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Contributing Editor:

Brian S. Cousin

Fox Rothschild LLP

glg Global Legal Group

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General employment and labour market and litigation trends

The Korean employment and labour market has undergone significant evolution in recent years, as the courts and the Labor Relations Commission (the "**LRC**") actively expanded the protection for employees and workers in general. Of particular significance, the Supreme Court of Korea rendered a ruling that remanded criteria for the "ordinary wage", expanding its scope and thus allowing employees to claim additional amount for statutory allowances such as overtime, nighttime/holiday allowances, and unused annual leave (paid time-off) allowances (Supreme Court en banc Decision 2023Da302838, December 19, 2024).

The courts are also expanding the scope of "employees" under the Labor Standards Act (the "**LSA**") or "workers" under the Trade Union and Labor Relations Adjustment Act (the "**Labor Union Act**") to those who were considered independent contractors in the past. The courts newly recognised freelance broadcasters, gym instructors, rideshare drivers as "employees" (Supreme Court Decision 2022Da22225, December 21, 2023; 2022Da271814, February 2, 2023; 2024Du32973, July 25, 2024), while acknowledging actors, home study tutors, and delivery drivers as "workers" (Supreme Court Decision 2015Du38092, October 12, 2018; 2014Du12598, June 15, 2018; Seoul Administrative Court Decision 2018Guhap50888, November 15, 2019).

Another notable trend is the rise in the number of the Serious Accident Punishment Act (the "**SAPA**") cases. The SAPA was enacted in January 2021 and went into effect in January 2022 for workplaces with 50 or more employees. Starting from January 2024, it applies to all workplaces with five or more employees. The law primarily applies to fatal occupational accidents, and it imposes criminal liabilities on persons with management authority. For three years, more than 800 SAPA cases were reported. Employers are still experiencing confusion over the responsibilities required under the SAPA. In March 2025, the Busan District Court approved a defendant's filing at the Constitutional Court to review whether the SAPA violates the Constitution of the Republic of Korea. Further discussions are expected to continue for a while.

In addition, labour disputes in Korea are on the rise due to easy-to-access labour law procedures, such as the LRC. The LRC plays a similar role as the National Labor Relations Board in the U.S., but to a greater extent, since the LRC exercises a broad authority over individual and collective labour issues, from unfair dismissal to discrimination remedy. Instead of filing a lawsuit in courts, an employee or a labour union seeking relief may file a claim with the LRC. The LRC shall hold a hearing within 60 days upon the receipt

of such application. Employees prefer disputing through the LRC because they can get results within a shorter period of time. In 2022, 13,142 unfair dismissals and other measures were filed at the LRC; the number increased to 15,816 in 2023 (a 20.3% increase).

Redundancies/reductions in force, business transfers, and reorganisations

Redundancies/reductions in force

An employer in Korea who seeks to restructure its organisation and reduce the number of employees may consider a "dismissal under managerial reasons" (layoff) (Article 24 of the LSA). The dismissal under managerial reasons is a unilateral termination of employment by an employer. Article 24 of the LSA, which regulates layoff, requires (i) urgent business necessity, (ii) efforts to avoid layoff, (iii) reasonable and fair criteria for selecting dismissed employees, and (iv) advanced notice (50 days) and negotiation in good faith with labour union or employee representatives.

The Korean courts have found some layoffs legitimate in some cases, but generally it is very hard to conduct a layoff legitimately under Article 24 of the LSA.

(i) "Urgent business necessity" requires that the company cannot continue its business, or at least has a possibility that the company may face some severe financial difficulties, if laying off a certain number of employees does not work. The courts consider the overall management situation of the company when they decide whether a company has such an urgent business necessity. The Supreme Court found that a company has an "urgent business necessity" when the company has shown constant net losses over a few years (Supreme Court Decision 2009Du14682, September 8, 2011). In another case, the Supreme Court denied an urgent business necessity, stating that, despite a net loss in the previous year, the company showed constant net profits.

(ii) The employer shall also put all of its efforts to avoid a layoff (Article 24(2) of the LSA). The "efforts to avoid a layoff" include improvement of business measures and work procedures, stoppage of overtime and new recruitment, temporary leave, voluntary retirement, etc. Employers should take all available measures to reduce operating costs to avoid a layoff. A layoff should be the last resort. The courts consider the company's financial status, reasons for a layoff, and the size and nature of the business when deciding whether the employer put enough effort to avoid a layoff (Supreme Court Decision 2003Du11339, January 15, 2004). If a company recruits new hires after a layoff, it could signal that the company has not fulfilled the requirement to put efforts to avoid a layoff (Supreme Court Decision 2015Du56144, March 24, 2016).

(iii) The employer should establish "reasonable and fair criteria" when selecting employees for a layoff. In many cases, companies already have policies or collective bargaining agreements that require certain criteria shall be considered for layoff criteria. If no such criteria have been predetermined, standards must be established that appropriately balance subjective employee circumstances (including the employee's health status, family support obligations, and possibility of finding a new job) with employer's interests (including work performance, disciplinary history, and compensation level) (Supreme Court Decision 2016Du64876, July 29, 2021). Layoff criteria were found unlawful when they did not include employee's subjective circumstances such as age, health status, and family support obligations (Seoul Administrative Court Decision 2009Guhap37395), or when a company intentionally managed the criteria so that strike participants were chosen as employees being laid off (Supreme Court Decision 2011Du11280, August 25, 2011).

(iv) If the company has a labour union that consists of the majority of the employees, then the company shall notify the union at least 50 days in advance of the layoff, and engage in negotiations in good faith. If no such union is established, then the company shall make employees elect employee representatives. In negotiation, the employer and the labour union (or the employee representative)

should discuss the current business status, the need for a layoff, the number of employees for layoff, the criteria for selecting employees, the layoff procedure, and protection measures for employees.

In addition, an employer who terminated an employee under Article 24 wishes to hire a new employee for the same job within three years from the date of layoff, such an employer should give priority to the employee laid off (Article 25(1) of the LSA). The employee can claim re-employment and compensation (Supreme Court Decision 2016Da13437, November 26, 2020).

Business transfers

A business transfer occurs when the whole business, including its material, organisational, and human assets, is transferred in its entirety (Supreme Court Decision 91Da41750, May 25, 1993). It is particularly important because, if the sale of a business is regarded as a business transfer, the transferee is required to re-employ all the employees of the transferor. The employee can also choose to stay in the transferor company or retire from both the transferor and transferee company (Supreme Court Decision 2011Da45217, May 10, 2012). On the other hand, the transferee does not need to re-employ the transferor's employees when it is a mere "sale of assets".

In a business transfer, the transferor and the transferee often agree on excluding some employees from being transferred. In that case, the transferee should have a "just cause" to terminate the employees under Article 23(1) of the LSA, just like any other termination. The business transfer itself does not constitute a "just cause" (Supreme Court Decision 2000Du9455, March 29, 2002).

Business protections and restrictive covenants

Protection of trade secrets

The Korean law protects confidential information through the Unfair Competition Prevention and Trade Secret Protection Act (the "**UCPA**"). Under the UCPA, a trade secret (confidential information) is defined as "information, including a production method, sale method, useful technical or business information for business activities, which is not known publicly, is managed as a secret, and has independent economic value" (Article 2(2) of the UCPA).

To be regarded as a "trade secret", it must not be known to the public, have an economic value (technically/managerially useful), and be managed as a secret. Some examples of the trade secret include technical information such as product/facility blueprints, production line designs, program source code, manufacturing methodologies, processing techniques and ingredient ratios, and business information such as customer database, marketing strategies, bid pricing, business performance analytics, and sales methodologies. Managing certain information as a trade secret could include signing a Non-Disclosure Agreement or a Confidentiality Agreement, providing regular training to employees, limiting access, sorting certain information as confidential, and establishing technical measures to protect the information.

An employer could seek a remedy for trade secret infringement under the UCPA. Those remedies include the prohibition of infringement of trade secrets (Article 10(1) of the UCPA), measures necessary to prohibit or prevent the infringement, such as the destruction of goods constituting the infringement and the removal of facilities used in the infringement (Article 10(2)). The employer may also claim liability for damages (Article 11). The right to request prohibition of infringement of trade secrets has a three-year statute of limitation from the date the employer acknowledged the infringement (or the possibility of such infringement) and the infringer, and 10 years from the date the infringement first occurred (Article 14). An employer may also claim damages based on the Non-Disclosure Agreement or the Confidentiality Agreement (Article 390 of the Civil Act).

The UCPA also lays out criminal liabilities for the infringer. The infringement could lead to imprisonment up to 10 years or fines up to 500 million KRW (Article 18).

Suwon District Court (Sungnam Branch) recently found guilty an employee who downloaded company files containing confidential information to his personal computer upon termination of employment and was sentenced to 10 months of imprisonment with two years of probation and a fine of 10 million KRW (Suwon District Court Sungnam Branch Decision 2023GoDan1788, November 17, 2023).

Non-compete agreements

It is quite common in Korea that an employer and an employee sign a non-compete agreement upon the termination of employment. The Supreme Court of Korea determines the legality of such an agreement under Article 103 of the Civil Act, focusing on whether it excessively restricts the freedom of occupation and the right to work, protected by the Constitution, or unduly limits the freedom of competition.

In doing so, the court considers: (i) whether the former employer has an interest worth protecting; (ii) the employee's position at the former employer (whether the employee had access to confidential information); (iii) how restrictive the non-compete agreement is (restricted area, range of restricted employers, restriction period, etc.); (iv) whether any remuneration was provided in return for signing the non-compete agreement, and how much was provided; (v) the circumstances regarding the termination; and (vi) public interest (Supreme Court Decision 2009Da82244, March 11, 2010).

Daegu High Court ordered an employee to pay 20 million KRW to his former employer in a recent case where the employee violated a non-compete agreement, which prohibited the employee from running a similar business for three years in the southern regions of South Korea. The court stated that the non-compete agreement is partially lawful up to one year from the date of termination and one southeastern region where the former employer operated (Daegu High Court Decision 2023Na17827, August 22, 2024).

Discrimination and retaliation protection

General framework for discrimination and retaliation protection

Currently, Korea does not have a general statute for anti-discrimination, but the Constitution of Korea states that all citizens shall be equal before the law, and no discrimination in political, economic, social, or cultural life on account of sex, religion, or social status shall be allowed (Article 11). Based on the Constitution, individual statutes such as the LSA, the Labor Union Act, the Equal Employment Opportunity and Work-Family Balance Assistance Act (the "**EEOA**"), the Act on Prohibition of Age Discrimination in Employment and Elderly Employment Promotion (the "**APA**"), and the National Human Rights Commission of Korea Act (the "**NHRCA**") prohibit discrimination in each field.

The LSA states that an employer shall neither discriminate against employees based on gender, nor take discriminatory treatment in relation to terms and conditions of employment on the ground of nationality, religion, or social status (Article 6). To be regarded as a "discrimination based on status", an employee should prove that he was treated differently despite providing the same labour as someone in the "inherently identical" group (Supreme Court Decision 2016Da255941, September 21, 2023). Likewise, the Labor Union Act asserts that a member of a trade union shall not be discriminated against on the ground of race, religion, sex, age, physical conditions, type of employment, political party, or social status (Article 9). Article 9 of the Labor Union Act applies to internal discrimination within trade unions (Daejeon High Court 2021Na14517, August 17, 2022).

The EEOA prohibits employers from discriminating on the grounds of gender in recruiting/employing employees, wages and other benefits, education, assignment, promotion, age limit, retirement, and dismissal (Articles 7, 8, 9, 10, 11). Any employer who discriminates against employees on the grounds of gender could be held liable to up to five years of imprisonment or a 30 million KRW criminal fine (Article 37(1)). Most notably, Article 8 provides that the employer shall provide "equal pay for equal-value work in the same business", which is used as a basis for discrimination lawsuits raised by employees. The Supreme

Court stated that any discrimination (unreasonable treatment) based on matters other than social status, gender, or any other standard shall be unlawful under Article 6 of the LSA, Article 8 of the EEOA, and Article 11 of the Constitution, ruling that it was illegal for a national university to discriminate against a part-time instructor and in favour of a full-time instructor in terms of their pay rate (Supreme Court Decision 2015Du46321, March 14, 2019). Any employer who does not provide equal pay could be punished to up to three years of imprisonment or a 30 million KRW criminal fine (Article 37(2)(1)).

Sexual harassment on the job

The EEOA also prohibits sexual harassment in the workplace, defining the harassment as "an employer, a superior or an employee causes another employee to feel sexual humiliation or repulsion by sexual words or actions by utilizing a position in the workplace or in relation with duties, or providing any disadvantages in working conditions and employment on account of disregard for sexual words or actions or any other demands, etc." (Article 12, Article 2(2)). The EEOA also requires employers to take certain measures upon acknowledging any sexual harassment in the workplace. The employer shall conduct an investigation immediately (Article 14(1)) and take necessary measures such as changing the workplace, taking disciplinary action against the perpetrator, and providing paid leaves to the harassed during and after the investigation (Article 14(2), (4), (5)). While doing so, the employer shall hear opinions of the harassed employee on the measure (Article 14(5)).

Furthermore, an employer shall not give any "disadvantageous treatment" to the harassed employee or the employee who reported the sexual harassment, such as disciplinary measures (e.g. termination, suspension), discrimination in performance evaluation, and restrictions on opportunities for training (Article 14(6)). The violation could lead to up to three years of imprisonment or 30 million KRW of a criminal fine (Article 37(2)(2)). Seoul Central District Court ordered an employer to pay 20 million KRW to a sexually harassed employee since the employer gave "disadvantageous treatment" to the employee by terminating her without any legitimate cause (Seoul Central District Court Decision 2018GaDan5243822, May 17, 2024). A person who is involved in the investigation of sexual harassment (e.g. the investigator, the person who receives the report) shall not leak confidential information learned in the course of the investigation to any other persons against the will of the harassed employees (Article 14(7)).

Workplace harassment

Article 76-2 of the LSA prohibits both employers and employees from harassing an employee at the workplace, defining "workplace harassment" as "causing physical or mental suffering to other employees or deteriorating the work environment beyond the appropriate scope of work by taking advantage of superiority in rank, relationship, etc. in the workplace". Similar to sexual harassment at work, an employer shall conduct an "objective investigation" upon acknowledging any occurrence of the workplace harassment, take protective measures such as changing the place of work and providing paid leaves, and take necessary measures such as disciplinary action (Article 76-3(2), (3), (4), (5) of the LSA). An employer shall not give any "disadvantageous treatment" to the harassed employee or the employee who reported the workplace harassment (Article 76-2(6)). Any employer who gave a disadvantageous treatment to a harassed employee or an employee who reported the workplace harassment could be held liable to up to three years of imprisonment or 30 million KRW of a criminal fine (Article 109(1)). Any violation regarding the employer's responsibility on workplace harassment could also lead to an administrative fine up to five million KRW (Article 116(2)(2)). In addition, a person who is involved in the investigation of workplace harassment (e.g. the investigator, the person who receives the report) shall not leak confidential information learned in the course of the investigation to any other persons against the will of the harassed employees (Article 76-2(7)).

Cheongju District Court found that ordering unpaid leaves to the employee who reported a workplace harassment and sending the employee to a remote branch without just cause constituted a

"disadvantageous treatment" and ordered the company to pay for the unpaid leaves and five million KRW for mental suffering damage, even though the company claimed that the report was found groundless through the investigation (Cheongju District Court Decision 2021GaDan72133, September 27, 2023).

Discrimination based on age

The APA prohibits employers from discriminating against an employee or a job applicant based on age regarding recruitment/employment, wage/other benefits, training, placement/promotion, and termination (Article 4-4(1)). Setting a certain standard other than age could constitute a violation of the law if it leads to discrimination based on age (Article 4-4(2)). It is prohibited for an employer to give any disadvantageous treatment to an employee because he filed a petition, complaint, report, or lawsuit regarding age discrimination at work (Article 4-9). An employer who gives disadvantageous treatment shall be liable for imprisonment of up to two years or a criminal fine up to 10 million KRW, while discriminating based on age could lead to a criminal fine up to five million KRW (Article 23-3).

Protection against dismissal

Legitimate causes for dismissal

Dismissal, or unilateral termination of employment, could be divided into three types: disciplinary dismissal; dismissal based on low performance; and others. Whether a dismissal or a unilateral termination of employment is lawful, an employer needs a "justifiable cause" to dismiss, layoff, suspend, transfer, reduce wages, or take any other disciplinary measure against an employee (Article 23(1) of the LSA). The Supreme Court requires a justifiable cause for both dismissal for wrongdoings and dismissal based on low performance. An employer bears the burden of proof that the employee has a justifiable cause for dismissal (Supreme Court Decision 2001Du11069, December 28, 2007).

(1) Disciplinary dismissal

When disciplinary action is taken against an employee, the employer has the discretionary power to determine what kind of disciplinary action shall be imposed. However, such disciplinary action may be deemed unlawful when the exercise of discretionary power by the employer is recognised as an abuse of the discretionary power entrusted to the employer.

When reviewing whether a disciplinary action is legitimate, the courts consider: (i) the nature and severity of the employee's misconduct; (ii) the employee's position and responsibilities; (iii) the employer's business objective and workplace environment; (iv) consistency with established disciplinary standards and precedents in the business; (v) the employee's prior work history and performance record; and (vi) the balance between the misconduct and the disciplinary action imposed, and see whether the continuation of the employment relations is "socially untenable" due to the employee's misconduct (Supreme Court Decision 95Nu15742, September 20, 1996; Supreme Court Decision 2007Du979, May 28, 2009; Supreme Court Decision 2013Du13198, October 31, 2013).

Furthermore, when an employee is subject to multiple disciplinary allegations, whether a dismissal is legitimate shall be judged by overall disciplinary causes rather than individual or partial misconduct (Supreme Court Decision 2007Du979, May 28, 2009).

The Supreme Court found dismissals lawful when an employee falsely stated his academic records and work history (Supreme Court Decision 98Da54940, June 23, 2000); an employee was absent at work without approval for more than 25 days in a year (Seoul Administrative Court Decision 2014Guhap14754, February 5, 2015); and an employee sexually harassed eight female employees, 14 times in total (Supreme Court Decision 2007Du22498, July 10, 2008). Note, whether a disciplinary action is legitimate varies widely depending on the circumstances.

(2) Dismissal based on low performance

For a performance-based dismissal to satisfy legal standards offered by the Supreme Court, an employer must prove that the "employee's performance is too inadequate to maintain employment relations under social norms". Specifically, the employer needs to demonstrate that (i) the performance evaluation process was conducted using "fair and objective criteria", and (ii) the employee's performance deficiencies were substantial – not merely below average compared to peers, but persistently failing to meet minimum expectations with little prospect for improvement.

In doing so, the Supreme Court considers the employee's role and responsibilities, whether the performance standards were reasonable for the position, the severity and duration of low performance, whether the employer provided improvement opportunities through training or reassignment, whether the employee showed any performance improvement following the opportunity, and the employee's overall attitude regarding the performance issue (Supreme Court Decision 2021Du33470, December 28, 2023).

Under such standards, the Supreme Court has found that the dismissal for low performance in the above case had a "justifiable cause" because (i) the employees were placed at 3,857th and 3,859th out of 3,859 employees in performance reviews from 2010 to the first half of 2016, (ii) they received a few poor performance warnings between 2013 and 2016, (iii) the employer gave them 10 months of job transfer training and transferred their positions, but they showed bad performance again, and (iv) they had shown little interest in better performance, and one of them even denied the employer's request to provide a plan to improve performance.

The court usually acknowledges such low performance when an employee has received the lowest performance grades for three or more consecutive years (note, the court has previously held that two consecutive years of lowest performance grades is not sufficient to satisfy the "just cause" requirement under the LSA; Seoul Administrative Court Decision 2005Guhap23879, January 27, 2006). The Seoul Administrative Court also found a dismissal unlawful when an employee received a "D" (bottom 5% of total employees) for two consecutive years, but had shown an average performance for the past 15 years (Seoul Administrative Court Decision 2022Guhap51161, February 10, 2023).

(3) Other legitimate cases for dismissal

A dismissal is also justified when an employee is not able to provide work anymore, for example, severe illness, being deprived of a necessary qualification for the work, such as a medical licence, or when an employment relationship cannot continue because the company is shutting down completely.

Procedures for disciplinary action, including dismissal

(1) Statutory procedure

When an employer intends to terminate an employee (including a layoff), the employer shall provide the employee who has worked three months or more with written notice of termination no less than 30 days prior to the effective date of such termination. In the event the employer fails to provide such advance notice, the employer shall remit to the employee compensation equivalent to at least 30 days' ordinary wages, unless the employer cannot continue its business due to natural disasters, incidents or other unavoidable circumstances, or the employee has intentionally caused a property loss or a serious damage to the business as prescribed under the Ordinance of the Ministry of Employment and Labor (Article 26 of the LSA). A failure to provide the advanced notice or the payment of 30 days of ordinary wage could lead to up to two years of imprisonment or a 20 million KRW criminal fine (Article 110(1)).

In addition, an employer is required to notify the employee in writing of the grounds and timing for the dismissal (Article 27 of the LSA). When providing written notification of grounds for termination, an employer must ensure the notification is sufficiently specific to allow the employee to clearly understand

the basis for the dismissal. In cases of disciplinary termination specifically, the notice must articulate the concrete facts or misconduct constituting the substantive grounds for dismissal. However, the courts have held that, where an employee already has knowledge regarding specific termination grounds and has had adequate opportunity to respond, a summarised description of disciplinary reasons in the termination notice would not constitute a statutory procedural violation (Supreme Court Decision 2011Da42324, October 27, 2011; Supreme Court Decision 2012Da81609, December 24, 2014). A dismissal without legitimate notification of disciplinary causes shall make the dismissal unlawful (an unfair dismissal).

(2) Discretionary procedure

Employers often establish a discretionary procedure for disciplinary action, such as a disciplinary hearing, a statute of limitations, and a retrial. If a collective agreement or a company policy (the Rules of Employment) expressly stipulates that an employee shall be notified of the date, time, and location of the disciplinary hearing, or that an opportunity for explanation shall be afforded to the employee, any disciplinary measure without adhering to these procedural requirements shall, as a general principle, be deemed invalid and unenforceable (Supreme Court Decision 92Da11220, January 30, 1992).

It is especially important to adhere to any disciplinary procedure established in the business because any procedural violation in the disciplinary action would make the disciplinary action void, regardless of whether the disciplinary causes are legitimate or not.

Other recent developments in the field of employment and labour law

The SAPA was enacted in January 2021 and has been applied to workplaces with 50 or more employees since January 2022. The SAPA aims to punish responsible managing officers and corporations who have caused serious casualties, such as death, in violation of their duties to take safety and health measures while operating businesses or maintaining workplaces.

The SAPA puts a series of responsibilities regarding safety and health measures on the managing officers. The responsibilities under the SAPA includes establishing an organisation exclusively responsible for the overall control and management of affairs concerning safety and health, establishing work procedures for identifying and improving hazardous or risk factors, and setting a budget necessary for implementing necessary measures (Article 4 of the Enforcement Decree, Article 4 of the SAPA).

The SAPA puts very strict liabilities on company owners and managing officers in violation of the law. Specifically, violating the SAPA may result in imprisonment for at least one year or a criminal fine of up to one billion KRW (Article 10). The imprisonment and the criminal fine could be levied at the same time. In addition to the criminal charges against responsible persons, the company could be levied with a criminal fine of up to five billion KRW, and both the responsible persons and the company could be liable for punitive damages up to five times the damage (Article 15).

As of May 2025, the courts have rendered around 40 decisions from the first instance court. Most of the decisions ordered one to one-and-a-half years of imprisonment with the suspension of two to three years. Five CEOs were sentenced to imprisonment without suspension, mostly because occupational accidents and deaths were repeated without enough efforts to prevent them. As of May 2025, there are four cases where the CEOs were found not guilty.

Young Hwan Kwon

Tel: +82 2 6200 1600 / Email: yhkwon@jipyong.com

Mr. Young Hwan Kwon mainly advises and represents clients on human resource management/labour, and industrial accidents and safety.

Mr. Kwon began his career as a certified public labour consultant in 2002. From 2014 to 2016, Mr. Kwon served as a law clerk at the civil division (responsible for labour matters) and administrative division (responsible for labour and fair trade matters) of the Seoul High Court. He worked on a number of significant labour cases, such as those involving employee's status, ordinary wages, illegal dispatch, time-off system, and unfair labour practices. Mr. Kwon has shown himself to be a successful attorney in labour-related cases.

Mr. Kwon obtained a Master's degree in International Human Rights Law from the University of Leiden, the Netherlands, in 2021, with a research project on the EU's proposed bill on corporate human rights due diligence. He lectured in civil practice at Seoul National University Graduate School of Law from 2023 to 2024.

Marc Kyuha Baek

Tel: +82 2 6200 1600 / Email: khbaek@jipyong.com

Mr. Marc Kyuha Baek is a senior associate in the Employment & Labour Group of Jipyong. Mr. Baek's practice focuses on labour and employment matters in Korea and has broad experience in the field. Mr. Baek has represented both companies and employees in over 200 civil, criminal, and administrative cases, at all levels of courts and Labor Commissions, including a landmark Supreme Court en banc reverse and remand decision 2017Da35588, 11 May 2023 and a Supreme Court reverse and remand decision 2020Du50966, 26 October 2023.

Mr. Baek also regularly advises both multinational and Korean companies on employment and labour matters, including employment agreements, disciplinary measures, non-compete, and termination. Having graduated from Cornell University with a major in industrial & labour relations, Mr. Baek has a deep understanding of foreign clients and their needs.

Andrew Minkyu Lee

Tel: +82 2 6200 1600 / Email: amlee@jipyong.com

Mr. Andrew M. Lee is a foreign attorney at Jipyong's Global Practice Group. He focuses his practice on international M&A and labour-related matters.

JIPYONG LLC

26F, Grand Central A, 14 Sejong-daero, Jung-gu, Seoul 04527, Republic of Korea

Tel: +82 2 6200 1600 / URL: www.jipyong.com

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