Employment and Labour Law of Korea

Bae, Kim & Lee LLC

Jeong Han Lee

1. Sources of employment law

The principal sources of law and regulation governing employment relationships in Korea are the Constitution, the Labour Standards Act and other statutes, individual employment contracts, internal employer work regulations, and collective bargaining agreements.

Of pervasive significance in employment law is the Labour Standards Act, which stipulates minimum standards for a wide range of work conditions. These standards will supersede any contrary provision—that is, any provision that is less favourable from the employee's point of view—of an employment contract, collective bargaining agreement ("CBA") or work regulation. Generally speaking, in case of inconsistency between any two of the sources of employment regulation, usually that source whose provisions work to the greater advantage of the employee will "trump" the other.

Following is a summary of each of the key sources of regulation.

Constitution: The Constitution of Korea establishes some basic principles of employment. Article 32 provides that all citizens "have the right to work," and contemplates legislation providing minimum wages and working conditions "to ensure human dignity." Article 32 also forbids gender discrimination in employment and work conditions. At the same time, Article 32 allows for "special protection" for working minors, and "preferential" work opportunities for military personnel and policemen or their family members following injury or death in the line of duty.

Labour Standards Act: The central piece of legislation, the Labour Standards Act (together with the related "presidential enforcement decree," or implementing regulation, the "LSA") prescribes the minimum work conditions that an employer must provide to its employees, including minimum standards for work hours, overtime pay, vacation and other paid leave, severance, and other allowances and benefits. The LSA applies to every employer that continuously employs 5 or more employees, including foreign employers with 5 or more employees at any office or "workplace" in Korea (certain provisions of the LSA also apply to smaller companies). As mentioned above, the LSA standards will supersede any contractual terms that are, for the employee, inferior. Violations of certain LSA provisions are punishable by criminal sanctions.

Other laws: There are other statutes and related regulations governing various aspects of employment, notably the following:

(i) establishing various minimum standards: the Minimum Wage Act, Employee Retirement Benefit Security Act, Act on the Protection of Dispatched Workers, Act on the Protection of Fixed-term and Part-time Employees and the Industrial Safety and Health Act;

(ii) establishing certain mandatory hiring guidelines: the Employment Security Act, the Employee Vocational Capability Promotion Act, the Equal Employment Opportunity and Work-Family Balance Assistance Act, the Act on Promotion of Employment and Vocational Rehabilitation of Disabled Persons, and the Act on Honourable Treatment and Support of Persons of Distinguished Service to the State;

(iii) regarding mandatory social insurance: the National Pension Insurance Act, the National Medical Insurance Act, the Employment Insurance Act, the Industrial Accident Compensation Insurance Act and the Wage Claim Guarantee Act;

(iv) regarding labour unions and labour-management relations: the Labour Union and Labour Relations Adjustment Act, which covers labour union activity and dispute resolution, and the Act on Promotion of Employee Participation and Cooperation, which concerns labour-management councils and grievance procedures.

Employment contract: Employer and employee are free to agree on the terms of employment as a matter of contract, subject however to the mandatory standards under the LSA, and subject also to any superior provisions under the employment regulations or an applicable collective bargaining agreement.

Employment rules: Under the LSA, a workplace with 10 or more employees on a continuous basis must prepare a set of rules of employment governing wage calculation and payment, work hours and other work conditions for its employees, and file the rules with the Ministry of Employment and Labour. Such rules exist in addition to the individual employment contracts.

Collective bargaining agreement: Employees are free to form a labour union, which may negotiate a collective bargaining agreement ("CBA") with the employer. Generally, the CBA will apply only to union members, and thus, employment conditions may vary as between a union member and non-union member. However, under the Labour Union and Labour Relations Adjustment Act, if a majority of the employees ordinarily engaged in a given type of work at a given workplace or in a given business are union members and the CBA applies to such union members, the CBA will also apply to the non-union employees engaged in the same work at the same workplace or in the same business. If the general employment rules contain conditions less favourable than those under the CBA, the CBA will prevail for any employees covered by the CBA.

2. Principal institutions

Government oversight of employment matters rests with the following agencies:

Ministry of Employment and Labour: The Ministry of Employment and Labour exercises general oversight over employment matters, including investigation into compliance with the LSA standards and other statutes. With a staff of labour inspectors, the Ministry has the authority to inspect workplaces and employee dormitories, inspect books and records, and question an employer and its employees. The Ministry has the authority to initiate prosecution based on penal provisions of the relevant statutes. The Ministry also handles government policymaking vis-à-vis labour unions, labour unrest and other major labour issues.

Labour Relations Commission: The Labour Relations Commission (or "LRC"), a quasi-judicial agency established under the Ministry of Employment and Labour, hears and reviews employee complaints of unfair labour practices in relation to labour union activity, such as discrimination based on labour union membership, and complaints of unjust dismissal or disciplinary action. The LRC also mediates disputes between employers and labour unions. The LRC includes district committees, to which grievances may be filed in the first instance, and a national committee, to which a district committee ruling may be appealed. In case of a finding of dismissal without just cause or other unfair labour practice, the LRC may order reinstatement of the employee, or require other necessary remedial steps.

3. Role of the courts

Generally, employment-related litigation may be brought before district civil courts, the courts of first instance having general jurisdiction over civil matters. An employee may for example bring suit for unjust dismissal, seeking reinstatement or compensation, before a district civil court, in addition to or in lieu of pursuing the grievance before the LRC. District court judgments may be appealed to an intermediate High Court, and from there to the Korean Supreme Court, the highest court.

A decision of the LRC may be contested before an administrative court, in a suit to invalidate the decision. Criminal prosecutions, based on penal provisions of the LSA or other statutes, come before the criminal courts. Appeals of an administrative court or criminal court decision may be taken to the High Court and then the Supreme Court.

4. Employment status and categories of worker

Employment status: The mandatory LSA standards and other key restrictions apply to "employees." Generally the term encompasses temporary as well as longer-term employees, and both full-time and part-time employees. The LSA defines the term "employee" broadly as one who "offers work to a business or workplace for the purpose of earning wages." Expanding on this, the Supreme Court enumerated the following set of factors that, to the extent they hold true, point to an employer-employee relationship:

(i) The individual's duties, and time and location of work, are determined by the (supposed) employer, there are applicable work rules, and the person is substantially supervised and ordered by the employer;

(ii) The duties are not such that the individual is able to delegate them to a third party.

(iii) Work equipment and materials are not owned by the individual.

(iv) Remuneration is in correlation to the amount of work furnished by the individual, based on a fixed rate of pay, and income tax is withheld.

(v) The relationship is continuous and the individual works exclusively for the employer.

(vii) The individual is classed as an employee according to other regulations.

(viii) The economic and social circumstances of the parties indicate an employment relationship.

Directors and Officers: "Employees" generally will not include directors on the board of a corporate employer (who are registered as such in public records), except in special situations where such a director has worked under the supervision of another director or an officer and thus is seen to satisfy the criteria above. Aside from such directors, other officers and directors are classed as "employees" for most purposes under the LSA and related regulations.

Fixed-term Employees: Under the Act on the Protection of Fixed-term and Part-time Employees ("Fixed-term Employees Act"), fixed-term employees are defined as employees employed subject to a limited term. This Act prohibits employers from using fixed-term employees, as such, for a period of over 2 years. Where an employer uses a fixed-term employee for over 2 years, the employee will be deemed employed for an indefinite term. That is, the employment period clause in the contract will be unenforceable, and instead, the employer will only be able to terminate him or her with just cause, like regular employees. In addition, the Fixed-term Employees Act prohibits employers from discriminating against fixed-term and part-time employees (employees who work less hours than other regular employees) in terms of pay or other working conditions, in comparison with any employees of indefinite term or regular employees who handle the same or similar jobs in the relevant business or place of business. Fixed-term or part-time employees who suffer discriminatory treatment have the right to file a claim for corrective measures to the LRC. Upon filing of such a claim, the LRC must investigate the case and may order an adjustment or corrective measure, improve wages or other working conditions, or award appropriate monetary damages.

Dispatched Workers: The Act on the Protection of Dispatched Workers ("Dispatched Workers Act") regulates the use of employees of another company by way of "worker dispatch." Under the Dispatched Workers Act, worker dispatch refers to a system in which a dispatching company ("Dispatching Company"), while maintaining the employment relationship with its employee, causes its employee to work for another company ("Receiving Company") under the supervision and direction of the Receiving Company in accordance with a dispatch agreement between the two companies. In addition, there is a distinction between outsourcing of work (when the employee is sent to the site of a client company to perform the outsourced work) and worker dispatch, based on whether the employee is supervised or ordered by his or her own employer or the client company. If the employee is ordered or supervised directly by the client company for the performance of his or her work, he or she will be regarded as a dispatched employee under Dispatched Workers Act. Under the Dispatched Workers Act, a company is prohibited from engaging dispatched workers in direct production processes and can only engage dispatched workers in 32 specified business roles, such as computer expert services, travel guide services, and security services. Any employer who dispatches or uses a dispatched worker in violation of the Dispatched Workers Act will be subject to a criminal penalty. Furthermore, under the Act, if a Receiving Company uses a dispatched worker for over 2 years or in violation of the Dispatched Workers Act, the Receiving Company becomes obligated to employ the dispatched worker directly as the Receiving Company's employee (unless the dispatched worker objects to such employment or there are justifiable reasons as prescribed by the Presidential Decree). The employment conditions for such workers will then conform to the employment rules applicable to that Receiving Company's regular employees who handle the same or similar jobs. If the company does not have any regular employees with the same job, the Receiving Company must at least provide the dispatched worker/new employee the working conditions that existed prior to the full employment by the company. Failure to comply with such restrictions may be punishable by criminal sanctions. Under the Act, Receiving Company may not discriminate against dispatched workers, in comparison with its own employees

engaged in the same or similar types of jobs within its business. This prohibition of discrimination applies to dispatched workers at all times including the two-year period before a dispatched worker becomes entitled to be treated as an employee of the Receiving Company. Dispatched workers who suffer discriminatory treatment may file a claim for corrective measures with the LRC, whose procedures in this context are analogous to those applicable to fixed-term and part-time workers as discussed above.

Exceptions to the application of the LSA: The maximum work hours and overtime allowance provisions of the LSA do not apply to managerial or supervisory personnel, or part-time employees who work less than 15 hours per week.

5. Contract

The LSA does not require an employment contract to be a contract in writing, except for an employment contract for a part-time employee. However, certain terms such as wage, working hours, annual paid leave and weekly holiday must be specified in writing, and such written terms must be provided to the employee at the time when an employment contract is entered into, and the employer must retain a copy for at least three years following termination. However, even absent a written agreement, either side may claim the existence of a verbal or implied agreement, which will be enforceable if proven.

Terms of an employment contract are in any case subject to restrictions under applicable statutes, mainly the LSA, and also are trumped by any superior conditions under employment rules and collective bargaining agreements. It is possible for additional, unwritten conditions to be alleged or implied, based on the course of conduct over a meaningful period or other circumstances.

Under the LSA, an employment contract need not specify a fixed duration and may be indefinite.

6. Terms and conditions

Scope of employment contract: An employment contract should indicate the nature of the work, wages and duration, and typically it will also indicate work hours and work site, either expressly or by reference to the internal employment rules. There are no legal requirements specifically concerning the content or form for the contract. In the absence of express contractual provisions, employment will be subject to the LSA and/or employment rules. Typically, the contract is a short one or two page document.

Scope of employment rules: All employers that have a workplace with 10 or more employees must file a set of employment rules with the Ministry of Employment and Labour. These typically include provisions governing wage calculation and timing and method of payment, work hours, paid leave, training, maternity care, workplace health and safety, and disciplinary procedure.

Average Wages versus Ordinary Wages: Severance pay, overtime and other allowances are each calculated on the basis of either “average wages” or “ordinary wages.” Severance pay is calculated based on average wages; overtime allowance, night work allowance, holiday work allowance and annual paid leave are calculated based on ordinary wages, as is the allowance in lieu of advance notice for dismissal.

> Calculation of Average Wages: Average wages, as the term is used in the LSA, are calculated for each employee by dividing the aggregate amount of wages paid, or due to be paid, during the three-month period preceding the day of the

triggering event for such calculation (such as the day of retirement), by the total number of calendar days during such period.

Calculation of Ordinary Wages: Ordinary wages are defined in the LSA as the hourly, daily, weekly or monthly wages which are due to be paid to an employee, whether periodically or in lump sums. Whether any particular wage is treated as an average wage or an ordinary wage is to be determined objectively. The Ministry of Labour issues certain illustrative examples for reference in uncertain cases.

Working time conditions: Generally, work hour, overtime and paid leave requirements are as follows, for all workplaces with 5 or more employees.

Work days and hours: The LSA imposes a maximum 5-day work week, of 40 hours per week and 8 hours per day (not including a minimum recess time of one hour per 8 hours of work or 30 minutes per 4 hours of work). Generally, an employee may agree to an additional 12 hours a week, for which the employer must pay an additional 50% of ordinary wages. However, for businesses that had less than 20 employees as of July 2011, until July 2014, employees may consent to an additional 16 hours per week, provided that the employer must then pay an additional 25% of wages for the first 4 extra hours (which may be overtime) and an additional 50% for the remainder. There is some flexibility, in that time exceeding 40 hours per week or 8 hours per day is possible for a day, or a week, if average hours per week during a broader period do not exceed 40 hours, but this is subject to restrictions.

Overtime: For work exceeding maximum permissible hours, the employer generally must pay, on top of ordinary wages of such hours, (i) additional 50% of ordinary wages as basic overtime allowance (except where additional 25% applies to the first 4 extra hours a week, in an arrangement with the employees' consent as noted above); (ii) additional 50% in case of night time work, performed between 10:00 p.m. and 6:00 a.m.; and (iii) additional 50% of ordinary wages for work on what should be a day off or holiday. Additional payment of night work and overtime work allowance are cumulative, not mutually exclusive (It is not clear whether the additional payment for holiday work allowance are cumulative or not. In practice, it has been interpreted as not cumulative. However, the legislation to make it cumulative has been submitted to congress for the review). The employer must pay each additional increment, if applicable. However, compensatory leave is possible with consent. For overtime work, the employer may agree with employees to grant paid leave in lieu of additional wages.

Annual leave: Under the LSA, an employee who works a full year with at least 80% attendance must get at least 15 days of annual paid leave. Until completing a full year, an employee who has not worked for a full year or has less than 80% attendance rate in a year, gets one day of annual paid leave per month of full employment with perfect attendance; however, any paid leave provided in the first year could be deducted from the following year's 15 day annual leave entitlement. An employee with over 3 years of employment is entitled to an additional one day of paid leave for every 2 years following the first year, provided that total annual paid leave need not exceed 25 days. There is no minimum paid monthly leave.

Severance pay: Under the Employee Retirement Benefit Security Act (the "Retirement Benefit Act"), employers must either pay a severance amount, according to seniority, at the end of the employment relationship, or with employees' consent, set up a retirement

pension system. Under the default regime of seniority-based severance pay, each employee who has worked for at least one year is entitled to the equivalent of 30 days' average wages (calculated by using wages for the 3 months preceding termination) for each year of continuous employment. This applies to voluntary retirement as well as termination for cause. Generally, an employer cannot elect merely to treat a part of payments made to the employee during the course of his employment as severance pay. Interim payment of severance pay accrued to date, during continued employment, is allowed only in specific situation prescribed by the Retirement Benefit Act. From December 2010, an employer with less than 5 employees must pay the minimum severance payment.

For the alternative of a retirement pension system, under the Severance Pay Act the employer may adopt either a "fixed contribution" system, whereby the employer will contribute fixed amounts for the retirement pension, or a "fixed payment" system, whereby the amount to be paid at retirement will be pre-determined. To adopt either type of system, the employer must obtain the consent of the labour union if there is one that represents the majority of the employees, or absent such a union, the consent of a majority of the employees, and file by-laws detailing the system with the Ministry of Employment and Labour.

Retirement Age: The mandatory retirement age under the amended Act on the Promotion for Employment of the Elderly is 60 years old. This requirement will begin to apply to workplace with 300 employees or more or to public sectors starting from January 1, 2016, and to other workplaces starting from January 1, 2017.

Social insurance: Employers must pay premiums to social "safety net" type funds, and withhold employee contributions from wages and forward such amounts to the funds, under the National Pension Insurance Act, the National Medical Insurance Act, the Employment Insurance Act, the Industrial Accident Compensation Insurance Act and the Wage Claim Guarantee Act. Employer premiums and employee contributions are calculated as a percentage of wages.

7. Employee representation

Labour-management council: Under the Act on the Promotion of Workers' Participation and Cooperation ("PWPC Act"), for any workplace with 30 or more employees, the employer must set up a labour-management council (or "LMC") comprising 3 to 10 representatives of the employees and an equal number of management representatives. Failure to set up an LMC where required is subject to a fine. Employee representatives on the LMC are to be elected by employees in secret balloting. The function of the LMC is to discuss and review a variety of matters bearing on employee-management relations summarized in part 8 below. Some of these matters require a resolution by the LMC.

An LMC must convene meetings every 3 months and may convene specially as needs arise. The quorum for LMC meetings is a majority of each side's representatives, and LMC resolutions are passed by a supermajority of the members in attendance. LMC by-laws, governing organization and procedure must be submitted to the Ministry of Employment and Labour.

Employee representative (ad hoc): Notice to, or consultation with, a general representative of the employees is required if an employer is considering a layoff and

under certain other situations as discussed in part 8 and part 11 below. This representative need not be one of the employee representatives on the LMC.

Unionization and collective bargaining: Employees are free to establish a labour union without any restriction and to demand collective bargaining. Under Korean law, employees are entitled to certain basic labour rights in order to maintain and improve their wages and other working conditions: (i) the right to organize and form a union; (ii) the right to bargain collectively with their employers regarding their working conditions; and (iii) the right to strike, in other words, the right to act collectively in order to facilitate negotiation. Interfering with the formation of a labour union, or otherwise interfering with any of the foregoing rights, constitutes an unfair labour practice and is strictly prohibited under the Labour Union and Labour Relations Adjustment Act. Other examples of unfair labour practices include dismissal or other disadvantageous actions on account of union activity; hiring employees on the condition that they withdraw from or refrain from joining a union, and impeding union activities.

8. Information and consultation

The LMC, including employee representatives, is involved in reviewing, and in some cases resolving on, a variety of common matters affecting the workforce. Consultation with or consent of a labour union, or an ad hoc employee representative, is required in certain key or crisis situations such as a proposed layoff.

LMC matters: There are 3 categories of issues for the LMC to deal with, requiring different levels of LMC review:

> Consultation: First, there are matters regarding which the employer should consult with the LMC. These matters include, among others: (i) improvement of productivity and profit sharing; (ii) hiring, development and training of employees; (iii) prevention of labour disputes; (iv) employee grievances handling; (v) improvement of occupational safety, health, and the work environment, and promotion of employee health; (vi) institutional improvement for personnel and labour management; (vii) general rules of employment adjustment, such as reassignment and transfer, retraining, dismissal for managerial or technological reasons; (viii) administration of working hours and recess hours; (ix) institutional improvement of wage payment methods, wage structure, wage system, etc.; (x) introduction of new equipment and technologies, or improvement of work processes; (xi) establishment or revision of work rules; (xii) employees' stock ownership plans and other support for the employee's wealth management; (xiii) welfare promotion for employees; (xiv) installation of employee surveillance equipment within the workplace; (xv) matters concerning maternity protection of female employees and balance between work and family life; and (xvi) other matters concerning labour-management cooperation.
>
> LMC resolution: For the following types of matters, the employer must seek a resolution of the LMC, and both employer and employees must abide by such resolutions: (i) setup of employee training or development plans; (ii) installation and management of facilities to promote employee welfare; (iii) establishment of employee welfare fund; (iv) matters outstanding from a grievances handling committee (required be established as a sub-committee of the LMC to address employee grievances); and (v) establishment of various labour-management collaboration committees. Failure to comply with such LMC resolutions is subject to fines. The LMC must promptly issue to employees a general notice of

its resolutions. Unexcused failure, by the employer or any employee, to comply with LMC resolutions is subject to a fine.

Reporting to LMC: The employer must report to the LMC and explain matters concerning the following: (i) overall management policy and management results; (ii) quarterly production plans and actual results; (iii) personnel plans; and (iv) the company's economic and financial condition. Where management omits any report on such matters, the employee representatives on the LMC may require submission of relevant data.

Layoffs: In the context of a proposed layoff or collective dismissal as discussed in part 11 below, including discussion of methods of mitigation and criteria for dismissal, the employer must, in good faith, at least 50 days in advance, "consult with" the employee(s) representing the majority of the employees (so chosen among them), or with the labour union if there is one that encompasses the majority of the employees. The term "consult with" in this context does not mean that consent of employees is required for dismissal, but in any event layoffs are subject to the constraints summarized in part 11 below.

Other special situations: Consent of a labour union representing a majority of the employees, or consent of a majority of the employees, is required as follows:

(i) To amend employment rules in a manner disadvantageous to the employees, the employer must get the consent of the majority-representing labour union if there is one, or else the consent of a majority of the employees.

(ii) Before adopting a retirement pension system pursuant to the Severance Pay Act (see part 6 above), the employer must obtain the consent of the majority-representing labour union if there is one, or else the consent of a majority of the employees.

(iii) It is worth noting that a merger or acquisition in itself does not require consultation with or consent of any employee representative. However, any transfer of an employee to another entity as employer requires his consent, including in the context of a business transfer.

9. Equal opportunities

Prohibitions on discrimination: Various forms of discrimination are prohibited under the LSA or other laws.

Gender: The Constitution as well as the LSA broadly prohibits discrimination against workers on the basis of gender. The Equal Employment Opportunity and Work-Family Balance Assistance Act (the "Equal Employment Act") prohibits gender discrimination by employers in recruitment, employment, promotion, retirement or other aspects of employment. Also under the Equal Employment Act, employers have an obligation to prevent sexual harassment in the workplace, and to provide safe and peaceful working conditions. Violation of the Equal Employment Act is subject to criminal as well civil penalties.

Other personal discrimination: The LSA prohibits employers from engaging in discriminatory treatment in relation to working conditions on grounds of nationality, religion or social status. Also, as described above, discrimination against fixed-term, part-time and dispatched workers, is prohibited under the Fixed-term Employees Act and Dispatched Workers Act.

Maternity leave and nursing time: An employer must allow 90 days of maternity leave, of which at least 60 days must be paid leave and at least 45 days of leave must be allowed following childbirth. Maternity paid leave of the LSA is applicable to miscarriage and premature birth: Five days of leave is allowed for employees who had a pregnancy period of up to the 11th week. Ten days of leave is allowed for those entering the 12th week to 15th week of pregnancy, thirty days of leave is allowed for those entering the 16th week to 21st week of pregnancy, sixty days of leave is allowed for those entering the 22nd week to 27th week of pregnancy, and the full ninety days of leave is allowed for those with at least 28 weeks of pregnancy. For women with infants under the age of one, an employer must, upon request, grant at least 30 minutes of nursing time twice a day on paid time.

Paternity leave: An employer must grant at least five days of paternity leave, among which three days must be paid leave if an employee whose wife has given birth requests such paternity leave within 30 days of childbirth.

Parental leave: For both male and female workers with a child under 6 years of age, an employer must allow leave (not necessarily paid leave) of up to one year or if sooner, until the child turns 6.

Menstrual leave: An employer must grant each female employee an additional one day of leave per month as menstrual leave. Under the provisions of the LSA, menstruation leave need not be paid leave.

10. Discipline and Termination

Disciplinary measures

Disciplinary measures against employees are subject to procedural requirements and a general requirement of just cause under the LSA, as well as any procedural requirements set out in the employer's internal employment rules.

A company's employment rules typically afford an employee the opportunity for a disciplinary committee hearing before disciplinary action is taken. Where the employment rules stipulate a hearing or other process, disciplinary action taken without following that process may be invalidated. However, a disciplinary hearing, such as a hearing before a committee formed for the purpose, is not actually required under the LSA. Rather, generally under the LSA, any disciplinary measure will require "just cause," a concept further discussed below in the context of termination.

Various types of disciplinary measures are permissible and commonly provided for under employment rules. Typical employment rules provide for warning, reprimand, deduction from wages, transfer, suspension without pay or dismissal.

However, in any event, under the LSA, an employer cannot apply any such measures, or generally take any other punitive action, without just cause Further, deduction from wages as a disciplinary measure is subject to the limitation under the LSA that the amount imposed for any one infraction cannot exceed half of one day's average wages (calculated over the preceding 3-month period) of the employee, and the aggregate amount of deductions for all infractions cannot exceed 10% of the total wages at each payment (typically monthly wages).

Dismissal as a disciplinary measure is subject to the restrictions on termination discussed below.

Termination

Dismissal of an employee is subject to the basic requirement of just cause, certain procedural restrictions, and other conditions for special situations. In essence, Korea is not an "at will" employment jurisdiction.

Grounds: Under the LSA, an employer cannot terminate an employee without "just cause." The term "just cause," which is not defined in the LSA, has been interpreted by the courts to mean such grounds as would, in the eyes of an "ordinary person," constitute reasonable grounds for termination; that is, it must be some factor so significant that continuing the employment would be unduly burdensome for the employer. Overall circumstances must be looked to, including the severity and frequency of the alleged misconduct or poor performance. Generally speaking, a single instance of negligence or inaptitude for relatively minor aspects of work is unlikely to constitute just cause; gross and repetitive incompetence will constitute just cause. Internal disciplinary standards are open to scrutiny and not determinative: even where the reason for dismissal falls within a category expressly provided for in such rules, the Supreme Court has held the dismissal may be deemed abusive and in bad faith, and hence invalid, if in fact it is lacking in just cause. The employer has the burden of proof of establishing just cause for dismissal. Depending on the degree of fault on the employee's part, dismissal may be invalidated for being disproportionate based on everyday notions as compared to alternative, lesser measures.

Procedure: Under the LSA, generally an employer must give 30 days advance notice of termination, or 30 days pay in lieu of notice. However, this can be omitted where either (i) the employee commits any intentional wrongful act or omission having a serious adverse effect on the company's business or operations; (ii) the employee is being terminated during a probationary period (provided that the period is 3 months or less); or (iii) the employee has a monthly payment term and has worked for less than 6 consecutive months.

Where employment rules provide for a particular process for dismissal such as a disciplinary committee hearing, a dismissal that does not follow that process may be treated as invalid.

Indemnity: In case of dismissal with just cause, no particular indemnity is due. Of course, severance pay will still be due, and in lieu of advance notice, 30 days' wage may be payable. In case of dismissal without just cause, the employee is entitled to seek reinstatement in a filing with the LRC or to a court and entitled to back wages from dismissal to reinstatement. In case of wrongful termination, the LRC has the authority to order payment of compensation instead of reinstatement where an employee declines reinstatement.

Consequences of wrongful termination: Under Supreme Court precedents, termination without just cause is null and void; employment cannot validly be terminated in this manner. Accordingly, in case of wrongful termination, the employee is entitled to reinstatement and back pay from the time of dismissal.

An employer may be subject to a fine for compelling compliance (the total amount of fines may not exceed eighty (80) million KRW in any two year period) if the employer does not follow a provisional remedy order rendered by the LRC. In addition, if an employer violates a final order issued by a court or the LRC, the employer may be punished by imprisonment up to one year or by a fine not exceeding 10 million KRW.

Restrictions in special situations: Additional restrictions, or in some cases additional flexibility for the employer, apply in certain situations:

Work-related recuperation period: An employer cannot dismiss an employee during, or within 30 days following, any period of leave for medical treatment for an industrial injury or disease.

Maternity leave: An employer cannot dismiss an employee during, or within 30 days following, her maternity leave.

Fixed term contracts: In general, the duration clause in an employment contract is enforceable under Korean law. However, the course of conduct may alter the effect of the clause. Where a contract has been renewed on substantially the same terms and conditions several times, a court may, for an employee's benefit, decline to enforce the duration clause according to its terms, and instead treat an employer's refusal to renew the contract as effectively a dismissal requiring just cause, as discussed above. Further, under the Act on Protection of Fixed-term and Part-time Workers, while an employer may use temporary employees (defined as employees having entered into employment contracts with a limited term clause) for a period of up to 2 years, if the employer should use a fixed-term employee for a period longer than 2 years, the employee will be regarded as having an employment contract without a fixed duration, terminable again only with just cause.

Probationary period: The general requirement of just cause for termination applies, in principle, even to termination of a probationary employee during his period of probation. However, the scope of just cause in the context of a probation period is generally understood to be more flexible than during regular employment and may include unsatisfactory ability or work attitude. Also, under the LSA, advance notice of termination is not required during a probationary period that is less than 3 months.

11. Collective dismissals

General conditions for collective dismissal: A collective dismissal, or layoff or "downsizing" will normally correspond to what under Korean law is termed "dismissal for reasons of managerial necessity." Under the LSA, as noted above, generally just cause is required for dismissal. However, under Article 24 of the LSA, collective dismissal is permitted and justifiable cause will be deemed to exist for such dismissal when all of the following conditions are satisfied:

(i) There is an "urgent managerial necessity" and the employer is able to demonstrate this fact.

(ii) The employer must exert its best efforts to avoid or minimize dismissals.

(iii) The employer must apply fair and reasonable criteria in designating the employees to be dismissed.

(iv) In connection with the above conditions (ii) and (iii), the employer must in good faith, and 50 days in advance of dismissal, "consult with" (which does not necessarily mean obtaining consent of) a representative of the majority of employees, or the labour union representing a majority of the employees if there is one.

Collective dismissal not in compliance with the above conditions will be deemed invalid. Hence, as in the case of other dismissals without just cause, the employer may be compelled to reinstate employees and pay back wages from the date of dismissal to reinstatement.

Related requirements: In addition to the above conditions, where the number of employees to be dismissed will exceed an applicable threshold, the employer must file with the Ministry of Employment and Labour, 30 days in advance, a report stating, among other things, the reasons for dismissal, the number of employees to be dismissed, and the timeline for the dismissals. The applicable threshold is basically 10% of the workforce: 10 employees for a company with fewer than 100 employees; 10% of the employees for a company of 100 to 999 employees; and 100 employees for a company of 1000 employees or more.

Furthermore, an employer is subject to rehiring obligations if he decides to expand his workforce again following a layoff. An employer must rehire previously dismissed employees within three years of their dismissal if the employer decides to hire new employees for positions similar to the ones previously held by the dismissed employees.

Interpretation: Among the conditions that must be satisfied, key terms such as "urgent managerial necessity" or "best efforts" are not precisely defined under the LSA. In the case of a business transfer, merger or acquisition undertaken to prevent deterioration of the business, the LSA permits a presumption of "urgent managerial necessity," but does not stipulate any specific criteria for that concept.

In general terms, based on court precedents, in determining whether such a necessity exists, the overall circumstances of a company are to be taken into account. According to some court precedents, a collective dismissal for managerial reasons under the LSA may be valid so as long as there is a persuasive showing of need in order to prevent a business crisis, even where the company does not face imminent insolvency. The recent trend among Korean courts, it is widely believed, is to allow greater scope for layoffs based on "managerial need." At any rate, the validity of a proposed collective dismissal should be determined on a case-by-case basis considering a variety factors such as the company's financial condition, market conditions, competitiveness and other circumstances.

The related concept of "best efforts" by the employer to avoid or minimize dismissals has been clarified by court decisions. Under Supreme Court precedents, suggestive factors include efforts by the employer (i) to reduce labour costs by reducing (or freezing) wages or limiting extra work; (ii) to avoid new hirings; (iii) to use temporary leaves of absence in order to reduce labour costs; (iv) to offer voluntary retirement plans; (v) to discontinue employment agreements with temporary or part-time employees; (vi) to restructure the work force in an efficient way, and (vii) to reduce other costs and expenses.

Inducements to retirement as an alternative strategy: In all cases, the conditions and procedures for collective dismissals involve uncertainty and complications. To avoid potential disputes, a company will typically offer extra compensation to employees, in addition to their accrued statutory severance, as an inducement to voluntary retirement. The package may vary widely from one situation to the next. A typical amount is equal to between three to 12 months' wages (on top of normal severance), or amounts equal to accrued severance.

12. Forthcoming legislation

As of the date of this publication, there is no notable forthcoming legislation governing labour and employment in Korea.

13. Useful references

The LSA, which is the central statute in the area of labour and employment and other employment and labour-related laws and regulations are available online, in both Korean and English, at the following two websites:

the Ministry of Employment and Labour - http://www.moel.go.kr

the Korea Legislation Research Institute - http://elaw.klri.re.kr