

# Issues in Calculating Average Wage and Possible Legislative Alternatives

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## 1. Introduction

Under the Korean *Labor Standards Act* (“the Act”; all Article references are to the Act unless otherwise specified), the “average wage” of an employee means the amount calculated by dividing the total amount of wages paid during the three calendar months immediately before the day grounds for calculating his or her average wages occurred by the total number of calendar days in those three calendar months; this applies mutatis mutandis to an employment of less than three months (Article 2(1)(6)), and when the amount calculated pursuant to the above is lower than that of the ordinary wages of the employee, the amount of the ordinary wages shall be deemed his or her average wages (Article 2(2)).

Wages and allowances paid on a temporary basis and wages paid by any means other than money are not included when calculating average wages (Article 2(2) of the Enforcement Decree), and bonuses that are recognized as a consideration for provision of labor are included by dividing the total amount thereof paid for 12 months by the number of months on which the employee concerned has worked during such period.<sup>1</sup>

Such calculated average wages serve a standard for calculating the amount of retirement allowances (Article 34, Article 8 of the Act on the Guarantee of Employees’ Retirement Benefits), shutdown allowances (Article 46), accident compensation such as compensation for suspension of work, compensation for disability, compensation for survivors, funeral expenses, lump sum compensation (Articles 79 through 84), temporary lay-off benefits, disability benefits, survivors’ benefits, injury-disease compensation annuities and funeral expenses in the insurance benefits of industrial accident insurances (Articles 52, 57, 62, 66 and 71 of the *Industrial Accident Compensation Insurance Act*).

However, in practice, there are cases in which it is difficult to calculate the amount of an average wage according to the above method for various reasons and in such case, the method of calculation may raise an issue.

<sup>1</sup> Guidelines for handling bonuses in calculating average wages (dated October 14, 2015; Ministry of Employment and Labor Established Rule No. 96)

## 2. Cases where it is hard to calculate an average wage in accordance with the Labor Standards Act

### A. Laws and regulations

Where it is impossible to calculate an average wage in accordance with Article 2(1)6. of the Act, the average wage is determined by the Minister of Employment and Labor (Article 4 of the Enforcement Decree of the Act). Here, the cases “where it is impossible to calculate an average wage” are not limited to those where it is literally impossible to calculate the amount due to technical reasons, but includes cases where it is remarkably inappropriate to calculate an average wage in accordance with the relevant provisions of the Act.<sup>2</sup>

In “cases where it is impossible to calculate an average wage,” the Ministry of Employment and Labor has determined each calculation method for (i) when the period to be excluded from the calculation of the average wage is three months or more; (ii) when the reason for calculating average wage occurs on the first day that the worker provides work; (iii) when wages are paid in a lump sum to two or more workers; and (iv) when any part of the total wage is not clear. If it is still impossible to calculate the amount of an average wage according to the above, the head of the local employment and labor administration decides the appropriate amount by considering various matters including “matters concerning the wage level and price situation in the region where the relevant place of business is located.”<sup>3</sup>

### B. Court precedents

In court precedents, the case where “it is impossible to calculate an average wage” raises an issue mainly when the amount of the average wage becomes significantly higher or lower than usual due to any special and accidental circumstances occurring in the average wage calculation period.

Considering this issue, in 1999 the Supreme Court ruled that as the basic principle of average wages is to calculate the ordinary living wage of a worker as it is, if “the total amount of wages paid to a relevant employee during the three calendar

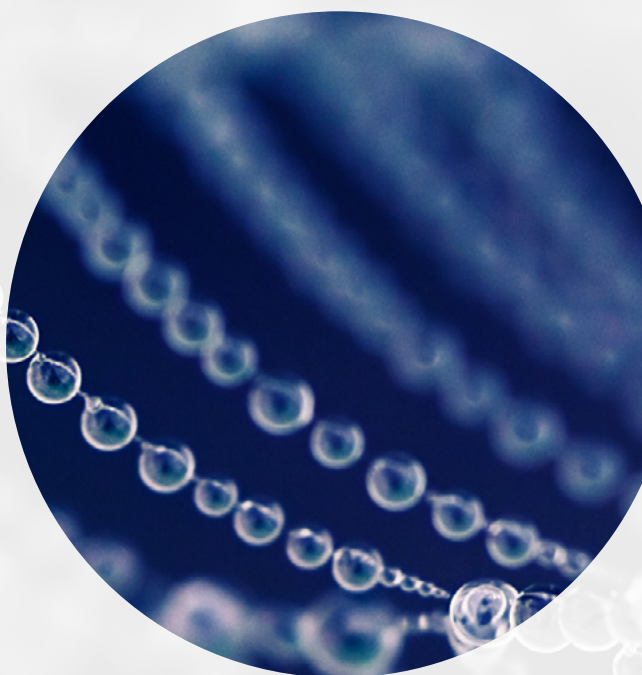
months immediately before the day grounds for calculating his or her average wages occurred” which is included in the calculation of an average wage is significantly lower or higher than usual due to any special circumstances, then such amount could not serve the basis for the calculation of average wage. Therefore, since the severance pay system which uses one’s average wages as a basis for the calculation is intended to ensure that workers can lead their ordinary lives as before even after retirement according to their rank and salary, it is contrary to the fundamental purpose of the system for retirement benefits to be calculated at a significantly higher or lower amount than usual due to any special and accidental circumstances.<sup>4</sup>

In a further case on this issue in 2010, the Supreme Court added that although the average wage was calculated according to the principles specified in the Act and the Enforcement Decree of the Act, if there was a change in the amount of a worker’s wages due to any special and accidental circumstances for a certain period around the time of his/her retirement and it is recognized that the average wage calculated as above was significantly lower or higher than usual when considering the overall circumstances (such as the total working period of the worker concerned, the length of such certain period in which the amount of the wages had changed and the degree of such change in

2 See Supreme Court decision no. 94Da8631 rendered on February 28, 1995, etc.

3 Notification on the Special Cases for Average Wage Calculation (dated October 14, 2015; Ministry of Employment and Labor Notification No. 2015-77)

4 See Supreme Court En Banc decision no. 97Da5015 rendered on May 12, 1999, etc.



amount), then calculating severance pay based on this should not be allowed in light of the spirit of the Act which seeks to calculate a worker's severance pay based on his/her ordinary living wage. The Court concluded that in such a case, the average wage should be calculated in another reasonable and rational way that can accurately reflect the ordinary living wage of the worker.<sup>5</sup>

In other words, the Supreme Court recognizes an exception for calculation of average wages as provided for in Article 2(1)(6) and other applicable provisions if: (i) an average wage is "significantly" lower or higher than in the usual cases when it is calculated according to the method set by the Act and (ii) there exist any "special circumstances" for the occurrence of such significant difference. Below are details of court rulings on matters related to the above:

	Issue	Judgment	Calculation Method
Supreme Court decision no. 94Da8631 (February 28, 1995)	The monthly wage for three months prior to retirement increased by about 73% compared to the average monthly wage for the preceding five months.	Exception recognized	Average wage must be calculated based on the amount of wages paid for three months right before when such increase has begun.
Supreme Court decision no. 97Da18936 (January 20, 1998)	The average monthly allowance paid to a worker in the previous six months was KRW 870,553 while the average monthly amount of the allowance he received for three preceding months of his retirement was KRW 1,047,520, making a difference of KRW 176,967.	Exception not recognized	
Supreme Court En Banc decision no. 97Da5015 (May 12, 1999)	A company's employment rules provided that even if an employee retires in the middle of the month, the full monthly remuneration shall be paid.	Exception recognized	Average wage could not be calculated by including the full amount of remuneration for the month in which an employee retires.
Supreme Court decision no. 98Da49357 (November 12, 1999)	A worker was arrested and retired after taking a leave of absence for more than three months. As a result, the average wage calculated based on the wages paid for the three preceding months of his retirement became less than a third of the average wages he got before he took the leave of absence.	Exception recognized	Average wage must be calculated based on the wages he earned before he took the leave of absence.

<sup>5</sup> See Supreme Court decision no. 2009Da99396 rendered on April 15, 2010.

	Issue	Judgment	Calculation Method
Supreme Court decision no. 2000Da18714 (December 27, 2002)	As an employee did not return to work after taking a leave of absence due to a non-occupational injury, he became a retiree 10 days after the end of the leave period according to the company's employment rules, and the average wage was calculated by excluding the period of leave he took.	Exception not recognized	
Supreme Court decision no. 2001Da12669 (July 25, 2003)	When a worker was transferred to another position before his retirement under the age limit, he did not get the overtime pay that he had received before the transfer.	Exception not recognized	
Supreme Court decision no. 2007Da72519 94Da8631 (October 15, 2009)	In order to receive more severance pay, a taxi driver intentionally paid more income exceeding his mandatory payment to the company than usual for five months prior to his retirement.	Exception recognized	The part of the driver's income exceeding the mandatory payment to the company must be calculated based on the wages he received for 3 months immediately before he intentionally increased the payments, but must be calculated by multiplying "the average increase rate in the income exceeding mandatory payments to the company among other workers in the same field during the period he had made such intentional overpayments", and for the remaining wage items excluding the above, average wages must be calculated based on the total amount of wages paid for the three months before retirement.
Supreme Court decision no. 2012Da12870 (October 11, 2013)	A worker received no or little remuneration for the three months before the last time when the wages were normally paid, but got paid or had many wage items before the three months period.	Exception recognized	Average wage must be calculated by converting an amount received for a year before the last time when the wages were normally paid into three months' worth.

	Issue	Judgment	Calculation Method
Supreme Court decision no. 2014Da87496 (June 11, 2015)	As a result of a worker's absence from work for a certain period before retirement, the total amount of wages paid for the three preceding months of retirement became KRW 2,266,657 while the total wages paid for the preceding three months was KRW 7,185,185,321.	Exception recognized	No detailed explanation made (Remanded after reversal of lower court judgment)

To sum up above court precedents, an exception in the calculation of average wage can be recognized only when there exists any "significant difference" in the total amount of wages due to "special circumstances." Therefore, even if the amount of overtime allowances was relatively high, for instance, if such overtime work has been done under an (implicit or explicit) agreement between the parties and the employer has normally received the provision of labor, then such case would not easily be recognized as an exception in the calculation of the average wage. However, if an employee intentionally abused the corporate system to raise his/her average wages, then it may possibly be recognized as an exception in the calculation of the average wage given the purpose of the system for calculating the actual ordinary living wage of a worker over time.

### 3. Conclusion

Average wage serves as a standard for calculating various kinds of remuneration paid to workers such as severance pay, and the purport of applicable laws and regulations related to such various remuneration such as the Act is to better ensure that workers can continue to lead their lives properly. Thus, as a standard for the calculation of severance pay and so on, average wage basically aims at calculating a worker's actual ordinary living wage over time.<sup>6</sup> From such point of view, calculating an average wage to be significantly higher or lower than the usual cases due to any special and accidental circumstances will go against the fundamental purpose of the introduction of the average wage system.

This has led courts to suggest reasonable and rational ways to reflect a worker's actual ordinary living wage in any specific case by recognizing exceptions in the calculation of average wages for certain cases. Despite the above, however, there is a need for the establishment of clearer standards because there remain many grey areas, such as how great must the difference in the amount of an average wage calculated according to the method set by the Act be in order to be considered a "significant difference," and in what cases we can consider that there exists a "special circumstances" for the occurrence of such significant difference. Also, if a business provides an allowance that varies in terms of the amount or the very payment thereof quarterly or semi-annually, or if several accidental circumstances occur in three months, the average wages could still not be able to accurately reflect a worker's ordinary living wage.

Many businesses calculate the total amount of wages annually by concluding employment agreements with their employees, and the defined contribution plan requires an employer to contribute no less than an amount equivalent to 1/12 of the total annual wages of an employee (Article 20(1) of the Act on the Guarantee of Employees' Retirement Benefits) and calculate the annual wages. In light of the above, I believe that legislators must carefully consider implementing improvements of the system such as changing the calculation period of average wages from the current three months to a year, or even by calculating the average wages over the entire period of a worker's continuous service.

\* Above is an article contributed by Attorney Yo-Sub Shim to the *Monthly Labor Law*. You can check the same content in the [link](#).

<sup>6</sup> See Supreme Court decision no. 90Nu2772 rendered on April 26, 1991, etc.

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