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Labour and Employment Compliance in the Republic of Korea

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Legal Compliance in the Republic of Korea

1. LEGAL FRAMEWORK: EMPLOYMENT LAWS

1.1. Sources of Employment Law

The sources of employment laws in Korea consist of the Constitution, the Labor Standards Act (the '*LSA*'), the Trade Unions and Labor Relations Adjustment Act (the '*TULRAA*'), and a variety of other labour and employment-related acts, as well as generally applicable civil and criminal law. The Korean Constitution provides all citizens with a right, and a duty to work, and charges the state with responsibility for promoting employment and imposing a minimum wage, and implementing special protections for women and children in the workforce.[1] The Constitution also guarantees the right to collective bargaining and collective action for private-sector employees.[2]

1.2. Labor Standards Act

The LSA is the primary statute governing an employment relationship, and it regulates the minimum working conditions for employees in individual labour relations between employers and employees. The LSA applies to all workplaces in Korea, but many of the LSA's provisions are not applicable to employers with fewer than five employees.[3] The LSA sets the minimum standards for appropriate working conditions. Any employment agreement

1. Constitution Art. 32.
2. Constitution Art. 33.
3. LSA Art. 11. The LSA, and certain other Korean labor-related statutes – for example, the Minimum Wage Act – also exempt employers who only employ relatives living together, as well as the employment of household/domestic employees, from coverage.

or policies which fall below the minimum standards of the LSA are deemed null and void to such extent.

1.3. Trade Union and Labor Relations Adjustment Act

The TULRAA governs collective labour relations between trade unions and employers. The guaranteed rights of employees with respect to association, collective bargaining and collective action pursuant to Article 33 of the Constitution are codified in the TULRAA.

1.4. Other Employment Laws

In addition to the LSA and the TULRAA, there are other statutes that govern individual employee-employer relations and collective labour relations. The Minimum Wage Act (*'MWA'*) establishes the minimum wages that employers must pay to employees. The Protection of Fixed-Term and Part-Time Employees Act (the *'FTPTA'*) and the Protection of Dispatched Workers Act (the *'DWA'*) extend various employee protections to fixed-term, part-time, and temporary dispatched workers. The Employee Retirement Benefits Security Act (the *'ERBSA'*) imposes minimum standards for retirement or severance pay. The Equal Employment and Support for Work-Family Reconciliation Act (the *'EEA'*), the Prohibition of Age Discrimination in Employment and Aged Employment Promotion Act (*'AEPA'*), and the Anti-Discrimination Against and Remedies for Persons with Disabilities Act (*'PDA'*) ban employment discrimination on the basis of gender, age, or disability, respectively, and institute policies designed to foster the employment of women, the aged, and people with disabilities.

2. CONTRACTS OF EMPLOYMENT

2.1. Overview

The formation and enforcement of contractual rights and obligations is generally governed by the Korean Civil Act (the *'Civil Act'*). However, the LSA is the primary source of legal rules governing an employment relationship. The LSA provides numerous minimum standards to which the terms of an employment relationship must conform, default rules that apply in the absence of a contrary contractual agreement, and other obligations imposed on employers. Its provisions apply to virtually all businesses or

workplaces that ordinarily employ five or more employees, and some of its provisions apply even to employers with fewer than five employees.

In addition to the statutory provisions that govern employment relationships, such relationships may also, in accordance with the TULRAA, be governed by the terms of a collective bargaining agreement (a *'CBA'*). An employer's rules of employment (also referred to as *'work rules'*) – to the extent that they do not conflict with any statutory requirement or valid collective bargaining agreement – may also legally bind employer and employee. All employers who regularly employ ten or more employees in a business or workplace must prepare written work rules and file them with the Ministry of Employment and Labor (the *'MOEL'*).

Contractual agreements with individual employees may provide additional terms and conditions of employment, to the extent that they do not conflict with any statute, CBA, or employer work rules.

2.2. Written Employment Contracts

There is no general rule, under the Civil Act, requiring a writing for the formation of a contract. Nor does the LSA require a writing to form an employment contract except with respect to part-time employees, who are required to be provided with a written employment contract. Thus, an employment relationship may be formed by oral agreement. Employment relationships may also, in some circumstances, be formed by operation of law without any agreement.

However, all employers are required to provide each employee with at least a written statement of certain primary employment terms, or any changes thereto.[4] These terms include wages, working and rest hours, days off, and annual leave. With respect to fixed-term employees these terms also include the contract period, the place of employment, and the nature of the work. For part-time employees, the work days and working hours for each day must also be stated in writing.

For regular (permanent) employees, the employer must only 'clearly state' (though not necessarily in writing) the place of employment and work to be performed. The employer must also 'clearly state' to all employees, whether full-time or part-time, the other matters required to be included in the work rules of an employer with ten or more employees (pursuant to the LSA).

In practice, all of these terms are generally stated through a combination of a written employment contract or letter, and the company's work rules.

4. LSA Art. 17.

Failure to provide the required statement of employment terms is an offence punishable by a fine of up to South Korean Won (*KRW*) 5 million.[5]

A liquidated damages clause in an employment contract is unenforceable.[6]

2.3. Oral Contracts

Although legally permissible, it is not advisable to orally enter into an employment contract given the inherent difficulty of conclusively establishing its terms. Moreover, in the absence of a written contract limiting an employee to a fixed-term, an employment relationship is generally of indefinite duration by default. Written employment agreements should also explicitly state that they may be amended only in writing, to avoid potential disputes over purported orally agreed changes to terms of employment.

2.4. Employee Handbooks (Work Rules)

Employers that ordinarily employ ten or more people must prepare written work rules concerning certain enumerated subjects.[7] The subjects that must be addressed are matters pertaining to the following (although certain of these items are allowed to be omitted if they are not relevant):

(i) Starting and finishing times, recess hours, days off, leave, and shifts.
(ii) Determination of wages, calculation of wages, means of payment, payment intervals, time of payment, and wage increases.
(iii) Calculation of family allowances and means of payment.
(iv) Retirement.
(v) Retirement/severance benefits required by the ERBSA, bonuses, and minimum wages.
(vi) Meal allowances and the allocation of expenses for operational tools or necessities.
(vii) Educational facilities for workers.
(viii) Maternity protections for female workers, such as maternity leave and childcare leave, and support for reconciliation between work and family life.
(ix) Safety and health.

5. LSA Art. 114, Art. 17, FTPTA Art. 17, Art. 24(2).
6. LSA Art. 20.
7. LSA Art. 93.

(x) Improvement of workplace environments according to employees' characteristics, such as gender, age, or physical attributes.
(xi) Support with respect to occupational or non-occupational accidents.
(xii) Award and punishment.
(xiii) Other matters applicable to all employees of the business concerned.

The requirement that an employer's work rules address a given subject is not a requirement that an employer provide the relevant subject matter itself.

These work rules may be contained in an 'employee handbook,' or in a collection of policy documents on various individual topics. They are binding and can override any terms in an individual employment contract that are less favourable to employees.

Even employers with fewer than ten employees may have 'work rules' to the extent that they apply rules (including unwritten rules) or practices that govern the fundamental terms and conditions of employment. The work rules of such employers need not cover all the matters listed above, nor are they required to be filed with the MOEL. However, these work rules may still be legally binding, and for employers with five to nine employees they are subject to mandatory employee consultation and consent requirements like those discussed immediately below with respect to formally prepared and filed work rules.

In order to prepare and amend its work rules, an employer that ordinarily employs five or more employees must consult with either: (i) a union representing more than 50% of the employees in the business or affected workplace; or (ii) if no such union exists, a majority of those employees.[8] To amend the rules of employment to the detriment of employees, the collective consent of a majority of employees is required. Once prepared in accordance with these requirements, the new or amended work rules must be filed with the MOEL. The filing must include the written comments of employees that result from the mandatory consultation. If an employer amends its work rules without satisfying the consultation and consent requirements, the change is effective with respect to the employees who are hired in the future, but is ineffective as to the current employees. Instituting or amending work rules without complying with these consultation, consent, and reporting requirements is punishable by a fine of up to KRW 5 million.[9]

8. LSA Art. 93, LSA Enforcement Decree Art. 7 & Table 1.
9. LSA Art. 114, Art. 94.

2.5. Job Descriptions

See section 2.2.

2.6. Offer Letters

An offer letter may be used as a preliminary statement of expected terms of employment, with the definitive terms subsequently set forth in a more comprehensive employment agreement, so long as the offer letter is clear that it does not constitute a final employment contract. In cases where an employer has comprehensive work rules in place, a simple offer letter with only the specific terms applicable to the relevant individual employee may also suffice in lieu of a more comprehensive employment contract, so long as the employer makes clear that the prospective employee will be subject to the employer's work rules, and those rules are provided to that individual.

2.7. Checklist of Do's and Don'ts

- Institute a simple set of work rules that satisfy the statutory requirements, ideally before hiring more than four employees.
- If an existing operation has no work rules, they should be prepared so as to formally codify existing practice – with modifications if desired – and majority consent should be sought from the employees to avoid potential disputes over claimed disadvantageous changes.
- Have a standard employment agreement (or letter) prepared that covers all matters statutorily required to be clearly stated to employees in writing, namely: wages, working hours, days off, and annual leave. Place of employment, and work to be performed, can be included in the agreement or otherwise clearly stated for indefinite-term employees. The agreement should also make clear that the employer's work rules apply to the employee, and those rules should be provided to the employee.
- Bear in mind that a liquidated damages clause in an employment contract is void.

3. RECRUITING, INTERVIEWING, SCREENING AND HIRING EMPLOYEES

3.1. Overview

The LSA is the primary law governing the mandatory and permissible terms of an employment relationship, but it has little to say about how an employer must treat a *prospective* employee. Various other statutes, however, impose a variety of rules on the hiring process, most importantly: (i) prohibitions on various forms of discrimination (see section 15); (ii) legal protections for the personal information of prospective employees, as well as employees (see section 16); and (iii) special obligations with respect to the employment of foreign workers (see section 13).

3.2. Recruiting

A recently passed law, the Fair Hiring Procedure Act (the '*FHPA*') will soon impose a number of prohibitions and obligations on certain employers with respect to their hiring practices. The FHPA will apply to employers with at least 300 employees beginning on 1 January 2015, and by 1 January 2017, it will expand to cover all employers with thirty or more employees.

The FHPA prohibits false or deceptive job advertisements by covered employers, and imposes criminal penalties of up to five years' imprisonment or a KRW 20 million fine for violating this prohibition. The FHPA also mandates that covered employers notify job applicants after a decision has been made whether to hire them, without undue delay; and upon an applicant's request, a covered employer must return any documentation submitted by the applicant. Violation of these requirements may result in a fine of up to KRW 5 million.

For employers not covered by the FHPA, there are no other salient specific procedural requirements for the recruitment of employees, except those required as to certain non-exempt foreign employees (see section 13.2). Instead, employers must avoid unlawful discriminatory practices in their recruitment procedure (see section 15); obtain any consent required for the collection of personal information from applicants, and otherwise comply with all applicable privacy laws (see section 16); and ensure that they do not hire a non-Korean who is not authorized to work in Korea (see section 13).

Typically, potential applicants are invited to submit their resumes and other requested documentation of education and experience, and selected applicants are invited to attend an interview, after which an offer or offers may be extended. Potential pitfalls in this process are discussed in more detail below.

The recruitment of foreign workers is subject to specific requirements discussed in section 13.

3.3. Employment Applications

An employment application form should avoid any inquiries or statements that could be construed as suggesting discriminatory practices, as discussed below, and should obtain consent to the collection and use of an applicant's protected personal information as described in more detail in section 16.

3.4. Pre-employment Inquiries

As a general matter, inquiries that relate to an applicant's educational background, work experience, and job-related skills are entirely permissible in the course of the recruiting process, as is the collection of information necessary to determine an applicant's right to work in Korea, such as the individual's national or foreign registration number. Inquiries that could give rise to an appearance of unlawful discrimination, such as inquiries about an applicant's marital status, children, pregnancy or plans to become pregnant, physical appearance, physical disability, or past union activities, should be avoided or, where genuinely necessary in light of the nature of the job, treated with great caution.

After an offer of employment has been extended, an employer may more freely inquire about matters such as an applicant's need for reasonable accommodation for a disability, marital status, and children (for purposes of tax adjustment and any family-related benefits).

3.5. Pre-employment Tests and Examinations

Employers are specifically prohibited from utilizing any test or examination to ascertain whether a job applicant is disabled, unless the test is required in light of the nature of the relevant job duties.[10]

Additionally, the use of pre-employment tests that are not clearly job-related may expose an employer to legal risk for discrimination claims. This risk is enhanced by the fact that 'disparate-impact' may be argued in many kinds of discrimination claims (e.g., age, gender, and disability) with respect to ostensibly neutral practices.

After having received an offer of employment, an individual may be asked to submit to standard medical testing. Employers are required to avoid the

10. PDA Art. 12(1).

use of employees with contagious diseases or mental illnesses, or any other disease that could worsen due to their work, for which testing may be a legitimate necessity.

3.6. Background, Reference and Credit Checks

In general, any background, reference, or credit check of a job applicant, will involve obtaining legally protected personal information about the applicant from third parties. Obtaining legally protected personal information about the applicant will require consent if the information is not 'necessary' to enter into an employment relationship with the applicant, and obtaining any personal information about the applicant from a third party will at least require notification of the applicant. See section 16 for a more detailed discussion of these requirements.

A credit check, in particular, is also governed by the Use and Protection of Credit Information Act (the '*Credit Report Act*'), which requires that an employer or other person obtain consent from an individual in order to obtain their credit report, including specific consent to its use for employment purposes.[11]

Additionally, obtaining detailed and frank reference information from prior employers may be practically difficult in Korea, because Korean defamation law is very strict and can result in criminal sanctions, and truth is not an absolute defence to a defamation claim. The LSA also prohibits employers from communicating for the purpose of interfering with a worker's employment.[12]

3.7. Fines and Penalties

The penalties – including fines and in some cases, imprisonment – that can be imposed for engaging in discriminatory conduct in the hiring process, depend on the nature of the discriminatory conduct, and are discussed in more detail in section 15. The penalties for violating laws relating to the privacy of applicants' personal information are discussed in more detail in section 16.

Additionally, where a person violates provisions of Korean labor law such that a criminal penalty is imposed, any relevant criminal fine generally may be imposed on the employer as well unless the employer exercised appropriate supervision so as to avoid the violation.

11. Credit Report Act Art. 32(2), Art. 33.
12. LSA Art. 40.

challenged. The justification for discipline should include fair and objective standards; for example, applying discipline solely on the basis of employees' comparative performance (such as the lowest 5% of employees by sales), would be considered unjust.

The scope of available disciplinary measures and the reasons for which they may be used, are also generally expected to be clearly stated in an employer's work rules. Attempting to discipline an employee in a manner not clearly contemplated by the employer's work rules is more likely to be found, by a court or the Labor Relations Commission, to lack just cause, except in cases of clear and egregious misconduct. For this reason, even employers that are not required to prepare written work rules because they employ fewer than ten employees, may find it advisable to prepare such rules regardless, rather than relying solely on a future tribunal's sense of fairness.

There is no statutory requirement that an employer follow any particular minimum procedure (such as review by a disciplinary action committee) for imposing disciplinary action. However, should the employer's work rules or the relevant collective bargaining agreement require a certain procedure, failure to satisfy such procedural requirement would be a significant defect which might render the action null and void.

If an employee successfully challenges a disciplinary measure before the Labor Relations Commission or in court, the employee is generally entitled to be paid any lost or reduced compensation, and to the reversal of any continuing adverse employment action.

4.5. Checklist of Do's and Don'ts

- Prepare written work rules that clearly describe the performance and conduct standards expected of employees, and fair disciplinary measures that may be applied to an employee who violates those standards.
- Keep detailed written records of any performance and conduct issues. Regular employee evaluations are a useful tool, and should ideally include objective measures of employee performance, rather than solely subjective impressions, as well as opinions from multiple evaluators. It is always an employer's burden to prove 'just cause' if an adverse employment action is challenged by the affected employee.
- Notify employees of any performance and conduct issues, and offer reasonable advice and opportunities to improve. Do not allow conduct and performance issues to simply go unaddressed.
- Approach disciplinary and performance matters progressively, from less severe to more severe measures, as befits the level of misconduct or poor performance. Employers should only resort to severe disciplinary measures in response to significant misconduct or after persistent failure to respond to lesser measures and to efforts to help the employee improve.

5. TERMINATION OF EMPLOYEES FOR PERFORMANCE OR DISCIPLINARY REASONS

5.1. Overview

'At-will' employment is a rare exception to the norm in Korea. Instead, an employer that ordinarily employees five or more employees must have 'just cause' to terminate any employee before retirement age or before the end of a fixed-term contract period (which generally can be up to two years, as discussed in section 7.2).[16] As discussed in section 4, all disciplinary measures require 'just cause' under LSA Article 23. However, termination is the most severe form of permissible disciplinary action, and as such the standard for 'just cause' is at its strictest in the context of an involuntary dismissal.

'Just cause' for termination is a very exacting standard that can be difficult for employers to satisfy, and as a result it affords employees robust job protection. Application of the standard varies depending on whether the termination is for reasons related to an individual employee's conduct, or for general business reasons such as restructuring.

In the context of a termination for individual performance or disciplinary reasons, 'just cause' requires that some 'fault attributable to the employee' makes continued employment untenable. Examples of conduct that can exhibit the requisite degree of fault include:

(i) grave misconduct that makes it impossible to continue the relationship;
(ii) continuous and persistent unsatisfactory performance, despite efforts to help the employee improve;
(iii) criminal or deliberate tortious acts against the employer;
(iv) serious criminal acts, even outside the scope of employment;
(v) improper relationships with other employees; and
(vi) material misrepresentations in the hiring process.

Whether an employee is dismissed for individual or business reasons, an employer that ordinarily employees five or more employees must provide the terminated employee with written notification of the reasons for the dismissal and the effective date.[17] The dismissal is not effective until this notice is given.

16. LSA Art. 23(1), Art. 11(1)–(2), LSA Enforcement Decree Art. 7 & Table 1.
17. LSA Art. 27, LSA Enforcement Decree Art. 7 & Table 1.

5.2. Separation/Severance Pay

All terminated employees, whether dismissed because of their individual fault or for business reasons, are entitled to thirty days' notice of termination or thirty days' 'ordinary wage' in lieu of notice.[18] 'Ordinary wage' is a legal construct used to calculate various statutory benefits, and it includes all regular, fixed and pre-determinable compensation that is paid uniformly to all employees or to a class of employees.[19] There are limited exceptions to this notice-or-pay requirement, the most notable of which are for employees still in the first three months of a probationary period, monthly-paid employees in their first six months, or employees who have caused certain types of significant or wilful harm to their employer as set out by regulation, such as through embezzlement or vandalism. A probationary period is a common mechanism used in Korea to evaluate employee performance over a limited time, such as three or six months, and during a probationary period courts tend to apply the 'just cause' requirement for termination somewhat more leniently, although employees still enjoy significant job protection.

All employees who have served one year or longer, are also entitled to certain severance or retirement benefits upon termination, whether voluntary or involuntary, as discussed further in section 10.2. Payment of benefits or transfer of retirement funds, must be effected in full and without setoff within fourteen days of termination, or an employer may be criminally liable and face fines and/or imprisonment.[20]

5.3. Fines and Penalties

When dismissing an employee, an employer takes the risk that its justification for the dismissal, or conduct leading up to it, will be found by the Labor Relations Commission or by a competent court to have been deficient. In a proceeding to determine wrongful dismissal the burden of proof is placed on the employer-defendant, not the employee-plaintiff.

Moreover, the reasons explained in the mandatory notice of the reasons for dismissal are the reasons that must be defended in any legal proceeding. An employer's ability to proffer additional grounds, without undergoing the entire process again, is sharply limited.

18. LSA Art. 26.
19. See S. Ct. Case No. 2012 Da 89399, pp. 7–11 (12 Dec 2013). In this case, the Supreme Court resolved a long-standing dispute over whether fixed amounts of compensation paid regularly in intervals of more than one month, and labelled 'bonuses,' were required to be included in employees' ordinary wages. The MOEL had advised that such compensation could be excluded from ordinary wage. However, the Supreme Court settled the issue, holding that *all* compensation that is regular, uniform, and fixed/predeterminable, is part of ordinary wage irrespective of the payment interval or name given.
20. ERBSA Art. 9, Art. 17(2)–(5), Art. 20(5), Art. 44.

A successful plaintiff in a wrongful termination suit or administrative proceeding is entitled to back wages for the period of unlawful dismissal, and reinstatement at the employee's option. In very limited circumstances, such as where a dismissal is in wilful violation of the law, the plaintiff may also be entitled to tort damages for emotional distress.

Termination of: (i) an employee while that employee is unable to work due to medical treatment of an occupational injury or disease (see section 11), and within thirty days thereafter; (ii) a female employee during statutory maternity leave (see section 9.8) and within thirty days thereafter; or (iii) an employee on statutory childcare leave (see section 10.4), is punishable as a criminal offence, by fine and/or imprisonment.[21]

5.4. Checklist of Do's and Don'ts

- Consider offering fixed-term employment and carefully evaluating an employee's performance before hiring that employee on a permanent basis.
- When drafting rules of employment, ensure disciplinary measures are appropriately detailed and include termination as a potential response to severely deficient or culpable conduct.
- Maintain detailed records of all performance and disciplinary issues.
- Ensure that all wages, benefits, and required severance, are paid in full within fourteen days of termination. Do not apply, without careful review, any setoff for amounts believed to be owed by the employee to the employer.
- In all but the most egregious circumstances, proving that there was 'just cause' to terminate an employee is an inherently difficult and risky enterprise. Therefore, consider offering a reasonable incentive for an employee to voluntarily resign, to avoid a potential legal dispute.

6. LAYOFFS, REDUCTIONS IN FORCE, AND/OR REDUNDANCIES AS A RESULT OF JOB ELIMINATIONS OR OTHER RESTRUCTURING

6.1. Overview

As with involuntary termination because of individual fault, involuntary termination as part of a workforce reduction can also only be undertaken for 'just cause.'[22] However, application of the standard differs in this context,

21. LSA Art. 23(2), Art. 107, EEA Article 19(3), Art. 37(2)(3).
22. LSA Art. 23(1).

and Article 24 of the LSA provides specific statutory requirements that must be met in order for any layoffs to be lawful.

6.2. Reductions in Force/Layoffs/Job Eliminations

Layoffs for business reasons are permitted only when an employer:

(1) has an urgent business necessity to reduce its workforce;
(2) makes every effort to avoid dismissing employees;
(3) selects employees to be dismissed based on fair and rational criteria; and
(4) gives fifty days' notice before the intended date of termination, to a union representing a majority of employees, or a representative selected by a majority of employees if no such union exists (either referred to hereafter as an '*employee representative*'); and consults with the employee representative with respect to the means used to avoid terminating employees and the criteria used to select them for termination.[23]

An urgent business necessity does not necessarily mean that an employer faces imminent bankruptcy in the absence of a workforce reduction; it can also arise because of competitive trends, and future risks to the company in the absence of restructuring. However, it is not an easy standard to meet, and requires more than simply the potential for increased profits by reducing labour costs.

'Best efforts' to avoid layoffs is an exacting requirement, which can involve offering affected employees incentives to accept voluntary resignation (also known in Korea as 'voluntary retirement'), attempting to secure third-party employment or internal reassignment for them, instituting a hiring freeze, and reducing working hours. These measures must, however, be strictly voluntary; use of coercive methods to induce acceptance of voluntary separation may cause it to be seen as involuntary dismissal.

The requirement that laid-off employees be selected using fair and reasonable criteria does not simply mean that explicitly unlawful criteria, such as gender, are not allowed. Rather, it is an affirmative requirement to implement objectively fair criteria in selecting which employees to terminate. Korean courts require that an employer consider both the needs of the employer and its employees in establishing the criteria for termination; and courts have allowed criteria such as age, seniority, number of

23. LSA Art. 24.

dependents, and performance to be included in employers' selection process. Although only *consultation* with an employee representative is required by statute, obtaining labour *consent* to the selection criteria, such as from an employee union, can be a useful way to strengthen the case that they are in fact fair and reasonable.

Failure to strictly adhere to the notice requirement, for example, has been found not to automatically render an employer's terminations unlawful. Instead, the standards are applied in a given case based on the totality of the circumstances.

Where the number of redundancies meets or exceeds certain thresholds, a report must be filed with the MOEL. The reporting threshold is 10% or more of the number of people ordinarily employed by the employer, with a minimum threshold of ten employees and a maximum threshold of 100 employees.[24] Failure to file the required report does not affect the lawfulness of the employee terminations, however.

An employee dismissed for business reasons is entitled to preferential treatment if an employer intends to hire someone for the same position within three years after the dismissal. Although in practice, this requirement is difficult to enforce.

6.3. Fines and Penalties

As with an individual involuntary termination, an employer who engages in layoffs takes the risk that its justification for the terminations, or conduct leading up to them, will be found to have been deficient by the Labor Relations Commission or by a competent court. The procedural requirements, burden of proof, and potential remedies are the same, but applicable to all of the affected employees.

6.4. Checklist of Do's and Don'ts

- Competent legal counsel is highly recommended in the event an employer is considering redundancies. Whether the business rationale for restructuring is sufficiently compelling, or if restructuring may not in fact be a business necessity, must be carefully considered.
- Concerted efforts to avoid involuntary termination are required. These efforts should include things such as internal reassignment, third-party job transfers, and/or voluntary separation packages. However, avoid

24. LSA Enforcement Decree Art. 10(1).

heavy-handed or coercive methods of inducement that could be seen as constructive termination.
- Comply with union/employee notification and consultation requirements, but do not interfere with union deliberations or actions.
- If layoffs are unavoidable, use fair and objective criteria to determine the employees who must be laid-off.
- Ensure that all wages, benefits, and required severance, are paid in full within fourteen days of termination. Do not apply, without careful review, any setoff for amounts believed to be owed by the employees to the employer.

7. USE OF ALTERNATIVE WORKFORCES: INDEPENDENT CONTRACTORS, CONTRACT EMPLOYEES AND TEMPORARY OR LEASED WORKERS

7.1. Overview

Under Korean labor law, there are two broad categories of workers: regular and non-regular. Regular workers (or regular employees) are full-time employees with indefinite employment terms. Employees with an indefinite employment term generally have a right to continued employment until reaching the employer's mandatory retirement age, unless terminated for 'just cause.' Since terminating an employment relationship with a permanent employee before the employee reaches retirement age is a challenging task in Korea – which generally does not allow 'at will' employment – they are often referred to as 'permanent' (as opposed to fixed-term) employees.

There are four principle types of non-regular workers: (i) part-time employees, (ii) fixed-term employees, (iii) dispatched workers from manpower supply agencies, and (iv) subcontracted workers and independent contractors. The first two refer to individuals who work under the direct supervision and control of the relevant business and are treated as its legal employees. The third refers to individuals who work under the direct supervision and control of the relevant business but *are not* treated as its legal employees, due to compliance with the worker dispatch law, the DWA. The last refers to workers who *do not* work under the direct supervision and control of the relevant business, and thus are not treated as its legal employees.

The FTPTA and the DWA govern the relationship between an employer and its non-regular employees, and between a using business and its dispatched workers, respectively.

7.2. Fixed-Term and Part-Time Employees

Under the FTPTA,[25] a fixed-term employee is one whose term of employment is limited to a specific period of time not in excess of two years. After two years of continuous service with an employer, subject to some exceptions,[26] a fixed-term employee will become a regular, permanent employee by operation of law,[27] entitled to continued employment until reaching retirement age absent 'just cause' for termination.

A part-time employee is one whose contractual working hours are fewer than a comparable full-time employee at the same workplace.[28] Part-time employment can be for a fixed-term, or for an indefinite term. However, a part-time employee whose average weekly working hours (averaged over four weeks) are under fifteen, is excluded from application of the rule under the FTPTA by which a fixed-term employee becomes permanent after serving for two years.

Overtime work for part-time employees is limited to twelve hours per week. Further, a part-time employee has a right to refuse overtime work if the employer has not obtained prior consent.[29]

The employment contract or statement of written employment terms for part-time and fixed-term employees are subject to special requirements (see section 2).

Both fixed-term employees and part-time employees are eligible to receive severance or retirement benefits from a company in a manner equivalent to regular employees if they are employed continuously in excess of one year.

7.3. Independent Contractors

a. Definition

It is permissible under Korean law to engage the services of an individual as an independent contractor rather than a statutory employee. However, if the substance of the relationship is, under the totality of the circumstances, that of employee-employer, under Korean law the individual will be deemed an employee irrespective of the language used in the relevant contract. A variety of factors including the exercise of direct supervision and control over an individual purporting to be an independent contractor, along with

25. The FTPTA generally applies to all employers with at least five employees, except for domestic employees.
26. Some notable exceptions to this rule include certain jobs requiring professional knowledge and skills, such as attorneys and medical doctors, and jobs defined by a specific project requiring more than two years to complete.
27. FTPTA Art. 4(2).
28. FTPTA Art. 2.
29. FTPTA Art. 6(2).

other factors such as tax treatment (e.g., whether VAT is paid), may be suggestive of the individual being a de facto employee.

One area in which this issue frequently arises is in the context of registered directors (i.e., members of the board). Board members are not, solely by virtue of fulfilling their responsibility to manage the business, considered to be 'employees' within the scope of the LSA. This is because directors are seen as exercising their own discretion in directing the management of the business. However, if a director appears in substance to be performing work under the direction of the business, there is the potential that the director can be found to be an employee, entitling the individual to all the protections of the LSA including the right to continued employment (though not to continued membership on the board).

7.4. Leased or Dispatched Workers

Under the DWA, there are certain enumerated job categories–generally of an ancillary business nature (e.g., drivers, receptionists, security guards) – for which an employer can hire dispatched workers through a 'worker-dispatch agency' (also referred to as a 'manpower supply agency'), and use their labour under its own supervision and control.[30] Dispatched workers may not be used for longer than two years, or they acquire the right to demand regular, permanent employment by the using business.

If a company uses dispatched workers for jobs not among the enumerated permitted categories under the DWA, the violation can result in criminal sanctions of up to three years' imprisonment or a KRW 20 million fine, imposed upon both the service recipient business (and its registered representative) and the manpower supply agency. Moreover, the service recipient business will be obligated to directly hire the dispatched worker as its own employee immediately, even if the dispatch term does not exceed two years, if the dispatch is deemed to be illegal.

7.5. Contract, Subcontracted or Outsourced Workers

It is not an uncommon practice in Korea for a company to bring in employees of a third-party service provider, more commonly referred as a 'contractor' or 'subcontractor,' to work at the company's workplace or site. However, in order for them to be recognized as 'subcontracted workers,' they must be subject to the supervision and control of the third-party employer, rather than that of the company receiving their services. In this

30. For example, the use of dispatched workers in direct production-line jobs in the manufacturing industry is not permitted under the DWA.

sense, the legal considerations respecting subcontracted labour are similar to those relating to independent contractors, but with the intermediation of another employer. Thus, a business must be careful not to interfere with the third-party service provider's supervision and control of its employees, to avoid running a high risk of the arrangement being deemed a de facto worker dispatch, subject to the requirements of the DWA and the concomitant danger of the workers being deemed direct employees. There is no time limit on the use of subcontracted or outsourced labour, so long as the workers are not subject to the using company's supervision and control to such a degree that they appear to be its direct employees.

7.6. Discrimination against Non-regular Workers

Employers cannot treat non-regular workers (including fixed-term employees, part-time employees, and dispatched workers) disadvantageously compared to regular workers with respect to wages and other working conditions, without reasonable grounds. A recent amendment to the FTPTA has expanded and clarified the legal definition and scope of prohibited discriminatory treatment, to include all matters related to wages, bonuses, and other working conditions and welfare benefits. [31] The act does not oblige employers to provide precisely equal treatment to regular and non-regular workers with respect to all terms of employment, but it bans discriminatory treatment without reasonable justification. Thus, different treatment of non-regular workers is permitted when there are reasonable grounds such as differences in productivity and skills.

Formerly, to obtain review of unreasonably discriminatory treatment, non-regular workers were required to actively seek redress, generally by filing a complaint with the Labor Relations Commission. However, due to recent amendments to the FTPTA and DWA, the MOEL can independently initiate investigations of employers to ensure that there are no discriminatory practices, even in the absence of any complaint. These amendments also make treble damages available to employees damaged by such discrimination if it is intentional or repeated.

If an employer does not comply with the MOEL's corrective instructions, if any are issued, the MOEL will formally file a complaint to the National Labor Relations Commission, which will then conduct its own investigation to determine the merits of the case and issue a corrective order. A penalty of up to KRW 100 million may be imposed for non-compliance with the Commission's corrective order. Due to recent amendments to the law, even if the corrective order from the Labor Relations Commission applies only to

31. Amendment to FTPTA, effective as of 23 Sep. 2014. See FTPTA Art. 2(3).

one employee, the MOEL may expand the order to other similarly situated employees.

7.7. Checklist of Do's and Don'ts

- Track the service periods of all employees (and dispatched workers, if applicable), and only allow them to work for more than two years if intending to offer them permanent employment.
- Only hire dispatched workers through reputable dispatch agencies, and take care to comply with all applicable laws so as to avoid inadvertently hiring a permanent employee by operation of law.
- Take precautions to minimize the risk that a subcontractor's workers may be deemed illegally dispatched workers or direct employees. This requires maintaining the distinct and separate identities of both the using business and service provider, as well as each business's employees. The primary means of doing so is to avoid exerting too much direct supervision or control over the operation of the subcontractor's employees.
- Specific useful precautions to keep in mind include avoiding situations where a subcontractor's employees work together at the same location, do identical work, wear the same uniforms, or otherwise project an image that is not meaningfully distinct from the company's own employees. The using business and the subcontractor should also have separate formal corporate identities, without excessive control or intermingling. Although the using business may specify the nature of the services it needs, it should not control the exact methods by which the purchased services are delivered; it is important that the subcontractor is not merely a conduit through which the using business controls the individual employees.

8. OBLIGATION TO BARGAIN COLLECTIVELY WITH TRADE UNIONS: EMPLOYEES' RIGHT TO STRIKE AND A COMPANY'S RIGHT TO CONTINUE BUSINESS OPERATIONS

8.1. Overview of Unions' Right to Organize

The right of private-sector workers to independent association, collective bargaining, and collective action, are all enshrined in Article 33 of the

Korean Constitution.[32] These rights are given form by the TULRAA, which sets out the specific rules by which labour unions may be formed and governed, and by which they may enter into collective bargaining agreements. The legal hurdles to organizing a union are not particularly high. Since 1 July 2011, a single employer or workplace may have multiple employee unions; and those unions may be formed without any election being held beforehand, and the minimum required number of union members is only two. Despite the ease with which unions may be formed, Korea's union density is relatively low compared to other OECD countries; it was found to be just over 10% as of 2013,[33] and private-sector union membership is highly concentrated in certain industries, including manufacturing and financial services.

It is permissible to form enterprise-level or industry-level unions, as well as confederations of individual unions.

Employers that regularly employ thirty or more people are also required to establish a labour-management council, but this council is not empowered to engage in collective bargaining like a union. However, consultation or resolution through the labour-management council is mandated for a variety of employment-related matters. Employers of this size must also constitute a grievance-handling committee with up to three grievance officers from each of the employer and employees; at any workplace with a labour-management council, they must be chosen from among the council's members.[34]

8.2. Right of Employees to Form and Join Unions

Employees may freely form and join a union, and a union may not discriminate against any eligible employee that wishes to join, on the basis of race, religion, gender, age, physical condition, type of employment, political party, or social status.[35]

Employers may not make it a condition of employment that a worker join, or abstain from joining, a union; *unless* the employer and a union representing more than two thirds of the employees in the same business agree to a 'union shop' provision in a collective bargaining agreement, in

32. Article 33 of the Constitution states that collective bargaining by public officials is allowed to the extent provided by act, and union formation and bargaining by such officials is governed by the Public Officials' Trade Union Act. Article 33 also provides that the right of workers to collectively bargain may be curtailed by statute if they are employed in important defence-related industries.
33. Changes in Union Density (chart) (*no-jo jo-jik-ryul byon-hwa-chu-i*), http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1511.
34. Promotion of Workers' Participation and Cooperation Act.
35. TULRAA Art. 5, Art. 9.

which case new employees may be required to join the union but cannot be disadvantaged if they are expelled from the union, or withdraw to organize or join a different union.[36]

To establish a union, an employee must prepare a report with certain statutorily required information and submit it, along with the union's bylaws, to a local government or the MOEL depending on the type and scope of the union. A certificate recognizing the union must be issued within three days of the submission, or a request to supplement the report may be issued instead, in which case certification must be granted within three days of submission of a supplemented report. Certification may generally be denied only if requested supplemental information is not provided, or if the proposed union organization is not of a type that may properly be recognized as a union. Such improper union organizations include 'company unions,' to which the employer provides a majority of the required financial support, or in which the employer's management are allowed membership; unions which allow membership to individuals who are not workers (except dismissed employees who may challenge their dismissal as unlawful); and organizations which are primarily political in nature.[37]

8.3. Multiple Unions and the Bargaining Representative

Forming a union is a relatively easy process, multiple unions may be formed in a single enterprise or workplace, and eligible employees are generally free to join or not join any particular union, as discussed above. However, two legal principles make collective decision-making by employees of significant importance.

First, a collective bargaining agreement will only apply generally, even to workers who are not members of the union that negotiated it, in two circumstances: (i) if it applies to at least half of the employees, or a particular class of employees, in a single enterprise or workplace, it will apply to all other such employees; and (ii) if it applies to more than two thirds of the workers performing the same kind of job and employed in the same geographical area, the Labor Relations Commission may declare that it applies to all other such workers.[38]

Second, generally a union may only negotiate on behalf of its own members, and an employer is only required to enter collective bargaining in

36. TULRAA Art. 81(2).
37. TULRAA Art. 12, Art. 2(4).
38. TULRAA Arts 35–36.

a single bargaining channel (although an employer may *consent* to collective bargaining with multiple unions). Therefore, if there are multiple unions representing the employees of a given employer, the TULRAA provides that they must undergo a statutory process to designate one union or a group of individuals from multiple unions, as the sole 'bargaining representative,' in order to negotiate a collective bargaining agreement with the employer.

Because of these two principles, for a collective bargaining agreement to have general force throughout an employer's workforce or over an entire class of employees, it must be negotiated either by: (i) a union representing at least half of the total employees or the class of employees sought to be covered; or (ii) a bargaining representative selected from among unions that represent at least half of such employees.

8.4. Unfair Labour Practices

Unfair labour practices are prohibited by the TULRAA, and are subject to criminal penalties of up to two years' imprisonment or KRW 20 million. The TULRAA defines 'unfair labor practices' to include:

(i) dismissing or discriminating against workers for joining, intending to join or establish, or performing any lawful act for the operation of, a union;
(ii) conditioning employment on joining or abstaining from joining a union (except where agreed in a collective bargaining agreement with a union representing more than two thirds of employees;
(iii) refusing or delaying required collective bargaining without justifiable reasons;
(iv) dominating or interfering with the formation or operation of a union, or financially supporting a union, except for certain permissible means of support, such as time off for union activities during working hours, and union offices on company premises; and
(v) dismissing or discriminating against workers for engaging in lawful industrial actions, and reporting or testifying about violations of the TULRAA.

Dominating or interfering with union activities is interpreted in a manner highly protective of free and independent union activity organized by the employees themselves. Accordingly, overt efforts to persuade or dissuade employees from forming a union, operating a union in a certain way, or adopting a certain course of collective action, are quite strongly discouraged and carry significant risk. This includes efforts to influence the election of