

The Limitations of Labor Law Protection for Foreign Native-English Instructors

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I. Introduction

In order to equip the country to be more globally competitive, English proficiency is essential. To this end, the cheapest way to improve one's English skills is to regularly attend English conversation classes taught by a native English instructor in Korea. The immigration data from the Department of Justice indicate that the number of native English instructors working in Korea has remained relatively constant at 20,000 in recent years, with this number expected to be maintained in the future. Native English teachers are highly educated with bachelors' degrees or higher from their home countries, where English is their mother tongue. Accordingly, it is necessary to induce competent, qualified native English instructors to stay longer by strengthening their legal protections. As all native English instructors are foreigners and have fixed-term contracts, they are not well-protected by Korean labor laws. In this article, I would like to point out the problems they face due to the weakness of the legal protection granted to them.

II. Unfair Dismissal

1. Difficulties in getting reinstated in reality

Korea's immigration law trumps labor law for Native English instructors because they entered Korea for employment. In cases where native English instructors are dismissed without justifiable cause, they can apply to the Labor Relations Commission for remedy. However, as native English instructors can stay only under the work-permission visa according to immigration law, they face many limitations in the course of seeking remedy. They may find their visa has expired or been cancelled while they are fighting unfair dismissal through the Labor Relations Commission. Even should the Commission order an employer to reinstate a native English instructor, they must go through the complicated process of getting a new E-2 visa (foreign language instructor visa). Many instructors do not wish to return to an employer who has mistreated them, so these cases often result in monetary settlement and an instructor who returns to their home countries.

2. Non-fixed term contract impossible after renewal of the fixed-term contract for two years

Native English instructors remain fixed-term employees, even when they have worked in excess of two years at the same job. Korean employees, on the other hand, must become regular employees if their employer wishes to keep them, but this protection is not afforded to foreigners.

3. Requesting a letter of release is regarded as agreeing to termination of employment

In cases where native English instructors find employment with another business during their original contract period, they need to receive a Letter of Release from the institute owner and

submit it to the Immigration Office with an Application for Workplace Transfer. If an instructor has been dismissed, it is very difficult to get a new job without this Letter of Release due to the complicated process of having a new E-2 visa issued. This, plus the fact that the Letter of Release is required to continue staying in Korea, means the dismissed instructor usually requests a Letter of Release from the employer who dismissed them. The Labor Relations Commission and the court often view such requests for a Letter of Release as “agreed termination,” or “implied agreed termination.”

III. Wages and Working Hours

1. Unpaid wages

There are not many cases of intentionally delayed payment of wages, but when an institute deteriorates financially, wages are delayed. In these cases, the following steps can be taken:

- ① The native English instructor submits a petition for unpaid wages to the Labor Office;
- ② Should the institute continue to delay payment of wages, risking criminal charges, the native English instructor can present a Confirmation of Unpaid Wages, issued by the Labor Office, to the Legal Aid Corporation of the Ministry of Justice, after which the Corporation places the institute’s property into foreclosure and retrieves the unpaid wages;
- ③ Should the institute become virtually insolvent or bankrupt before wages are paid, a native English instructor can request insolvency payment through the Labor Office, in accordance with the Wage Claim Guarantee Act just as a Korean employee can. This will amount to wages for only the final three months of employment, and unpaid severance pay for the final three years of employment, within insolvency payment limits. The process of receiving unpaid wages is so complicated and takes so much time that native English teachers must often give up on receiving their unpaid wages.

2. Statutory severance pay

The employer shall pay employees who resign after serving one year or longer, 30 days’ average wages per each continuous service year, except for part-time employees whose average contractual working hours per week are fewer than 15 hours for four consecutive weeks. Severance pay is a system that other countries do not have, which is to be paid later according to the Korean wage structure. Employers of native English teachers (who are not accustomed to the severance pay system) have at times created contracts in an attempt to allow the employer to avoid paying severance pay, and in some cases, have terminated the employment contract just ahead of one year. Generally institute owners recognize their obligation to pay severance pay, but some employers still find ways to avoid paying it, which is in violation of the Labor Standards Act.

A. Cases where the employment contract has been renewed every 10 months

“A International Foreign School” in Seoul had employment contracts with its native English instructors for 10 month periods, excluding the summer vacation, in an attempt to evade their obligation to pay severance pay. Their native English instructors had continued working for them for four years on average, with their contracts renewed continuously unless their teaching skills were significantly inferior. Once they resigned from this school and did not receive their severance pay, 7 native English instructors brought a claim for unpaid severance pay to the Labor Office. The school continued to refuse to pay severance pay until the Supreme Court made it clear that the employer was obligated to pay it.¹

B. Freelance contracts

“C language institute”, which had its head office in Seoul, had freelance contracts with its instructors and did not pay severance pay to them. Only employees who have provided continuous labor service for one year or longer can receive severance pay, while independent contractors or freelancers are excluded. Even though native English instructors agree to freelance contracts rather than employment contracts, if they work under the employer’s supervision and control and the characteristics of their income are similar to that of wages paid as remuneration for labor service, they shall be regarded as employees, and the employer shall pay severance pay. Twenty-four native English instructors who resigned from “C language institute” had not received severance pay and submitted a petition to the Labor Office for this unpaid severance pay, insisting that they were entitled to severance pay as employees. The Seoul district court ruled that while some factors existed that would seem to deny these native English instructors had been employees, they had provided labor service under considerable control and restrictions by the employer, and it was reasonable to consider them as employees.²

C. In cases where an employment contract has been terminated before one year of service

If a native English teacher is dismissed one or two months prior to expiration of the contract period, they are not protected by Korean labor law. As employees who have not worked for one full year are not entitled to severance pay, if the employees are terminated with advance notice of dismissal just before expiration of the contract period, they do not fall under the protection of labor law. In these cases, the returning airfare stipulated in the contract is not paid, nor is severance pay. As their visa will be cancelled at the same time, time will be short for them to find another job before they must leave the country.

¹ Supreme Court ruling on December 9, 2010, 201da58490: Unpaid severance pay for foreign teachers at International Foreign School

² Seoul district court ruling on December 9, 2010, 2011gahap121413: C language institute’s unpaid severance pay

3. Working hours

Controversial issues in relation to working hours are whether all hours that native English teachers are required to stay in the institute should be calculated into wage or whether only teaching hours should. ① In general, if the employment contract stipulates, “Monthly wages are 2.2 million won. Working hours are six hours per day, 30 hours per week, including preparation time for classes”, this can be interpreted as a mutual agreement that working hours should include class time and preparation time. In such a case, paid class preparation time shall be limited to the maximum weekly working hours allowed by law, which is 40 hours per week total. ② However, if the employment contract stipulates, “Class hours shall be 30 hours per week and 120 hours per month. If the employee agrees to work overtime, the institute shall pay 15,000 won per each additional hour”, then the mandatory time to prepare for classes shall be considered as overtime and additional payment calculated as overtime wages. The Labor Standards Act also agrees with this, as it stipulates, “Waiting hours the worker spends while under the employer's direction and supervision for work shall be regarded as working hours.”

IV. Conclusion

Protection for native English instructors, in terms of labor law, is considerably limited for two reasons: 1) they are foreigners staying by permission for employment according to immigration law, and 2) they are considered short-term employees providing services for a fixed time period. Many native English instructors have faced extreme difficulty in receiving remedy for unfair dismissal, and often return home after receiving minimal compensation. Competent native English instructors should be encouraged to stay long-term and an environment provided where they receive adequate protection under Korea's labor laws. As the most basic requirement for this purpose, if a native English instructor is unfairly dismissed, they should be allowed to obtain a D-10 employment visa so they can work elsewhere without needing the previous employer to issue a Letter of Release. In addition, in cases where someone is staying under a Lawsuit Visa (G-1) to pursue a case of unfair dismissal, a D-10 employment visa should be issued to the instructor if he/she wins the lawsuit.