

■ Labor Column ■

## Recent court decision trends on the “current employee” requirement in deciding ordinary wage

### 1. Introduction

Recently the Seoul High Court has decided that the requirement of being in employment, i.e., holding status of a current employee as of the payment date, attached to payment of regular bonus in the form of a fixed compensation is invalid as long as it is construed that an employer would not be required pay for the work a retired employee had already provided (Seoul High Court 2017Na2025282 decided December 18, 2018 later referred as “this decision”). Many companies having this “current employee” requirement for their regular bonuses appear to be in confusion because of the potential impact that this High Court decision may have on the scope of ordinary wages.

However, this decision invalidating the “current employee” requirement (and thus recognizing the regular bonus as part of ordinary wage) needs to be reviewed in conjunction with the past Korean decisions regarding ordinary wages, to better understand the impact of the recent decision of the Seoul High Court. In fact, there is a Supreme Court decision in 2018 that upheld a lower court decision, which ruled that the “current employee” requirement attached to regular bonus payment was valid, but that the regular bonus payment that had the “current employee” requirement should not be part of ordinary wages as such payment lacked the element of “fixability”.

We will further discuss below the recent views of Korean courts regarding the ordinary wages and its relationship to “current employee” requirement attached to regular bonus payment.

### 2. Understanding the ordinary wage and the “current employee” requirement

#### (1) Ordinary wage

Under the Labor Standards Act of Korea (LSA), the term “wages” refers to wages, salary and any other kinds of money or valuables, regardless of their titles, which the employer pays to a worker as remuneration for work. In addition the term “the ordinary wage” means hourly wage, daily wage, weekly wage, monthly wage, or contract amount to be paid to a worker for a specifically agreed work or entire works on a regular and flat basis. As compared to the “ordinary wages”, we should note the term “average wage,” which refers to the money amount calculated by dividing the total amount of wages paid to a relevant worker during three calendar months immediately before the day grounds for calculating his/her average wages occurred by the total number of calendar days during those months.

Ordinary wage is used as a basis for calculating extended/night/holiday work pay (Article 56, LSA), annual paid leave (Article 60, LSA), advance notice of dismissal pay (Article 26, LSA), minimum standard for average wage (Paragraph 2, Article 2, LSA), and maternity leave payment (Article 76, Employment Insurance Act). On the other hand, average wage is used as a basis for calculating retirement allowance (Article 34, LSA) and shutdown allowances (Article 46, LSA).

## **(2) “Current employee” requirement**

In deciding whether a certain payment is an ordinary wage, all of the following 3 elements need to be met: ① regularity ② uniformity ③ fixability. The “current employee” requirement should be discussed in the context of “fixability” element as the requirement is linked to whether a relevant employee is employed as of a specific date to be eligible to receive a certain payment.

The Supreme Court views the element of “fixability” as, in regard to an employee who has provided his/her labor during any given day, the least amount of wage that should be naturally and definitely paid to the employee in return for such labor provided, even if the employee retires the next day (Supreme court decision 2012Da94643 decided December 18, 2013).

Therefore, in regards to any regular bonus payment conditioned upon meeting the “current employee” requirement, if the “current employee” requirement attached to such payment is

deemed valid, then whether such bonus is an ordinary wage would be determined by the relevant bonus possessing (or not possessing) the element of “fixability”.

### **3. Court decisions that have invalidated the “current employee” requirement**

Except for the above-noted Seoul High Court case, it is difficult to find any other court decisions in which the regular bonus payments were deemed part of ordinary wages by way of invalidating the “current employee” requirement relevant to regular bonus payment. There is one Gwang-ju District Court case, however, in which the court concluded that the existence of the “current employee” requirement alone did not necessarily mean that the fixability of a regular bonus must be denied (Gwang-Ju District Court decision 2014Kahap66690 decided July 7, 2016). But this court case had unusual facts in that the employer proceeded to make the regular bonus payment to the employee on a pro rata basis even after leaving the company; so it is difficult to regard this Gwangju court decision as another court decision that recognized the regular bonus as ordinary wage through invalidation of the “current employee” requirement.

### **4. Court decisions recognizing validity of the “current employee” requirement**

As shown below, the Supreme Court and many district court cases have concluded that regular bonuses with the “current employee” requirement lacks fixability, and thus regular bonuses are not ordinary wage.

#### **(1) Supreme court decision 2016Da15150 decided September 21, 2017**

In this decision, the Supreme Court agreed with decision of the lower court that the “current employee” requirement would be valid so long as it is not against mandatory provisions or public order and good morals, and that since the requirement was continuous work during the period subject to regular bonus payment, such payment condition was not contrary to such mandatory provisions or such order.

**(2) Supreme court decision 2017Da232020 decided September 26, 2017**

In this case, the district court recognized the element of fixability to a regular bonus with the “current employee” requirement, as the requirement was an incidental condition and on this condition alone, it would be difficult to reject the element of fixability.

But the Supreme Court overturned the lower court’s decision, stating that because the regular bonus payments were made to all persons who were employed as of a specific date, it was difficult to view those payments for compensation for the certain labor provided.

**(3) Supreme court decision 2016Da237653 decided October 25, 2018**

In this case, the lower court decided that the regular bonus with the “current employee” requirement was not ordinary wage, stating, in part, that such requirement “did not force the worker to give up his/her wage beforehand or to work against his/her will.” The Supreme Court concurred with the lower court’s decision that a regular bonus with the “current employee” requirement should not be included in ordinary wage because it lacked fixability, and that the “current employee” requirement was valid.

**(4) Discretionary review dismissal decisions and decisions of lower courts**

**A. Seoul High Court 2015Na25909 decided October 12, 2016, etc.**

The court in this case stated that an employer can decide the amount of pay, payment condition and the form of payment upon agreement with employees/labor unions, considering various factors such as the employer’s financial situation and the workers’ level of contribution to production, etc. and, thus, the “current employee” requirement as a payment condition was valid, barring such circumstances as the said requirement not meeting the minimum standard prescribed under the Minimum Wage Act.

**B. Seoul High Court 2017Na2033597 decided March 28, 2018**

The court in this case stated that “employed as of a specific date” condition on a base performance bonus payment cannot be viewed as unduly restricting workers to such a level that it is against the workers’ freewill and social norm. It also stated that the intent of Article 43 of the Labor Standards Act (Payment of Wages) is that all wages that have become payable upon meeting all necessary conditions must be fully paid, and that this provision does not apply to the case because “employed as of a specific date” condition is one of the conditions giving rise to a wage payment claim.

## 5. Conclusion

As seen above, most Supreme Court and lower courts are of the view that the “current employee” requirement on regular bonuses is valid, and thus there’s no element of fixability to it. So, the Seoul High Court decision first described above is seen as an exception, and it is expected that the Supreme Court will likely conclude differently.

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