 “Deemed working hours” system

- After business surveys and consultation with labor and management, the government will reconsider related work based upon those works which require, in light of their characteristics, employee discretion in terms of ways used to perform the work.

2-11 Use of all leave days

- The Tripartite will promote the continuous use of all annual leave in terms of the nature of the leave system, and cooperate to create a workplace culture compatible with home life. In particular, the government will play an exemplary role in spreading this atmosphere to all other businesses.

3. Improving the wage system to ease acceptance of retirement age

3-1 Efforts to improve wage systems

- As the May 8, 2008 agreement regarding wage structure improvement for job security, the Tripartite will work together in model development and revision of collective agreements and/or rules of employment so that wage structures like the peak wage system will develop in an employment-friendly way, with the government leading in this process.

3-2 Expanding the peak wage and peak working hour systems

- Labor and management will begin to adjust wage, working hours, and number of working days according to workplace situation to increase acceptance of the extended retirement age and gradual preparation for retirement. The government will support the development of suitable jobs, consulting, incentives, etc. so the extended retirement age and peak wage and working hour systems can operate in a reasonable manner.

3-3 Revising wage structures

- Labor and management will revise wage structures in a reasonable way that promotes job security for middle-aged workers, and a win-win employment situation between generations. Labor and management will implement wage structures according to the trend for revision and the criteria of job duties and skills.

- The Tripartite will ensure observance of the requirements and procedures necessary for revision of collective agreements and rules of employment regarding wage structure revisions, including introduction of a peak wage system. The government will not unilaterally implement the process, but engage in sufficient consultation with labor and management.

3-4 Support for wage structure revisions

- To promote autonomous revision of wage structures, labor and management will establish and operate an exclusive organization, with the government in active support. In particular, the government will expand and reorganize the “Wage Center” so that it provides current information on wage, develop a model wage structure and equitable evaluation criteria, identify and expand excellent examples, and support with consultation services.
- To promote reemployment of middle-aged persons, the Tripartite will strengthen the role of the “Hope Center for the Middle-Aged”, provide a life career program, develop jobs suitable for those approaching their senior years, improve workplaces, and vitalize outplacement. In particular, the Tripartite will focus on strengthening SMEs.

V. Establishing a Tripartite Partnership

- The Tripartite will decrease illegal unfair activities and unreasonable practices, and work hard to cultivate productive bargaining cultures for the purpose of reasonable, future-oriented labor-management relations that can contribute to job creation.
- The Tripartite will strengthen investment in development of labor and management group policy and human resources, and support regional cooperation of labor, management, the population and government, and the labor-management partnership program.
- To strengthen the function and role of the Tripartite Commission, the Commission will endeavor to implement draft legislation for system improvements agreed in the Tripartite Commission in 2013 to include participation of representatives for the youth and irregular employees, etc.
- The Tripartite will regularly share recent information on the economy, industry, and employment in the Tripartite Commission, and consult each other about bilateral cooperation towards improvement of government competitiveness and job creation.
- The Tripartite Commission will operate committees for each industry to strengthen social dialogue at the workplace level.

VI. Implementing & Disseminating the Agreements

- The Tripartite will implement the agreements faithfully, and endeavor to reflect them in the course of consultations at the region and industry level, and collective bargaining at individual workplaces.
- Items required to give substance to the agreements will be discussed at a later time. This includes the establishment of a Tripartite partnership to eradicate blind spots in labor rights and increasing representation by non-organized participants in labor, and other items regarding organizational improvements such as increasing productivity.
- The Tripartite will actively request support so that agreements can be quickly and effectively implemented through legislation and appropriate allocation of funds.

Understanding the Multiple Union System & the Bargaining Representative Union

I. Understanding the Multiple Union System

Generally in the Multiple Union System, only the largest labor union representing more than half of a company's union members will engage in collective bargaining and collective contracting as the bargaining representative union, and has the duty to represent the minority labor unions fairly. Since this Multiple Union System was implemented on July 1, 2011, many changes have occurred in labor relations between employers and the labor unions, both positive and negative. The positive changes include guaranteeing the right to multiple labor unions in one company where employees are free to join the one they like, and even establish their own. The negative changes include the weakening of industrial unions as they are now splintered and must choose a bargaining representative union to represent all of them in each workplace or business unit. Some companies have taken advantage of this change by subsidizing or otherwise supporting company-friendly labor unions to the point where they obtain the majority of union membership. In such situations, the existing combative and unfriendly labor unions find themselves generally powerless as they become minority labor unions that have lost their right to bargain and take action collectively.

This loss of union power has resulted in petitions being filed with the Constitutional Court, claiming employers have violated the bargaining representative system. However, the Constitutional Court ruled that the system of determining the bargaining representative union is constitutional and declared the following: "Article 29-2 of the Labor Union Act regulates that the system for determining the bargaining representative union was designed to solve potential issues in the following areas: In cases where there are two or more labor unions coexisting in a business or workplace, as these labor unions exercise their bargaining rights respectively, problems that realistically be anticipated include: hostility between those labor unions or disputes between the labor unions and the company; an increase in the costs associated with collective bargaining due to having to repeat negotiations in the same bargaining areas; management difficulties in preparing multiple collective agreements; and unreasonable differences arising out of the application of different working conditions for members of different unions who are all providing the same or similar work. The system of determining a bargaining representative union as mentioned above has resulted in restrictions of the collective bargaining rights of minority labor unions not selected as the representative union, requiring certain safeguards to minimize these restrictions. One of the safeguards introduced was the duty of fair representation stipulated in Article 29-4 of the Labor Union Act. This was designed to prevent discrimination against: a) minority labor unions not selected as the representative union (and who had participated in determining the bargaining representative unions) or b) their members by assigning the bargaining representative union and employer the duty of fair representation." (Constitutional Court decision on April 24, 2012, 2011hunma338)

The following explains relevant laws and their application, and the duty of fair representation.

II. Determining the Bargaining Representative Union

1. The right of collective bargaining

(1) Principle: If there are two or more labor unions which are established or joined by workers in a business or workplace, regardless of the type of organization, the labor unions shall determine the bargaining representative union before beginning collective bargaining. The bargaining representative labor union shall have the authority to collectively bargain and conclude a collective agreement with the employer on behalf of all labor unions or union members that requested collective bargaining. A labor union, if there is a collective agreement in the business or workplace concerned, may begin requesting collective bargaining with the employer three months before the expiration date of the existing collective agreement. Provided that if there are two collective agreements or more, the labor union may begin to request bargaining with the employer three months before the expiration date of whichever collective agreement expires soonest.²⁰ In cases where there is only one labor union in the business or workplace, whether the employer shall take the procedure for determining bargaining representative union or not can be a controversial issue to consider. If there is evidently only one labor union existing in the business or workplace, the labor union does not have to go through the procedure. However, although the employer knows that there is only one labor union in the business or workplace concerned, as some employees may join industry-level or regional labor unions, the employer shall demand determination of the bargaining representative union through the procedure for determining the bargaining channel. This will avoid any problems if another labor union was established during the bargaining process or if the fact that another labor union was in existence during the bargaining period becomes confirmed later, perhaps after the employer has concluded a collective agreement with the current labor union.²¹

(2) Exceptions:

1) Separate bargaining: This shall not apply if the employer consents not to undergo the procedure for determining the bargaining channel within the period (14 days) during which the bargaining representative union can be determined autonomously (Article 29-2 of the Labor Union Act);

2) Decision on dividing bargaining unit: The unit for which the bargaining representative union shall be determined shall be a business or workplace. However, if it is deemed necessary to divide the bargaining unit given the considerable disparity in working conditions, employment status, bargaining practices, etc., in a business or workplace, the Labor Relations Commission may decide to divide the bargaining unit at

²⁰ Labor Union Act: Article 29-2 (Procedure for Determining Bargaining Representative Union); Article 29 (Authority to Bargain & Make Agreements); and Enforcement Decree: Article 14-2 (Timing & Method for Demands to Bargain by Labor Unions)

²¹ Guidelines from the Ministry of Employment & Labor: A Manual for Multiple Unions (Dec. 2010)

the request of either or both of the parties to the labor relationship (Article 29-3 of the Act).

2. Procedure for Determining the Bargaining Representative Union

Determination of the bargaining representative union shall be a step-by-step process (Article 29-2 of the Act). (1) All labor unions participating in the procedure for determining the bargaining representative union shall autonomously determine the bargaining representative union within 14 days. (2) If the bargaining representative union is not determined within the 14-day period, the labor union composed of a majority of the members of all labor unions participating in the procedure for determining the bargaining representative union shall become the bargaining representative union. (3) All labor unions participating in the procedure for determining the bargaining representative union, if failing to determine the bargaining representative union, shall jointly organize a bargaining representative team and then begin collective bargaining with the employer. In this case, labor unions eligible to participate in the joint bargaining representative team shall be those whose members make up not less than 10/100 of the members of all labor unions participating in the procedure for determining the bargaining representative union. (4) If agreement fails to be reached on the organization of the joint bargaining representative team, the Labor Relations Commission may decide in consideration of the proportions of union members at the request of the labor union(s) concerned.

The following restrictions shall apply to labor unions not participating in the procedure for determining the bargaining representative union: they cannot request collective bargaining; they cannot apply to the Labor Relations Commission for mediation of labor disputes; industrial action undertaken by such unions cannot be justified as legitimate actions; they cannot seek remedy from the Labor Relations Commission for violation of the fair representation duty.

3. Duty of Fair Representation

The bargaining representative union and the employer shall have the duty of fair representation, which is to treat fairly and avoid discriminating against members of minority labor unions, participating in the procedure for determining the bargaining channel, or the labor unions themselves, without reasonable grounds. If the bargaining representative union and employer engage in discrimination, the affected labor union(s) may request the Labor Relations Commission to remedy such discrimination within three months from the date on which the act is committed. If the Labor Relations Commission recognizes that there has been discrimination without reasonable grounds, it shall issue an order to remedy such discrimination (Article 29-4 of the Act). One example of the failure to uphold the duty of fair representation is when a bargaining representative union paid union officers from a minor union a much lower rate for paid time-off hours than officers from their own union (Seoul Administrative Court ruling on April 25, 2013, 2012guhap35498).

III. Practical Application for Organizations with Multiple Unions

The following are important practical questions related to the bargaining channel system.

1. Question from the private sector

“My company has multiple unions: 60 employees belong to the company-based labor union while another 50 employees belong to the port industry labor union. Today, we received a request for collective bargaining for 2014 wages from the port industry labor union. My company has already concluded a collective bargaining agreement with the company-based labor union after going through the procedure to determine the bargaining representative union when there was a request for collective bargaining in May 2013. At that time, the port industry labor union did not participate in the procedure to determine the bargaining representative union. In this situation, does the company have to respond favorably to the port industry union’s demand for collective bargaining?”

➔Response: The company-based labor union will continue to have authority as the bargaining representative union since your company determined the bargaining representative union after the procedure to decide the bargaining channel in May 2013. Accordingly, the port industry labor union cannot request collective bargaining during the effective period of the collective agreement that the bargaining representative union contracted with the company. They may participate only in the procedure to determine the next bargaining representative union beginning three months prior to expiry of the current collective agreement, which is in May 2015. The courts have also stipulated that any union not participating in the procedure to determine the bargaining representative union has no right to request collective bargaining. (Related reference: Article 29-2 of the Act, Gwangju Appellate Court ruling on August 16, 2011, 2010ra131).

2. Question from the public sector

“In the Seoul City government at present, the Public Service Workers’ Union is composed of full-time employees who are not public servants. This public service workers’ union has a membership of 300 regular full-time workers in 6 subordinate divisions under the City government. Recently, 28 short-term contract workers in the Park Administration Office of the city has established a branch union of the Public Irregular Workers’ Labor Union and requested collective bargaining with the Park Office on April 10, 2014. Does the Park Office have to respond favorably to this request?”

For reference, the City government received a demand for collective bargaining from the Public Service Workers’ Union in 2014, and on March 6, 2014 posted on the bulletin boards of its 6 subordinate workplaces for 7 days that they had requested collective bargaining. No other labor union joined in the request during the posted period. The City government accepted the Public Service Workers’ Union as the bargaining representative union and announced it to the 6 mentioned workplaces. Currently, the

City government is engaged in collective bargaining with this Public Service Workers' Union."

➔ Response: The main issue in this question is whether the City government can be regarded as their employer, or whether the Park Office that hired those irregular workers is considered their independent employer. The designated unit for selection of a bargaining channel shall be "a business or workplace". The business shall not solely be determined in terms of location, but whether that particular business is operated and managed as part of an organic structure, regardless of its location (Supreme Court ruling on February 9, 1993, 91da21381). "Business" means the company itself in operating management, while "workplace" refers to subordinate organizations in different locations. As one business entity belongs to one business, even though several workplaces and business organizations have been commissioned with partly independent management in personnel and labor management, they belong to a business entity as they are generally restricted by corporate directions and purposes. The business entity shall therefore be considered one bargaining unit representing all workplaces and business organizations. However, even though one particular workplace belongs to one business entity, if they are independently operated in personnel and labor management, accounting, and other business functions, that workplace or subordinate organization shall be regarded as one bargaining unit.

Since a bargaining representative union has been determined through the proper procedure according to Article 29-2 of the Labor Union Act, the City government can reject the request for collective bargaining from the 2nd labor union with justifiable grounds. In this case, the 2nd labor union can participate in the procedure for determining the bargaining representative union in two years.

IV. Conclusion

As multiple unions have been allowed at one workplace, the bargaining representative union system was introduced as a restriction against undue complications arising from multiple bargaining requests, different working conditions inside one company, intense struggles between labor unions, and inter-union splits. Some companies have been able to successfully defeat the hostile and combative nature of their majority labor unions through the exclusive bargaining representative union in this Multiple Union System, but in this author's opinion, these are exceptions that have developed in the course of adopting the Multiple Union System. If companies and unions clearly understand and respect the bargaining representative union's duty of fair representation to protect the rights of minor labor unions involved in bargaining representative union selection, all labor unions can be protected equally in accordance with the size of their membership. This would allow the Multiple Union System to be viewed as a way of helping the members of any union, and promote a more active involvement in varying labor unions representing their interests.

An Evaluation of a Collective Bargaining Agreement between a Janitors' Labor Union and their University Employer

I. Introduction (Summary)

On May 27, 2014, a signing ceremony was held for a collective bargaining agreement between a certain university (hereinafter referred to as "the University") and the University janitors' labor union (hereinafter referred to as "the Labor Union"). As representatives of both the Labor Union and the University management signed the collective agreement, it marked an end to the labor disputes that had continued for more than a year and established a new employment relationship. In this article, I would like to review the content of the collective agreement, and the reasons why it took such a long time, in the anticipation of some lessons against making the same mistakes in the next collective bargaining sessions.

In July 2013 when the University had difficulty negotiating with the newly established Labor Union, it gave this labor attorney authority to negotiate on its behalf. The University janitorial staff were employed as regular employees from an outsourcing company on March 1, 2013. The University and the Labor Union began collective bargaining at the time, but this devolved into labor disputes that involved the Labor Commission until May, 2013. The University explained to this labor attorney that since there were no items the two parties could agree on, I could start the collective bargaining from the beginning. After drafting and obtaining University approval for a counter-proposal to the Labor Union's collective agreement proposal (80 articles), I was ready for collective bargaining.

The two parties' negotiating teams began their bargaining sessions on July 16, 2013. The Labor Union's negotiating team was composed of seven persons: two union officers from the umbrella union (the Seoul and Gyeonggi branch of the Korean Public & Social Services and Translation Workers' Union), three union officers from the janitor's union, and two observers from the building management team (outsourced workers at that time). The University negotiating team consisted of three persons: this labor attorney as the chief negotiator, a team leader in charge of general affairs, and the staff member responsible for managing the cleaning services on campus. During the first negotiating session, when the University team submitted the counter-proposal to the Labor Union, the Labor Union showed in the collective bargaining minutes that the previous University bargaining representative had already agreed to 50 of the 80 items. The previous University representative who was in charge of cleaning services explained that he had just signed the meeting minutes without approval from his superiors as the Labor Union had assured him that the meeting minutes could change at a later time. This labor attorney then told the Labor Union that the meeting minutes that the previous University representative had signed were of agreements that the University could never accept, and any agreements made were mistakes by the staff member who had signed the minutes. I then requested that the meeting minutes be officially determined as void.

For this action, the Labor Union filed a complaint with the Labor Office against the University president, the general manager, a team leader in charge of general affairs, and the new chief negotiator (this labor attorney) for unfair labor practice in early August 2013. The Labor Union took several actions in protest including a press conference, a one-person picket of City Hall, a regular Wednesday sit-in protest at the University headquarters, and a slowdown of cleaning services. The chief Union negotiator took to tearing up the University's counter-proposal at the bargaining table, and throwing his hot coffee at the team leader in charge of general affairs for being late to one of the collective bargaining sessions.

In November, after investigation, the Labor Office found there to be no evidence of unfair labor practice by the University declaring the two meeting minutes void, and threw out the Labor Union's complaint. After this, the Labor Union demanded that there be no discrimination between the university labor unions, and that the University should allow this Labor Union's activities as it allowed other unions their activities. The University accepted some of the Labor Union's demands, and both parties managed to reach agreement on 20 items, including union activities.

In February 2014, major disputes moved on to job security, protection of union activities, and allowance of paid time off for one full-time union officer. In terms of job security, the Labor Union demanded extension of the retirement age to 70 (instead of the current 65 years of age), in light of over 20 union members expecting to have to retire at the end of the year if this was not done. When the University rejected the demand to extend retirement age to 70, the Labor Union began taking action on February 29, 2014, hanging up approximately 30 banners around the campus, and setting up a tent at a building near the main gate to engage in a sit-in strike at the tent.

By April 1, 2014, the number of union members had dropped to just half of the total janitorial staff. In this worsening situation, the Labor Union had to withdraw their demand for extension of the retirement age to 70, and instead accepted that the University would work to protect job security. As the Labor Union could not perform union activities for a long time without a collective agreement, it seems to have decided that the next best alternative was to accept realistic measures. The Labor Union then suggested to the University that a working level negotiating team be formed to draw up a collective agreement as soon as possible, which the University accepted. This working-level team consisted of three members of the Labor Union and three University representatives. The working level negotiating teams reached agreement on all remaining items and finalized the collective agreement.

II. Rejection of Meeting Minutes & Unfair Labor Practice

When a labor union was established for the janitorial workers and demanded a collective agreement, the University appointed the staff member in charge of cleaning services as its collective bargaining representative. This particular staff member had no experience negotiating with labor unions before, and as the Labor Union repeatedly asked him to sign the meeting minutes, he did so simply to confirm that he had

negotiated with the Labor Union. When this labor attorney, in preparations for collective bargaining, reviewed the contents of the signed meeting minutes, there were many articles that the University must not accept in any situation. Some examples:

“Anyone engaging in unfair labor practice as defined in Article 81 of the Labor Union Act shall be subject to disciplinary action.”

“The Disciplinary Action Committee shall consist of 4 representatives from the Labor Union and 4 from the University. Half or more of the Disciplinary Action Committee shall be present, and consent from a majority of those present is required before disciplinary action can be taken.”

The University also disagreed with such requirements as it needing approval from the Labor Union when handling many different personnel issues.

For these reasons, the University could not accept the meeting minutes. In addition to filing a complaint against all negotiating team members of the University including the University president for unfair labor practice, the Labor Union also demanded the replacement of this labor attorney as University negotiating team representative.

The Labor Union delayed collective bargaining until the Labor Office determined there was insufficient evidence of unfair labor practice by the University, and dismissed the case on November 27, 2013.

III. Issue Related to Extension of the Retirement Age

When the janitorial workers were employed by the outsourcing company, there were no regulations regarding retirement age, but upon direct hiring by the University in March 2013, the University's retirement age regulations became applicable. Their wages also increased considerably because they received the service fees normally paid to the outsourcing company, and other working conditions like welfare benefits improved as well. However, as the retirement age had recently been set at 65 (although the University allowed application for two years' delay in mandatory retirement), 22 of the approximately 60 janitorial staff were due to retire at the end of 2014 in accordance with retirement regulations. The Labor Union demanded extension of the retirement age to 70, but as the University received a subsidy for janitors' wages from Seoul city government, this was impossible without the city government changing its policy. The Labor Union had to accept the fact that the University could not agree to any extension of the retirement age without the consent of the city government, and on April 1, 2014, withdrew this demand, accepting that the University would seek to provide job security.

IV. Articles Related to Personnel & Managerial Rights

Articles related to personnel and managerial rights refer to an employer's authority to make decisions affecting personnel, such as determining regulations on working hours, work place, work assignments, and disciplinary action, etc. It would be an infringement of its personnel and managerial rights if a company were to be required through inclusion in the collective agreement such conditions as needing prior

agreement from or advance consultation with the labor union, or having to seek the labor union's opinion before making such decisions. When the Labor Union in question requested collective bargaining, many of the articles they presented infringed on these employer rights. However, at the end of the day, many of these demands were moderated.

Items in the Labor Union Proposal Affecting the Employer's Personnel & Managerial Rights	Negotiated Changes in Final Collective Agreement
<u>(Establishing & abolishing rules)</u> In order to establish or abolish any rules, the University shall receive advance agreement from the Labor Union.	In order to establish or revise any rules, the University shall receive the Labor Union's opinions. However, before revising the rules unfavorably, the University shall obtain the Labor Union's consent.
<u>(Disciplinary or personnel issues for union officers)</u> Regarding disciplinary or personnel issues for the full-time union officer or other union officers, the University shall receive advance agreement from the Labor Union.	Regarding personnel issues for the branch union chairman and branch union officers, the University shall receive the opinion of that person in advance.
<u>(Personnel assignments)</u> The University shall receive advance agreement from the Labor Union when assigning Labor Union members to certain positions.	Personnel assignments shall be implemented fairly and objectively, with the University assigning positions in consideration of the individual's opinion and previous work location.
<u>(Composition of Disciplinary Action Committee)</u> 1. The Disciplinary Action Committee shall be composed of 4 persons representing labor and 4 persons representing management. 2. The Disciplinary Action Committee shall occur with a majority of all members, and decisions shall require agreement by the majority of those present. If votes result in a tie, the motion shall be rejected. Dismissals shall require the consent of at least two-thirds of those present.	The Disciplinary Action Committee shall be composed of three persons appointed by the University, and one observer from the Labor Union shall be allowed to represent the Labor Union's views, and to be present during the entire Disciplinary Action Committee meeting. If the observer's presence is not permitted, any disciplinary action taken is null and void.
<u>(Maintaining appropriate headcount)</u> When deciding to reduce the workforce, the University shall receive advance agreement from the Labor Union.	The University shall strive to maintain the appropriate size of workforce in cooperation with the Labor Union.
<u>(Revision of wage structure)</u> When intending to revise wages or organization, the University shall receive advance agreement from the Labor Union.	When intending to revise wages or organization, the University shall receive the Labor Union's opinion in advance.
<u>(Working hours)</u> When intending to revise working hours, the University shall inform the Labor Union 30 days in advance, and shall not adjust them without agreement from the Labor Union.	When intending to revise working hours, the University shall discuss with the Labor Union before making the adjustments.

V. Conclusion (Evaluation of the Collective Bargaining Process)

Generally, collective bargaining with new labor unions results in many disputes, and the situation in this article was no exception. When beginning these particular collective bargaining sessions, I followed two principles: 1) the collective agreement shall not

infringe on the employer's personnel and managerial rights; and 2) the collective agreement shall create an employment situation that is sustainable for the University later.

There were three major issues in the course of the collective bargaining. The first issue was that by signing the meeting minutes, the former University representative agreed on 50 of the proposed items from the Labor Union before this Labor Attorney came to represent the University as chief negotiator. This mistake by the previous representative resulted in extended conflict between labor and management when the original meeting minutes were rejected: the Labor Union filed a complaint against the responsible University managers for unfair labor practice, which also served to delay the collective bargaining process as both sides had to wait for a decision from the Labor Office. The second issue was the Labor Union demanding extension of the retirement age from 65 to 70. When this was refused, the Labor Union hung about 30 protest banners around the campus and staged a sit-in protest in a tent at one of the gates. Since any changes to the retirement age required city government approval, the University could not agree to this demand, even though it was understood that this demand arose from the fact that 20 of the 60 employees were supposed to retire by the end of 2014. The third issue was the infringement of the employer's personnel and managerial rights, which was the strategy the Labor Union used to protect jobs. In practice, when an employer allows such rights to be restricted in the collective agreement, labor disputes increase and rifts in labor-management relations arise.

Although a reasonable collective agreement between the University and the Labor Union was ultimately concluded, one major problem was the length of time it took: 15 months. There were two reasons for this. Firstly, the Labor Union involved the umbrella union at the bargaining table, resulting in the first draft proposal containing many items that infringed on the employer's personnel and managerial rights, and demands for working conditions and union activities beyond what the University could afford to accept. Secondly, the University had no specialized staff with the knowledge of labor laws necessary for dealing with a labor union. As the Labor Union received professional support from its umbrella union, the University decided to hire an outside labor specialist for the professional legal support they lacked. Due to a failure to cooperate and compromise, the Labor Union and the University were unable to conclude a collective agreement except after labor disputes and a significant amount of time and effort.

Despite the aforementioned problems, the final collective agreement was accepted by both parties. The Labor Union was recognized as a labor union, receiving an office and workers' lounges, paid time-off for union activities, and additional off-days, etc. For its part, the University also views the outcome as a success, as it was able to protect its personnel and managerial rights as an employer, and sign a sustainable collective agreement. It is desirable that the resulting agreement, concluded after much struggle, will play a pivotal role in maintaining peace between labor and management, and allow both parties to base their labor relations on a win-win situation.

Forced business closure as a result of a labor union's abuse of its rights

I. Summary

This case is about a taxi company in Yeosu, South Jeolla Province, that actually had to shut down its business due to abuses by the labor union of its own rights. These same abuses resulted in the new employer, who purchased the taxi company, also having to shut down. The taxi company had been unable to increase the 'deposit money which taxi drivers have to turn over to the company out of their daily earnings' ("daily deposit") for its last ten years, which resulted in accumulated deficits over a long period of time. Furthermore, the company was not allowed to discipline any employees who violated company regulations over the last ten years either.

This company was the biggest taxi company in Yeosu about 10 years ago, with 80 taxis. The company and the labor union agreed on a daily deposit amount in their collective agreement in 1998. The daily deposit amount stipulated in the collective agreement was much lower than that of any of the other taxi companies, and so this helped to maintain peace between management and labor for some years. However, from 2000, the company started facing difficulty from operational deficits due to inflated prices, a rise in fuel costs, etc, and the company requested an increase in the daily deposit, but the labor union rejected, arguing that the company's explanation of the reasons for the monthly deficit could have been falsified. The employer then completely laid out the company's financial situation to the labor union in the hopes of being able to rescue the company, and desperately demanded the drivers' daily deposit be increased up to the minimum break-even point. However, this was impossible, as the labor union was unwilling to compromise. In the end, the employer had to sell the business in February of 2006, due to its accumulated debt.

A new employer purchased the taxi company with a verbal promise from the labor union that it would increase the daily deposit, but when the new employer purchased the company, the labor union allowed the increased daily deposit for only two months, after which the labor union returned to the previous daily deposit. When the new employer decided to stop subsidizing fuel in order to prevent another deficit, the union members submitted their daily deposit after deducting an amount equivalent to the fuel subsidy. The company, following the disciplinary procedures in company regulations, then dismissed several union officers who had led other union members to deduct the fuel subsidy from their daily deposit. However, the Labor Relations Commission ruled that the dismissals were unfair in that the company did not observe the expired collective agreement's disciplinary process, which was that "the disciplinary action committee shall consist of an equal number of representatives from the company and the labor union, and its decisions shall be decided by a two-thirds majority of the committee members present." The new employer could not raise the taxi drivers' daily deposit amount, and was also told that the Labor Office had decided that the company's cessation of a fuel subsidy was illegal. Again, in the end, the new employer had to give up the business, due to the accumulated debt, only two years after purchasing the company.

II. Timeline of Major Events

- | | |
|----------------------|--|
| 1. 1979 | The taxi company was established. |
| 2. May 1, 1998 | The drivers' daily deposit, 65,000 won, was stipulated in the collective agreement. |
| 3. July 2004 | A deficit of 10 million won per month started occurring, due to the rise in fuel costs. The company desperately demanded that the labor union accept a 5,000 won increase of the drivers' daily deposit, the minimum to break even, but the labor union refused. |
| 4. Oct 29, 2004 | The company notified the labor union of the cancellation of the existing collective agreement. |
| 5. Apr. ~ May 2005 | The labor union went on strike for two months to prevent the sale of the taxi company. |
| 6. Dec 2005~Feb 2006 | The taxi company suspended business for three months due to accumulated debt, and then was sold. |
| 7. Mar ~ Apr 2006 | A new employer purchased the company after obtaining a verbal promise from the labor union that they would raise the drivers' daily deposit by 9,000 won. However, the labor union returned to the previous daily deposit two months later. |
| 8. May 2006 | After two months, when the new employer continued to deduct the increased daily deposit, the employees sued the company for these deductions, and the Labor Office ordered the company to return these deductions to the employees. |
| 9. May ~ Nov 2006 | The new employer desperately demanded that the labor union raise the drivers' daily deposit so the company could stop running a deficit. Negotiations with the labor union were held more than twenty times, but the labor union rejected the increase to the end. |
| 10. After Nov 2006 | After sufficiently explaining the need to stop the fuel subsidy, the company stopped subsidizing fuel costs. The union members then reduced their daily deposit to 47,000 won, after deducting 18,000 won, equivalent to the fuel subsidy. |
| 11. Nov 2006 | The company dismissed key union officers who defied the company's decision to cease the fuel subsidy. |
| 12. Dec 19, 2006 | The Labor Relations Commission ruled that the dismissals were unfair because the company violated disciplinary procedures. |
| 13. May 21, 2007 | The employer appealed, but lost the case. |
| 14. Aug 27, 2008 | The new employer gave up the business due to the debt load. |

III. Necessity for the increase in the taxi drivers' daily deposit and the labor union's objections

1. Necessity for the increase in the taxi drivers' daily deposit

When the company and the labor union determined the drivers' daily deposit of 65,000 won in the collective agreement in May 1998, the fuel was 222 won per liter, but in June 2006, it rose up to 737 won, a 330% increase. During this period, the base taxi fare was 1,300 won, and increased to 1,800 won. However, the taxi drivers' daily deduction did not increase due to the labor union's continuous objections.

2. A written statement from one of the former company presidents

My company had the best working conditions of all taxi companies in July 2004. Their average monthly income was 300,000 won more than their counterparts at other taxi companies, and thanks to this situation, we were awarded a prize by the Minister of Construction and Transportation in the field of labor-management relations. However, with the rise in fuel costs, the company could not share any profit with its stockholders, and even the company's invested capital was at risk, due to the accumulated debt. The company had been losing, on average, 10 million won every month.

At the emergency board meeting, I was elected the new representative director. Based on my three basic standards of company management like a principle of trust, win-win situations, and transparency, I started to negotiate with the labor union and laid out the company's financial situation for the labor union to see (the union inspected the company's business practices three times), but the labor union would not agree to an increase of their daily deposit. The company requested only 5,000 won more, the minimum to break even, explaining that the company would do business without profit for the time being so as to rescue the company, but the labor union refused the company request, repeatedly claiming the company was not losing money. The board meeting concluded with the company still unable to recover from its accumulated fuel and other debts, and in the end, it was sold, with the entire amount from sale going to payment of company debts.

A considerable number of faithful union members suggested the daily deposit be increased an additional 10,000 won (even in this case, an employee could receive, on average, 100,000 won more per month than at other companies) demanding that the company suspend its sale, but their efforts availed nothing, due to threats and interference from a few militant union members.

3. Comparison of wages versus taxi drivers' daily deposit

– prepared by a certified public accountant (as of Nov 1, 2006)

1) Company income per driver (daily deposit): 65,000 won x 25 days = **1,625,000 won/month**

2) Labor costs (direct costs + indirect costs) → **1,976,609 won per driver per month**

- Direct labor costs: basic pay, long-term service allowance, car wash allowance, summer vacation allowance, tuition subsidy, severance pay reserve, insurance premiums for the four social security insurances, compensation for unused annual/monthly leave, paid leave allowance (5 days), gift expenses, fuel subsidy (26.7 liters) → 1,272,645 won

- Indirect labor costs: management staff labor costs, general expenses, car insurance, depreciation of car values, car repairs, dividends to stockholders → 703,963 won

3) Company income versus individual labor costs

1,625,000 won (company income) – 1,976,609 won (labor costs)

= **-351,609 won (deficit amount per individual per month)**

IV. Loss of the company's right to implement disciplinary action

Through negotiation with the labor union, the company introduced a disciplinary process in the collective agreement which stipulates, "the disciplinary action committee shall consist of an equal number of representatives from the company and the labor union, and its decision shall be decided by a two-thirds majority of the committee members present." The company gave up its right to unilaterally take disciplinary action in order to include the labor union as a business partner and to cooperate in a win-win strategy. Unfortunately, the company was not able to take disciplinary action against even one union member over the company's last ten years on account of the

requirements for taking disciplinary action within the disciplinary process. Consequently, sometimes union members cursed the employer and neglected to carry out their duties properly. Union members also frequently caused car accidents. As a result of the lack of disciplinary action, the company had to pay more in annual car insurance premiums than other companies: more than 2 million won per taxi, compared to about 1 million won per taxi for the company's competitors. This was as a direct result of the company's inability to maintain ethical standards through disciplinary action. What is worse, under this disciplinary process, the company couldn't even punish an employee who sued the employer without justifiable reason. This resulted in a collapse of order within the company, so manager directions were not adequately implemented.

V. Related judicial rulings and administrative interpretation

If a collective agreement expires, provisions concerning disciplinary process continue to be effective as normative sections. (Jan 25, 2007, Labor Relations-293)

Although the effective period of the collective agreement expires or the collective agreement is declared invalid by one party cancelling the agreement during the autonomous extension period, 'standards concerning working conditions and other matters concerning the treatment of employees' (namely, the normative section), as prescribed in the collective agreement, would still remain in effect as the working conditions of individual employees. If the employer wants to revise the normative section, he shall conclude a new collective agreement in accordance with legitimate procedures, or revise the Rules of Employment and obtain collective consent of the employees concerned. (Supreme Court Ruling, Jun 9, 2000, 98da13747)

In cases where the employer agrees with the labor union in the collective agreement that "when taking disciplinary action, the disciplinary action committee shall consist of an equal number of representatives from the company and the labor union, and its decision shall be decided by a two-thirds majority of committee members present," it is true that it is practically impossible to discipline employees who violate company regulations. Although this makes it difficult to take disciplinary action, the validity of the disciplinary process as stipulated in the collective agreement, will still hold.

VI. Conclusion

In this labor case, as in other cases where the employer gives up a certain range of personnel and management rights in order to maintain peace with the labor union, the results are evident. The loss of managerial and personnel rights will lead to failure of the business, reducing competitiveness in the market and employee job security as well. Therefore, when an employer establishes autonomous agreement by collectively bargaining with the labor union, the employer should not forget that he or she should negotiate with the labor union within certain boundaries: fundamental employers' rights, namely, personnel and managerial rights, should not be given up in the collective agreement. If the employer hands over personnel and managerial rights to the labor union, it should be remembered that negative consequences will occur for the employer and the labor union in the long run.

Recovery of Infringed Managerial Rights through Collective Bargaining

I. Major Outlines

A labor union of civilian employees employed by one local autonomous government (hereinafter referred to as “the employer”) was established ten years, and has obtained the labor union’s rights by involving into managerial rights and expanded paid union time though collective agreements. The employer could not operate manpower efficiently due to the labor union’s involvements at managerial rights in reality, and the employer has also been obstructed at work performance gradually due to the excessive paid union time. Under these circumstances, since existing collective bargaining expired in April 2008, the labor union and the employer could not renew the collective agreement due to many differences despites ten collective bargain meetings. Then, the employer commissioned me with this collective bargaining authority in March 2009, demanding that I should delete infringed articles related to managerial rights and reduce the labor union’s too much paid union time. This labor attorney has implemented 24 collective bargaining meetings very faithfully with the labor union from March 2009 to Oct 1st. Based upon sincere collective bargaining meetings, the employer recovered the infringed managerial rights from the collective agreement, and the employer also reduced the labor union’s paid union time in half. Of course, in return for their compromises, the employer paid back to the labor union with improved working conditions such as extension of retirement age, increase of health checkup subsidy, introduction of interim severance pay, etc. Finally, we concluded collective bargaining into the collective agreement, exchanging mutual gains.

II. Collective Bargaining Summary

1. The employer proposed the labor union for the employer’s draft of collective agreement. (Feb 17, 2009)
2. 1~2nd collective bargaining meetings on Mar 11(Wed), 11th and Mar 19(Wed)
 - The labor union did not recognize the company’s labor attorney as the employer’s representative negotiator.
3. 3~7th collective bargaining meetings on Apr 1(Wed), Apr 15(Wed), Apr 24(Wed), and Apr 29(Wed)
 - The labor union did not respond to the employer’s collective agreement draft at all, but instead requested for collective bargaining on wages first.
4. 8th collective bargaining on May 6(Wed)
 - The labor union unilaterally declared the status of industrial disputes, and the labor union held a press conference and announced a strike against the employer on May 13 (Wednesday morning).
- 5. The employer informed the labor union of cancellation of the collective agreement on May 13, 2009 (in the afternoon): its effect will be available in 6 months on Nov 13.**
6. Application to the Labor Relations Commission for adjustment of industrial disputes and both sides rejected mediators’ draft. (10 days from May 20 to May 29)
7. After a bargain broke down, the labor union held more than 50 demonstrations in front of city hall from May to October.
8. The labor union requested for a meeting with a mayor and had a meeting with the relevant director on Jun 10.
 - The both parties agreed on the resumption of practical collective bargaining.
9. 9th collective bargaining on Jun 17 (Wed) and held a sit-in strike demanding at least three collective bargaining meetings in a week.
10. 10th collective bargaining on Jun 24(Wed)

- Both parties agreed on one collective bargaining meeting per week, and the labor union started to respond to the employer's draft.
- 11. 11 ~ 21st collective bargaining meetings (Jun 1(Wed) ~ Sep 24(Thu))
 - Agreed on most articles of the employer's draft excluding controversial issues concerning managerial rights, disciplinary actions, full-time union officials, etc.
- 12. 22 ~ 23rd collective meetings on Sep 30(Wed) and Oct 14(Wed)
 - The labor union proposed a greatly compromised collective agreement.
- 13. Both parties agreed on the new collective agreement and held a signing ceremony on Oct 28, 2009 (Wed).

III. Background of the Employer's Cancellation of the Collective Agreement

1. The labor union's perspective

- (1) The existing collective agreement has a provision of an automatic extension for its effective period that the current collective agreement continues to be effective while the collective bargaining is going on even though the collective agreement expired, and there is also a provision of an automatic renewal if one party does not request for a revision at the current collective agreement. Therefore, due to aforementioned articles of the current collective agreement, the labor union does not have to negotiate with the employer's draft that is very disadvantageous compared to the existing collective agreement. This is why the labor union did not respond to the employer's draft.
- (2) The labor union cannot give up the current collective agreement because it is the labor union's rights that they have acquired through their struggles against the employer for the last ten years.

2. The employer's perspective

- (1) The collective agreement is effective for two years and when its period expired, the collective agreement is not valid.
- (2) The employer explained that what the employer is pursuing in this collective bargaining is not to revise current working conditions unfavorably, but to recover infringed managerial rights, which are the employer's fundamental rights.
- (3) Although the employer had held collective bargaining meetings with the labor union 8 times, the labor union did not respond to the employer's draft at all. So, the employer decided to cancel the collective agreement in order to start a practical negotiation on the employer's collective agreement draft.

IV. Contents Recovered from Infringed Managerial Rights

1. Revision of provisions requiring the labor union's agreement and consultation

- (1) 'Establishment or revision of the regulation'
 - Current: When the employer intends to establish, revise or abolish regulations and rules related to the labor union members including the rules of employment, the employer shall consult with the labor union in advance.
 - Revised: This provision is replaced to Article 94 of the Labor Standards Act.
- (2) 'Restriction of hiring irregular employees like daily worker'
 - Current: When the employer intends to hire irregular employees, the employer shall consult with the labor union in advance concerning necessity of employment, employment period, numbers, and positions.
 - Revised: It is a principle that the employer shall not use irregular employees like daily worker on the jobs that the labor union members are engaged in.

(3) 'Introduction of new technology'

- Current: The employer shall provide all information related to new technology to the labor union and shall introduce new technology under a consultation with the labor union.
- Revised: When the employer intends to introduce new technology or change current technology, the employer shall provide relevant information in advance to the labor union.

(4) 'Outsourcing or subcontracting'

- Current: The employer shall determine it through mutual negotiation with the labor union in advance.
- Revised: When there is a change in employment relations or working condition, the employer shall listen to the labor union's opinion.

2. Revision of disciplinary provisions

(1) Severity of disciplinary punishment

- Current: The types of disciplinary punishment were expressed based upon the number of misbehaviors. (For an example, disciplinary dismissal is only possible to a person who used violence to his/her superior three times.)
→ This means that the employer cannot dismiss the union employee until he/she used violence against his/her superior three times. So, this article infringed on the employer's justifiable disciplinary action.
- Revision: The type of disciplinary is determined by the severity of violation and the degree of negligence. The previous provision, 'the number of misbehaviors' was deleted.

(2) Composition of the disciplinary action committee

- Current: The disciplinary action committee shall consist of five members: three managers representing the employer and two persons representing the union members. The determination is made by the affirmative vote of a majority of the members present at a meeting where a majority of all members are present.
→ As it was hard to compose a disciplinary action committee to discipline a union member who violated rules, the employer could not implement it. I persuaded the labor union that what the labor union pursues honestly in the disciplinary provisions shall be a fair disciplinary process.
- Revised: The disciplinary action committee shall be composed of three persons designated by the employer, who shall provide an observer an opportunity to state his/her opinion, guarantee his/her presence at the disciplinary committee meeting until the final decision-making time. If the observer's presence was not allowed, its disciplinary decision is null and void.

3. Revision of other unreasonable provisions

(1) Reduction of the number of full-time union official and paid union time

- Current: Two full-time union officials (for 230 union members) and 4 hours per day (monthly 88 hours) allowed for paid union time for branch labor union representatives.
- Revised: Full-time union officials are reduced to one and branch union representatives' paid union time is reduced 8 hours per week.

(2) Deletion of labor-management council-related detailed provisions

- Current: There were separate provisions for the labor-management council in the collective agreement: [Labor-Management Council], [Matters to reported],

[Matters subject to consultation], [Matters subject to council resolution], [Provision of business data], and [Effect of matters subject to council resolution]

→ As the detailed provisions of the labor-management council are stipulated in the collective bargaining, the labor union can request a collective bargaining every quarter and the company shall respond to the labor union's demand.

- Revised: all provisions of the labor-management council except one provision, [composition and operation of the labor-management council] are deleted out of the collective agreement.

(3) Obligation to respond to collective bargaining

- Current: 'When one party requests for a collective bargaining, the other party shall respond to that demand.'
- Both parties shall keep peace duty during the effective period stipulated in the collective agreement, but this provision can nullify this provision.
- Revised: Added with 'in closing to the expiry date of the existing collective agreement'

V. Background of the Union's Compromise and Evaluation of Collective Bargaining

1. Background of the labor union's compromise

(1) The employer's consistency in collective bargaining purpose

The employer consistently explained that the purpose of this collective bargaining was not to worsen existing working conditions, but to recover infringed managerial rights from collective agreement. The labor union gradually tried to find compromised agreement, because the labor union would lose all contractual rights that the labor union has acquired if the collective agreement expired. Under circumstances where the existing collective agreement is about to expire by the employer's unilateral cancellation of the collective agreement six months ago, the labor union faced a big burden for its result and accepted most provisions of the employer's proposed draft just before termination of the collective agreement.

(2) The employer's reliability in the collective bargaining

The employer has maintained reliable attitude at weekly collective bargaining meetings in a good faith and sincerity rotating meeting places of both parties. Also, the labor union has not been interfered much during collective bargaining from its umbrella labor union thanks to long time confidence developed between the labor union and the employer.

(3) The labor union's weakened strike power

After adjustment of industrial disputes broke down, the labor union had staged protesting demonstrations more than 50 times in front of city hall, but the employer did not respond to their demands, keeping consistent attitude, and so the labor union's collective actions could not bring their expected effect.

2. Evaluation of collective bargaining

This collective bargaining was a remarkable case that has changed existing practices that the employer has unilaterally compromised to the labor union's demands so far. The employer recovered infringed managerial rights through negotiating sincerely with the labor union, and the labor union also acquired practical gains. Therefore, this collective bargaining has helped both parties throw away existing confrontational and combative relations and instead build up mutually complementary and cooperative relations.

An Airline Labor Union Improves Working Conditions

I. Introduction

As a labor attorney, I have usually represented companies on labor issues, but recently I was asked to provide some consulting by a labor union (hereinafter referred to as “the Union”). This particular union is composed of employees of a foreign airline (hereinafter referred to as “the Company”) and was established in April 1989, surviving simply as an entity without a collective agreement for the past 25 years. As soon as the Union was established, the company had treated the Union chairman so disadvantageously (such as moving him from the Seoul office to a workplace at the airport) that he was obliged to resign. In addition, the Union was unable to carry out its duties due to the headquarters’ continuous habit of disadvantaging all succeeding union officers. Although Union members’ salary was superior to that of employees at other airlines in the beginning, their salary increases had not kept pace with their peers’ at other airlines. Through 10 months of collective bargaining, the Union was able to improve its working conditions, including salaries, with the assistance of a professional (this labor attorney) through legal advisory consulting.

This article will describe how the Union concluded a successful collective agreement, and dealt with major issues.

II. Company Handling of the Union

1. Company refusal to recognize the Union

The Company refused to recognize the Union entity, and shut down attempts at collective bargaining by creating an atmosphere of insecurity for Union members and treating them unfavorably. Some of the details are listed below.

(1) When the Union was established in 1989, the Company moved its new Union chairman from the head office in Seoul to the airport branch office, without a promotion or salary increase, after which the Union chairman decided to resign.

(2) Between 2009 and 2012, the branch manager emailed Union members at “director” level (a Korean employment rank designation) and threatened them as pressure to withdraw their membership from the Union. This included public orders to withdraw their membership during wage bargaining meetings, which resulted in several directors withdrawing their union membership. As an explanatory side note, although their Korean title was “Director”, they did not have any practical management authority over lower-ranking employees, and just worked as “persons in charge”. Their English title was still “Employee”: only those with the Korean rank of “Manager” could use their Korean titles in English, as they had actual management authority (Manager = Team leader = Department head). “Director” was simply a title given to recognize their age and their long service.

(3) The branch manager also included threats during labor-management council meetings or the wage bargaining table, saying repeatedly “My company’s wage level is inferior. If you don’t want to work for that wage, then quit.” This prevented any effective bargaining with the employer.

(4) The company also constantly reminded employees through various department heads and the branch manager’s secretary, of its intention to disadvantage any union members refusing to obey company policy.

Together, this kind of environment cowed the Union members against pursuing a collective agreement.

2. Disadvantageous changes in working conditions

(1) Wage cut: The Company unilaterally cut out almost 1/3 of its regular bonus in 2009 (normal bonuses equaled 650% of normal salary, but only 450% was paid out that year). Although the Company informed the Union chairman and Union officers in writing in February 2009, the Company designated a particular Union member to sign the agreement, completely ignoring the Union chairman, and used this “agreement” to make the unilateral cut in May of the same year.

(2) Unpaid incentive (in 2012): The Company paid incentive bonuses every year in the past when it reached its corporate targets. However, although the Company reached its 2012 targets, no incentive bonus was paid, nor any explanation given.

(3) Changing menstruation leave from paid to unpaid leave (from 2009): Prior to 2009, the Company had paid menstruation leave allowances to women, but changed this to unpaid leave without collective consent or Union agreement.

(4) Unilateral reduction of sales allowances for sales department employees: Sales employees had received 450,000 won in sales allowance every month, but in 2009, the Company reduced this sales allowance to 350,000 won without notification or explanation to the sales department. It was again unilaterally reduced to 250,000 won in 2012. Unilaterally changing a long-running sales allowance twice is a disadvantageous change of working conditions.

III. Details of Collective Bargaining

1. The Company’s attempts to evade collective bargaining

The Union requested collective bargaining in January 2014, and at the first meeting on February 10, 2014, demanded a collective bargaining schedule. The Union also handed over a draft of the collective bargaining demands, without response from the Company. The Union sent two reminders in writing, but still no response. Then, suddenly, the Korean branch manager (a non-Korean) returned to his home country without notifying the Union of any bargaining schedule. It is assumed that this was part of the Company’s strategy to maintain the existing situation and avoid making a collective agreement.

2. Inducing the Company to engage in collective bargaining through Labor Ministry authority

When the branch manager returned to his home country in March 2014, the Union decided to exercise its rights guaranteed by the Constitution to force the Company to the bargaining table, and began lawsuit proceedings with the Ministry of Employment & Labor for the Company’s unfair labor practices and violations of the Labor Standards Act.

The purpose of the suit was to retrieve the illegally reduced wages, and continue to work out collective bargaining with the Company. The Company’s former branch managers were required to attend the Labor Office investigations, coming to realize the power of the Union for the first time. After two months of investigations, in July 2014 the Company had to return the unpaid wages, and also the additional 200% of the regular bonus that was deducted illegally. As the Union accepted the payment of the retroactive wages and trusted the Company’s verbal promise to engage in collective bargaining, the Union withdrew the suit it had filed against the Company.

3. Concluding a collective agreement through the Labor Relations Commission

The Company appointed the Busan branch manager as its representative negotiator and began to negotiate a collective bargaining agreement with the Union in July 2014, meeting 8 times up to September 23. However, the Company continually rejected any other working conditions except those agreed on in the rules of employment, claiming that the collective bargaining draft contained so many articles that infringed on Company personnel and management rights. On top of this, the Company also pushed to lower the current working conditions in return for increasing salaries.

The Union decided that this kind of collective bargaining would yield nothing in the way of better working conditions, and on September 25, 2014, applied to the Labor Relations Commission for adjustment of labor disputes towards obtaining the official right to strike (case number: NLRC 2014 mediation 99).²²

The Labor Relations Commission assigned this case to the Special Mediation Committee of the National Labor Relations Commission for 15 days, as the Company belonged to the public services industry as an aviation service and had workplaces in several cities (Seoul, Busan, Incheon etc.). The Special Mediation Committee held its first investigation meeting on September 29, 2014, and then held a preliminary mediation hearing for 4 hours on October 7. The Company had stubbornly rejected the Union's proposals, but displayed serious concerns at the present situation which could lead to a strike by the Union. Although the Company began negotiating more actively than previously, the parties could not reach agreement within the permitted mediation period of 15 days due to the wide gap in their viewpoints.

The Company and the Union agreed to extend the mediation period and an additional 15 days were permitted. The Union focused on obtaining Company recognition of itself and recovering the unfavorably-changed working conditions rather than striking. Labor and Management made the most of the mediation period, intensively negotiating a final agreement on changes related to 28 of the 60 articles in the first collective agreement draft. Both parties submitted the agreed draft to the Special Mediation Committee which in turn accepted it, making the collective agreement official.²³

This successful outcome was possible thanks to two distinctive factors: (1) the two parties were required to attend the compulsory mediation hearings held by the Labor Relations Commission; (2) three commissioners from the Special Mediation Committee worked hard with labor and management in the process of reaching agreement. If the commissioners had been unsuccessful in persuading the employer, concluding a

²² **LABOR UNION AND LABOR RELATIONS ADJUSTMENT ACT. Article 45 (Mediation before Industrial Action)**
(2) No industrial action shall be taken without first undergoing mediation procedures (excluding mediation procedures that come after the decision to end the mediation is made pursuant to Article 61-2) under the provisions of Sections Two to Four of Chapter V. This paragraph shall not apply when mediation procedures do not finish within the period prescribed in Article 54, or when the arbitration ruling is not made within the period prescribed in Article 63.

Article 53 (Commencement of Mediation) (1) The Labor Relations Commission shall conduct the proceedings of mediation, without any delay, when one of the parties to labor relations submits a request for mediation to the Labor Relations Commission. The parties concerned shall undertake in good faith the proceedings of mediation.

²³ **Article 54 (Period of Mediation)** (1) **Mediation shall be completed within ten days in the case of general businesses, and fifteen days in the case of public services, after the request is made for mediation pursuant to Article 53.** (2) The parties concerned may agree to extend a period of mediation under paragraph (1) up to ten days in the case of general businesses, and fifteen days in the case of public services.

Article 61 (Effect of Mediation) (2) The contents of the mediated agreement shall have the same effect as a collective agreement.

collective agreement would have been impossible with a company that thought the Union was an organization to be under its control.

IV. Evaluation and Lessons

1. Evaluation

One of the most significant outcomes for the Union was successful conclusion of a collective agreement, something it had not had in its 25 years of existence. Although the collective bargaining agreement contained only 28 of the original 60 articles, the Union was recognized as a real entity through the collective agreement, and obtained the legitimacy and power to negotiate with the Company as an equal bargaining party concerning the determination of terms and conditions of employment. The details of what was obtained in this collective bargaining include a Union office, paid time-off for full-time Union officers, and an equal number of labor and management representatives in the disciplinary action committee. The improved working conditions include restoration of the original sales allowances, restoration of the paid menstruation leave, and stipulations in the collective agreement protecting working conditions that had been previously obtained. As the structure for wage agreement and general collective agreement bargaining was also established in the first collective agreement, the Union is now equipped with knowledge and a recognition of its authority to negotiate improvements to working conditions.

2. Lessons

Article 32, Paragraph 3 of the Korean constitution stipulates, “Standards of working conditions shall be determined by Act in such a way as to guarantee human dignity.” Out of this article came the Labor Standards Act. Here, if the Labor Standards Act existed without the Labor Union Act, improving working conditions would be difficult as employers usually pursue profit over worker benefits. Enhancing working conditions is the reason why the Labor Union Act guarantees three rights for labor: association, collective bargaining, and collective action. Through exercise of these three rights guaranteed by the constitution real working conditions can be improved, based upon mutual determination of working conditions where labor and management can negotiate on equal footing.

V. Conclusion

The foreign airline’s labor union had simply existed without a collective agreement for 25 years, and was unable to represent its members effectively or act collectively towards improving their working conditions. However, through the process of concluding a collective agreement this time, they understood the importance of exercising their three rights of labor in the workplace, and also restored the Union’s real functions and at the same time achieved the power to protect their working conditions through a collective agreement achieved by collective bargaining. It is my hope that this Union will maintain the solidarity that its members showed throughout the collective bargaining process and protect its members’ job security, while also improving their relatively lower wage levels and working conditions when compared to other airlines.