RESEARCH INSTITUTE OF
FUTURE LABOR RELATIONS MANAGEMENT

ISSUE REPORT

DR&AJU LLC

Direct Employment Obligation Under the Temporary Agency Workers Act

1. Direct Employment Obligation and Types of Employment Under the Temporary Agency Workers Act

Article 6-2 (1) of the current Act on the Protection, Etc. of Temporary Agency Workers (hereinafter referred to as the "Temporary Agency Workers Act") stipulates the obligation on the part of the employer to *directly employ temporary agency workers* (hereinafter referred to as "direct employment obligation"). That is, **an employer whose employment of a temporary agency worker exceeds a period of two years**—in violation of the term limit under Article 6 (2) of the Temporary Agency Workers Act—**is obligated to directly hire the temporary agency worker** (see Article 6-2 (1) 3 of the Act).

Article 6 (3) of *the former Temporary Agency Workers Act* (partially amended by Act No. 8076, December 21, 2006) contained the deemed direct employment clause, which provided, "Where an employer company continues to employ a temporary agency worker in excess of two years, it shall be deemed that the company has employed said worker from the day following the date of expiry of the two-year term, provided that this shall not apply where there is explicit

dissent of the worker." At the time, the Supreme Court of Korea had ruled in an en banc decision that "under the *deemed direct employment clause* , the performance of temporary agency work as defined in subparagraph 1 of Article 2 of the Act and the continuance of such work for more than two years immediately establish an employment relationship between the employer company and the temporary agency worker" and that "in such a case, **the term of the employment relationship shall be deemed indefinite in principle, unless there otherwise exist special circumstances to be considered"** (Supreme Court en banc Decision 2007Du22320 Decided September 18, 2008).

In other words, the Court took the position that under *the deemed direct employment clause of the former Temporary Agency Workers Act*, the employment relationship between an employer company and a temporary agency worker shall be converted to permanent status in principle upon the lapse of two continuous years.

However, *the deemed direct employment clause* was replaced with the *direct employment obligation clause* in the revised Temporary Agency Workers Act, leaving a void in relevant Supreme Court rulings on the employment type of such workers subject to direct employment. Accordingly, the Ministry of Employment and Labor provided **the interpretation that employer companies may fulfil their direct employment obligation by signing a fixed-term labor contract** (see Administrative Interpretation No. 1504, May 3, 2007, by the Non-Regular Workforce Team, Administrative Interpretation No. 2424, June 26, 2007, by the Non-Regular Workforce Team, etc.). As a result, in the field of business, companies were often deemed as having fulfilled the direct employment obligation after hiring a temporary agency worker as a fixed-term employee.

The Court, however, recently found that **even under the new direct employment obligation clause of the Act, the term of the employment shall be indefinite in principle unless there otherwise exist special circumstances to be considered.** The summary of the Court Decision and its implications will be reviewed, followed by a look into some practical considerations.

2. Summary of Decision

The recent Supreme Court Decision (2018Da207847 Decided on January 27, 2022) reconfirmed that the legislative intent and purpose of the deemed direct employment and the direct employment obligation clauses under both the former and current Temporary Agent Workers Act are to “establish a legal relationship between employer companies and temporary agency workers with the aim to prevent temporary agency work from being commercialized and prolonged and to promote the employment safety of temporary agency workers,” adjudicating that **the employer company shall execute an indefinite labor contract pursuant to the direct employment obligation clause, excepting special circumstances.**

Provided, the Court views that under Article 6-2 (2) of the Temporary Agency Workers Act, **there can exist *special circumstances* where an employer company and a temporary agency worker can execute a fixed-term labor contract**, in which case an exception is accepted where a temporary agency worker explicitly shows dissent. Special circumstances are (i) when a temporary agency worker requested a fixed-term labor contract even though he/she knew that he/she could seek the fulfillment of the direct employment obligation from the employer; and (ii) the temporary agency worker was unable to conceive of signing an indefinite labor contract as most workers of the employer company who perform the same kind of work or similar work as the temporary agency worker in question are working under a fixed-term contract.

That is, the Court stated that the temporary agency worker can sign a fixed-term labor contract only if he/she has a "special reason in which setting a fixed term in a direct labor contract is not deemed to circumvent the legislative intent and purpose of the direct employment obligation clause." The Court further stated that the burden of proof lies with the employer company.

The Court ruled that if employer companies, which are under the direct employment obligation, directly employ temporary agency workers by concluding a fixed-term labor contract even though there exist no special circumstances, it cannot be deemed as a complete fulfillment of the direct employment obligation. In such cases, setting a term limit of the contract is in violation of the mandatory provisions of the Temporary Agency Workers Act enacted for the purpose of protecting the temporary agency workers and may thus be rendered null and void.

3. Implications of Decision

The said ruling is of great significance in that it is the first Supreme Court Decision on a case regarding the employment type of the direct employment obligation since the amendment of the Temporary Agency Workers Act. Under such a Decision, the employer company (i) shall execute an indefinite labor contract with the temporary agency worker (in principle); and (ii) can execute a fixed-term labor contract only when it proves that the "special circumstance cannot be deemed to circumvent the legislative intent and purpose of the direct employment obligation clause" (as an exception) when the direct employment obligation is incurred by the employer company.

Accordingly, the employer company shall (i) strictly manage so as to prevent unexpected direct employment obligations from incurring in the event of employing temporary agency workers; (ii) prepare to prove that there is any special circumstance that cannot be deemed to circumvent the legislative intent and purpose of the direct employment obligation when it intends to employ a temporary agency worker as a fixed-term worker even upon the occurrence of the direct employment obligation; and (iii) explore workforce management plans that reflect the purpose of

the said ruling by comprehensively considering the Temporary Agency Workers Act and the Act on the Protection of Fixed-term and Part-time Employees (Article 4).

In particular, it is predicted that it would be significantly difficult for a employer company to prove the legitimacy of converting a fixed-term worker in cases where requests for fulfilling the direct employment obligation collectively incur. DR & AJU-affiliated Research Institute of Future Labor Relations Management will help Client establish plans for employing temporary agency workers with professionals who have extensive experience in labor and employment, including experts who worked at trade unions, lawyers who practice labor and employment law, and labor consultants.

The Research Institute of Future Labor Relations Management, affiliated with DR & AJU LLC and headed by Kil Sung OH, provides comprehensive solutions to labor-management relations issues and ESG management. The Institute aims to streamline such solutions, establish sound work culture and safe workplaces, ensure just hiring practices and equal opportunities, and operate a cooperative labor director system, etc. The Institute has signed multiple MoUs with KSR-certified institutions, such as the Occupational Health and Safety Management System (ISO 45001), the Business Continuity Management System (ISO 22301), and the Anti-bribery Management System (ISO 37001), in addition to an MoU with the Korea Certified Public Labor Attorneys Association, an organization comprising experts on labor relations. As such, our intensive resources and professional expertise allow us to tailor effective solutions to the various issues clients face in labor relations and ESG management.

DR&AJU LLC

RESEARCH INSTITUTE OF FUTURE LABOR RELATIONS MANAGEMENT
Affiliated with DR & AJU

Kil Sung OH
Expert Counsel
Labor & Employment
E oks770@draju.com
T +82 2 3016 8740

Seung Taeg LEE
Partner
National Defense
E stlee@draju.com
T +82 2 3016 5291

Bo Hoon KIM
Partner
Labor & Employment
E bhkim@draju.com
T +82 2 3016 5206

Hyeon Joon CHOI
Attorney
Labor & Employment
E choihj@draju.com
T +82 2 3016 8769

Areum KIM
Attorney
Labor & Employment
E kimar@draju.com
T +82 2 3016 5389

Nak Hyun CHOI
Labor Consultant
Labor & Employment
E nhchoi@draju.com
T +82 2 3016 8716

Chan Wook PARK
Labor Consultant
Labor & Employment
E parkcw@draju.com
T +82 2 3016 5325

Han Bom SONG
Labor Consultant
Labor & Employment
E hbsong@draju.com
T +82 2 3016 5275

Seong Won Yoon
Labor Consultant
Labor & Employment
E yoonsw@draju.com
T +82 2 3016 5267

Ye Ji Lee
Labor Consultant
Labor & Employment
E yjilee@draju.com
T +82 2 3016 5251