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JIPYONG LLC | Labor Newsletter

JIPYONG

Contents

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Article

Labor Law Issues Concerning Social Media

1. Introduction

With increased use of social media, including Facebook, Youtube and messengers such as Kakaotalk, there are more and more cases in which the employees' use of social media becomes problematic. In some cases, the materials which are posted on social media cause problems at the workplace. More recently, it has become possible to use Youtube for generating profits, and there are questions about restricting the employees' activities on Youtube. This article will examine how companies may restrict the employees' use of social media and what types of disciplinary actions may be imposed on the employees for their use of social media.[1]

2. Possibility of disciplinary actions for employees' use of social media and points of caution

A. Cases in which employees may be disciplined for activities on social media

Imposing disciplinary actions for the activities on social media alone would require that the activities of an employee reached a certain level to be deemed a violation of duty of good faith under the relevant employment agreement. For example, a prior court case recognized that an employer who reprimanded a trainee for constantly being on a smart phone to be a legitimate reason for refusing to hire the trainee.

[1] Seoul Administrative Court decision 2015guhap5832 dated October 15, 2015 (appeal dismissed and finally confirmed under Seoul High Court decision 2015nu65140 dated April 28, 2016).

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In principle, the materials posted by the employees on their social media are in the private sphere. The prior court cases provide that an awry act or behavior in an employee's private life may be legitimate grounds for disciplinary actions in case such an act or behavior is (1) is directly related to business activities or (2) raises concerns of disparaging the reputation of his or her employer.[2] These standards of evaluation under the court precedents may apply to the disciplinary actions concerning the materials posted on social media. For example, either the act of disclosing on social media the information deemed as confidential of a company or the act of posting on social media the materials disparaging the reputation of the company may be deemed grounds for disciplinary actions. As to the concerns about disparaging the reputation of the company, the court cases provide that this does not require occurrence of any specific impediment to the business or loss of transactions but objective evaluation that the act had substantially significant and negative influence on the societal evaluation of the company.[3] Therefore, there may be grounds for disciplinary actions even if there is not specific evidence on the harm suffered by the company as a result of the social media post.

Imposing disciplinary actions on the ground of engaging in for-profit activities on social media as a violation of any agreement not to hold any concurrent position would require that the activities reached a level of interfering with the order at the company or causing encumbrances in the employees' provision of services to infringe upon the employer's interests. The court cases provide that even if personnel policies under the rules of employment stipulate holding more than one job position as the ground for automatic dismissal, any justifiable ground as set forth under Article 23 Paragraph 1 of the Labor Standards Act shall be recognized for such a dismissal to be valid. Therefore, in practical terms, the automatic dismissal may be allowed only in the event it is deemed that the employment relationship may no longer be maintained under the societal

[2] *See* Supreme Court decision 93nu23275 dated December 13, 1994.
[3] Supreme Court decision 2000du3698 dated December 14, 2001.

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customs by the employee holding concurrent positions.[4] Further, there is also a court precedent finding that, where an employee privately operated a café business while being employed at a company, there was no evidence of any interference in the order at the company or in the performance of services, so this cannot be the ground for imposing any disciplinary actions.[5]

B. Points of caution in case of imposing disciplinary actions on ground of social media activities

Imposing disciplinary actions for maintaining the order as required in a company's operations shall be based on a justifiable cause or ground under Article 23 Paragraph 1 of the Labor Standards Act. Therefore, it is advisable to specify in the rules of employment the grounds, such as "any damage being incurred to the company by any awry or wrongful act of an employee committed outside of workplace" or "any trade secrets or information relating to the business operation acquired in the course of business at the company being disclosed to the outside".

Provided, however, an act of the employee in violation of the rules of employment and amounting to the ground for a disciplinary action would not automatically mean that the disciplinary action was lawful. The ground for a disciplinary action shall be lawful in itself. Therefore, a disciplinary action on an employee's activity on social media shall be carried out in a strict manner, so that only any such act deemed to be disclosure of the information relating to the trade secrets acquired from the performance of the services, or relating to the operation of the business, or an act deemed to be acquisition of personal profits by taking advantage of the same information or uploading materials of defamation against the company, or the other employees, via social media, thereby disparaging the reputation of the company or interfering with the order at the company, shall become subject to any disciplinary action by the employer.

[4] Seoul Administrative Court decision 2000gu22399 dated February 15, 2001 (finally confirmed under Seoul High Court decision 2001nu4247 dated September 27, 2001).
[5] Seoul Administrative Court decision 2001gu7465 dated July 24, 2001 (finally confirmed under Seoul High Court decision 2001nu13098 dated July 4, 2002).

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Furthermore, the determination of the disciplinary actions shall be at an appropriate level as well. A recent court case ruled that a disciplinary dismissal of an employee who repeatedly posted writing in mockery of the supervisor on social media was lawful.[6] However, the person subject to the disciplinary action in the above case had a history of being subject to three months of salary reduction from having engaged in a protest in front of the company for some reason which was relating to the company yet lacking any bases. Further, the person was imposed a fine for defamation for having posted false facts regarding the supervisor in addition to writing mockery on social media. Therefore, it would be advisable to first provide a warning or a light penalty and to notify in advance that there may be more serious disciplinary actions in the event the same act is repeated rather than immediately imposing serious disciplinary actions on the employee on the ground that the materials uploaded on the social media may be legally problematic.

In the event the materials the employee posted on social media concern labor union activities, there would be a risk that imposing disciplinary actions, or disadvantages, on the employee may be deemed unjust labor practices. Therefore, it would be important to carefully consider whether the employee is a member of a labor union or whether the posted materials which became problematic concern a labor union when determining whether to impose disciplinary actions or warnings.

3. Other labor law issues relating to social media usage

A. Direct orders via social media by contractor with relations to illegal dispatch

There were cases in which an employee of a contractor continuously requested for the services in a group chatroom on social media involving the employees of both the contractor and the

[6] Seoul Administrative Court decision 2019gu60233 dated November 14, 2019.

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subcontractor. It is likely for such request to be deemed a direct order from a contractor to subcontractor's employees, which may then be seen as circumstances of an illegal dispatch.[7] Therefore, opening a group chatroom on social media for the purpose of orders and supervision should be avoided for the services via a subcontractor to be not mistakenly deemed a dispatch relationship.

B. Orders via social media outside business hours

Concerning the limit on the weekly work hours to 52 hours, the orders and supervision via social media, emails and phone are becoming problematic. As to the work-related contacts outside the business hours themselves, there were not any definite issues of labor law. However, there were concerns that this could lead to the overtime hours not intended by the employer. Therefore, it would be important for the purpose of managing work hours to prevent work-related contacts outside the statutory work hours by preparing guidelines and providing trainings for the employees.

C. Workplace harassment in the sphere of social media

The Ministry of Employment and Labor stipulated that the place of workplace harassment would not be limited to the place of business and could extend to the online sphere, including the internal messenger and social media, based on the premise that it would consider the totality of circumstances as to whether an act would qualify as workplace harassment including the relationship between the parties, the place and the situation in which the act took place and whether the act was continuous.[8] In the event the employer recognized that the workplace

[7] *See* Seoul Central District Court decision 2017gahap544834 dated October 24, 2019.

[8] Ministry of Employment and Labor, Workplace Harassment Determination, Prevention and Response Guidelines, February 2019, p. 10.

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harassment took place in social media, the employer should promptly investigate the matter and take the necessary measures as provided by the Labor Standards Act.

4. Advice: Need for social media guidelines for the purpose of maintaining order at workplace

The employees' use of social media is fundamentally in the sphere of the employees' private lives. Therefore, it is impossible for the employer to comprehensively prohibit the employees' use of social media. Further, such restrictions may raise objections from the employees. Therefore, the company should prepare guidelines concerning the use of social media as a way to avoid disorder at the company in advance. Provided, however, if the guidelines either impose additional, new matters to be subject to sanctions, rather than further clarifying the existing rules of regulations, or provide for disciplinary actions on the ground of the violation of the guidelines, such provisions may be deemed unfavorable changes to the rules of employment and therefore require undergoing the necessary procedures (under Article 94 Paragraph 2 of the Labor Standards Act). Further, in view of respecting employees' freedom in their daily private living, the contents of such a guideline should be on the basis of negative regulations, such that as an employee's activities on social media may be restricted only in cases of interfering with the services at the company, disclosing the confidential information of the company, and disparaging the reputation of the company, etc.

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Case Highlights

Successful representation obtaining recognition for lawful contracting or delegation relationship on behalf of contractor in case involving issue of illegal dispatch of private firefighters hired by contractor

An automobile manufacturer delegated the operation of an internal firefighting division to a contractor, and the contractor subcontracted the operation to a subcontractor. In this case, the subcontractor's employees who were performing the services as the firefighters were the plaintiffs complaining of illegal dispatch against the automobile manufacturer as the principal. They sought verification of the employee status and compensatory damages.

Jipyong represented the contractor which intervened as a third party to support the principal to argue and prove that the contractor fulfilled its duties as a contractor for the principal and as a contractor for the subcontractor and that the subcontractor exercised the rights of instruction and personnel management as the employer for the employees.

The Seoul Central District Court accepted the arguments of the principal and the client, and determined that there was no illegal dispatch between the principal and the plaintiffs, thereby dismissing all the claims from the plaintiffs.

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Case Highlights

Successful representation on behalf of company defending against claim for severance payments by credit collectors in delegated positions

The plaintiffs executed delegation agreements for credit collection services with a company, and performed credit collection services. However, after the expiration of the delegation agreements, the plaintiffs filed a suit against the company seeking severance payments, arguing that they were deemed employees pursuant to the Labor Standards Act.

Jipyong represented the company and convincingly argued that the plaintiffs and the company were not in the employment relationship but in the delegation relationship by explaining in detail the actual services rendered by the plaintiffs, including the nature of the credit collection services, the relevant laws and regulations, the practical services performed by the credit collectors in the delegated positions and the nature of the fees received by the plaintiffs.

The court accepted the arguments of the company, determined that the plaintiffs were not employees under the Labor Standards Act, and dismissed all claims from the plaintiffs. This case was significant for having reached this conclusion despite a prior court judgement finding that the credit collectors were the employees of the company. This showed that the conclusion may differ depending on varying evidence, timing and actual operation methods as presented to the court, even if the issues were the same.

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Case Highlights

Successful representation on behalf of a CEO obtaining innocent verdict in a criminal complaint for failure to make severance payments

The CEO of an IT company ("IT Company"), upon the IT Company obtaining shares of another company ("Target Company"), undertook that new employment agreements were entered into between the IT Company and the employees of the Target Company. The employees continued their employment at the IT Company, and then resigned before continuing the employment for one year. The employees then filed a lawsuit against the IT Company seeking severance pay, as well as a criminal complaint against the CEO for a violation of the Act on the Guarantee of Employees' Retirement Benefits, on the ground that the employment relationships were succeeded along with the acquisition of the shares of the Target Company and that their continuous service period exceeded one year when having included the service period at the Target Company.

Jipyong represented the CEO and argued that there could not be any employment succession because the share purchase agreement did not amount to the business transfer and, even if it were deemed that there were employment succession, it would not be effective because the CEO of the Target Company, after the execution of the share purchase agreement, failed to fulfill the relevant obligations under the agreement, thereby leading to the IT Company's cancellation of the agreement and also resulting in extinguishing validity of the employee succession.

The court accepted the CEO's argument and declared the verdict of innocence.

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Case Highlights

Successful representation reversing National Labor Relations Commission decision which recognized unfair penalties and unfair labor practices

Two employees at a non-profit organization argued that the lowest grade on their evaluation and the resulting salary reduction constituted unfair penalties and unfair labor activities in submitting a claim for relief to the National Labor Relations Commission. The Seoul District Labor Relations Commission and the National Labor Relations Commission rendered a decision upholding all of the arguments of the employees.

Jipyong represented the non-profit organization and argued that (1) the evaluation was fair and reasonable; (2) the salary reduction was a fair result of the evaluation; and (3) the evaluation and the subsequent procedures, which were carried out without any relations to any labor union activities of the employees, were neither unfavorable treatments on the ground of the union activities nor based on any intents to engage in any unfair labor practices.

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Case Highlights

Successful representation on behalf of company in claiming for bonuses for 500 employees who were hired from contractor

The plaintiffs were the employees who were hired by the company while working for a contractor to the company. The plaintiffs argued that the provisions of the rules on the bonus, which provided for the bonus to be calculated by the number of days of the actual employment since the start of the employment (the "Clauses on Actual Number of Days") as to the employees having started the employment within one year, were either invalid or inapplicable to the plaintiffs. The plaintiffs further filed a complaint to the Seoul Central District Court against the company seeking a part of the bonus which was reduced. The plaintiffs argued that (1) the Clauses on Actual Number of Days were invalid as they were either exceeding the scope of the collective agreements or against the nature of the bonus which was not in consideration of the employment, (2) the plaintiffs were recognized to have a certain number of years of experience by the special agreement reached between the labor union and the management, and therefore, not under one year since the start of employment, and (3) the plaintiffs were the employees practically dispatched to the company while being employed by the contractor, and therefore, deemed to be employed by the company under the Act on the Protection, Etc. of Temporary Agency Workers.

However, the Seoul Central District Court determined that (1) the company's rules on the bonus were valid as supplementing the collective agreements; (2) the number of years of experience recognized by the special agreement between the union and the company was intended for the purpose of giving recognition to the experience for certain partial payments specified under the above-mentioned agreement without any relations to the number of days of the actual employment; and (3) the

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arguments for the employees' relationships as temporary workers may not be accepted as they were not in accordance with the agreement to withhold from any legal actions which the plaintiffs agreed to at the time of the employment. The Seoul Central District Court therefore dismissed all the claims of the plaintiffs.

Jipyong represented the company and strongly argued the effectiveness of the Provisions on the Actual Number of Days and the applicable criteria, the circumstances surrounding the employment, as well as the purpose and legitimacy of the particular employment to bring about successful results.

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Recent Court Cases

Compensation agreement requiring separate payments for overtime, nighttime and holiday pay in addition to ordinary wages would not qualify as blanket wage system

[Case No. Supreme Court decisions 2015da233579 and 2015da233586 dated February 6, 2020]

The plaintiffs were working as bus drivers of the defendant bus company by working every other day. The plaintiffs operated the line five times per day and the work hours were set to be 17 or 19 hours per day in view of the average hours of operation. The plaintiffs filed a suit against the defendant company seeking additional payment of statutory allowances. The defendant company responded that there was a blanket wage system in place.

The first instance court held that the blanket wage system was established between the plaintiffs and the defendant.

However, the Supreme Court held that there would be no blanket wage system if there were either collective agreements, or rules of employment or compensation, providing for separate payments of overtime, nighttime and holiday pay in addition to ordinary wages, even if the overtime, nighttime and holiday work were clearly anticipated based on the form of employment or the nature of the work in the individual cases.

The court reversed the lower court decision which had held the blanket wage system was established, and remanded to the lower court based on finding that (1) the statement on the compensation agreement provided for separate payments for overtime and nighttime pay in addition to ordinary wages; (2) the compensation agreement provided in advance for the work hours to be 17 or 19 hours

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per day including a set number of hours for overtime and nighttime work; and (3) the overtime and nighttime pay by the number of work days were calculated per the number of hours for overtime and nighttime work as set forth above based on the ordinary wages and in view of the rate set forth under the Labor Standards Act to be included in the monthly wage.

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Recent Court Cases

When calculating agreed number of work hours to be included in total number of work hours for converting fixed allowances into hourly wages, the number of work hours actually agreed by the employees shall be added, unless otherwise agreed

[Case No. Supreme Court decision 2015da73067 dated January 22, 2020]

The plaintiffs worked for an agreed number of work hours per work day, which were in excess of the standard work hours under the Labor Standards Act (i.e., for eight standard work hours and five overtime hours, 30 minutes of which was nighttime hours). The plaintiffs were paid, in consideration of the agreed number of work hours, various fixed allowances in the form of monthly or daily salaries in addition to the ordinary wages per month. The plaintiffs argued that various fixed allowances (e.g., allowances for continued service, driving, new year, drivers' association fees, meals and bonuses) which the company excluded from the ordinary wages should be included in the ordinary wages in seeking additional amounts of overtime allowances which were re-calculated based on the higher ordinary wages.

The key issue in this case was how to calculate the total number of work hours, which would form the basis for converting the fixed allowances into the ordinary wages per hour if the court were to conclude that the fixed allowances have the characteristics of the ordinary wages. The employees had already been paid, as the wages for the agreed number of work hours exceeding the standard work hours under the Labor Standards Act (i.e., eight hours per day and 40 hours per week), the fixed allowances in the form of monthly or daily salaries, which have characteristics of the ordinary wages. The employer had already excluded the fixed allowances from the ordinary wages.

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The Supreme Court had held in the past, if the employees were paid fixed allowances per month as the wages for the agreed number of work hours exceeding the standard number of work hours under Article 50 of the Labor Standards Act, the rate for calculating the additional allowances should be considered in calculating the number of overtime and nighttime work hours out of the agreed number of work hours which were included in the total number of work hours. In accordance with this decision by the Supreme Court, the lower court had included both the overtime work hours, by applying the rate of 150%, and the overtime and nighttime work hours, by applying the rate of 200%, in the total number of work hours for calculating the hourly wages.

In this case, however, the Supreme Court held that, in case of converting the fixed allowances, which were paid in the form of monthly salaries as the wages for the agreed number of work hours exceeding the standard number of work hours under the Labor Standards Act, to the ordinary wages per hour, the agreed number of work hours to be included in the total number of work hours shall be calculated by adding the number of work hours actually agreed by the employees, unless provided otherwise.

That is, the Supreme Court overturned the precedent which had calculated the agreed number of work hours by adding the number of overtime and nighttime work hours considering the applicable rates.

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Recent Court Cases

Incentives (e.g., productivity incentives and profit sharing) were found to be not wages which form the basis for the calculation of the average wages

[Case No. Suwon District Court decision 2019gadan50590 dated January 21, 2020]

The defendant company has paid incentives to the employees every year since 1999, and paid the incentives by the name of productivity incentives and profit sharing ("Incentives") since 2007. The defendant company did not include the Incentives when calculating the severance pay. The plaintiffs are the individuals who retired after being employed at the company, and they argued that the Incentives should be deemed to be in consideration of the employment, and thereby deemed wages, in bringing the suit.

The court held that neither productivity incentives nor profit sharing should be deemed wages which form the basis for the calculation of the average wages on the ground that it is unlikely the Incentives were continuously and regularly paid or the defendant company was under any obligation to pay these Incentives under any collective agreements, rules of employment or compensation, employment agreements or labor customs given that the Incentives were paid as the object of the work. The specific reasons for the holding are as follow:

1. The payment criteria and conditions of the Incentives depended on uncertain, external factors outside the control of the individual employees such as industry trends, overall market conditions, operating conditions, financial status and management decisions of the defendant company. Therefore, the Incentives would not be deemed directly or closely related to the provision of services.

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2. The rules of employment or compensation, or the collective agreements, provided simply that the defendant company may not pay severance pay or that the defendant company may separately determine the severance pay if necessary without providing for any criteria or conditions concerning the payment of the Incentives. Therefore, the defendant company would not be deemed to be under any obligation to pay the Incentives.

3. While a draft labor-management agreement in this case specifically provided for the payment criteria and rates of the Incentives, the specific payment conditions varied each year depending on the operating conditions of the defendant company. Therefore, it would not be sufficient by the existence of the draft labor-management agreement alone to deem that the payment criteria for the Incentives were established to oblige the defendant company to pay the Incentives or that there were customs established for the labor union and the management to expect the payment of the Incentives.

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Recent Court Cases

The rules of employment applicable to permanent employees were to apply to the employees transitioned from fixed-term employees to indefinite-term contract employees while performing the same or similar services

[Case No. Supreme Court decision 2015da254873 dated December 24, 2019]

The plaintiffs were hired as fixed-term employees and transitioned to indefinite-term contract employees. Even after the transition to indefinite-term contract employees, they were not subject under the rules of employment applicable to the permanent employees. Instead they entered into the employment agreements in the same form as they did when they were fixed-term employees. As a result, they were paid 80% of the ordinary wages and bonuses and KRW 100,000 less in vehicle support compared to the permanent employees. They were provided neither continuous service pay nor regular promotion. On the other hand, there was not a lot of difference in the terms and scopes of services or the quality and quantity of the services when compared to the permanent employees in the same departments with the same responsibilities providing the same services as the plaintiffs.

The Supreme Court held, in the event there are indefinite-term contract employees and permanent employees performing the same or similar services at the business (or place of business), the rules of employment applicable to the permanent employees shall apply on the indefinite-term contract employees, unless otherwise provided, for the following reasons.

1. While Article 8 Paragraph 1 of the Act on the Protection, Etc. of Fixed-Term and Part-Time Employees in principle simply prohibits discriminatory treatments against fixed-term employees, these provisions, in view of the intent and the concept of fairness, are to be

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interpreted as providing indefinite-term contract employees the working conditions no less favorable than the working conditions for the permanent employees providing the same or similar services, unless there are any other special circumstances.

2. Considering the purpose, structure, legislative intent and circumstances surrounding the drafting of the Act on the Protection, Etc. of Fixed-Term and Part-Time Employees, if there are permanent employees providing the same or similar services at the business (or place of business), this Act shall be interpreted as providing for the working conditions applicable to the permanent employees to apply in the same manner as to the indefinite-term contract employees, unless there are any special circumstances providing otherwise.

Furthermore, the Supreme Court held that (1) any parts of the employment agreements setting out the working conditions which are below the standards set forth under the rules of employment of the defendant should be invalidated and that (2) these parts should be made subject to the standards set forth under the rules of employment, thereby providing for ordinary wages, bonuses, continuous service pay and vehicle support according to the standards set forth under the rules of employment of the defendant, as well as regular promotion, for the plaintiffs.

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Recent Court Cases

Dismissal of labor leader, who is charged on allegation of embezzlement from union dues and sentenced to imprisonment and probation, was lawful

[Case No. Seoul Administrative Court decision 2019guhap54603 dated December 20, 2019]

The plaintiff is a state-owned enterprise operating the business of power utilities and related facilities development. The participant was criminally charged with the allegation of embezzlement of union dues while serving as the secretary general of the labor union and was sentenced to ten months of imprisonment and two years of probation ("Criminal Activities"). Based on the media coverage of this case, and there were public complaints and audit requests submitted to the Prime Minister's Office, Anti-Corruption and Civil Rights Commission and the Board of Audit and Inspection of Korea calling for disciplinary measures to be imposed on the participant. The plaintiff subsequently dismissed the participant.

The court ruled that, even if the Criminal Activities of the participant were internal issues of the labor union and could not be deemed specific and direct breach of duty in terms of the job responsibilities based on the relationship with the plaintiff, the awry or wrongful act of the participant could be the ground for a disciplinary action given that (1) the Criminal Activities were exposed to the media and caused substantial disorder and confusion and (2) the labor union and the place of business are indivisibly related, and the plaintiff labor union, as an independent union, is exposed to serious risks in connection with the Criminal Activities.

Further, the employees of the plaintiff, which is a state-owned enterprise, are expected to maintain the level of ethics and sense of responsibilities which are higher compared to other enterprises. Moreover, the media coverage of the Criminal Activities must have substantially damaged the reputation of the

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plaintiff as a state-owned entity. Therefore, it would be fair to conclude that the employment relationship between the plaintiff and the participant could not be maintained as a result of the Criminal Activities. As such, the court ruled that the dismissal of the participant was lawful.

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Recent Court Cases

Store managers of consignment sale store based on consignment agreements with company at department store are not employees

[Case No. Seoul High Court decision 2018na2054232 dated December 20, 2019]

The defendant is a company in the business of manufacturing and selling clothes and leather products. The plaintiffs entered into a consignment agreement ("Agreement") respectively for each plaintiff to sell certain products of the defendant at the store inside the department store where the defendant's products were displayed, in exchange of certain fees from the defendant. Each plaintiff worked as the salesperson at the department store.

The issue in this case was whether the plaintiffs were employees as defined under the Labor Standards Act. The court found that the plaintiffs were not employees of the defendant based on the following reasons, and thereby dismissed the claims of the plaintiffs.

1. The plaintiffs performed services in the capacity set forth under the Agreement, and did not appear to have performed any services which were unrelated to the Agreement by the order of the defendant.

2. The stores where the plaintiffs worked were not unilaterally designated by the defendant after the execution of the Agreement but assigned by considering the input from the plaintiffs after individual consultation at the time of the execution of the Agreement with the plaintiffs.

3. The plaintiffs hired a number of sales support staff as needed based on the surrounding circumstances, and determined the compensation for the sales support staff.

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4. The plaintiffs received certain fees as the compensation from the defendant. The fees were calculated based on the amount corresponding to a certain rate out of the amount of the sales at the store by each plaintiff from the first day to the last day of each month.

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Recent Court Cases

Dismissal of newly hired employees who joined minority union on the ground of "union shop agreement" was unlawful

[Case No. Supreme Court decision 2019du47377 dated November 28, 2019]

The sole labor union at the plaintiff company and the plaintiff place of business ("Majority Union") as of March 2016 had all new employees automatically become the union members immediately upon the employment at the plaintiff company, except the persons specified under Article 3 of the Union Shop Agreement (defined hereunder) (i.e., the employees other than the employees in the crew positions), and the plaintiff only employed the union members. The plaintiff entered into a bargaining agreement containing a union shop clause ("Union Shop Agreement") with intent to dismiss the employees not having joined the labor union under Article 2 of the Union Shop Agreement.

A nationwide and industry-specific labor union established a branch at the plaintiff place of business ("Minority Union") in December 2017, resulting in more than one labor union existing at the plaintiff place of business. Meanwhile, the Majority Union maintained as the members at least two thirds of the employees at the plaintiff place of business.

The employees who started working at the plaintiff company in August 2017 immediately joined the Minority Union around the time the Minority Union was established without going through the process of joining and withdrawing from the Majority Union. The plaintiff dismissed these employees in December 2017 by referencing the Union Shop Agreement.

The court found, in view of the statutory provisions and the intents of the relevant laws and regulations, including the Constitution, the Trade Union and Labor Relations Adjustment Act and the Labor Standards Act, the validity of the Union Shop Agreement which was executed between the

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Majority Union and the employer would not extend to the event of infringement of the employees' freedom to choose a labor union or of the right to organize by the labor union other than the Majority Union. That is, the validity of the Union Shop Agreement would extend only to the employees unaffected by the freedom to choose the labor union or by the right to organize by the union other than the Majority Union (i.e., the employees not having joined any labor unions).

The court further held the validity of the Union Shop Agreement could not be deemed to extend to the employees in the event the newly hired employees exercised the freedom to choose the labor union and already joined the labor union other than the Majority Union. Even if the employees had not separately completed the application or withdrawal procedures with the Majority Union, the employer's dismissal of the newly hired employees on the ground of the Union Shop Agreement would be found to be unjustified and thereby invalid.

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Recent Court Cases

Employee transfer between affiliates involving company deemed to be in business of temporary placement of workers may be subject to Temporary Agency Workers Act

[Case No. Seoul High Court decision 2019na2001310 dated November 12, 2019]

The defendant company in carrying out a new project had certain employees who were qualified in connection with the new project transfer from the affiliates of the defendant company. The plaintiffs were the employees transferred to the defendant company. They filed a lawsuit seeking a declaratory judgment on the employee status, arguing that the defendant company had the duty to directly employ because they were under the relationship of temporary placement of workers with the defendant company and the affiliate had not obtained the permit for temporary work agency business.

The court held that the temporary placement of workers by the temporary work agency in the business of temporary placement of workers is deemed temporary placement of workers under the Temporary Agency Workers Act and thereby subject to the Temporary Agency Workers Act and that once it is recognized that a company engaged in temporary placement of workers is in the business of temporary placement of workers, the transfer between the affiliates is not excluded from the scope of application of the Temporary Agency Workers Act. Whether a company was in the business of temporary placement of workers was to be determined by considering (1) the totality of the circumstances surrounding the temporary placement and (2) whether the temporary placement was repeated and continuous as well as (3) the size, number of times, duration and nature of business in accordance with the societal norms. The determination would not necessarily require the element of profit motive.
The court found based on the above criteria that the defendant had a duty to express intent of employment to the plaintiffs pursuant to the Temporary Agency Workers Act because the affiliates'

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transfer of the plaintiffs would practically be deemed temporary placement of workers and there was no evidence that the affiliates obtained the permit for temporary work agency business. This case is currently under appeal by the defendant company and pending review by the Supreme Court.

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