

THE IMPACT OF ORDINARY WAGE DETERMINATIONS ON AN EMPLOYER'S LABOUR COSTS IN KOREA

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SIGNIFICANCE OF INTERPRETING ORDINARY WAGES

Ordinary wages in Korea are made up of base salary and other compensation given to workers for the work they perform, which are given regularly, consistently and in a fixed manner. Calculation of ordinary wages in Korea is important because the amount of ordinary wages serves as a basis for the payment to workers of other benefits and compensation such as overtime and severance payments. The greater the amount of ordinary wages, the greater the amount owed to workers for these other benefits and compensation.

40 hours per week are considered to be the legal working hours in Korea. There are also bonuses and other allowances for such things as meals and holidays that are also regularly provided. These can impact the ordinary wage calculation if they are included. Given the workplace culture of rampant overtime in Korea - which has led to substantial increases in the amounts being paid to workers for overtime work - the ordinary wage calculation can have a profound impact on an employer's labour costs.

Interpreting the legal provisions surrounding ordinary wages had been controversial in the past, due to the absence of clear guidance as to what items of compensation should be included in a worker's ordinary wages. Consequently, a number of years ago, Korean labour unions began filing lawsuits, claiming that ordinary wage calculations should include additional types of compensation, such as regular bonuses, meal allowances and other payments received by workers. Adding those amounts would result in a ballooning of the ordinary wage numbers and a related increase in the amount of other separate compensation owed for overtime and severance pay. The lawsuits sought retrospective application and re-calculation of ordinary wages and back-pay for amounts that should have been paid, based on the higher ordinary wage numbers.

In response to these suits, the Korea Employers' Federation announced in March, 2013 that if all such compensation was included within the ordinary wage calculations, the additional financial burden placed on employers would amount to KRW 38,550,009,000,000.^[1]

Under these circumstances, employers need to make certain that they understand fully what items are included for purposes of calculating ordinary wages. They also should know how those calculations must be made to ensure that their workers are receiving the correct amount of total compensation owed. Failing to do so could result in underpayment and compensation claims.

As a result of the earlier ordinary wage lawsuits, several Supreme Court decisions^[2] have provided standards for determining what items of compensation should be included in the calculation of ordinary wages. Following that

guidance, we provide further explanation of the law and explore some legal strategies employers may consider utilizing to better predict and control the amount of compensation they may need to pay.

ORDINARY WAGES

Whether items of compensation should be considered ordinary wages must be determined based on payment history. Payments that have been regular, consistent and fixed as compensation for labour generally will be considered ordinary wages.

Regular – Wages must be paid continuously at regular intervals, such as bi-weekly or monthly. However, an interval longer than one month does not itself lead to the exclusion from ordinary wages of regular bonuses and other similar regularly paid wages.

Consistent – Wages and/or bonuses must be paid consistently with respect to workers having the same working conditions or meeting the same work standards.

Fixed – Fixed wages are wages paid to workers, regardless of the workers fulfilling any additional requirements or conditions, such as accomplishing certain goals, meeting certain performance requirements, etc. The payments are deemed to have been ascertained beforehand. Thus, wages determined prior to overtime are considered to be fixed, whereas performance-based bonuses generally fail to qualify as ordinary wages. Even in the case of performance-based bonuses, if there is a minimum amount that is paid to workers despite poor performance, that minimum amount would be deemed to be fixed wages.

Work that is conditioned on factors or events that have already been fulfilled or have taken place as of the date the work is performed is also included within the definition of fixed wages. For example, work performed on conditions such as the employee having a certain amount of experience or having worked for the employer for a certain period of time would be deemed to be fixed wages. By contrast, compensation that is tied to a condition that would not be fulfilled simultaneously with performance of the work would not be deemed fixed wages.

LEGAL STRATEGIES FOR REDUCING ORDINARY WAGES

While the Supreme Court of Korea has identified a mechanism to protect employers from having to pay back certain wages including bonus payments to employees for time periods prior to the Supreme Courts' clarification on what constitutes ordinary wages; given the existing law, employers reasonably may be able to predict and control their wage payments by reducing the amount of compensation that is fixed. This would involve increasing compensation related to performance evaluations, adjusting bonus payments based on performance, imposing requirements that to receive a certain bonus the worker must be employed on the date a payment is to be made, etc.

This article was co-authored with Lee International IP & Law Group

[1] This projection will likely increase substantially going forward, given the 16.4% yearly increase in the hourly minimum wage to KRW 7,530 that is scheduled to occur in 2018.

[2] Supreme Court 2013. 12. 18 decided 2012da89399; Supreme Court 2013. 12. 18 decided 2012da94643.

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