

AVERAGE WAGES AS A BASIS FOR CALCULATING SEVERANCE PAY: DEFINITIONS AND INTERPRETATION

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Under the applicable laws of Korea, an employer must pay its employees severance pay in the amount of at least 30 days' average wages for each year of the employee's continuous service for the employer. For example, an employee who has worked at the same job for 10 years, upon leaving that employer would be entitled to at least 10 months' wages as statutory severance pay. This is in addition to any other contractually based severance pay that the employee is entitled to receive.

'Average wages' are defined as "the amount calculated by dividing the total amount of wages paid to a worker during the three calendar months immediately preceding the day that those circumstances requiring such calculation occurred, by the total number of calendar days during the three months." In short, 'average wages' are an average of monthly wages received during three months immediately preceding the termination of employment.

Statutory severance pay is calculated based on the daily average wage x 30 (days) x (total days of work/365). In other words, it is 30 days of daily average wages per year of work, with any incomplete year pro-rated. The daily average wage is calculated based on the total wages received (including allowances for night work, extended work, holiday work, etc.).

The foregoing information alone may appear sufficient for estimating roughly the amount of statutory severance pay. However, in the event that an employee receives a considerable amount of special allowances and/or bonuses other than his/her regular wages prior to termination, an employer must determine whether those special allowances and bonuses also should be included in the calculation of average wages.

The Ministry of Employment and Labor has provided some guidance as to the different types of allowances that should or should not be included when calculating an employee's average wages. According to the Ministry, one type that should be included is "an allowance paid to reconcile price fluctuations or wage differences between job positions: an allowance for price increases, adjustment allowance, etc." An example of such an allowance would be a "cost of living allowance" given to an employee.

Additionally, "a transportation allowance/vehicle maintenance cost" allowance is included in the average wage, but only when it is paid to all employees regularly and uniformly. If it is paid on a variable basis, depending on the number of employees' actual work days or paid only to some employees, then it would not be considered part of the average wage.

A "company housing allowance" also should be included in the average wage, but only when it is paid to all employees regularly and uniformly. If it is paid temporarily or paid only to some employees, such as only those living abroad, then it would not be included in the average wage. "Valuables paid as reimbursement of costs: travel expenses, information activity expenses, business operating expenses, costs of purchasing work-related goods, etc." would not be included in the average wage.

The Ministry has provided the further explanation that if the "cost of living allowance" or "per diem stipend" means an allowance given to reconcile price fluctuations or wage differences between job positions, it would constitute an "allowance for price increases, adjustment allowance, etc." and thus would fall under the average wage. However, if the per diem is paid to reimburse travel expenses or business operating expenses, it would not be included in the average wage. In the case of banking fees, if they are paid simply to reimburse expenses, they would likely constitute travel expenses or business operating expenses and thus, would not be included the average wage.

Korean courts also have provided additional guidance, although it is not always entirely consistent. They have held that certain amounts paid to employees in association with the employee's performance are included and other amounts are not included in calculating average wages.

Specifically, courts have held that "the total amount of wages, based on which average wages are calculated, refers to all types of money and valuables paid by an employer to an employee in compensation for the employee's labor. If such payment is made to the employee on a continuous and regular basis and the obligation for such payment is also provided for under a labor collective agreement and/or employment rule, such payment is included in calculation of average wages regardless of its label."

Courts also have said that in order to determine whether certain payments were provided in compensation for one's labor, there must be a direct or close association between provision of the employee's labor and the occurrence of the employer's payment obligation. Conversely, if the employer's payment obligation arose from some exceptional or random circumstances surrounding an employee, then the payment made to the employee is not deemed compensation for the employee's labor, even if such payment was made in accordance with the labor collective agreement, employment rule, employment agreement or other policies the employer has adopted.

Additionally, certain amounts labelled "bonuses" or "special bonuses" may be included in the calculation of average wages if practically equivalent to regularly-paid wages. It is also possible that certain amounts paid as special bonuses initially and then paid regularly, consistently and steadily might be included in the calculation of average wages.

Thus, Supreme Court 2009da86246 held that a performance bonus should not be considered part of the salary that becomes the basis for an average salary calculation. Only compensation payments made continuously, regularly and on a predetermined basis (not a discretionary basis) should be considered when calculating average salary. Supreme Court 2009da99396 was in accord, holding that if a worker's salary becomes exceptionally larger or smaller due to special circumstances, then the average salary should be calculated excluding discretionary and highly variable performance incentives.

In contrast, also consider Supreme Court 2011da23149, delivered on July 14, 2011. In that case, a car salesman whose compensation was paid exclusively based on the cars he sold (no other compensation) was found to be entitled to severance benefits that were calculated based on all of the payments he received, even though they

were not fixed and arguably all were discretionary. That case is somewhat different in that he had no other source of compensation and if all of those payments received were considered discretionary and not part of his ordinary wages, then he would have been entitled to no statutory benefits at all. The Court apparently considered the regularity and consistency of paying him sales commissions, even though there was variability in the amount and timing of the payments he received.

CONCLUSION

Although a legal definition of average wages under Korean law exists, companies may face disputes over whether to include certain amounts paid to their employees in the total amount of wages used for calculating average wages. Because Korean courts' stance on this issue is not unequivocally clear, companies need to exercise caution when determining average wages and calculating severance payments for departing employees.

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