

The risk of "employee transfer between affiliate companies" has decreased... but the actual practice of providing labor needs to be reviewed

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1. Introduction

The Supreme Court of South Korea recently announced a judgment (Supreme Court judgement no. 2019Da299393 rendered on July 14, 2022; hereinafter the "Subject Judgment") to throw out the decision of an appellate trial which determined that the legal nature of employee transfer between affiliates of a domestic communication giant constituted a dispatch of workers under the Act on the Protection, Etc. of Temporary Agency Workers (hereinafter the "Dispatch Act") and this judgment is making growing interest and controversy over how to classify employee transfer and dispatch between affiliate companies like the case under the judgment.

Since transference and dispatch of an employee is almost similar to each other in terms of its appearance as provision of labor, such classification could be made depending on whether "the dispatch of a worker (or transfer) has been made for business" and in that sense, the Subject Judgment is noteworthy as it suggested the detailed meaning of and the criteria for such matters.

Below, we will look into the gist of the Subject Judgment and its implications.

2. Gist of the Subject Judgment

A. Determination criteria for dispatch agency and employee transference

By stating that the obligation of direct employment pursuant to Article 6-2(1) of the Dispatch Act is applied to any dispatch agency who conducts employee dispatch business (in other words, any dispatch of workers by a person who conducts employee dispatch for business), the Subject Judgment ruled on the specific criteria for determining the definition of 'a person who conducts employee dispatch for business' that "this matter should be determined in accordance with social norms by comprehensively taking into account various circumstances such as: (i) whether the act of employee dispatch has repeatability, continuity and business potential; (ii) the business purpose of the original employer and its purpose of concluding labor contract; and (iii) the purpose, scale, frequency, duration and form of the employee dispatch. And the repeatability, continuity and business potential as described above must be determined on the basis of a person who dispatched an employee - that is, the original employer - unless there are special circumstances."

Furthermore, by comparing the concept of dispatch of a worker, the Subject Judgment explained that “if a worker is **transferred**, he/she will be exempted from his/her obligation of providing labor to the company he/she originally belonged to by taking various forms such as leave of absence, dispatch, outside work or outside dispatch while maintaining the labor contract signed with the company he/she originally belonged to, and the other party who receives his/her service will change as he/she will provide labor under the direction and supervision of the company where he/she is transferred to and generally, his/her return to the originally-belonged company is planned.”

It ruled that “in particular, in the case of any transfer between affiliate companies that have their own business purpose and conduct independent business activities, an intact labor contract relationship remains to exist between the worker being transferred and the company he/she originally belonged to, and when his/her return to the original company is ordered, the existing labor contract relationship will actualize and continue to exist. Thus, although the transfer of an employee as above is similar in appearance with the dispatch of a worker under the Dispatch Act in the way that a labor force from outside is put on the business organization, the purpose and legal basis of such system is different from each other. Therefore, regarding any labor relationship on which employee transfer has made, it will be not appropriate to identify a company where a worker originally belonged to as a dispatch agency under the Dispatch Act and a company where such worker has been transferred to as a user company under the Dispatch Act based only on the resemblance in appearance, and such matter must be determined carefully by comprehensively considering various circumstances as we have seen above.”

B. Detailed grounds for denying the affiliate company's status as dispatch agency in the case of the Subject Judgment

The Subject Judgment determined that the defendant's affiliate company didn't constitute a dispatch agency for the following circumstances:

1. The affiliate company has not acquired any separate consideration or fee related to the transfer of workers or other economic benefits that can be equated thereto, and the sales of such affiliate company cannot be evaluated as consideration for such transfer, and although the defendant obtained a profit of paying less overtime allowance compared to the case of directly hiring the plaintiff (the transferred person), such matter falls under the circumstances of the company where the worker in question has been transferred to.
2. Considering diverse matters such as its main area of business, asset size and operating organization, the business purpose of the affiliate company has nothing to do with the dispatch of workers.
3. Considering the fact that the timing of joining the company, the transfer and the return to the originally belonged company were scheduled and the workers in question have returned to the company where they originally belonged to after the end of business, it is difficult to view that the purpose of concluding labor contract is to dispatch workers.
4. The employees of the affiliate company were suitable workforce for the business and it seems that they were transferred according to the decision-making process at the corporate group level, taking into account the business needs of the business group the workers in question belonged to as well as the efficiency of manpower utilization.
5. It is difficult to view that the plaintiffs were in a situation such as the commercialization and prolongation of employee dispatch or any job insecurity.

3. Implications of the Subject Judgment

A. Limiting the possibility of applying the Dispatch Act to any employee transfer between affiliate companies

In the appellate trial, judges did not make any distinguishment between the cases of general indirect employment and transfers between affiliate companies by ruling that “as long as the dispatch agency business was acknowledged to have been conducted ‘for business’, the application of the Dispatch Act would not be exempted even if it was an employee transfer between affiliate companies.”

However, in the relevant legal principle part, the Subject Judgment stated that “although the transfer of an employee between affiliate companies is similar in appearance with the dispatch of a worker under the Dispatch Act in the way that a labor force from outside is put on the business organization, the purpose and legal basis of such system is different from each other. Therefore, it will be not appropriate to identify a company where a worker originally belonged to as a dispatch agency under the Dispatch Act and a company where such worker has been transferred to as a user company under the Dispatch Act based only on the resemblance in appearance, and such matter must be determined carefully by comprehensively considering various circumstances” and this could be interpreted as the court’s statement that it can limit the applicability of the Dispatch Act more than in the case of general indirect employment such as subcontracts and services in the case of any employee transfer between affiliate companies.

In order to efficiently and flexibly respond to the changing business environment, many companies can make various management decisions such as division, merger and joint venture of a business and in the process, personnel exchanges may be involved. According to the Subject Judgment, it can be understood that the risk of violating the Dispatch Act in the process of such manpower exchange has been reduced to some extent.

But even in such case, as suggested by the Subject Judgment, there comes a premise that “the case must be any transfer between affiliate companies that have their own business purpose and conduct independent business activities.” But in any individual case, it is hard to determine in detail whether the business purpose of a specific affiliate company is unique and its business activities are independent.

B. Suggesting specific criteria for determining a “dispatch agency”

As specific criteria for determining whether a company is a dispatch agency, the Subject Judgment suggested that (i) whether the act of employee dispatch has repeatability and continuity; (ii) whether such act has business potential; (iii) the business purpose of the original employer and its purpose of concluding labor contract; and (iv) the purpose, scale, frequency, duration and form of the employee dispatch.

In particular, the appellate trial ruled that “whether the dispatch has any commercial and business purposes must be determined by considering whether not only the dispatching party but also the receiving party of such dispatch has obtained any profit through such dispatch, and as long as it can be seen that the defendant obtained a certain amount of profit in relation to overtime allowance as described above through the act of employee transfer, we cannot say that there was no profit or business potential in such act of employee transfer” but the Subject Judgment cancelled such ruling and viewed that the existence of business potential must be determined from the viewpoint of the “original employer.”

The Supreme Court further determined that the affiliate company maintaining stable sales through the mutual relationship between affiliate companies without obtaining any separate consideration or fees related to the transfer of workers or other economic benefits that can be equated thereto would not constitute a consideration for employee transfer.

According to the above, it is understood that the “business purpose” means any direct payment or compensation for employee transfer (or dispatch) itself, and it is necessary to refrain from paying additional expenses other than labor costs such as wages for any worker who has been transferred when conducting human resource exchanges between affiliate companies within a corporate group in the future.

4. Conclusion

As shown above, the Subject Judgment further limited the applicability of the Dispatch Act to the case of any employee transfer between affiliate companies compared to any indirect employment such as general subcontracts or services. As a result, many companies or corporate groups can expect the effect of promoting flexible and efficient business management and manpower management in a changing business environment.

However, it is still difficult to view that the Subject Judgment fully and generally allowed the employee transfer between affiliate companies, and an affiliate company which will conduct employee transfer must have its unique business purpose and independent business activities as a premise. In that respect, there still is a room that the legal evaluation will go different even on any employee transfer between affiliate companies which takes similar form to the present case in the future.

Therefore, you should not underestimate the risk of violating the Dispatch Act by simply believing that your case is about the employee transfer between affiliate companies. Rather, you must closely compare and analyze legal principles on the classification between subcontracting and dispatch along with various cases accumulated over the years. In doing so, you have to design and supplement your case so that it would not be evaluated as employee dispatch not only in the “form” of transfer between affiliate companies, but also in terms of the “substantiality of labor provision”.

* Above article is a special contribution by Attorney Yong-Moon Kim to *Monthly Labor Law* 2022 September issue. You can also find this at the [link](#).



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