Foreign Workers: the Employment Permit System and Human Rights

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I. Introduction

Professional foreign personnel (E-1 ~ E-7) are managed under the Employment Permit System (EPS) according to the Immigration Control Act, but they can stay for a long time through a job-seeking visa (D-10). Non-professional foreign workers (E-9) are strictly controlled according to the short-term circulation system and are prohibited, on principle, from becoming residents under the EPS, which has resulted in many human rights violations. In the case of overseas Koreans, there are two types of visas: Working visit visas (H-2) for those from China and the former Soviet Union and Korean descendant visas (F-4) for those from advanced nations. Working visit Korean descendants (H-2) are allowed to work under the Work Permit System (WPS) for a period of 5 years and can choose their workplace freely, while F-4 visa holders can continue to stay on in Korea without restrictions for an unlimited period of time.

Both non-professional and professional foreign personnel are managed under the EPS, while Korean descendant workers are managed by the WPS. As visa status under the EPS can only be maintained with a valid employment contract, the status of foreign workers is unstable and easily subject to human rights violations. On the other hand, under the work permit system, foreigners can be freely employed and move elsewhere to work during the period of the work permit. Since August 2004, we have been dealing with non-professional foreign workers (hereinafter referred to as "foreign workers") under the EPS, to offset the labor shortages in small- and medium-sized companies involved in industries such as production, agriculture, livestock, fishery, construction, etc. This EPS has brought out positive results, by meeting this shortage with foreign workers. However, as the EPS has been used for the benefit of employers, foreign workers' human rights have not been sufficiently protected, therefore necessitating that the current EPS be supplemented.

II. The Employment Permit System (EPS)

The introduction of foreign workers in Korea began in November 1993 when the industrial trainee system was introduced. Under this system, the government recognized foreign workers as trainees rather than workers, and to whom only some provisions of the Labor Standards Act applied. As a result, there was constant corruption in importing foreign workers due to the fact that they were managed by private companies rather than government agencies. Specifically, 80% of the trainees stayed on illegally beyond expiration of their effective stay, resulting in serious social

problems such as forced labor and human rights violations. The EPS was introduced to address these serious problems.

The EPS, in accordance with the Act on the Employment, etc. of Foreign Workers (the Foreigners Employment Act) was enacted on August 16, 2003, and implemented on August 17, 2004, while the Industrial Trainee System ran concurrently with the EPS until the former's abolishment on January 1, 2007. Through adoption of the EPS, a large number of illegal foreign workers were legalized and brought into the system, while the government itself managed the employment process for foreigners to preclude corruption and succeeded in significantly reducing illegal stays. Above all, working conditions for these workers improved by means of managing them according to labor law. Nevertheless, since the purpose for legislation of the Foreigners Employment Act was to contribute to balancing the supply of and demand for human resources and the balanced development of the national economy through systematic introduction and management, human rights were not specifically protected. Foreign workers who live in Korea for a long time should be guaranteed dignity and value as residents and human beings. However, the EPS has limited the legal rights of foreign workers for the purpose of enhancing the convenience and benefit of the employer. In reality, even though foreign workers are long-term residents, their rights such as freedom of occupation, freedom to have their families with them, equal treatment, applications for remedy under labor law, and social insurances, etc., have been restricted and their human rights at times seriously infringed.

III. System Changes for Employers

1. Employment contract terms have been extended.

Article 9 (3) of the Foreigner Employment Act, at the time of enactment, stipulated that "the term of employment contracts shall not exceed one year." However, as the law was revised on October 9, 2009, this term was extended to three years. This means that when an employer sets a contract period of three years, the foreign worker is restricted to a specific workplace for three years.

2. There is no freedom of movement.

The foreign worker cannot move to other workplaces unless the contract has expired or is terminated due to a reason not attributable to the foreigner. The direct reasons to restraint their transfer to other workplace are ① restrictions for change of workplace, ② frequency, ③ type of industry and ④ permitted period of transferring to other workplace. The indirect reason to restrict their ability to work at another workplace is to give long-term stay benefits if they have not changed jobs. If a foreign worker

continues to work at the same workplace for five years, he/she will be given a chance to renew his/her employment contract and be able to work for an additional maximum of 4 years and 10 months.

① Valid reasons to work for a different employer: In Article 25 (1) of the Foreigners Employment Act,

a) If his/her employer intends to terminate his/her employment contract during the contract period, or intends to refuse to renew his/her employment contract after its expiration, on unjustifiable grounds;

b) Where the Minister of Employment and Labor gives public notice, as he/she deems, under social norms, that the foreign worker is unable to continue to work in the company or workplace for reasons not attributable to him/her, such as temporary shutdown, closure of business, cancellation of the employment permit, limitations on employment, or violation by his/her employer of the terms and conditions of employment, or unfair treatment.

② Frequency limitations on changing jobs: According to Article 25 (4), workers to whom the Foreigners Employment Act applies cannot change jobs more than three times in three years, or two times in the extended two year period.

③ Restrictions against moving to another industry: As a general rule, the movement of foreign workers into other industries is limited under the current EPS for foreigners. However, it is possible for those originally employed in the manufacturing industry to move into agriculture, livestock, fisheries, and construction, as labor is needed in those industries.

④ Limited period for approval to change jobs: Article 25 (3) of the Foreigners Employment Act stipulates that "within three months from the date of application for change of workplace, or within one month from the date of termination of the employment contract with the employer, foreign workers who have not applied to change jobs at a Job Center must leave the country."

3. Choice of workplace is restricted.

At the time of enactment of the Foreigners Employment Act, when a foreign worker moved to a new workplace, he/she was provided a list of prospective employers from the employment center. However, in August 2012, the government issued a guide to improve the process. As only two designated workplaces were given as options, there was essentially no choice for foreign workers. If one applied for a job and did not get hired by one of the places of employment provided by the employment center, he/she would have to leave the country three months beyond termination/expiry of the

original employment contract. This would seriously hamper a worker's efforts to learn more about a potential employer (Article 25 (3).

4. The retirement allowance is replaced with the Insurance for Departure Guarantee.

In order to prevent foreign workers from staying illegally, the employer shall replace the retirement allowance with an 8.3% deposit of regular wages each month into the Insurance for Departure Guarantee program. The employee will receive this money (his or her retirement allowance) only upon departure at the airport (Article 13 of the Foreigners Employment Act). This is a special provision in the Act, creating an exception to Article 36 of the Labor Standards Act, which requires payment within 14 days from the date employment ends. The Constitutional Court has ruled in favor of its constitutionality as reasonable measures to prevent illegal stays. [1]

III. Demands for Improvement of Human Rights

1. Freedom to choose a workplace

The EPS is a foreign worker employment system designed to supplement the scarce labor force at SMEs with foreign workers. The rights of foreign workers are limited because the EPS is designed strictly to make use of them. However, it is a violation of human rights that foreign workers are deprived of the choice of workplace despite their long stay. Some foreign workers submitted a petition to the Constitutional Court that Article 25 (4) of the Foreigners Employment Act violated the right to work, the freedom to choose a job, and the right to pursue happiness by restricting movement of workplaces to three times in a three-year period. In the decision, the Constitutional Court ruled that Article 25 (4) was not unconstitutional because foreign workers were not entirely restricted in consideration of the legislative purpose of the law.[2] The dissenting opinion in this decision was that, "Even if you are a foreigner, if you were granted permission to work under the procedures set by the Republic of Korea, legally entered the country, have lived in Korea for a considerable period of time, acquiring and maintaining a certain type of living relationship, as a foreigner you must still be granted human dignity and value during the period of your legal stay, and the freedom to choose the means to maintain a living, including the freedom to choose a job. The provisions violate the principle against restricting basic rights, and the principle against excessive restriction of the freedom to choose a job." According to Article 52 (3) of the UN Convention on Foreign Workers' Rights, foreign workers should be entitled to the freedom to choose a job after two years of their first employment.

[1] The Constitutional Court ruled on March 31, 2016, 2014 hunma 367 (Insurance for Departure Guarantee)

[2] The Constitutional Court decision on September 29, 2011, 2007hunma1083, 2009hunma230, 352 (combined), (Freedom to Choose an Occupation)

2. Legalization of undocumented foreign workers

Currently, there are more than 200,000 undocumented foreign workers in Korea, with most non-professional foreign workers who did not leave the country even though their period of stay expired. Undocumented foreign workers are subject to human rights violations such as delayed payment of wages, industrial accidents, and the denial of social insurance. Due to market demand, it is possible for such workers to stay for a lengthy time. Undocumented foreign workers suffer from human rights violations, vulnerable while providing work at SME workplaces, construction projects and farming and fishing villages, living on illegal income for five to as many as 20 years. It is necessary now to protect their human rights by legalizing their status.

3. Application of labor laws and social insurance laws

In cases where a non-professional foreign worker is dismissed, it may be possible to apply for a job at another workplace. If a foreign worker is dismissed and does not apply for another job with the Job Center, he/she should leave Korea within one month. Also, if the employer unilaterally submits an employment termination report to the Job Center, it is difficult for foreign workers to receive relief from unfair dismissal as the Center often does not accept the termination report as a dismissal, but simply the employer's administrative duty to report. [3]

Since it is not mandatory for foreign workers to subscribe to employment insurance, they are virtually excluded. As a result, foreign workers cannot receive unemployment benefits while looking for a new job. Regarding industrial accident insurance, workplaces with fewer than 5 workers in farming and fishing workplaces are not covered.

4. The effective prohibition of discrimination

Discrimination based on nationality and race is prohibited in accordance with Article 6 (Equal Treatment) of the Labor Standards Act, Article 9 (Prohibition of Discrimination) of the Labor Union and Labor Relations Adjustment Act, and Article 22 (Prohibition against Discrimination) of the Foreigners Employment Act. However, in reality, it is not easy for foreign workers to be protected from discrimination as that based on the Immigration Control Act, that based on the characteristics of fixed-term workers' employment, and that based on the degree of Korean language skills, are all recognized as legitimate forms. [4] In order to eradicate such discrimination, it is

[3] Hongeup Choi, "Case Studies for the Report on Employment Changes", 「Labor Law Periodical」, 25th edition, Comparative Labor Law Society of Korea, Volume 35, 2015, pg. 172.

[4] Hyungbae Kim, 「Labor Law」 24th edition, Parkyoung-Sa, 2015, pg. 239.

necessary to apply the principle of equal pay for the same work without distinguishing between foreigners and locals.

5. Living together with family members

Foreign workers are not allowed to be accompanied by a family member even after they continue to work for a period of five years or even longer period due to an extension program of the "Reinstatement of Sincere Workers". Foreigners are entitled to human rights guaranteed by the Constitution, and should be guaranteed the right to have their family with them if they stay for five years or longer.

IV. Conclusion

In order to use foreign workers continually, they need to be treated the same as domestic workers. Although this is the basic principle of labor law, it is not reality in terms of wages and working conditions. I would like to recognize the necessity of treatment for these workers based on human rights, by quoting Choi Eulpal, head of the Seoul Foreign Workers Center:

"We should not forget our experience of sending miners and nurses to Germany in the 1970s. At that time, Korea and Germany had a huge wage gap. Nevertheless, in Germany, according to the state-to-state bilateral agreement, Korean workers were introduced as equivalent workers without any difference in working conditions with their German counterparts. Of course there were differences in productivity, but in order to overcome this, the German government enrolled the Korean workers into two-month language training programs paid for with German government funds." [5]

[5] Eulpal Choi (Chief of Seoul Foreign Workers Center), “An Employment Permit System that Cannot Reflect Reality”,「Monthly Welfare Trends」(56), June 2003, pg. 22.