

# Court's Ruling to Recognize the Nature of Ordinary Wage on Retroactive Pays Caused by Wage Increases and Implications Thereof

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## 1. Background

We often see a prolonged wage negotiation between an employer and a labor union which comes to settle long after the usual wage increase season. In such case, the employer generally gives the employees retroactive pay for the amount of the increase agreed. That means, the difference between the then and the current wage is paid in a retroactive manner. However, this is where one can question whether the retroactive pays caused by the wage increase must be reflected to ordinary wages which are the basis for calculating various statutory allowances including over-time allowance.

On above matter, the Supreme Court of South Korea ruled in August that "any retroactive pay generated from wage increase must be calculated by being included in the ordinary wage (Supreme Court decision no. 2017Da56226 rendered on August 19, 2021; hereinafter "the Subject Ruling")," and such ruling by the Supreme Court is followed by many other judgments with the same intent in the Supreme Court and the courts of lower instances. It appears that the legal principle on the recognition of retroactive pays caused by wage increase is being firmly ensconced.

However, such position taken by those courts in their precedents also raises several matters that require additional review in the way that the issue of ordinary wage can cause a great debate between managements and labor unions.

## 2. Critical study on the Subject Ruling

### 1) On fixability

The Subject Ruling may draw a question whether it directly accords with an en banc judgment rendered by the Supreme Court in 2013 (Supreme Court En Banc decision no. 2012Da89399 rendered in December 18, 2013). In such en banc judgment, the court determined the meaning of fixability when explaining the requirements of ordinary wage as "any wage that is expected to be paid regardless of whether additional conditions are met once an employee provides prescribed work on an arbitrary day, and whether it will be paid and the amount thereof must be fixed in advance."

However, there could be a situation in certain business places where employees cannot know nor predict on any day they work any details such as when and at what level the future wage increase will be agreed while providing services on any day before a labor-management agreement for a wage increase. In such case, the retroactive pay caused by such wage increase would hardly be seen as fixed since it is not something that is predetermined.

## 2) Whether 'anticipation' of employees can be used as the standard for recognition of ordinary wages

In the Subject Ruling, the Supreme Court seems to have set the fact that the employees were able to anticipate certain retroactive payment to be made after the wage increase as a critical basis for judging the recognition of ordinary wage, by ruling that "based on the agreements they have previously made every year on wage increases plus the retroactive payments generated therefrom, the employees were able to anticipate that the wage increase will entail retroactive pays for the amount of the increase, from the date on which it became effective."

However, under such logic, it is hard to suggest any objective standard in any detailed matter on how many retroactive payments of wage increases could cause such 'anticipation' among the employees. For instance, when a labor union is newly formed and its members have gained their first retroactive pays after wage increase, it would be hard to view that the employees in such business place have forged any detailed "anticipation" as they didn't have any precedent regarding whether the wage will be increased and by how much. It is determined that the logic of the Subject Ruling could not be applied as it is to any business place like the one we saw as an example right above.

Then, it can be said that employees could be able to have some kind of "anticipation" (the "anticipation" to the extent that any legal protection is possible or necessary) only after experiencing certain rounds of retroactive payments made after wage increases, and this is the moment when the retroactive payment generated from wage increase comes to obtain the nature of fixability as ordinary wage. But with such grey area as described above which requires ex-post determination, the meaning of the standards suggested by the en banc ruling in 2013 can go obscure.

In particular, if we expand the logic of the Subject Ruling, one can assert that the nature of fixability is met according to the anticipation of employees and thus can consist an ordinary wage with regard to any "wages for which whether or not to be paid or the amount thereof are determined by evaluating a worker's performance" which was mentioned as a wage item on which the fixability was denied in 2013's en banc court ruling.

## 3) Lack of reality on the case argued

By postulating the case where "the base salary increase rate from the previous year exceeds 50%," the Subject Ruling suggested as one of the grounds for its argument that "if the amount of retroactive payment caused by wage increase is not included in the ordinary wage, there may be cases in which the wage for the prescribed work and the wage for overtime work become the same, or the wage for overtime work even becomes lower."

However, it is not easy to find the case of such a rapid increase in wages in actual labor-management scene.

Thus, above ground for argument used in the court precedent rather lacks practicality, and it is also uncertain whether such precedent has an intent that it can be judged otherwise when the rate of wage increase is less than 5% like the cases of many other business places and the above-mentioned overturn will rarely cause any problem.

### 3. Future prospects and how to respond

According to the Subject Ruling, when a wage increase is backdated in a business place in which employees may be considered to have certain anticipation on such retroactive payment, such retroactive payment must be made every year by reflecting it to ordinary wages from the date on which it became effective. One can resolve any possible legal risks such as bearing civil/criminal responsibilities by calculating various allowances through above method.

In addition, it is worth noting that the Subject Ruling takes position that “the retroactive payment made after wage increase has a nature on which it should be paid regardless of whether the worker met additional conditions such as making certain achievement

or performance, and it is something that should be paid as compensation for his/her provision of prescribed work.” This can raise some controversy on whether the right to claim retroactive payment will be recognized for any workers who was excluded from the group of employees who get the retroactive payment. How to handle and respond to such scenario will become an issue.

In particular, any business places that own labor unions need to seal their wage agreements considering the intent of the Subject Ruling. In other words, it will be better for them to clarify how to handle the issue of retroactive application of wage increase and the issue of ordinary wage in their labor-management relations.



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