

# Is Passion Pay Fair in Korea? :

## A Comparative Analysis of Zero-Hours Contracts

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## **Abstract**

*Recently, “passion pay” is considered as non-payment or less than minimum wages in Korea. In fact, it is a compound word combining passion and pay. In practice, companies and public organizations tend to hire youth who receive non-payment or a small stipend less than minimum wages. However, passion pay has brought much poorer working conditions infringing upon rights to minimum wages, working hours, and any (monthly or annual) leaves, even though many employers prefer it in order to use cheap workforce in reality. In the United Kingdom, likewise, there are zero hour contracts, which have been a growing controversial issue. These are employment contracts where an employer is not mandated by law to offer regular working hours. Some proponents consider these as part of labor market flexibility so that the unemployment rate gets lower and the employment rate grows higher than the current rate. However, young people require their rights to receive fair wages when the wages are compared with the nature and value of their work. Even though we have the rights and laws for these problems, it is not good enough to govern employers who violate the laws. Therefore, a strong punishment on the laws or regulations shall be needed for people who get passion pay to solve this problem. Also, it is necessary for employers to reconsider entering into zero hour contracts in the United Kingdom in order to improve stable employment. As a result, employers have to correct the practice that young people must endure the low pay with their passion and the unstable employment of zero hour contracts.*

**Keywords:** Passion Pay, Zero Hour Contracts, Labor Market Flexibility, Contingent Employment, Irregular Workers.

# I . Introduction

After the 1997-98 Asian economic crisis, the youth unemployment rate in Korea has increased at 9.2 % according to the statistic in 2015.<sup>1</sup> A growing number of young people have failed to find decent jobs. As a result, they look for some companies or organizations that can give good experiences even though receiving little or even no payment as interns. In fact, they think that these chances encourage them to have a beneficial position when compared with their competitors in the job markets.

Many employers recognize the reality and misuse these poor situations in order to use cheap workforce. Regardless, young people willingly work for the companies or organizations with passion pay. In other words, they are forced to have passion enough to endure poor working conditions.

However, passion pay has brought much poorer working conditions infringing rights to minimum wages, working hours, and monthly or annual leaves. In particular, young people's passion was abused to an extreme degree in fashion, beauty, hotel, bakery, and social commerce industries. According to the statistics of the Ministry of Employment and Labor, there have been 255 cases that violate the provisions of labor or related laws among 103 out of 151 companies that hired interns.<sup>2</sup>

Nowadays, there are a number of employment types that force to work on the employment contract and real employment with subordinate relationships after employers hire an intern for education and training. In fact, in the case of providing employment on passion pay, one does not have any protection of the Labor Standards Act, the Minimum Wage Act, the Industrial Accident Compensation Insurance Act, etc. if he or she is not an employee under the Labor Standards Act.

On the other hand, the United Kingdom has a growing controversial issue of zero hour contracts as a means of labor market flexibility. Pursuant to said contract, an employer does not have any obligation to offer minimum working hours, while an employee does not also have any obligation to accept any work by the employer. The opinions on the zero hour contracts are conflicting. Some experts explain that these contracts are a part of the flexible labor market and a significant reason why unemployment has seen low. By contrast, other experts consider them as exploitation of labor and a trend in the weakening of insecure forms of labor contracts.

As a result, to overcome these limitations regarding low wages and short working

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- 1) Statistics Korea, The Youth Unemployment Rate in 2015, [http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx\\_cd=1063](http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1063).
  - 2) *The Violation of Labor Law two out of three Workplaces that hire an intern*, YTN, [http://www.ytn.co.kr/\\_ln/0103\\_201507221848210628](http://www.ytn.co.kr/_ln/0103_201507221848210628).

hours, it is necessary to examine whether or not a person who provides employment with passion pay or an individual who enters into zero hour contracts can be recognized as an employee since employers do not recognize that their workers have what types of legal status as an employee between passion pay and zero hour contracts.<sup>3</sup> If the person or the individual becomes an employee, this paper explores what legal protection he or she has under labor related laws. In the following section, it will consider comparatively, whether or not there is a difference between passion pay and zero hour contracts.

## II . Passion Pay in Korea

### A. What is Passion Pay?

The term passion pay is defined as non-payment or less than minimum wages in Korean. Sometimes, it is referred by different words such as passion wages or passion payment. In fact, it is a compound word combining passion and pay. The word is used in the situations where companies and public organizations<sup>4</sup> hire youth as interns without pay or less than minimum wages under the consideration of giving work experience.<sup>5</sup>

In general, a person who receives passion pay is considered an intern; the types of interns vary in Korea. However, the most important problem is whether or not he or she is defined as an employee because an intern recognized as an employee has the legal protection under the labor related laws. For example, a worker who is called an intern in Korea during the probationary period and trial period does not have any questions on whether or not they are an employee under the Labor Standards Act. However, a person in training or unpaid intern, who is there to get work experience or passion pay, has a complicated problem on whether or not he or she shall be protected in the specific case.

### B. The Current Stream and Tendency

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- 3) *See infra* part II .C and III.C (It is controversial on whether or not a person who receives passion pay is an employee in Korea and also the employers who enter into zero hour contracts do not know whether or not their individuals have what types of employment).
  - 4) *Current Status of Passion Wages for Young People*, The Presidential Committee on the Young Generation, <http://www.young.go.kr/#!/content/17282> (Young people who receive passion pay answered that there are Private companies, 75.5% and Non-profit organizations, 12.0%).
  - 5) *Passion pay*, KOREANARY, <http://www.koreanary.com/w/28360>.

### 1. Introduction

On June 24, 2015, the Presidential Committee on the Young Generation concluded in its report, 2,799 out of 5,219 young people between the ages of 19 and 34 are working as an intern or receiving on-site training.<sup>6</sup> These 2,799 young people answered several questions that the Committee wanted on the list. This report examined how many young people experience passion pay, how their employment circumstances are, and what types of employment conditions their employers do not implement on passion pay.

### 2. Methodology

The report on the Current Status of Passion Wages for Young People reflected a survey of 5,219 young people between the age of 19 and 34 years old. Of these, 32.4% of 5,219 young people were male, but 67.6% were female. The age was composed of 32.1% between the ages of 19 and 24, 33% between 25 and 29, and 34.9% between 30 and 34. Among 5,219 young people, this report identified that 53.6% (2,799) received passion wages; 33% of the 2,799 young people were male, but 67% were female. Similarly, 30.2% were between the ages of 19 and 24, 35.4% between 25 and 29, and 34.4% between 20 and 34.

The lists of the survey are related to what employment types receiving passion pay they had, whether or not they had experience of passion pay and types of passion pay, how they experienced discriminative employment circumstances, and what countermeasures they have to prepare.

### 3. The Employment Types Receiving Passion Pay

<Table 1> The Employment Types Receiving Passion Pay

Employment Types	Detailed Explanation of Employment Types
Intern	Intern for employment experience
	Intern for hire
	Intern for job training

Source: Hochang Noh, *Inteonui beopjeok jiwi* [A Study on the Legal Status of a So-called Intern], 33 Labor Law Review 197, 204 (2012) (S. Kor.).

6) The Presidential Committee on the Young Generation, *supra* note 4.

An intern consists of a variety of employment types such as an intern for employment experience, an intern for hire, and an intern for job training, which receive passion pay.<sup>7</sup> First, an intern for employment experience works for specific fields such as fashion, entertainment, and broadcasting in order to get a better job. Second, an intern for hire works for a company that intends to hire him or her. Third, an intern for job training acquires skills through on-site practicum.

In general, these types of interns receive three types of payment: more than minimum wages as an intern in the probationary period, less than minimum wages, and non-payment as passion pay.<sup>8</sup>

#### 4. The Types of Passion Wages

<Table 2> Types of Passion Wages

Type	Ratio (% , total 2,799)
More than Minimum Wages	25.2
Less than Minimum Wages	42.6
Unpaid	32.2

Source: The Presidential Committee on the Young Generation (Reorganization) Study “Win-win pay better than Passion pay”<sup>9</sup> (<http://www.young.go.kr/#!/content/17281>).

As stated above, the report of Current Status of Passion Wages for Young People identified that among 5,219 young people, 53.6% (2,799) received passion wages. In this regard, according to Table 1, 74.8% of young people in Korea received less than minimum wages or were unpaid while organizations used their passion. Only 25.2% of young people received more than minimum wages.

#### 5. The Discriminative Employment Circumstances

##### a. Unpaid Employment

Article 2(1)(4) of the Labor Standards Act provides that a worker offers work for

7) Hochang Noh, *Inteonui beopjeok jiwu* [A Study on the Legal Status of a So-called Intern], 33 Labor Law Review 197, 204-05 (2012) (S. Kor.).

8) *Id.*

9) The Presidential Committee on the Young Generation, *supra* note 3. On June 24, 2015, the Presidential Committee on the Young Generation studied “Current Status of Passion Wages for Young People” that consisted of 2,799 out of 5,219 young people between the ages of 19 and 34 working as an intern or having on-site training.

which the employer pays its corresponding wages.<sup>10</sup> In other words, it means that a worker who offers work to the employer shall receive fair wages. However, 57.5% of young people did not receive fair wages even though they work for a company or an organization equally or similarly as an employee does.<sup>11</sup> As explained above, 42.6% of young people in Korea received less than minimum wages, 32.2% provided unpaid work, and 25.2% only received more than minimum wages.<sup>12</sup>

b. Unprovided Job Training

Of the young people who answered that they did not receive fair wages, 56.3% claimed they did not have an opportunity for meaningful job training.<sup>13</sup> For instance, a 24-year-old woman who worked as an on-site trainee in the service field gave an interview on the condition of anonymity as follows:<sup>14</sup>

“The company for which I worked paid me \$10 per day as an on-site trainee and instead of providing me with any actual job training, I had to do miscellaneous work for twelve hours a day. I was named as a trainee, but I seemed to feel like a clerk in a convenience store.”

c. Non-fulfillment of Employers’ Promise before Offering Work

There were 1,296 young people to whom employers promised a variety of benefits. Of these, 57.6% (747) responded that the employers kept the promise, while 42.4% (549) answered that the employers did not.

<Table 3> Types of Benefits

Type	Ratio (% , total 1,296)
Transferring of Regular Position	52.8
Conditions of Preferential Employment	51.6
Certification of Completion	28.2
Other	46.9

Source: The Presidential Committee on the Young Generation (Reorganization) Study “Current Status of Passion Wages for Young People” ([http://www.young.go.kr/#!/content/17282.](http://www.young.go.kr/#!/content/17282))

- 10) Geunro gijun beop [Labor Standards Act], No. 5309, Mar. 13, 1997, *amended by* Act. No. 10339, July 5, 2010, art. 2(1)(4) (S. Kor.).
- 11) The Presidential Committee on the Young Generation, *supra* note 4.
- 12) *Id.*
- 13) *Id.* (The number of young people who answered that they did not receive fair wages is 1,819.)
- 14) *Id.*

According to Table 3, one of the benefits promised by employers was to transfer workers in irregular positions to regular jobs; but according to the survey, about 52.8% did not keep this promise. Of the respondents, 52.6% answered they worked for their employers under the condition of preferential employment after finishing the current job. Another 28.2% planned to receive a certification of completion from their employers, but was not implemented. The rest of the respondents (46.9%) gave the reasons why their employers did not follow their agreement.

#### d. Unreasonable Discrimination

From the respondents who received passion pay, 37.4% had experienced some kind of unreasonable discrimination from the employers.<sup>15</sup> They considered themselves a vulnerable class as to the reason why they thought they received unfair discrimination. For example, a 25-year-old woman who worked as an intern in the professional field gave an interview on the condition of anonymity as follows:<sup>16</sup>

“The company for which I worked did not give me any incentive and bonus for holidays or birthday and I was not able to participate in a single workshop to gain practical training.”

## 6. The Countermeasure and Improvement to Passion Pay

Young people who receive passion pay indicated that the most difficult thing is receiving low wages (27%) and the second thing is not learning anything from the position of an intern (18.7%).<sup>17</sup> However, 41.1% of the respondents recognized it as a part of social life even though passion pay is unfair and unreasonable, while 16% of the young people thought of quitting the job because the job was not helpful for them to develop their abilities (36.2%).<sup>18</sup>

Of the respondents who had experienced passion pay, 68.2% recognized that first of all, passion wages is created largely due to social circumstance (37.1%) and second, the responsibility lies with employers who pay passion wages to their workers (31.1%).<sup>19</sup> In addition, the young people strongly think that the countermeasures and improvements to passion pay are first, to change the awareness of employers (35.6%) and second, to raise social awareness (28.9%).<sup>20</sup> Finally, they

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15) *Id.*

16) *Id.*

17) *Id.*

18) *Id.*

19) *Id.*

20) *Id.*



also think that the Korean government needs to provide institutional strategies, such as regulating related laws (29.0%), establishing a standard guideline (25.9%), and strengthening inspection or penalty.<sup>21</sup>

On Feb. 2, 2016, the ministry of Employment and Labor announced that it will conduct labor inspections for vulnerable groups in order to remove any discrimination over an intern who receives low wages and non-payment called passion pay from fashion and hotel industries. In addition, the Ministry drew up a specific policy, “A Guideline of Judgment and Protection of Legal Status on the Trainee of Work Experience.” The guideline explains the meaning of a trainee of work experience, which is defined as a person who experiences work (employment) at the workplace for the purpose of education or training regardless of its names such as an apprentice, trainee, or intern. Moreover, a trainee has to be distinguished from an employee under Article 2(1)(1) of the Labor Standards Act. Lastly, the guideline examines the criterion of judgment on whether or not a person becomes an employee under the precedent as follows: ① providing work that is directed according to need without any educational program, ② using a trainee substituted by an employee in the necessary employment for a special time or permanent time, ③ having a main purpose for using workforce from the beginning since the education and training is extremely repetitive and simple.

## C. The Application of Labor Related Laws

### 1. Introduction

In order to apply to labor related laws in Korea, an intern who receives passion pay shall be an employee under the Labor Standards Act. As stated above, “A Guideline of Judgment and Protection of Legal Status on the Trainee of Work Experience” listed who becomes an employee in the passion pay situation. However, the list is uncertain and ambiguous when compared with the preceding Supreme Court’s rulings.<sup>22</sup> Therefore, the Supreme Court has to decide its criteria for the near future. Until the present, it is called as all or nothing on the legal status of an intern because the intern does not have any legal protection if he or she is not recognized as an employee. As a result, this paper examines the legal status of an intern who receives passion wages in the last part; and explores what types of labor related laws an intern is under regarding the passion pay if he or she is an employee.

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21) *Id.*

22) Supreme Court 2004Da29736, Dec. 7, 2006 (S. Kor.) (The Supreme Court examines twelve requirements on becomes whether or not a person an employee unlike an trainee of work experience).

## 2. The Labor Standards Act

The Labor Standards Act governs the employment conditions and circumstances in the individual employment relationship.

Article 1 of the Labor Standards Act provides that “the purpose of this Act is to establish the standards for terms and conditions of employment in conformity with the Constitution, thereby securing and improving the fundamental living standards of workers and achieving a well-balanced development of the national economy.”<sup>23</sup> That is to say, an employee is entitled to fundamental living standards under the terms and conditions of employment.

An employee means a person, regardless of being engaged in whatever occupation, who offers work to a business or workplace for the purpose of earning wages under Article 2(1)(1) of the Act.<sup>24</sup>

Article 2(1)(4) of the Act indicates that there is an employment contract between an employer and an employee, which means an employee offers work for which the employer pays its corresponding wages.<sup>25</sup> The main contents of employment contracts constitute that an employee offers work for which the employer pays its corresponding wages.

Under Article 3 of the Act, an employer and an employee follow the terms and conditions of employment, which shall be the minimum standards for employment and the parties to labor relations shall not lower the terms and conditions of employment under the pretext of compliance with this Act.<sup>26</sup>

Article 15 of the Act explains that “(1) A labor contract which has established terms and conditions of employment which do not meet the standards as prescribed by this Act shall be null and void to that extent. (2) Those parts which are null and void in accordance with paragraph (1) shall be governed by the standards as prescribed by this Act.”<sup>27</sup>

As a result, an intern who receives passion pay has legal protection under the Labor Standards Act. However, an intern who receives less than minimum wages and non-payment shall be protected under the Minimum Wage Act.

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23) Geunro gijun beop [Labor Standards Act], No. 5309, Mar. 13, 1997, *amended by* Act. No. 10339, July 5, 2010, art. 1 (S. Kor.).

24) *Id.* art. 2(1)(1).

25) *Id.* art. 2(1)(4).

26) *Id.* art. 3.

27) *Id.* arts. 15(1) and (2).

### 3. The Minimum Wage Act

Under Article 1 of the Minimum Wage Act, it proposes to stabilize workers' life and to improve the quality of the labor force by guaranteeing a certain minimum level of wages to workers, thereby contributing to the sound development of the national economy.<sup>28</sup> Also, the term employee in this Act is prescribed in Article 2 of the Labor Standards Act. Therefore, a person who receives legal protection in this Act shall be an employee under the Labor Standards Act.<sup>29</sup>

Article 3 of the Act provides that "This Act shall apply to all kinds of businesses or workplaces which employ workers" unlike Article 11 of the Labor Standards Act.<sup>30</sup> In other words, the Minimum Wage Act extends the more scope of application than the labor Standard Act.

Under Article 6(1) and (2) of the Act, an employer shall pay workers covered by the minimum wage, at least the minimum wage amount or more and no employer may lower the previous wage level on the ground of the minimum wage determined under this Act.<sup>31</sup>

If an employer pays wages below the minimum wage amount or lowers the previous wage level based on the minimum wage, in violation of Article 6(1) or (2), he or she shall be punished by imprisonment for not more than three years or by a fine not exceeding 20 million won. In such cases, both the imprisonment and fine may be imposed.<sup>32</sup>

### 4. The Act on the Protection, etc. of Fixed-Term and Part-Time Workers

An intern who receives passion pay is subject to the Act on the Protection, etc. of Fixed-Term and Part-Time Workers because an intern enters into an employment contract with either a fixed-term or part-time duration. The Act on the Protection, etc. of Fixed-Term and Part-Time Workers is to promote the sound development of the labor market by redressing undue discrimination against fixed-term and part-time workers and improving their working conditions.<sup>33</sup>

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28) Choejeo imgeum beop [Minimum Wage Act], No. 4575, Jan. 1, 1994, *amended by* Act. No. 11278, July 1, 2012, art. 1 (S. Kor.).

29) *Id.* art. 2.

30) *Id.* art. 3. (Article 11 of the Labor Standards Act provides that this Act shall apply to all businesses or workplaces in which not less than five workers are ordinarily employed.)

31) *Id.* arts. 6(1) and (2).

32) *Id.* art. 28.

33) Giganje mit dansigan geunroja boho beopyul [Act on the Protection, etc. of Fixed-Term and Part-Time Workers], No. 8372, July 1, 2007, *amended by* Act. No. 12469, Sept. 19, 2014, art. 1 (S. Kor.).

However, Article 3(1) of the Act provides that “This Act shall apply to all business or workplaces ordinarily employing at least five workers” like Article 11 of the Labor Standard Act.<sup>34</sup> In other words, the scope of application is limited in the workplace where more than five employees are employed.

Under Article 4(1) of the Act, any employer may hire a fixed-term worker for a period not exceeding two years (where his or her fixed-term employment contract is repetitively renewed, the total period of his or her continuous employment shall not exceed two years).<sup>35</sup>

Article 8(1) and (2) of the Act provides that no employer shall give discriminatory treatment to any fixed-term worker on the ground of his or her employment status compared with other workers engaged in the same or similar kinds of work on a non-fixed term employment contract at the business or workplace concerned, and no employer shall give discriminatory treatment to any part-time worker on the ground of his or her employment status compared with full-time workers engaged in the same or similar kinds of work at the business or workplace concerned.<sup>36</sup>

Under Article 4(2) of the Act, where any employer hires a fixed-term worker for more than two years although those grounds under the proviso to paragraph (1) do not exist or cease to exist, such fixed-term worker shall be deemed a worker subject to non-fixed term employment contract.<sup>37</sup>

### III. Zero Hour Contracts

#### A. Definition

In the UK, there has been growing public interest in the growth of zero hour contracts. A zero hour contract is not a legal term given to one of the contractual types between an employer and an employee. Under a zero hour contract, an employer does not have any obligation to provide any minimum working hours whereas an employee does not also have any obligation to accept any work offered by the employer.<sup>38</sup> These are employee contracts where the employer is not mandated by law to offer regular working hours.

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34) *Id.* art. 3(1). (Article 11 of the Labor Standards Act provides that this Act shall apply to all businesses or workplaces in which not less than five workers are ordinarily employed.)

35) *Id.* art. 4(1).

36) *Id.* arts. 8(1) and (2).

37) *Id.* art. 4(2).

38) THE CHARTERED INSTITUTE OF PERSONNEL AND DEVELOPMENT: CIPD, ZERO-HOURS CONTRACTS: UNDERSTANDING THE LAW 3 (2013).

The opinions on zero hour contracts are divided: some proponents think that these contracts are a part of the flexible labor market and a significant reason why unemployment has seen lower rates and employment has seen higher than we would have expected over the past five years.<sup>39</sup>

Opponents, on the other hand, view the contract negatively as exploitation of labor and a trend in the weakening of insecure forms of labor contracts.<sup>40</sup> The Office for National Statistics (ONS) reported that there were around 1.5 million zero hour contracts in August 2014 by a survey of employers.<sup>41</sup> ONS uses the more precise definition of “employee contracts that do not guarantee a minimum number of hours.”<sup>42</sup>

## **B. The Requirements of an Individual Becoming an Employee, Worker, Self-employed**

Section 230(1) of the Employment Rights Act 1996 provides that “employee means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.”<sup>43</sup> Also, Section 230(3) provides that “worker (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under) (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.”<sup>44</sup> The government of the United Kingdom states that “a person is self-employed if they run their business for themselves and take responsibility for its success or failure.”<sup>45</sup>

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39) Ian Brinkley, *Flexibility or Insecurity? Exploring the Rise in Zero Hours Contracts*, The Work Foundation, Part of Lancaster University, Aug. 2013, at 5.

40) *Id.*

41) Doug Pyper and Aliyah Dar, *Zero-hours Contracts 5* (House of Commons Library, Briefing Paper No. 06553, 2015).

42) *Id.*

43) Employment Rights Act, 1996, c. 18, § 230(1) (Eng.)

44) *Id.* § 230(3).

45) GOV.UK, Employment status: 5. Self-employed and contractor, available at <http://www.gov.uk/employment-status/selfemployed-contractor>.

First, there are some requirements in order to become an employee as below:<sup>46</sup>

1. An individual has an obligation to provide personal service; and
2. An individual and an employer have mutuality of obligation; and
3. The employer has an ability to control the way where work is done; and
4. Other factors: the consistency of employment.

Second, an individual will become a worker as below:<sup>47</sup>

1. An individual has an obligation to provide personal service; and
2. An employer and an individual have mutuality of obligation; and
3. An individual does not carry a business and the other party is not a customer; and
4. An individual does not match the test for becoming an employee.

Third, an individual will become self-employed as below:<sup>48</sup>

1. An individual does not have any obligation to provide personal service; or
2. An individual does not have mutuality of obligation; or
3. An individual carries a business and the other party is the customer.

<Table 4 > General Rights and Protection on the Main Three Types of Employment

Rights/Protection	Employee	Worker	Self-employed
Right not to be unfairly dismissed (after two years' service)	Yes	No	No
Right to receive written statement of terms and conditions	Yes	No	No
Itemized payslip	Yes	No	No
Statutory minimum notice (after two years' service)	Yes	No	No
Protection from discrimination in the workplace	Yes	No	No
National Minimum Wage	Yes	Yes	Possibly
Protection from unlawful deduction from wages	Yes	Yes	No
Paid annual leave	Yes	Yes	No
Right to daily and weekly rest breaks	Yes	Yes	No
Pension auto-enrollment	Yes	Yes	No
Right to be accompanied at a disciplinary or grievance hearing	Yes	Yes	No
Rights under data protection legislation	Yes	Yes	No

46) THE CHARTERED INSTITUTE OF PERSONNEL AND DEVELOPMENT : CIPD, *supra* note 37, at 4.

47) *Id.* at 5.

48) *Id.* at 4.

Rights/Protection	Employee	Worker	Self-employed
Whistleblowing protection	Yes	Yes	Yes
Statutory Sick Pay	Yes	Yes	Possibly
Statutory maternity, paternity, adoption leave and pay	Yes	Possibly	No
Unpaid time off to care for dependents	Yes	No	No
Right to request flexible working	Yes	No	No
Time off for ante-natal care	Yes	No	No
Time off for trade union activities	Yes	No	No
Protection under the transfer of undertakings legislation	Yes	No	No
Health and safety in the workplace	Yes	Yes	Yes

Source: The Chartered Institute of Personnel and Development: CIPD, Zero-hours contracts: understanding the law T.1 (2013).

### C. The Legal Status of Individuals Who Enter into Zero Hour Contracts

In the United Kingdom, 64% of employers consider zero hour workers as an employee, but 19% of employers classify them as workers.<sup>49</sup> The rest of employers (3%) describe them as self-employed.<sup>50</sup> In this regard, the most important problem is whether or not a person is an employee who works for his or her employers on the zero hour contracts.

As stated above, there are three main types of employment. An individual on a zero hour contract will be an employee or worker. The important difference between an employee and a worker is whether or not there is the employer's control. The employer's control is defined as his or her power to decide what, how, when, and where the work is done.<sup>51</sup> In other words, it means that the employer has a contractual right to control rather than his or her supervision over individuals.<sup>52</sup>

For instance, the courts held that a lap dancer who worked at Stringfellows is not an employee.<sup>53</sup> The dancer worked to a rota which was determined by Stringfellows, she was required to attend meetings at the club and fines were imposed by Stringfellows if she was late for her shifts or if she didn't attend meetings. It was clear

49) *Id.* at 3.

50) *Id.*

51) *Id.* at 5.

52) *Id.*

53) *Stringfellow Restaurants Ltd. v. Quashie*, [2012] EWCA (Civ) 1735 (Eng).

that the dancer provided *personal service* and Stringfellows had *control* over how she carried out her work, but the question for the court was whether there was sufficient *mutuality of obligation* to give rise to an employment relationship. The Court of Appeal decided that there was not.

The most important factor was that Stringfellows was under no obligation to pay the dancer anything at all. She negotiated her own fees with customers and risked being out of pocket on any given night. In the court's view, it would be unusual to find an employment relationship where the individual is paid exclusively by third parties and takes the economic risk. This conclusion was reinforced by the terms of the dancer's contract, under which she accepted that she was self-employed, and by the fact that she paid tax as a self-employed individual. The dancer was therefore not an employee. Please note that this decision may be appealed to the Supreme Court.

## **IV. Legal Status of Individuals on the Passion Pay and Zero Hour Contracts under the Labor Related Laws**

### **A. Introduction**

The Korean Labor Standards Act just applies to an employee, which is called all or nothing so that the starting point on the legal status of individuals on the passion pay and zero hour contract examines whether or not an individual is considered an employee. Becoming an employee is important to have legal protection from labor related laws such as the Labor Standards Act, the Minimum Wage Act, The Act on the Protection, etc. of Fixed-Term and Part-Time Workers, etc.

In the case of passion pay, it is controversial for an individual to receive less than minimum wages or non-payment, which is unfair and unreasonable in the labor market. In order to become an employee as an individual who receives passion pay, this part shall examine the definition of an employee, which consists of requirements. Under Article 2(1)(1) of the Labor Standards Act, an employee means a person, ① regardless of being engaged in whatever occupation, who ② offers work to ③ a business or workplace for ④ the purpose of earning wages. Therefore, becoming an employee is composed of four requirements as follows:

- ① Regardless of being engaged in whatever occupation
- ② Offering work
- ③ A business or workplace
- ④ The purpose of earning wages



However, two of the requirements (①③) do not have a decisive criterion in order to decide the legal nature of employee because “regardless of being engaged in whatever occupation” is recognized as a general characteristic and “a business or workplace” is good enough to be interpreted as “something that does continuously to get profits on the social life.” On the other hand, the rest of the requirements (②④) shall be interpreted as “offering work in order to earn wages.” In this regard, “work” is regulated under Article 2(1)(3) of the Labor Standards Act, “The term work means both mental work and physical work.” Furthermore, “wages” is provided under Article 2(1)(5) of the Labor Standards Act, “The term wages mean wages, salary and any other kind of money or valuables, regardless of their titles, which the employer pays to a worker as remuneration for work.” It is hard to examine whether or not “offering work in order to earn wages” is a definite criterion on the legal nature of employees since it is an abstract concept.<sup>54</sup> As a result, the legal nature of employees cannot be determined under the labor related laws.

With respect to the determination of legal nature of employees, precedents hold that there shall be a subordinate relationship in employment between an employer and an employee.<sup>55</sup> This part first examines the required criteria to recognize an employee under the Labor Standards Act by analyzing the precedents. Second, an intern who receives passion pay and individuals who enter into zero hour contracts are applied to the criteria of an employee under the Act. Third, the legal status of an intern with passion wages is compared with an individual under a zero hour contract.

## **B. The Representative Precedent on Whether or not a Person is an Employee**

### **1. Outline of Case<sup>56</sup>**

Plaintiffs gave a lecture to students as a general class’ lecturer from 1985 to December 1999 or from 1999 to February 2001 in an institute located in Busan where the defendant operates; among the plaintiffs, Kim Du Hwan, Shin Young Kyu, and Jeong Yong Su took charge of class except one or two to five years.

Plaintiffs received 3 million won (\$3,000) as a salary while they gave a lecture from 9:00 a.m to 7:00 p.m from the middle of February, at the time of the

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54) Jeonghee Seo et al., *Saheobokji yeongyeok iljarisaeop chamyeojaui geunrojaseong bigyo yeongu* [A Comparative Study on the Employment Status of Participants among Job Creating Program in Social Welfare], 13(2) Quarterly Journal of Labor Policy 95, 99 (2013) (S. Kor.).

55) Supreme Court [S. Ct.], 94Da22859, Dec. 9, 1994 (S. Kor.); Supreme Court [S. Ct.], 2004Da29736, Dec. 7, 2006 (S. Kor.).

56) Supreme Court [S. Ct.], 2004Da29736, Dec. 7, 2006 (S. Kor.).

government-sponsored scholastic aptitude test, to November; calculated by 28,000 won or 30,000 won per hour of which the total amount is approximately 100 or 110 hours per month. After the test, they did not give more lectures or receive wages until the following February, when lectures resumed. Jeong Yong Su only received wages for essay lectures from November 20 to December.

The schedule of the institute started a faculty meeting starting from 8:30 a.m. The lecturers in charge of class went to the institute at 8:00 a.m, supervised an independent and broadcasting study for students in the morning, and joined a faculty meeting. The lecturers not in charge of class went to the institute before starting their first lecture and left the institute at 5:00 p.m. or 7:00 p.m. On the other hand, the lecturers in charge of class supervised an independent study and left the institute in the evening taking turns several times per month.

Plaintiffs spent their free time on researching teaching materials so that they were not available to lecture in another place; it was possible to adjust lectures in the morning and evening. The textbook used for lectures in the defendant's institute was that recommended by the lecturers.

Plaintiffs did not draw up a contract in writing when they work for the institute, paid earned income tax, and joined employees' medical insurance named as the workplace of the institute. From 1994, however, the institute changed its policy. The institute drew up a contract named as a contract of offering lecture services, lecturers were registered as self-employed under the Value-Added Tax Act, and lecturers joined local medical insurance instead of employee's medical insurance.

On January 13, 2000, Jeong Yong Su was dismissed and the remainder was discharged on February 14, 2001. Therefore, the plaintiffs filed a lawsuit regarding severance pay and dismissal allowance. The trial court denied the legal nature of an employee for a lecturer not in charge of class, but recognized the legal nature of an employee for a lecturer in charge of class and a contract with nine months, which are not enough to receive a severance pay so that the fixed-term contract was finished naturally without any special measures.<sup>57</sup> Moreover, the appellate court also denied the legal nature of an employee in charge of class and maintained the trial court's holding. On the other hand, the Supreme Court reversed the decision of the appellate court for the following reason: all of the lecturers in charge of class and not in charge of class are recognized as employees and severance pay shall be paid to the lecturers since employment contracts are renewed several times, which includes a period of a blank so that all of the periods are considered a continuing employment period. In this regard, the most important issue is what criteria to decide the legal nature of an employee are under the Labor Standards Act.<sup>58</sup>

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57) Busan District Court [Dist. Ct.], 2001kahap18448, 2003 (S. Kor.).

## 2. The Ruling of Judgment

The Supreme Court ruled that the lecturers are recognized as an employee for the following reasons:<sup>59</sup>

Whether or not a person is an employee under the Labor Standards Act is determined by whether the person that provides work is in a subordinate relationship in employment in order to receive wages in a business or workplace in actual practice, rather than the existence of employment contracts or subcontracts, regardless of what type of employment. In this regard, whether or not a subordinate relationship in employment is recognized shall be determined after considering the economic and social conditions collectively as follows: ① whether or not employment is decided by an employer, ② whether or not a person is subject to the rules of employment or other service regulations, ③ whether the person is controlled and supervised significantly by an employer in the course of his or her work performance, ④ whether or not the employer designates his or her working hours and workplaces and he or she is controlled by the employer, ⑤ whether or not a working provider owns the equipment, raw materials or working tools, ⑥ whether or not the working provider hires a third party and can do business by himself or herself through substituting employment, ⑦ whether or not the work provider has a risk related to creating business profits or causes loss to himself or herself by providing work, ⑧ whether or not the nature of payment is considered as work itself, ⑨ whether or not a basic or fixed wage is determined, ⑩ whether or not there is any matter of payment including a withholding tax regarding income tax, etc., ⑪ whether or not there is continuation of relationship of providing work and exclusion of an employer, ⑫ whether or not the person is recognized as an employee by the Social Security Insurance Acts or other laws.

The general lecturers of university entrance institutes enjoy the rights to commute time, lecture time, designation of lecture place, limitation of providing labor to another workplace, additional employment performance except lectures, etc. and receive payment which consists of multiplying consistent wages and hours so that the number of students does not affect the income's increase. In the above instance, the lecturers shall be recognized as an employee even though they entered into a contract called, "a contract of offering lecture services," are not subject to the rules of employment, did not have a fixed wage or file business tax other than income tax under the Value-Added Tax Act, and joined local medical insurance.

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58) Supreme Court [S. Ct.], 2004Da29736, Dec. 7, 2006 (S. Kor.).

59) *Id.*

### 3. Understanding the Legal Criteria of Nature of an Employee

The legal criteria of nature of an employee are based under the twelve requirements, “substantial criteria for determining subordinate relationship in employment,” under the Supreme Court ruling. The judgment method is to review each case individually and collectively, and when a person’s situation satisfies a majority of requirements, he or she can be recognized as an employee under the Labor Standards Act. These twelve requirements may be divided into four parts: directed and supervised factors (①②③④), self-employed factors (⑤⑥⑦), wage factors(⑧⑨), and additional factors (⑩⑪⑫).<sup>60</sup>

The directed and supervised factors examine how much an employer supervises a worker in the process of performing his or her duties. Recently, the Supreme Court rulings tend to hold that considering the occurrence of various employment types and more self-employment, “being supervised and directed during his or her work performance specifically<sup>61</sup> and directly by an employer has changed to ‘being supervised or directed considerably’.”<sup>62</sup>

The self-employed factors are decided by whether a person can create profit by his or her efforts while he works. Plaintiffs did not draw up a contract in writing when they worked for the institute, paid earned income tax, and joined employees’ medical insurance named as the workplace of the institute. From 1994, however, the institute changed its policy. The institute drew up a contract named as a contract of offering lecture services, lecturers were registered as self-employed under the Value-Added Tax Act, and lecturers joined local medical insurance instead of employees’ medical insurance. In this case, however, plaintiffs were recognized as an employee.<sup>63</sup>

The wage factors are whether a basic or fixed wage is determined in advance and whether income tax is deducted for withholding purposes. The additional factors deal with a requirement which is decided unilaterally by an employer, may result in a worker being taken advantage of by the employer due to his or her position, and whether a person is registered as an employee by the Social Security Insurance Acts or other laws.

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60) Seongtae Kang, *Teuksu goyongjikui nodongbeopjeok boho* [Legal Protection of ‘Economically Dependent Workers’ in Labor Law], 7(3) *Quarterly Journal of Labor Policy* 93, 102 (2007) (S. Kor.); See Jeonghee Seo et al., *supra* note 53, at 105.

61) Supreme Court [S. Ct.], 94Da22859, Dec. 9, 1994 (S. Kor.).

62) Supreme Court [S. Ct.], 2004Da29736, Dec. 7, 2006 (S. Kor.).

63) *Id.*

### **C. The Breach of Contracts and Minimum Wages with respect to Passion Pay**

In the case of an intern who receives passion pay, first of all, it is necessary to examine whether or not an intern is regarded as an employee. Article 2(1)(1) of the Labor Standards Act provides that as the definition of an employee, “the term worker means a person, regardless of being engaged in whatever occupation, who offers work to a business or workplace for the purpose of earning wages.” Under the Labor Standards Act, an employee provides work in order to earn wages. It can be interpreted that a person who receives non-payment or offers work except for the purpose of wages is not an employee.<sup>64</sup> However, in the specific case, it is not good enough to decide whether or not a person is an employee because the modern labor market has a variety of employment types which are not easy to be recognized as an employee. As a result, “in order to earn wages” shall be interpreted from an objective perspective, since it can be omitted to interpret the legal nature of an employee of an intern from a subjective perspective.<sup>65</sup>

Under the precedent stated above, there is no argument that a subordinate relationship in employment exists in the case of the relationship of direction and supervision regardless of payment or non-payment.

Thus, an intern offers work under the direction and supervision in a business or workplace so that he or she can be an employee, but the passion wages including less than minimum wages or non-payment violates the Labor Standards Act and Minimum Wage Act. Only if an intern has pure education and training, he or she is not an employee under the Labor Standards Act.

An employer violates the following provisions of the Labor Standards Act and Minimum Wage Act: Article 2(1)(4) and Article 15 of the Labor Standards Act and Article 6(1), (2), (3), and Article 28 of the Minimum Wage Act.

#### **The Labor Standards Act**

Article 2 (Definitions) (1) The definitions of terms used in this Act Shall be as follows:

(1) The term “labor contract” means a contract which is entered into in order that a worker offers work for which the employer pays its corresponding wages;

#### **Article 15 (Labor Contracts in Violation of This Act)**

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64) JONGYUL LIM, NODONG BEOP [LABOR LAW] 33 (2016) (S. Kor.).

65) Hochang Noh, *supra* note 7, at 229.

(1) A labor contract which has established terms and conditions of employment which do not meet the standards as prescribed by this Act shall be null and void to that extent.

### **The Minimum Wage Act**

#### Article 6 (Effect of Minimum Wage)

- (1) An employer shall pay workers covered by the minimum wage, at least the minimum wage amount or more.
- (2) No employer may lower the previous wage level on the ground of the minimum wage determined under this Act.
- (3) Where a labor contract between an employer and a worker covered by the minimum wage provides for a wage below the minimum wage amount, the relevant stipulation concerning the wage shall be null and void and the invalidated part shall be considered to stipulate that the same wage as the minimum wage amount determined under this Act shall be paid.

#### Article 28 (Penal Provisions)

A person who pays wages below the minimum wage amount or lowers the previous wage level based on the minimum wage, in violation of Article 6 (1) or (2) shall be punished by imprisonment for not more than three years or by a fine not exceeding 20 million won. In such cases, both the imprisonment and fine may be imposed.

## **D. The Problems of Working Hours with respect to Zero Hour Contracts**

As stated above, in the United Kingdom, 64% of employers consider zero hour individuals as an employee, but 19% of employers classify them as workers. The remainder of employers (3%) describes them as self-employed. In fact, it is hard to analyze whether or not zero hour individuals are recognized as an employee. In this regard, the most important problem is whether or not an individual is an employee who works for his or her employer on the zero hour contract, because they have different types of legal status depending on whether they are regarded as an employee, a worker, or as self-employed.

Some requirements in order to be recognized as an employee include: an individual that has an obligation to provide personal service; an individual and an employer that have mutuality of obligation; and the employer that has the ability to control the way in which work is done. Other factors include the consistency of employment. On the other hand, an individual is recognized as worker when: the

individual has the obligation to provide personal service; an employer and the individual have mutuality of obligation; the individual does not carry a business and the other party is not a customer; and the individual does not match the test for becoming an employee. Moreover, a self-employed individual constitutes: an individual that does not have any obligation to provide personal service; an individual that does not have mutuality of obligation; or an individual that carries a business and the other party is the customer.

As a result, an individual who has entered into a zero hour contract can be an employee, worker, or self-employed in the United Kingdom. But in Korea, he or she shall be an employee in order to protect the individual's legal status under the Labor Standards Act. The important difference between an employee and a worker is that an employer has the ability to control over the way in which work is done. Likewise, there shall be a subordinate relationship in employment between an employer and an employee in order for the person to be recognized as an employee.

In the case of zero hour contracts, if an individual is considered an employee, he or she shall be protected under the Labor Standards Act and other related labor laws. Article 2(1)(8) of the Labor Standards Act stipulates the definition of part-time worker as, "the term 'part-time worker' means a worker whose contractual work hours per week are shorter than those of a full-time worker engaged in the same kind of work at the workplace concerned." Moreover, Article 18 of the Labor Standards Act provides the terms and conditions of employment of part-time workers as follows:

Article 18 (Terms and Conditions of Employment of Part-Time Workers)

- (1) The terms and conditions of employment of part-time workers shall be determined on the basis of relative ratio computed in comparison to those work hours of full-time workers engaged in the same kind of work at the pertinent workplace.
- (2) Criteria and other necessary matters to be considered for the determination of terms and conditions of employment under paragraph (1) shall be prescribed by Presidential Decree.
- (3) Articles 55 and 60 shall not apply to workers whose contractual working hours per week on an average of four weeks (in cases where their working periods are less than four weeks, such period of working) are less than 15 hours.

An individual who enters into a zero hour contract may apply to the Act on the Protection, etc. of Fixed-Term and Part-Time Workers because an individual enters into an employment contract where the period is either fixed or is a part-time contract. This Act stipulates the protecting provisions as follows:

**Article 3 (Scope of Application)**

(1) This Act shall apply to all business or workplaces ordinarily employing at least five workers.

The scope of application is limited in the workplace where more than five employees are employed.

**Article 6 (Restrictions on Overtime Work of Part-Time Workers)**

(1) If any employer intends to have a part-time worker provide his/her services in excess of the working hours prescribed in Article 2 of the Labor Standards Act, it shall obtain the consent of such worker. In such cases, the number of overtime hours shall not exceed 12 hours a week.

(2) Any part-time worker may refuse to work overtime if the employer orders the overtime work without obtaining his/her consent under paragraph (1).

(3) Any employer shall pay 50/100 or more of the average wage for overtime work under paragraph (1) in addition to ordinary wages.

**Article 8 (Prohibition of Discriminatory Treatment)**

(2) No employer shall give discriminatory treatment to any part-time worker on the ground of his/her employment status compared with full-time workers engaged in the same or similar kinds of work at the business or workplace concerned.

## **E. A Comparative Analysis between Passion Pay and Zero Hour Contracts**

As explained above, the legal criteria of nature of an employee are based on the twelve requirements, “substantial criteria for determining subordinate relationship in employment,” under the Supreme Court ruling. The judgment method is to review each case individually and collectively, and when a person’s situation satisfies a majority of requirements, he or she can be recognized as an employee under the Labor Standards Act. These twelve requirements may be divided into four parts: Directed and supervised factors (①②③④), self-employed factors (⑤⑥⑦), wage factors(⑧⑨), and additional factors (⑩⑪⑫).



<Table 5 > Comparative Analysis between Passion Pay and Zero Hour Contract

Legal Criteria of the Nature of an Employee	Passion Pay	Zero hour Contracts
① whether or not employment is decided by an employer	Yes	Yes
② whether or not a person is applied to the rules of employment or other service regulations	Yes	Yes
③ whether the person is controlled and supervised significantly by an employer in the course of his or her work performance	Yes	Yes
④ whether or not the employer designates his or her working hours and workplaces and he or she is controlled by the employer	Yes	Yes
⑤ whether or not a working provider owns the equipment, raw materials or working tools	No	No
⑥ whether or not the working provider hires a third party and can do business by himself or herself through substituting employment	No	No
⑦ whether or not the working provider has a risk related to creating business profits or causing loss by himself or herself through providing workforces	No	No
⑧ whether or not the nature of payment is considered as work itself	No	Yes
⑨ whether or not a basic or fixed wage is determined	No	Yes
⑩ whether or not there is any matter of payment including a withholding tax regarding income tax, etc.	Possibly not	Yes
⑪ whether or not there is continuation of relationship of providing work and exclusion of an employer	Yes	Possibly not
⑫ whether or not the person is recognized as an employee by the Social Security Insurance Acts or other laws.	Yes	Yes

According to Table 5, as well as Table 2 and 4, four out of twelve requirements are different between a person who receives passion pay and an individual who enters into zero hour contracts.

First, a person who receives passion pay does not have a fair wage that he or she has to receive for work itself. However, an individual who enters into a zero hour contract is eligible to receive a fair wage even though he or she offers work for working hours when an employer wants, regardless of how long or short the hours.

Second, a person who receives passion pay is not determined on the basis of a fixed wage which is fair and reasonable under the Labor Standards Act, while an individual who enters into a zero hour contract is eligible for a basic or fixed wage, although he or she receives it per hour.

Third, it is not easy for a person who receives less than minimum wages or non-payment to pay a withholding tax concerning income tax because he or she is not determined yet as an employee, whereas an individual who enters into a zero hour contract has a duty to pay a withholding tax since he or she receives at least minimum wages.

Fourth, a person who receives passion pay works continuously and is directed and supervised by an employer when compared with passion pay, while an individual who enters into a zero hour contract has the eligibility to work when an employer wants, even though he or she is directed and supervised by an employer.

## **V. Conclusion**

After the 1997-98 Asian economic crisis, a growing number of young people failed to find decent jobs. As a result, they look for some companies or organizations that can provide good experiences even though receiving less than minimum wages or even non-payment as interns. Many employers recognize this reality and misuse these poor situations in order to use cheap workforce.

However, passion pay has brought much poorer working conditions, infringing rights to minimum wages, working hours, and monthly or annual leaves. In particular, young people's passion was abused to an extreme degree in the fashion, beauty, hotel, bakery, and social commerce industries. In fact, in the case of providing work on passion pay, a person does not have any protection of the Labor Standards Act, the Minimum Wage Act, the Industrial Accident Compensation Insurance Act, etc. if he or she is not an employee under the Labor Standards Act.

Likewise, in the United Kingdom, zero hour contracts have been a controversial issue as a means of labor market flexibility. Some proponents intend that these contracts are a significant reason why unemployment has been low. On the other hand, opponents think that these contracts attract a trend in the weakening of job security.

Therefore, first of all, it is necessary to examine whether or not a person who offers work on passion pay or an individual who enters into a zero hour contract can be recognized as an employee. With respect to the determination of legal nature of employees, precedents hold that there shall be a subordinate relationship in employment between an employer and an employee. That is to say, whether or not

a person is an employee under the Labor Standards Act is that the person provides work in a subordinate relationship in employment in order to receive wages in a business or workplace in actual practice, rather than the existence of employment contracts or subcontracts, regardless of what types of employment. In this regard, whether or not a subordinate relationship in employment is recognized shall be determined after considering the economic and social conditions collectively per twelve requirements.

If a person is recognized as an employee, the following will examine whether or not a person who provides employment on passion pay has the following differences with an individual who enters into zero hour contracts.

First, a person who receives passion pay does not have a fair wage that he or she has to receive for work itself. However, an individual who enters into a zero hour contract is eligible to receive a fair wage even though he or she offers work for working hours when an employer wants, regardless of how long or short the hours.

Second, a person who receives passion pay is not determined on the basic or fixed wage, which is fair and reasonable under the Labor Standards Act, while an individual who enters into a zero hour contract is eligible for a basic or fixed wage, although he or she receives it per hour.

Third, it is not easy for a person who receives less than minimum wages or non-payment to pay a withholding tax concerning income tax because he or she is not determined yet as an employee, whereas an individual who enters into a zero hour contract has a duty to pay a withholding tax since he or she receives at least minimum wages.

Fourth, a person who receives passion pay works continuously and is directed and supervised by an employer when compared with passion pay, while an individual who enters into a zero hour contract has the eligibility to work when an employer wants, even though he or she is directed and supervised by an employer.

As a result, if the judgment method to recognize an employee is to examine a majority of requirements, one cannot deny that an intern who receives passion pay and an individual who enters into zero hour contracts shall be protected under the Labor Standards Act in Korea.

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