

■ Labor Column ■

## Broad Recognition of Illegal Dispatch in Non-Manufacturing Sectors

### 1. Introduction

Illegal dispatch is one of the most frequently disputed labor issues in South Korea. From 2012 until 2016, there have been a total of 1,045 investigated cases in connection with violation of the Act on the Protection, etc. of Temporary Agency Workers (the “**Temporary Agency Worker Act**”), and these figures have steadily increased from 201 cases in 2012 to 303 cases in 2016.

One of the reasons why illegal dispatch is an issue is because it is difficult to make the legal distinction between illegal dispatch and lawful contracting. Under the Temporary Agency Worker Act, “temporary placement of workers” is defined as “engaging a worker employed by a temporary work agency to work for, and under the direction and supervision of, a user company in accordance with the terms and conditions of a contract on temporary placement of workers, while maintaining his/her employment relationship with the temporary work agency” (Article 2, Subparagraph 1 of the Temporary Agency Worker Act). In the meantime, “contracting” is established when “one of the parties has agreed to perform a certain job and the other has agreed to pay remuneration for the result of such work” (Article 664 of the Civil Act). Due to such ambiguity in the criteria for determination between illegal dispatch and lawful contracting, even the court is apt to render inconsistent decisions between them.

We will hereinafter review the tendency, criteria for judgment and decisions related to illegal dispatch in non-manufacturing sectors, which is recently becoming an issue.

## 2. Broad Recognition of Illegal Dispatch in the Non-Manufacturing Sectors

In January 2019, the Seoul Southern District Court sentenced the representative director of a large retailer to imprisonment (for 10 months, with a two years' stay of execution) for violation of the Temporary Agency Worker Act (Seoul Southern District Court 2018Godan 1654 dated Jan. 31, 2019)<sup>1</sup> because workers dispatched by an unlicensed agency, which was re-subcontracted by the contractor, worked on cashiering, display, and finishing at the retail store.

Illegal dispatch is recognized, even if it takes the form of a contracting for work or a service agreement, if it entails, in substance, temporary placement of workers in violation of the Temporary Agency Worker Act. Illegal dispatch has been recognized mostly in the manufacturing sector,<sup>2</sup> many of such cases subject to criminal liabilities.<sup>3</sup> In the above large retailer decision, the criminal liabilities for illegal dispatch were recognized in the distribution/service sectors. Illegal dispatch was also recognized in other lower instance cases involving expressway toll collectors and safety patrols, and the Ministry of Employment and Labor also recognized illegal dispatch in a case involving bakers. We will hereinafter review major illegal dispatch cases in the non-manufacturing sectors, given such broadening recognition of illegal dispatch in the relevant sectors.

## 3. Criteria for Judgment in the Precedents

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<sup>1</sup> An appeal by the accused (Seoul Southern District Court 2019No364) is currently pending.

<sup>2</sup> Supreme Court decision 2010Da106436 dated Feb. 26, 2015; Supreme Court decision 2010Da93707 dated Feb. 26, 2015; and Supreme Court decision 2015Da32905 dated Dec. 22, 2017, etc.

<sup>3</sup> Supreme Court decision 2011Do34 dated Feb. 28, 2013; Gwangju High Court decision 2010No366 dated Feb. 17, 2012.

Under the principle that the decision shall be rendered based on the substance of the employment relationship, without regard to the title or form of the contract, the Korean Supreme Court rules on illegal dispatch, without distinction between manufacturing and non-manufacturing sectors, based on (i) substantial command/direction of original contractor; (ii) substantial incorporation into original contractor's business; (iii) independent personnel management by original contractor; (iv) limited distinction and expertise/technicality of contracted work; and (v) independent organization or facilities.<sup>4</sup> We will take a look at major cases falling under each category.

#### **4. Major Cases based on Criteria for Judgement**

##### **A. Substantial command/direction of original contractor**

###### **(1) Field representative**

The court recognized illegal dispatch if there was no field representative permanently stationed at the workplace of the subcontracted workers,<sup>5</sup> if the field representative merely delivers the decisions made by the original contractor<sup>6</sup>, or if the main duty of the field representative is not command/direction but engagement in field work just like the other workers.<sup>7</sup> On the other hand, illegal dispatch was not recognized if a field representative

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<sup>4</sup> Supreme Court decision 2010Da106436 dated Feb. 26, 2015; Supreme Court decision 2015Da232859 dated Mar. 22, 2017; and Supreme Court decision 2016Da240406 dated Dec. 13, 2018, etc.

<sup>5</sup> Supreme Court decision 2016Da13741 dated June 23, 2016; and Supreme Court decision 2015Da232859 dated Mar. 22, 2017, etc.

<sup>6</sup> Supreme Court decision 2015Da32905 dated Dec. 22, 2017; and Seoul High Court decision 2014Na2036786 dated June 24, 2016 (final appeal pending as Supreme Court case 2016Da239024), etc.

<sup>7</sup> Supreme Court decision 2015Da232859 dated Mar. 22, 2017; and Seoul Eastern District Court decision 2016Gahap102687 dated Aug. 17, 2017 (decision became final and conclusive as of Sept. 9, 2017 upon the employer's withdrawal of appeal)

was stationed permanently at the workplace and substantially commanded and directed the works, including exercise of right to assign duties.<sup>8</sup>

**(2) Operating manual, rules of operation, etc.**

Illegal dispatch was recognized if the original contractor gave directions for the work by providing an operating manual to the subcontracted workers<sup>9</sup> or through bulletin board,<sup>10</sup> or required them to work in accordance with the regulations/rules of operation.<sup>11</sup> On the other hand, substantial command/direction of original contractor was not recognized, despite the operating manual, if the original contractor gave instructions for the work through the subcontractor's field representative.<sup>12</sup>

**(3) Regular reports**

Illegal dispatch was clearly recognized if the subcontracted workers were required to regularly report to or obtain confirmation on the deliverables (work log, etc.) from the original contractor.<sup>13</sup>

**B. Substantial incorporation into original contractor's business**

**(1) Mixed work**

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<sup>8</sup> Supreme Court decision 2014Da211619 dated Jan. 25, 2017; and Supreme Court decision 2014Da61401 dated Nov. 27, 2014.

<sup>9</sup> Seoul High Court decision 2015Da2006676 dated Feb. 3, 2017 (final appeal pending as Supreme Court case 2017Da219249).

<sup>10</sup> Supreme Court decision 2012Da17806 dated Jan. 28, 2016.

<sup>11</sup> Seoul High Court decision 2015Da2006676 dated Feb. 3, 2017; Uijeongbu District Court (Goyang Branch) decision 2015Gahap 71412 dated July 14, 2017 (agreement on mediation reached during the appeal)

<sup>12</sup> Supreme Court decision 2014Da211619 dated Jan. 25, 2017.

<sup>13</sup> Supreme Court decision 2015Da232859 dated Mar. 22, 2017; and Supreme Court decision 2014Da222794 dated July 22, 2016, etc.

Substantial incorporation into original contractor's business was recognized when the subcontracted workers carried out virtually the same work together with the original contractor's employees,<sup>14</sup> or carried out the business in the same manner while maintaining the same reporting or cooperation system with the original contractor's employees even if they did not work together.<sup>15</sup> On the other hand, substantial incorporation into original contractor's business was not recognized, even if they worked at the same place, if the duties of the original contractor's employees and those of the subcontracted workers were clearly distinguished.<sup>16</sup>

**(2) Use of the same uniform, and logos, etc.**

Substantial incorporation into original contractor's business was recognized when the subcontracted workers wore uniforms or name tags that were the same as those of the original contractor's employees, or if they used them together with the original contractor's logo.

**C. Independent personnel management by original contractor**

Illegal dispatch was recognized if the subcontractor prepared a duty roster and reported the same to the original contractor,<sup>17</sup> if the original contractor provided job training directly to

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<sup>14</sup> Supreme Court decision 2012Da17806 dated Jan. 28, 2016; Supreme Court decision 2015Da232859 dated Mar. 22, 2017.

<sup>15</sup> Seoul High Court decision 2014Na2036786 dated June 24, 2016.

<sup>16</sup> Supreme Court decision 2011Da78316 dated Feb. 26, 2015; and Supreme Court decision 2014Da211619 dated Jan. 25, 2017.

<sup>17</sup> Seoul High Court decision 2014Na2036786 dated June 24, 2016; and Uijeongbu District Court (Goyang Branch) decision 2015Gahap71412 dated July 14, 2017.

the subcontracted workers,<sup>18</sup> or if the training was provided by the subcontractor but was merely a repetition of the standard established by the original contractor.<sup>19</sup> The subcontractor's independent personnel management was not recognized otherwise if the original contractor got involved in the recruiting procedure (interview),<sup>20</sup> subcontracted workers were required to go on a leave with approval from the original contractor's manager,<sup>21</sup> or if the original contractor decided the personnel placement.<sup>22</sup> On the other hand, illegal dispatch was not recognized if the subcontractor had the authority to recruit or to take disciplinary actions, exercised the right to assign duties, and independently managed personnel records such as early leave or vacations.<sup>23</sup>

#### **D. Limited distinguishment and expertise/technicality of contract work**

Illegal dispatch was recognized if the contracted works were defined comprehensively without specification,<sup>24</sup> or if the price were calculated based on the labor cost incurred (e.g. labor rate subcontracting method).<sup>25</sup> However, illegal dispatch was not recognized if the contracted works were limited to the scope set forth in the subcontract agreement, and no additional work was carried out at the demand of the original contractor, even when the subcontract price was calculated based on the labor cost.<sup>26</sup>

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<sup>18</sup> Supreme Court decision 2013Da14965 dated Nov. 26, 2015; and Supreme Court decision 2016Da13741 dated June 23, 2016.

<sup>19</sup> Uijeongbu District Court (Goyang Branch) decision 2015Gahap71412 dated July 14, 2017.

<sup>20</sup> Supreme Court decision 2015Da232859 dated Mar. 22, 2017; and Seoul High Court decision 2017Na2029727 dated May 28, 2019 (final appeal pending as Supreme Court case 2019Da245266).

<sup>21</sup> Supreme Court decision 2016Da13741 dated June 23, 2016.

<sup>22</sup> Supreme Court decision 2014Da222794 dated July 22, 2016.

<sup>23</sup> Supreme Court decision 2014Da211619 dated Jan. 25, 2017.

<sup>24</sup> Supreme Court decision 2015Da232859 dated Mar. 22, 2017.

<sup>25</sup> Seoul High Court decision 2014Na2036786 dated June 24, 2016.

<sup>26</sup> Supreme Court decision 2014Da211619 dated Jan. 25, 2017.

Illegal dispatch was recognized if it involved simple repetitive work and the subcontracted workers carried out the normal duties of the original contractor.<sup>27</sup> On the other hand, illegal dispatch was not recognized if the works carried out by the subcontracted workers required certain experience and qualifications.<sup>28</sup>

**E. Independent organization or facilities**

Illegal dispatch was recognized if the original contractor provided free-of-charge the equipment, office, furnishings and supplies necessary for the performance of works.<sup>29</sup> On the other hand, it was not recognized as illegal dispatch if the subcontractor had independent organization or facilities,<sup>30</sup> or if the subcontractor had substantial business organization and carried out the contracted works at a number of workplaces.<sup>31</sup>

**5. Conclusion**

Recently, the court and the Ministry of Employment and Labor have been broadly recognizing illegal dispatch in non-manufacturing sectors as well as the manufacturing sector. Therefore, it would be desirable for each company to check and ensure in advance that the contracted works in non-manufacturing sectors are being carried out lawfully.

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<sup>27</sup> Seoul High Court decision 2018Na2062905 dated May 28, 2019 (decision became final and conclusive as of June 14, 2019 as neither party appealed).

<sup>28</sup> Seoul High Court decision 2016Na11051 dated Apr. 7, 2017 (final appeal pending as Supreme Court case 2017Da17955).

<sup>29</sup> Supreme Court decision 2013Da14965 dated Nov. 26, 2015; and Supreme Court decision 2012Da17806 dated Jan. 28, 2016, etc.

<sup>30</sup> Seoul High Court 2016Na11051 dated Apr. 7, 2017.

<sup>31</sup> Supreme Court decision 2014Da211619 dated Jan. 25, 2017.

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