# Changing Working Conditions

## I. Introduction

With the Aged Employment Promotion Act[1] revised in 2013, along with implementation of the compulsory retirement system starting in 2016, workplaces with seniority-based wage systems are expecting a rapid increase in labor costs. Under these circumstances, it is debatable whether unilateral introduction of a wage peak system by employers seeking to cope with the new labor costs is simply disadvantageous to employees or socially acceptable rationality. For guidance, it is necessary to look at the legal criteria required in labor laws for changing working conditions, which is equivalent to changing the Rules of Employment. With labor issues appearing in this area, I would like to explain appropriate ways to make or change the Rules of Employment, obtain consent for unfavorably-changed rules and the legal principle of socially acceptable rationality.

## II. The Rules of Employment: Concept & Making Changes

### 1. Concept

The Rules of Employment refer to the company regulations that an employer stipulates unilaterally regarding working conditions and service rules. The Labor Standards Act stipulates the employer's obligations for preparing and filing their rules (Article 93) and ways to compose and change the rules (Article 94). In particular, if a labor contract includes employment conditions which are below the standards stipulated in the Rules of Employment, the nonconforming part of the labor contract is null and void (Article 97). Korean law stipulates that areas in which employment conditions have been invalidated shall be governed by the standards provided for in the Rules of Employment. The Rules of Employment are to put the employer and workers on equal footing, which shows that the employer can compose or revise the rules unilaterally when revising working conditions advantageously, but shall obtain collective consent from the majority of employees when revising them disadvantageously.

### 2. Making Changes to the Rules of Employment

#### (1) Advantageous changes

When preparing or revising the Rules of Employment, the employer should, as a rule, consider the views of the majority of employees. For favorable changes to working conditions, it is sufficient that the employer listens to the majority of employees, but there is no obligation to consult with or obtain consent from them. [2] Violations of the duty to consider employee

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[1] **Act on Prohibition of Age Discrimination in Employment & Aged Employment Promotion, May 22, 2013**
**Article 19 (Retirement Age)**
① When an employer sets a retirement age, he/she shall set it at 60 years of age or older.
② Regardless of Subparagraph ①, in cases where the employer has previously set a retirement age at less than 60 years of age, his/her retirement age policy shall be regarded as having been set at 60 years of age. **Article 19-2 (Changing the Wage system, etc. due to Extension of the Retirement age)**
①The employer of a business or workplace who extends the retirement age in accordance with Subparagraph ① of Article 19, and a labor union which is formed by the majority of all workers (or a person representing the majority of all workers) shall take the steps necessary to revise the wage system, etc. according to the conditions pertaining to the business or workplace concerned.
**Addenda**
This Act shall enter into force one year from the date of enforcement of its promulgation. Provided, that the revised rules of Article 19, Paragraph ① and of Article 19-2 shall enter into force in accordance with the following: 1. Businesses or workplaces with 300 or more full-time workers, public institutes in accordance with Article 4 of the Act on the Operation of Public Institutions, local public enterprises and local corporations under Articles 49 and 76 of the Local Public Enterprises Act: effective January 1, 2016;
2. Businesses or workplaces with fewer than 300 workers, national and local governments: effective January 1, 2017.

[2] Jongryul Lim, 『Labor Law』, 13th edition, 2015, Parkyoung sa, page 353.

opinions regarding changes to the Rules of Employment are subject to punitive action: the violation does not invalidate the change(s). Considering employee opinions serves as a way of protecting those employees by giving the employer opportunity to reflect their opinions in changes, but the failure to do so does not invalidate those changes. [3]

**(2) Disadvantageous changes**

When working conditions stipulated in the Rules of Employment are changed disadvantageously, existing employees will continue to work under the previous conditions if their consent was not received for the changes, but new employees hired after revision of the Rules of Employment will be subject to those changes. [4]

**1) Changing the Rules of Employment unfavorably**

The acceptable methods for receiving employee consent are as follows: ① If there is no labor union composed of the majority of employees, it is necessary to receive consent from the majority of employees by means of allowing them to hold their own conference. Here, 'obtaining consent through a conference' means that employees get together and exchange their opinions for and against particular issues at the division or department level of a workplace or business, without interference from or participation of the employer, and then gathering their collective opinions for delivery to the employer. [5] ② If there is a labor union composed of the majority of employees, the revised Rules of Employment upon the union's consent to the changes will also be in effect for non-union employees who have not had any input into the agreement. [6] ③ If working conditions are different for production and management divisions, and for regular and non-regular employees, consent shall be received from those groups who will be affected by the revised working conditions. This means the employer does not have to receive consent from the majority of all employees if some of them will not be affected by the changes. [7] ④ At the time the Rules are changed, even though only a certain group of employees will be disadvantageously affected, if the revisions will affect other groups of employees, consent from these other groups shall also be required. [8]

**2) Criteria for changed working conditions to be considered disadvantageous**

Whether amendment of the Rules of Employment is disadvantageous or not shall be evaluated substantially by considering all factors such as reasons and procedures for the amendment, characteristics of the jobs, and the structure of each regulation of the Rules of Employment. Accordingly, even though one working condition has been revised disadvantageously, if other related factors were changed favorably or other favorable changes were made in return for the disadvantageous change, whether these revisions were disadvantageous or not should be determined after considering all the changes. [9]

Court rulings have showed: ① In cases where regulations on accumulating retirement payments were changed disadvantageously to non-accumulating retirement payments, if employee wages were increased and their working hours shortened, that change will not automatically be considered disadvantageous. [10] ② In cases where a wage regulation in the Rules of Employment was changed disadvantageously for some employees, but advantageously for other employees, such changes shall be considered as disadvantageous. [11]

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[3] Hyungbae Kim, 『Labor Law』, 24th edition, 2015, Parkyoung sa, page 304.
[4] Supreme Court ruling of June 24, 2011, 2009da58364.
[5] Supreme Court ruling of May 14, 2004, 2002da23185. June 24, 2011, 2009da58364.
[6] Supreme Court ruling of February 29, 2008, 2007da85997.
[7] Supreme Court ruling of December 7, 1990, 90da19647.
[8] Supreme Court ruling of May 28, 2009, 2009du2238.
[9] Supreme Court ruling of January 27, 2004, 2001da42301.
[10] Supreme Court ruling of November 13, 1984, 84daka414.
[11] Supreme Court ruling of May 14, 1993, 93da1893.

③ Reducing or abolishing overtime work exceeding legal standard working hours cannot be regarded as a disadvantageous change to the Rules of Employment.[12] ④ In cases where working at night or on holidays in the working shift system, employees used to receive additional allowances. However after changing work shifts to day time only, night and holiday work allowances were no longer available. In this case, the reduced wages cannot be seen as disadvantageous. [13]

## III. Disadvantageous Changes to the Rules of Employment and the Legal Principle of Socially Acceptable Rationality

### 1. Socially Acceptable Rationality

In cases where working conditions in the Rules of Employment were revised disadvantageously, if the Rules of Employment were revised without consent of the employee group, the changed rules will be invalid due to the unilateral nature of the change. However, if the revision of the Rules of Employment can be admitted as socially acceptable rationality, the change(s) may be considered legitimate. There are two opposing opinions regarding this issue: 1) As long as socially acceptable rationality is admitted, employer revisions to the Rules of Employment are effective (theory of affirmative recognition)[14], and 2) Disadvantageous employer revisions of the Rules of Employment are invalid (theory of negative recognition). [15]

The point of dispute is whether, when introducing the extension of mandatory retirement to age 60, the employer can introduce a wage peak system to employees under a seniority-based wage system without their consent. We will review disadvantageous revision of working conditions under the theory of socially acceptable rationality.

### 2. Criteria for Socially Acceptable Rationality

A judicial ruling regarding criteria for socially acceptable rationality stipulated, “It is not permitted to apply disadvantageous working conditions that deprive employees of their existing rights and interests through unilateral establishment or revision of Rules of Employment by the employer. However, in cases where there is sufficient socially acceptable rationality to recognize justification in terms of both necessity and the details of the establishment or revision, even when considering the degree of employee disadvantage, the effectiveness cannot be denied simply because there was no collective consent obtained from employees to whom the previous working conditions or Rules of Employment applied. Whether there is socially acceptable rationality or not shall be evaluated by collectively considering several items such as the degree of disadvantage the employees suffer under the changed Rules of Employment, the degree of employer necessity to change the ROE, efforts to replace or compensate for the changes to the ROE, negotiation situation with the Labor Union, and other general conditions in the domestic business. Provided, as changing the Rules of Employment disadvantageously for employees ignores the provision of the Labor Standards Act requiring their consent, this should be interpreted as necessary only a limited basis under stringent conditions.

### 3. Review

#### (1) Theory of affirmative recognition

The following points are used as support in the argument that unilaterally changing working

[12] MOEL Guideline (Kungi 68207-286, March 13, 2003).
[13] MOEL Guideline (Kungi 68207-691, June 11, 2003).
[14] Chulsoo Lee, “It is possible for an employer to unilaterally implement a wage peak system!”, 『Labor Law 』, Jungang Economy, April 2015.
[15] Kaprae Ha, “It is impossible for an employer to unilaterally implement a wage peak system!”, 『Labor Law 』, Jungang Economy, April 2015.

conditions disadvantageously is rational to a degree that is socially acceptable: First, according to Paragraph 1 of Article 19-2 of the Aged Employment Promotion Act, "The employer of a business or workplace who extends the retirement age, and a labor union which is formed by the majority of all workers (or a person representing the majority of all workers) shall take the steps necessary to revise the wage system, etc. according to the conditions pertaining to the business or workplace concerned." In a seniority-based wage system, this article can be regarded as necessary, as changing the wage system is unavoidable and socially acceptable rationality. Secondly, Paragraph 2 of Article 19-2 mentions, as the Employment Insurance Act outlines a system for subsidies related to implementation of the wage peak system in accordance with the retirement extension, such a change to working conditions would not be considered disadvantageous because there is no decreased wage in reality. Therefore, introducing a wage peak system along with extended retirement can be regarded socially acceptable rationality because of sufficient follow-up measures. In consideration of these arguments, this theory claims that employers can revise the ROE without consent of the employee group. [16]

**(2) Theory of negative recognition**

The following points are used as support in the argument that unilaterally changing working conditions disadvantageously is not rational to a degree that is socially acceptable[17]: Article 19 of the Aged Employment Promotion Act stipulates that introduction of the retirement age extension to 60 years is a normative provision, while Article 19-2 stipulates that the provision on introducing a wage peak system is a suggestive one and not legally binding. The related judicial ruling shows that the theory of socially acceptable rationality shall be strictly limited as this effectively ignores the provision in the Labor Standards Act requiring employee consent. [18]

**(3) Our interpretation**

In introducing extended retirement, it will not be considered justifiable for an employer to introduce a unilaterally-determined wage peak system to cut wages as this violates the principle of labor and management having decision-making power over working conditions. Provided, if the employer extends retirement age beyond the mandatory retirement age while introducing a wage peak system, this revision can be regarded as socially acceptable rationality as it contains advantages for both labor and management.

## VI. Conclusion

Revision of working conditions is possible at any time the employees and the employer agree. In cases where working conditions are revised advantageously, the employer does not need the consent of the employee group. However, if the revisions are disadvantageous, the employer needs to obtain consent from the employee group before the revision(s) shall be considered legally effective. Unilateral revision by employers violates the principle of labor and management determining working conditions, and shall not be effective due to violating both the contractual characteristics of the Rules of Employment and its normative effect. [19] For this reason, socially acceptable rationality as a theory allowing the employer to revise working conditions unilaterally, shall be evaluated strictly on a case-by-case basis, after considering a fair comparison of the necessity of revising the Rules of Employment and the disadvantage created for affected employees in unfavorable revisions.

16 Chulsoo Lee, "The wage peak system is possible to be implemented unilaterally by the employer!"
17 Kaprae Ha, "The wage peak system is impossible to be implemented unilaterally by the employer!"
18 Supreme Court ruling of January 28, 2010, 2009da32362.
19 Jung Lee, "Whom to get consent for revising the Rules of Employment disadvantageously", 『Labor Law』, Jungang Economy, September 2009.

# Statutory Retirement Age and Labor Law

## I. Introduction of Retirement Age System

The 'Retirement Age System' is a system whereby the employer-employee relationship is terminated when an employee reaches the appropriate retirement age as stipulated by the Rules of Employment or an employment contract, regardless of any intention on the part of the employee to renew the employment contract or his/her ability to work. Previously, Korean labor law regarding retirement age gave only a recommendation, not a compulsory stipulation, but a statutory retirement age system became effective in May of 2013. Accordingly, any retirement age system that had considered retirement age to be lower than 60 years of age became null and void, and retirement age automatically set to 60. In addition to this, a rank-based retirement age system is now considered justifiable if it was the result of a labor-management agreement, but with the introduction of the statutory retirement age system, any retirement age set at less than 60 years of age is now invalid. In situations where a company that did not previously have a retirement age regulation introduces one due to the introduction of the compulsory retirement age law, it is recognized that this can be a disadvantageous revision of working conditions, and such unilateral revision is invalid as well.

This revision includes both the introduction of the statutory retirement age and the necessary measures to revise the wage structure, but in actual practice, only the statutory regulation will be applied to companies. Because a revision of the wage structure could result in disadvantageous conditions, it requires agreement from the employee representative (or the representative of the labor union representing a majority of employees). Outlined below, I would like to review the legal considerations regarding the various applications: mainly the enactment of the statutory retirement age, the changes resulting from wage restructuring, and introduction of the wage-peak system.

<Act on Prohibition of Age Discrimination in Employment & Aged Employment Promotion, May 22, 2013>

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| (Before revision) **Article 19 (Retirement Age)**<br>When an employer sets a retirement age, he/she shall endeavor to set it at 60 years of age or older. |
| (After revision) **Article 19 (Retirement Age)**<br>① When an employer sets a retirement age, he/she shall set it at 60 years of age or older.<br><br>② **Regardless of Subparagraph ①, in cases where the employer has previously set a retirement age at less than 60 years of age, his/her retirement age policy shall be regarded as having been set at 60 years of age.**<br>**Article 19-2 (Changing the Wage system, etc. due to Extension of the Retirement age)**<br>The employer of a business or workplace who extends the retirement age in accordance with Subparagraph ① of Article 19, and a labor union which is formed by the majority of all workers (or a person representing the majority of all workers if such a labor union does not exist) shall take the steps necessary to revise the wage system, etc. according to the conditions pertaining to the business or workplace concerned.<br>The Ministry of Employment & Labor may provide necessary support (such as an employment support subsidy, etc., in accordance with the Presidential Decree) to an employer or the employees of a business or workplace that has implemented the required measures in accordance with Subparagraph ①.<br>The Ministry of Employment & Labor may provide necessary support (such as consultation for the revision of wage structures, etc., in accordance with the Presidential Decree) to an employer or the employees of a business or workplace which extends the retirement age to 60 years of age or above.<br>**Addenda** : This Act shall enter into force one year from the date of enforcement of its promulgation. Provided, that the revised rules of Article 19, Paragraph ① and of Article 19-2 shall enter into force in accordance with the following:<br><br>Businesses or workplaces with 300 or more full-time workers, public institutes in accordance with Article 4 of the Act on the Operation of Public Institutions, local public enterprises and local corporations under Articles 49 and 76 of the Local Public Enterprises Act - effective January 1, 2016.<br>Businesses or workplaces with fewer than 300 workers, national and local governments - effective January 1, 2017. |

## II. Applications of the statutory retirement age system[20]

### 1. In cases where a company has a previously-established retirement age lower than the statutory retirement age:

Any retirement age that was previously established at lower than the statutory age of 60 years is null and void due to the enforcement of the statutory retirement age, and such invalid retirement age system will be revised so it is in accordance with the compulsory retirement age of 60 years. Accordingly, any such previous retirement age system that a company has stipulated in their regulations is null and void due to the introduction of the statutory retirement age, and that statutory retirement age shall become the company′s retirement age.

### 2. In cases where a company which did not previously have a retirement age establishes one due to the introduction of the statutory retirement age:

1) Judicial ruling (Supreme Court ruling on May 16, 1997, 96da2507): In a situation where a transportation company that did not have a regulation for retirement age established a retirement age, the company′s employees could have worked without any age restriction until such time as the company established a retirement age regulation. Once the company established the retirement age regulation, only those employees who passed a review committee could work past the retirement age. This introduction of a retirement age regulation is considered to be an unfavorable change in the working conditions, because it deprives employees of their existing rights and interests.

2) Judicial ruling (Busan District Court ruling on September 7, 2007, 2007gahap2704): The employees had worked continuously without any age limitation until the company established a new retirement age regulation. Because of the new retirement age regulation, employees who reached 60 years of age could continue to work as daily workers afterwards. Therefore, this new regulation of the retirement age deprives the employees of their rights and interests, and is considered to be a disadvantageous revision of working conditions.

### 3. In cases where a company continues to use employees after reaching retirement age:

If an employee has continued to work with the employer′s implied consent after reaching retirement age, the employer cannot terminate employment just because the employee has exceeded the retirement age unless there are special circumstances. When re-employing retirees after their retirement age, the expiration of their contract period is: if the contract period is fixed, the expiration of such contract period is reason to terminate employment; and if the contract period is not fixed, it is possible to dismiss the employee only when there is a justifiable reason for the dismissal.

### 4. In cases where the company has a rank-based retirement age system under the statutory retirement age system:

If the retirement age can be regulated differently in accordance with title or rank within the workplace, and if the company has established reasonable criteria regarding work characteristics, content, and type of work that the employees provide, the company can then regulate the retirement age by rank (rank-based retirement age system) or as tenure-based employment that cannot be renewed (the tenure-based retirement age system) (Supreme Court ruling on April 9, 1991, 90da16245). The company can also implement two retirement age systems at the same time: a general retirement age system and a rank-based tenure system (Labor Standard Team-856, October 31, 2005). However, this regulation becomes null and

[20] Reference: Ministry of Employment & Labor Guidelines related to handling the retirement age system《Kungi68201-690, March 3, 2010》

void once the statutory retirement age is introduced, but is possible and valid for the period exceeding the statutory retirement age.

**5. In cases where an employee is undergoing medical treatment:**

In cases where an employee is receiving medical treatment due to an occupational accident, the employment relationship shall be continued up to the retirement age (Gungi 01254-9824, July 6, 1991).

**6. In cases where the company has hired an employee who was older than the retirement age at the age of hiring:**

In cases where the company was aware that the employee was older than the retirement age stipulated by the Rules of Employment, and hired the employee anyway, it is unfair to dismiss the employee due to the retirement age in the Rules of Employment (Gungi 68207-658, April 18, 1994).

**7. Retirement age and retirement date**

The retirement date should be clearly stipulated in order to prevent dispute between the employer and employees. If the retirement date has not previously been stipulated, but has habitually continued on a certain day in practical repetition, such habitual practice is the date of termination. In the following samples, I clarify the appropriate retirement dates in various situations where the employee was born on April 1, 1958:

1) If the retirement age was stipulated as 60 years of age, the retirement date becomes the first day exceeding 60 years of age, which means April 1, 2018.
2) If the retirement date is the first day of retirement age, the effective date would be April 1, 2018.
3) If the retirement date is stipulated as the last day of the month after reaching retirement age, the retirement date would be April 30, 2018.
4) If the retirement date is stipulated as the last day of the quarter after reaching retirement age, the retirement date would be July 30, 2018.
5) If the retirement date is the last day of the first half-year after reaching retirement age, the effective date would be June 30, 2018.
6) If the retirement date is the last day of the year when retirement age is reached, retirement becomes effective on December 31, 2018.
7) If the retirement date is the last day of retirement age, the effective date would be March 31, 2019.

## III. Change of the Wage Structure and Introduction of the Peak Wage System

**<Wage differences per service year for each country (for companies employing 10 or more employees as of 2010). The number shown is percentage (%)>**

| | Korea | Germany | Spain | France | Italy | Sweden | England | Japan |
|---|---|---|---|---|---|---|---|---|
| Less than 1 year | **100.0** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| 1~less than 6 years | **134.9** | 128.4 | 114.6 | 113.2 | 126.6 | 110.9 | 116.1 | 129.8 |
| 6~less than 10 years | **188.0** | 157.6 | 125.0 | 124.5 | 129.2 | 115.7 | 125.0 | 148.5 |
| 10~less than 15 years | **211.1** | 166.2 | 133.5 | 132.6 | 136.9 | 116.1 | 134.3 | 168.7 |
| 15~less than 20 years | **261.9** | 170.6 | 149.8 | 143.3 | 140.6 | 114.6 | 139.2 | 202.5 |
| 20~less than 25 years | **313.0** | 191.2 | 168.2 | 146.3 | 152.7 | 110.8 | 156.7 | 241.6 |

Reference: Jinho Jung (2011), Jiman Lee ('Wage policy to adjust to the retirement age of 60 years of age,' Symposium held by Seoul Univ. Employment Welfare Law Center on January 22, 2014).

### 1. Change of wage structures

As the wage structures of Korean companies are mostly based upon seniority-based salary systems determined by service years, the extension of the retirement age creates an additional burden to employers' labor costs. Because of this, Subparagraph 1 of Article 19-2 stipulates: "The employer of a business or workplace who extends the retirement age, and the labor union which is formed by the majority of all workers (or a person representing the majority of all workers if such a labor union does not exist) shall take the necessary steps to revise the wage system, etc. according to the conditions of the business or workplace concerned." This provision explains that, while the employer should change the wage structure to adjust to the statutory retirement age of 60 years, in cases where this change is connected to productivity and performance (a job-based salary system), the employer shall obtain agreement from the majority of employees at the workplace concerned, just as for a procedure requiring a disadvantageous change of working conditions. In cases where the employer makes unilateral changes to the wage structure, the changes do not apply to existing employees, but only to those hired after the rule-change was made. Provided, that if the disadvantageous change in wage structure is recognized as reasonable in social norms in both its necessity and content, the change of rules is applicable to target employees even without the employer receiving consent from the majority of employees concerned. Here, the acceptable reasonableness in social norms is significantly restricted. The related Supreme Court ruling (on January 28, 2010, 2009da32362) states: *"In principle, it is not permissible for the employer to establish or revise the Rules of Employment unilaterally, to deprive existing rights or interests that employees previously obtained, or to apply disadvantageous working conditions. However, when establishing or revising the Rules of Employment becomes necessary enough to recognize the acceptable rationality in social norms in terms of both necessity and content, such application cannot be denied just because the company did not receive consent from the majority of employees for whom the previous working conditions or Rules of Employment had applied. On the other hand, whether there is reasonableness according to social norms as mentioned here shall be collectively judged by considering: 1) the degree of disadvantageous conditions affecting employees as a result of the revision of the Rules of Employment, 2) the degree and details of the employer's necessity for change, 3) reciprocity of the content in the Rules of Employment after revision, 4) improvement of other working conditions, including the employer's measures having equivalent effect, 5) procedures for collective bargaining with the labor union and reaction from the labor union or other employees, and other general situations within the company regarding this issue. Provided, that this exceptional stipulation shall be significantly restricted in application, as this measure actually precludes the requirement under the Labor Standards Act that the employer shall receive consent from the majority of employees when revising the Rules of Employment disadvantageously."*

### 2. Introduction of a peak wage system

The peak wage system is a method of reducing labor costs in return for extending the retirement age in seniority-based wage systems, which are not connected to productivity and wage. Since the statutory retirement age is determined to be age 60, the peak wage system is only applicable during the period exceeding the retirement age previously determined through mutual agreement between labor and management or individual reemployment. The introduction of the peak wage system for the period within the statutory retirement age becomes a disadvantageous revision of working conditions and requires consent from the representative of the labor union representing the majority of employees (or the employee representative in case there is no such labor union). Without this procedure, it is not possible to reduce wage levels in return for extension of the retirement age once the statutory retirement age is introduced. Accordingly, the introduction of the peak wage system within the statutory retirement age belongs to the category of being a disadvantageous revision of working conditions and requires the collective consent of the corresponding employees.

# The Occupational Safety & Health Act, and Employer Duties

## I. Introduction

On April 16, 2014, a ferry named Sewol ho, bound for Jeju island from Inchon, sank in the ocean near Jindo island, and about 300 passengers lost their lives. This is known as the Sewol ho accident, one of the worst tragedies in Korea, and one which could have been avoided if the employer had fulfilled his duty to observe safety regulations.

The current Occupational Safety & Health Act (hereinafter referred to as "the Act") requires the employer to establish a management system for occupational safety and health, to prepare preventative measures for harmful and dangerous equipment, facilities, materials, working environment, etc., and at the same time to periodically provide workers the necessary safety and health education to prevent industrial accidents from happening. Also, in cases where an employer is found to have violated the Act, the employer is punished immediately so that the occupational safety and health-related accident preventative activities can be habitualized. Workers can also be punished with a fine for negligence when they violate the Act.

Occupational safety cannot be emphasized enough, as it protects personnel, property, and investment by preventing accidents. This Act, which stipulates the observance of occupational safety and health regulations, is very complicated, and enumerated with many technical articles, and so here I have attempted to define the management structures of the Act clearly and divide the employer's duties according to their characteristics in order to make the Act more easily and clearly understood.

## II. The Act's Scope of Application & Management Structure[21]

### 1. Scope of application

This Act shall apply to all businesses or workplaces: Provided that this Act may not apply wholly or partially to businesses taking into consideration the degree of harm and hazard, the type and scale of business, the location of business, etc. Generally, those excluded from application are 1) public administration work, education service, foreign agencies; 2) businesses that use only office employees; and any business that ordinarily employs fewer than 5 workers. (Article 3)

### 2. Management structure

### (1) Appointment duties

1) The general manager in charge of safety and health management: The general manager is responsible for general control of occupational safety and health and supervises safety and health managers. Accordingly, the general manager shall be capable of managing the company's business (e.g., plant manager) (Article 13). Companies that ordinarily employ 50 workers or more engaged in manufacturing etc., companies that ordinarily employ 100 workers or more engaged in wholesale and retail sales, etc., and companies that ordinarily employ 300 or more engaged in pure office administration, such as finance, etc., must appoint a general manager to be in charge of safety and health management.

**2) Supervisor**: An employer shall designate the head of a division within the management structure, who directly manages and supervises production work and employees involved therein or who takes charge of such a position, to carry out safety- and health-related duties such as safety and health inspections.

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21 Kim, Hyungbae『Labor Law』, 21st edition, Parkyoung Publishing Co. 2012, page 474-487,

**3) Safety manager and health manager**: An employer shall assign a safety (health) manager at the workplace to assist the employer or the general manager in technical matters concerning safety among the matters regarding safety and health, and to instruct and advise the supervisor on such matters.
The business owner of a manufacturing company or etc., ordinarily hiring 50 workers or more shall generally appoint a safety (health) manager, but for companies with fewer than 300 employees, the business owner may assign the safety (health) manager an additional safety management job or refer to a professional institution to perform the necessary safety management measures. (Articles 15 and 16)

**(2) Industrial safety and health committee**

The business owner shall establish an industrial safety and health committee comprised of an equal number of worker and employer representatives for workplaces ordinarily hiring more than 100 employees, or which has between 50 to 100 employees engaged in dangerous work. The committee shall meet once per quarter and its decisions shall be posted, and shall be faithfully implemented. (Article 19)

**(3) Safety and health management regulations**

In order to maintain safety and health in the workplace, an employer shall prepare safety and health management regulations, post and/or keep them in the workplace, and notify workers thereof. The employer and workers shall observe the safety and health management regulations (Article 20). These rules shall apply to workplaces ordinarily hiring 100 workers or more; provided that for service businesses like finance, etc. these rules shall apply to workplaces ordinarily hiring 300 workers or more.

## III. Employer′s Duties

### 1. Report industrial accidents

In cases where a worker dies due to an occupational accident, or is injured or inflicted with a disease requiring medical treatment for three days or more, the employer shall submit to the Minister of Employment & Labor an accident investigation form regarding the occupational accident within one month from the occurrence date of the occupational accident. Provided, in cases where a ′serious accident′ occurs, the employer shall report it without delay. (Article 10)

### 2. Measures to prevent harm & hazards

**(1) Notice of substance of acts and subordinate statutes**

The business owner shall inform workers of the major aspects of orders enacted under this Act by posting them at each workplace. (Article 11)

**(2) Attachment of safety signs**

The business owner shall install or attach safety and health signs to warn employees of dangerous facilities and places in the workplace and provide emergency drills to promote safety consciousness. (Article 12)

**(3) Safety and health measures**

The business owner shall take measures necessary to prevent the following hazards in operating the business: ① hazards caused by machines, tools or other equipment; ② hazards caused by explosive, combustible or inflammable substances; ③ hazards caused by electricity, heat or other forms of energy; ④ Hazards caused by improper work methods in excavating, quarrying, loading and unloading, timbering, transporting,

operating, dismantling, handling of heavy objects, etc.; and ⑤ hazards in places where workers might easily trip and fall, sand, structures, etc., (Article 23).

The business owner shall take measures necessary to prevent the following from causing health problems commonly encountered in the course of business operations: gas, dust, high temperatures, low temperatures, remnants, precision work, poor ventilation or lighting, computer terminals, radiation, simple repetitive actions, etc. (Article 24).

**(4) Suspension of operation due to a serious accident or possible risk**

If there is imminent danger of an industrial accident, or if a serious accident has occurred, the business owner shall take necessary measures for safety and health, such as immediate suspension of operations, evacuation of workers from the workplace, etc., until work can be resumed after meeting safety requirements. (Article 26)

If any worker suspends work to evacuate as a result of possible risk of an industrial accident, he/she shall report it without delay to the immediate superior officer, who shall take appropriate measures to rectify the situation. (Article 26)

**(5) Other measures to prevent harm and hazards**

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| Article 33 (Protective Measures, etc. for Harmful or Dangerous Machines, Instruments, etc.) | Machines and instruments requiring harmful or hazardous work or operated by power, shall not be transferred, leased, installed or used, or displayed for the purpose of transfer or lease, without taking protective measures for the prevention of harm and hazards. |
| Article 34 (Safety Certification) | To assess the safety of harmful or dangerous machines, instruments, equipment, protective devices and personal protective equipment, the Minister of Employment & Labor may determine and announce safety certification criteria concerning safety performance, the manufacturer's technological capacity, production systems, etc. |
| Article 36 (Safety Inspection) | An employer who uses harmful or dangerous machines and equipment shall receive a safety inspection on whether the performance of the harmful or dangerous machines, etc. meets safety standards. |
| Article 38 (Permission to Manufacture, etc.) | A person who intends to manufacture or use "substances subject to permission" shall obtain, in advance, permission from the Minister of Employment & Labor. This provision shall also apply if the person intends to make a change to anything that has previously been permitted. |
| Article 38-2 (Asbestos Investigation)<br>Article 38-4 (Asbestos Disposal or Removal by Asbestos Disposal or Removal Service Provider) | If structures or facilities are to be demolished or dismantled, the owner or lessee, etc., of the structures or facilities shall conduct a "general asbestos investigation" and record and keep the results thereof.<br>The owner, etc., of structures or facilities subject to an institutional asbestos investigation shall have an "asbestos disposal or removal service provider" dispose of or remove the asbestos. |
| Article 41 (Preparation, Keeping, etc. of Material Safety Data Sheets) | A person who transfers or supplies a chemical and/or chemical-containing preparations meeting the classification standards pursuant to "target chemicals" shall make and provide a Material Safety Data Sheet (MSDS) to the person to whom they are transferred or supplied. |
| Article 41-2 (Risk Assessment) | An employer shall identify hazards and determine the potential for harm caused by structures, machines, instruments, equipment, raw materials, gas, vapor, dust, etc., work behavior or work, determine the level of risk, and take measures under this Act and any order issued under this Act according to the findings, and if necessary to prevent risks or health problems for workers, take additional measures as required. |

**3. Safety and health measures for contractor businesses**

1) Safety measures: The business owner of a contractor business shall institute safety measures to prevent industrial accidents which can occur when those employed by the business owner and the contractor work simultaneously at the same place. (Article 29)

2) Prohibition of contract for harmful and dangerous work: Sectors of work recognized as harmful or dangerous to safety and health shall not apply under a separate contract without the approval of the Minister of Labor. (Article 28)

3) Prohibition of adding dangerous conditions: No persons offering a contract to undertake construction work, etc., for another entity shall add any condition to the method of work, term of work, etc. that risks the safety and sanitary performance of the work. (Article 29)

4) Setting aside of funds for safety management: Upon entering into a subcontract or independently executing construction, shipbuilding or repair work, or other projects, funds for industrial safety and health management shall be set aside for activities to prevent occupational accidents when planning subcontract or project costs. (Article 30)

**4. Safety & health education**

In order to prevent possible safety-related accidents while working, the employer shall provide education for new workers, regular education for existing workers, education for workers changing jobs within the company, and special education as necessary.

**(1) Regular education**: The employer shall periodically conduct employee education on safety and health issues (one hour or longer each month for office/sales workers, two hours or longer per month for production workers, and 16 hours per year for supervisors).

**(2) New workers′ education**: When hiring workers, the employer shall provide safety and health education regarding their respective jobs for 8 hours or longer (one hour for daily workers).

**(3) Education when changing jobs within the company**: The employer shall provide safety and health education for 16 hours or longer to workers working in harmful and/or hazardous workplaces (two hours for daily workers).

**5. Management of Worker Health**

**(1) Evaluating the working environment**

An employer of a business dealing with dangerous or harmful chemical substances or producing a high level of noise shall evaluate the working environment within 20 days from the date when a new workplace or work process is added or when there is any change in the existing workplace or work processes. An additional evaluation shall be made every 3 months for 1 year. The evaluation results shall be reported to the local labor office within 30 days from the completion date of the evaluation. (Article 42)

**(2) Health examinations**

The business owner shall periodically conduct health examinations of the workers. Health examinations must also be given upon the hiring of new workers. (Article 45)

1) Employees who are required to take a special medical checkup (as they are engaged in work dealing with harmful substances or materials) should have a medical checkup before they are assigned to the work. In addition, medical checkups should be conducted for them whenever necessary.

2) All employers shall ensure that a general medical checkup is conducted at least once every two years for employees engaged in office work and at least once every year for other employees.

3) When an employer receives the results of a special medical checkup from the medical service provider, he/she should take any measures necessary to protect the employee's health and then report to the jurisdictional local labor office.

**(3) Prohibition or restriction of work for sick persons**

For persons diagnosed with infectious disease or mental illness, or any other condition that can be aggravated by work, the business owner shall prohibit or restrict work according to the medical diagnosis. However, upon recovery, the business owner shall, without delay, permit the employee to resume their original work. (Article 45)

**(4) Extending working hours prohibited**

The business owner shall not have an employee who is engaged in harmful or dangerous work working more than six hours per day or thirty-four hours per week. (Article 46)

**(5) Restriction of employment by qualification**

The business owner shall not allow any persons other than those who have the qualifications, license, experience, and/or required skills, to perform harmful or dangerous work. (Article47)

**6. Documenting & keeping records**

Documented records concerning appointment of safety and health personnel and the examinations on harmfulness and toxicity of new substances shall be kept for 3 years (internal inspection records shall be kept for 2 years). Records on working environment evaluations and employee medical examinations shall be kept for 5 years. (Article 64)

## IV. Conclusion

Almost all accidents occurring on construction sites and in industrial workplaces, including the tragic Sewol ho accident, can be connected to the absence of a safety and health attitude. We need to remember that happiness and safety at work does not occur without the proper planning, and can only be guaranteed when the employers and workers strictly observe this Act.

# Application of Labor Laws to Illegal Foreign Workers

## I. Introduction

According to the statistics of the Ministry of Justice, as of December 31, 2014, the number of illegal aliens in Korea was 208,778 people, which is 11.6% of the total number of aliens (1,797,618). Chinese (excluding ethnic Koreans) are overwhelmingly the largest group at 70,311, while ethnic Korean Chinese constitute another 19,256 people. The second largest group is Thais (44,283), which is a remarkable change, since Thai illegal aliens have more than doubled from 20,665 people in December 2013 to 44,283 as of December 2014, as a result of the non-visa agreement between the two governments. The next largest are 26,932 Vietnamese; 12,814 Filipinos; 7,409 Mongols; 7,237 Indonesians; 6,627 Uzbeks; 4,309 Bangladeshis; 3,010 Pakistanis; and 3,004 Americans. Other nationalities comprise an additional 3,586 persons[22] The number of foreign workers has increased by more than 20% every year, and along with this, the number of illegal foreign workers has also continuously grown.[23]

The Immigration Control Act was designed to manage foreign workers strictly according to the principle of a 'Korean-first employment policy', and the "Act on Foreign Workers' Employment, etc." (hereinafter referred to as "the Foreign Workers' Employment Act" or the "FWE Act") was also introduced to manage the non-professional employment (E-9) of the majority of foreigners along with the visiting employment (H-2) of overseas Koreans. As the number of illegal foreign workers who have recently violated the Immigration Control Act and the Foreign Workers' Employment Act has increased dramatically, it is necessary to understand their protection under the labor laws, and the limitations on that protection.

## II. Related Laws to Restrict Illegal Aliens

### 1. The Immigration Control Act

The Immigration Control Act is the compulsory regulation stipulating matters concerning safe border controls through the immigration control of all nationals and foreigners who enter or depart Korea, control over the sojourn of foreigners who stay in Korea, and procedures, etc. for the recognition of refugees. Any foreigner can stay in Korea within the scope of their status and period of sojourn (Article 17). Also, foreigners intending to be employed in Korea shall attain the applicable status for employment activities, and employers may employ any person having the proper work status (Article 18). There are three kinds of work-related employment: ① non-professional employment, ② professional employment, and ③ employment through sojourn.[24]

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[22] Immigration and Foreigners Policy Office in Ministry of Justice, January 2015, Monthly Statistics Report

[23] Insang Han, "Related laws for foreign workers and reviewing foreign laws regarding illegal foreign workers," 『Thesis Collection of Labor Laws』 volume 23, 2011, page 465.

[24] Immigration Control Act Enforcement Decree (Article 23): ① Technical employment: non-professional (E-9), visiting employment (H-2);② Professional employment: College professor (E-1), native speaker (E-2), R&D scientist (E-3), engineer for technology transfer (E-4), certified specialist (E-5), artist (E-6) and professional (E-7); ③ Employment due to legitimate residency: resident

### 2. The Foreign Workers′ Employment Act

The Foreign Workers' Employment Act was designed to promote a smooth supply to meet the demands for manpower along with a balanced development of the national economy through the systematic introduction and management of foreign workers. Foreigners to whom this Act applies are those engaged in non-professional employment (E-9) and overseas Koreans engaged in visiting employment (H-2). Foreigners hired for jobs classified as non-professional employment (E-9) use the Employment Permit System. This Employment Permit System grants permission to hire particular foreigners, after employers have unsuccessfully made an effort to hire domestic workers. After such effort, foreigners can be invited after signing a contract for employment with the particular employer. Visiting employment (H-2) has used the Employment Permit System containing the characteristics of the Labor Permit System (LPS). Through this LPS, Foreign nationality Koreans are allowed to come to Korea first and attempt to find a job within a limited time period. If they cannot find a job within that time, they must leave Korea immediately.[25] Foreign workers may be employed up to three years from the date of their entry, and they may have their employment extended one time only by a maximum of two additional years, which means that their total period of residence in Korea can be up to five years (Article 18, Article 18-2).

### 3. Related judicial ruling

The Supreme Court explained the purpose for strictly controlling foreigners in violation of the Immigration Control Act as follows: "The Immigration Control Act regulates in its Article 18 (paragraph 1) that a foreigner intending to be employed in Korea shall attain the status of sojourn eligible for employment activities, and also regulates in the same Article (paragraph 2) that no foreigner having the status of sojourn under paragraph (1) shall work at any place other than the designated working place. Therefore, the purpose of this legislation was not simply to restrict the illegal stay of foreigners, but also to regulate the qualifications of eligibility for employment and block foreigners not eligible for employment so that it could protect the status of the domestic employment market from immigrating not-eligible foreign workers, manage the foreign workforce effectively, and protect domestic workers. This means that this law was enacted to directly restrict foreign workers not eligible for employment in fact."[26]

## III. Application of Labor Laws

### 1. Individual employment relations

Korean labor laws apply to those who offer work to earn wages without any discrimination, according to the principle of territorial privilege for jurisdiction. If a foreign worker whose employment contract was made in his/her home country provides labor service in Korea, or if a foreign company and a foreign employee agreed that his/her

(F-2), overseas compatriot (F-4), permanent stay (F-5), marriage immigration (F-6)

[25] Gaprae Ha, 『Labor Standards Act』 Volume 26, 2015, pages 961 and 975.

[26] Supreme Court ruling of September 15, 1995, 94nu12067.

home country's labor laws would apply to his/her employment contract, excluding the application of Korean labor laws, Korean labor laws are applied in accordance with the compulsory law of a workplace in Korea providing labor service according to the Conflict of Laws Act, Article 28 (Employment Contracts).[27]

While providing for labor service, Article 6 of the Labor Standards Act prohibits discriminative application based on an individual's different nationality, by stipulating that "no employer shall give discriminatory treatment in relation to working conditions on the basis of nationality." Exceptionally, regarding whether the protection of the labor laws regarding illegal foreign workers is applied or not, the Labor Ministry judged that illegal foreign workers were not subject to protection as any employment contract made by illegal foreign workers would not be in effect.[28] However, later, as the court determined an illegal workers' injury as occupational[29], and also admitted foreign trainees' eligibility for severance pay[30], the Labor Ministry changed its guidelines and accepted that illegal foreign workers were subject to the protection of the labor laws.

The court clearly ruled whether the Labor Standards Act is applicable to illegal foreign workers as follows: "The regulation restricting employment of foreigners is a control act to prohibit foreigners not eligible for employment from being employed. This cannot be a regulation to restrict the legal effect of the labor right that an illegal foreign worker with no eligibility for employment has obtained by providing labor service, and the legal effect of labor laws concerning employment status. Therefore, even if a foreign worker without eligibility for employment made an employment contract in violation of the regulation restricting employment of the Immigration Control Act, it cannot be determined that the employment contract itself be regarded as clearly invalid. However, since the employment status makes it possible for a foreign worker to participate in employment activities, in a case where a foreign worker is illegal, the employment relationship should be stopped. Furthermore, both parties can always cancel the employment contract due to the absence of employment eligibility.[31]

According to the guideline for handling foreign workers' labor cases from the Ministry of Employment and Labor, foreign workers' labor cases shall be dealt equally with those of domestic workers. In cases where a foreign worker has worked in a workplace to which the Labor Standards Act applies, the same Act applies to foreign workers there whether their employment violates the Immigration Control Act or not. Even though the labor inspector has found in the course of investigating the case that the foreign worker and his/her employer violated the Immigration Control Act, the labor inspector shall inform the Immigration office of that fact after implementing remedy for unpaid wages and/or other violations of labor laws in terms of protecting the worker's human rights.[32]

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[27] **The Conflict of Laws Act, Article 28 (Employment Contracts)**
1) For employment contracts, regardless of the governing law that both parties agreed to, it is not possible to ignore the employee protections endowed by compulsory rules of the resident country related to the governing law stipulated by Paragraph 2.

[28] Kungi 01254-152, February 2, 1993

[29] Supreme Court ruling of September 15, 1995, 94nu12067: Occupational accident case

[30] Supreme Court ruling of December 7, 2006, 2006da53627: Severance pay case

[31] Supreme Court ruling of September 15, 1995, 94nu12067: Occupational accident case

[32] Work Processing Guide for Foreign Workers (Kungi 68201-691, March 10, 2000); Immigration Control Act – Article 84 (Obligation

## 2. Collective labor relations

Foreign workers residing in Korea have exercised the rights of labor through their participation in labor union activities, just like Korean workers. Foreign workers with legitimate residence visas can establish a labor union with a membership of foreign workers only. However, it has become a matter of grave concern as to whether a labor union which included some illegal foreign workers could be recognized as a legitimate labor union in the Korean legal system.

On April 24, 2005, 91 foreign workers residing in Seoul, Gyeonggi-do, and Inchon established a 'migrant workers' labor union, and submitted an application for labor union establishment to the Seoul Labor Office. The Labor Office demanded adjustment of the application by requesting that illegal foreign workers be eliminated from membership, as the union contained a majority of illegal foreign workers. When there was no follow-up submission of a corrected document, the Labor Office returned the establishment application to the labor union.

On June 27, 2005, the 'migrant workers' labor union' filed a suit at the Seoul Administrative Court to have the Labor Office's rejection of the application for establishment of a labor union cancelled. The Seoul Administrative Court ruled that the Labor Office's returning disposition was justifiable and rejected the labor union's claim.[33] In its ruling, it stated, "As those illegal foreign workers with no right to reside in Korea are strictly prohibited from employment according to the Immigration Control Act, their legal status does not allow them to maintain and improve working conditions and to upgrade their status on the condition of continuing labor relations. Therefore, they do not have the substantial requirements needed under subparagraph 4 of Article 2 of the Labor Union Act, and so it would be justifiable to return the application of labor union establishment in accordance with subparagraph 3 (1ho) of Article of 12 of the Labor Union Act."

However, on February 1, 2007, the Seoul High Court ruled that returning the application of labor union establishment would be illegal, and canceled the Labor Office's disposal.[34] The High Court stipulated in its ruling: "Despite the status of illegal foreign workers, as long as they are providing work in fact and live on wages, salary, or other equivalent form of income earned, they qualify as workers who can establish a labor union. Even though the Immigration Control Law regulates that they are strictly prohibited from employment, this enforcement is to prohibit illegal foreign workers from being employed in actuality. As the illegal foreign workers are providing work in fact, it is difficult to determine the original employment contract invalid just because they are not eligible for employment. Therefore, this enforcement regulation cannot be allowed to prohibit an action where illegal foreign workers get together to make a workers' association to improve their working conditions by means of establishing an equal footing." The court cancelled the Administrative Court's ruling by explaining that the Labor Office's

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to notify)

[33] Seoul Administrative Court ruling of February 7, 2006, 2005guhap18266: Migrant workers' union case

[34] Seoul High Court ruling of February 1, 2007, 2006nu6774: Migrant workers' labor union

returning of the application for the establishment of a labor union was an illegal disposal.

The Labor Office appealed the appellate court's ruling to the Supreme Court, and the final decision has not yet been made. Accordingly, the Labor Office's disposal to return the application of the migrant workers to establish a labor union has been valid for the past 10 years so far. This means that Korea does not guarantee the rights of labor for illegal foreign workers in collective labor relations.

## IV. Conclusion

The application of labor laws for illegal foreign workers has been restricted due to their conflict with compulsory enforcement of the Immigration Control Act. The enforcement of labor laws for illegal foreign workers has been implemented at the barest minimum only, for the work provided, in terms of human rights protection. It is general practice that foreign workers only apply for the remedy application of the labor laws as a last recourse when anticipating forced deportation from Korea, so in reality, most illegal foreign workers can get no help from the protection of the labor laws due to the risk of forced deportation, and so they endure forced labor, exploitation of wages, violation of human rights, etc. As a matter of fact, it is almost impossible for an individual illegal foreign worker to apply for remedy under the labor laws. Therefore, a migrant labor union is necessary to represent these illegal foreign workers, to improve their working conditions in a way that the individual illegal foreign worker cannot do.

# Understanding Cultural Differences at Work Between Korea and the West

## I. Introduction

While Korea has been making free trade agreements (FTAs) with the United States and the European Union, more and more foreign companies have been establishing branches in Korea. Companies here are hiring more foreign professionals in an effort to enhance their competitiveness in the markets of advanced nations. While working in the same company or workplace, it is very common for disagreements or misunderstanding to arise between Koreans and Westerners due to differences in culture, occupational habits and language. It is very difficult to understand our counterparts if we do not understand the cultural characteristics that have formed over long periods of time, which of course can lead to an atmosphere that is not conducive to business. There are many differences in the way we think and behave at work, such as the kind of hierarchy we are familiar with, the way we relate to each other through linguistic expression, the way we address each other, and the way we express our opinions. I would like to deal with this issue through one tragic case involving culture, and the opinions of some foreigners living and working in Korea.

## II. Culture: the Secret Behind a Plane Crash

At about 1:42 am on August 6, 1997, a Korean Air passenger plane approached Guam Airport and attempted to land, but because of the low visibility due to stormy weather and pilots' accumulated tiredness, the plane went off the runaway and crashed into a small hill nearby the airport. This accident resulted in the deaths of 228 of the 254 passengers onboard. As the pilots were trying to land, they could not see the runway due to the poor weather. When the ground proximity alarm sounded at 500 feet (152 meters), the co-pilot suggested gently "Let's give up the landing." When the pilot did not do so, the co-pilot said again, strongly this time "No visibility, give up the landing!" The pilot then gave up trying to land, but it was too late: the plane continued to descend and crashed. If the co-pilot had spoken in a commanding voice instead of a suggestion, the pilot would have understood the emergency situation they were in, and prevented the crash.[35]

After David Greenburg from Delta Air was hired by Korean Air to be a flight safety manager, he discovered the fundamental causes for this tragedy: the complicated ways of expressing oneself in the Korean language and Korea's vertical hierarchy. His approach was to create a rule for Korean Air pilots: they must speak English. "The official language in Korean Air is English. If you want to continue to work as a Korean Air pilot, you must be able to speak English fluently." English does not have such strict rules regarding politeness, and emotional authority between positions and ages is not as high as in Korea. In the 'Power Distance Index,' which indicates the degree of authority people in higher social positions have over those in lower positions, Korea places among the highest, while

[35] Malcolm Gladwell, "Outliers" Chapter 7, page 252, (The Ethnic Theory of Plane Crashes)

the US places among the lowest. Although a pilot and co-pilot work in a situation which requires them to operate a plane together in cooperation, Korean pilots have a very clear vertical hierarchy of superior and subordinate, putting the co-pilot in a position of obedience to the pilot. The pilot can discipline his co-pilot by hitting his hand for minor mistakes, something taken for granted. In addition, this vertical hierarchy includes complicated expressions of language. The superior talks down to the subordinate while the subordinate talks in high forms to the superior. For example, using the lowest form of language includes orders "you will do this"; talking in low form would be "do this"; talking in high form would be "please do this"; talking in the highest form would be "would you please do this?" Under such a strict vertical hierarchy and the required forms of expression, a subordinate cannot simply point out his superior's mistakes, but must speak indirectly in a way that does not offend the superior.

Since Korean Air began employing Mr. Greenburg, accidents have almost ceased and the company was able to restore confidence, both internally and in terms of how other entities view Korean Air. Mr. Greenburg changed the cultural atmosphere inside the cockpit by insisting on the use of English, hiring more civilian pilots to join an organization made up mostly of former military pilots, and standardizing technical terms and conversational methods. By making adjustments to these organizational cultures, Korean Air has been able to prevent similar plane crashes, and has become an example of air safety for other airlines. On April 10, 2010, a plane with the Polish president, Lech Kaczynski, aboard, crashed while trying to land at a Russian airport in very foggy conditions, killing 97 passengers. One of Poland's major daily papers, Gazeta Wyborcza, introduced Korean Air and its recent safety history. "During the late 1990s, Korean Air faced a crisis: Air France and Delta Air were requesting the airline leave their alliance, and the American Federal Aviation Agency (FAA) had given it a very poor safety rating. However, Korean Air was able to get through the crisis with the help of safety consultants. The answer was to 'speak English.' Korean culture demands such a high form of respect for superiors or seniors that a co-pilot could not address directly the fact that a pilot was making a mistake. But through English communication, the airline was able to work around this strong hierarchical structure rooted in the Korean language 'trap'."

## III. Cultural Differences Related to Position and Age

1. Cultural differences: position

In Korea, addressing someone by their title or position is important. People at work call each other by their job positions, while westerners use first names, or Mr., Mrs., or Ms., plus family names for respect. In western culture, position titles only indicate persons-in-charge, and are not used when addressing that person. Mr. or Mrs. is acceptable regardless of someone's position, with first names used once two people are on friendly terms. In Korea, title indicates status, so if someone is addressed in a way that is not suitable for his age or position, he or she may be offended and feel they are being talked to as an inferior. Sales employees introduce themselves using a title that is higher than their own, to give themselves authority in the eyes of customers.

Following are some titles used in Korean companies when addressing other persons or describing their positions.

| Korean Titles | Chinese Titles | Pronunciation | English Title |
|---|---|---|---|
| 회장 | 會長 | Hway jang | Chairman |
| 대표이사 | 代表理事 | Dae pyo isa | Representative Director |
| 사장 | 社長 | Sa jang | President |
| 부사장 | 副社長 | Bu sa jang | Vice President |
| 전무이사 | 專務理事 | Jun moo isa | Executive Managing Director |
| 상무이사 | 常務理事 | Sang moo isa | Managing Director |
| 이사 | 理事 | Isa | Director |
| 부장 | 部長 | Bu jang | General (Senior) Manager |
| 차장 | 次長 | Cha jang | Manager |
| 과장 | 課長 | Gwa jang | Section Chief (Manager) |
| 대리 | 代理 | Dae ri | Assistant Manager |
| 사원 | 社員 | Sa won | Employee |

2. Cultural differences: age

In Western culture, people can be friends with whomever they want, while in Korea you can only call someone your friend if he or she is the same age as you. In Western culture, people keep in mind the age difference and give respect where it is due, but nevertheless they are free to befriend anyone they please.

In the Korean work environment, to be in a higher position than someone older than you is difficult because age is very important. To be young and in a higher position than someone older puts you in a predicament because you are not able to conduct yourself as that person's senior as they may think there's nothing to learn from you or you have no authority to lead them because you are younger. In western cultures, positions in the workplace are more respected than here.

## IV. Cultural Differences Related to Behavior

Here are examples of cultural differences related to behavior that I collected from expatriates living and working in Korea. [36]

1. "In Korea it is polite to decline something that is offered to you and maybe on the 2nd or 3rd time it is offered you accept it. In western culture if something is offered to you and you want it you can gladly accept it the first time it is offered."

2. "Also in Western culture, the use of "thank you" is much more common than in Korean culture. It is quite common for friends, spouses, and family members in Korea not to say thank you to each other for little gifts, for giving someone something they requested etc., whereas this would be quite rude in Western culture. We even say "thank you" to the

[36] Opinions of cultural differences are provided by expatriates who have lived more than two years in Korea. They are: an Italian PhD candidate at Sookmyung Women's University, a Canadian employee of Daewoo Ship Building Co., an Italian embassy staff member, a South African native English teacher at SDA, and a Polish employee of SBNTECH.

salesperson at a store when we buy something, for giving us our change."
3. "In Korea when people eat they have to wait for the oldest member to eat first (in family) or the teacher (in school/institute) before they can start eating. In Western culture it doesn't really matter."
4. "If a Korean knows you then they're extremely kind and helpful but if they don't know you they ignore you like you don't exist. In Western culture people are relatively friendly even if they don't know each other: e.g. they'll greet and start a conversation, etc."
5. "Saying 'OK OK OK' or 'Yeah yeah yeah' in English can be ***extremely*** rude. In Korea, it just means 'I really understand or 'Yes, right away.' In English it means 'OK, shut up. I don't want to hear what you are saying.'"
6. "Koreans cannot confront their superiors directly (for example, when they feel they have been treated unfairly, or the superior is doing something in the wrong way). Westerners usually can, and do."
7. "In Western culture, a graduate school student can discuss freely, ask questions, and provide opposing opinions about his/her major subjects to his/her academic advisors (professors), but in Korea his/her professors are so authoritarian that the student cannot oppose their opinions, and so generally accepts their opinions unequivocally."
8. "A common mistake for Koreans is to say 'Mr. Shawn' or 'Miss Jennifer.' In English, we don't use the first name with 'Mr.' or 'Miss etc. We use the family name instead. So, Shawn Stenson would be 'Mr. Stenson,' and Jennifer Beal would be 'Miss Beal' or 'Mrs. Beal' (if she's married)."

## V. Conclusion

The cultural differences between Korea and the West are very wide, go very deep, and reach into a huge variety of situations. If employees are unable to come to a cultural understanding of these differences, even in this Global Era, then Koreans and expatriates working together will have to settle for a relationship of 'close in proximity, but distant in relationship'. When cultural differences are allowed, accepted, and understood, employees can work better, more constructively, and in greater cooperation. With a partnership based on this acceptance, Korean employees can work well with foreign expatriates, improve their own work efficiency and help the company increase its competitiveness with leading companies from around the world.

# The Employment Permit System for Hiring Foreign Workers (E-9 Visa)

## I. Introduction

There are two main types of foreign workers being brought into Korea. The first type is foreign migrant workers (E-9 visa) under the Employment Permit System (EPS) for such industries as manufacturing, construction, farming, and fishing ("3D", or "dirty, dangerous, difficult" industries), and the other is foreign professional employees (E1~E7 visas) with specialized knowledge, such as college professors, experts in a specific field, researchers, and English teachers. These foreigners not only supplement our insufficient work force, but also provide professional knowledge and technology necessary to our industries.

Korea had been bringing foreign workers in under the Industrial Trainee System since 1993 to deal with the labor shortage in small and medium sized companies, but since August 2004, this System has been replaced with the Employment Permit System of the "Act on Foreign Worker Employment, etc." (Foreign Workers Act). The Employment Permit System consists of the non-professional employment visa (E-9) for foreign workers engaged in simple skilled jobs and the visiting employment visa (H-2) for overseas Koreans. The Employment Permit System was introduced to provide workforce stability in industries suffering from severe labor shortages while protecting the Korean labor market. The following explains the process of hiring foreign workers, application of labor law, and items requiring attention under the Foreign Workers Act.

## II. Employment through the Employment Permit System

### 1. Industries permitted to hire foreign workers and related quotas

**(1) Manufacturing:** Small and medium-sized manufacturing companies ordinarily hiring fewer than 300 workers or with a market capital of ₩8 billion are allowed to hire foreign workers. Provided that, if a manufacturing company surpasses the aforementioned conditions, it can still hire foreign workers if it receives a "Certificate of Small & Medium Enterprise Confirmation" from the regional Small & Medium Enterprise Administration. The quota of foreign workers depends on the size of the company, but is 10 to 20% of the domestic workforce.

**(2) Construction:** Most construction companies can use the Employment Permit System. Construction companies are allowed to hire up to 5 workers if the company's average annual gross is less than ₩1.5 billion, with an additional 0.4 foreign workers allowed for every ₩100 million in gross exceeding the ₩1.5 billion.

**(3) Services:** Service companies can use overseas Korean job-seekers (H-2 visa) visiting through the Special Employment Permit System. Service companies with 5 workers or fewer can hire up to 2 overseas Korean workers even if there are no other Koreans working for the company, while service companies with 6 or more workers can hire the number of overseas Koreans equivalent to 30 to 40% of the domestic workforce.

**(4) Agriculture, livestock and fishing**: Agriculture and livestock companies with 10 workers or fewer can hire up to 5 foreign workers even if this means that there are no Korean workers in the company. Larger companies can have up to approximately 20% of their workforce as foreign workers. For the fishing industry, fishing boats of 20 tons or less and aquaculture do not fall under the Seamen's Law. They can use foreign workers, and non-Korean workers can make up 40% of the personnel onboard each boat.

## 2. Employment Methods through the Employment Permit System

### (1) General Employment Permit System

**1) Issuance of a letter of employment permission:** Employers intending to hire foreign workers shall first apply to the Employment Security Center (ESC) for recruitment of Korean nationals. The ESC will issue a document confirming a workforce shortage for employers unable to find enough Korean workers despite their hiring efforts (the recruiting period must be at least 3-7 days). The employer shall choose the workers he/she needs from a list of foreign workers that the ESC recommends (which will be three times larger than the number needed). Once the employer has done so, the ESC will issue employment permits for those foreign workers. Before issuing these permits, the ESC shall confirm that the following qualifications exist: the company applying to recruit foreign workers fits the eligibility criteria; the employer had tried to hire Korean workers; there shall be no employment adjustment within two months, and there should not be any delay in payment of wages for 5 months.

**2) Signing an employment contract:** The employer will sign the standard employment contract provided by the Ministry of Employment & Labor with the chosen foreign workers. The contract will specify working conditions such as wages, working hours, holidays, work places, and working period etc. The effective date of the employment contract is when the foreign worker enters Korea. Therefore, the employment relationship begins with this date of arrival to Korea, and shall be the date used to calculate severance pay, etc.

**3) Essential duties to be handled:** The employer must register the foreign workers at the Immigration Office and apply for work visas. That is, the employer will receive certificates of alien registration regarding the E-9 visas and have the foreign employees enter Korea. Foreign workers shall receive pre-employment training at a designated training institute within 15 days of their arrival into Korea. During this training period, the training institute will have them receive a medical checkup against epidemic diseases defined under law. Employers and foreign workers shall have the essential insurances. The employer shall provide a departure guarantee insurance to secure severance pay and guarantee insurance to prevent delayed payment of wages, while the foreign workers shall ensure they have personal injury insurance and sufficient funds for return airfare.

### (2) Employment Permit System for Overseas Koreans

**1) Introduction:** Special Employment for Overseas Koreans is a system where employers can hire overseas Koreans already in Korea, for the construction, service, manufacturing, and other industries. Those who have a visiting employment visa (H-2) shall attend the employment training designated and get a job after registration with the Employment Security Center.

**2) Applicable overseas workers:** ① Overseas Koreans with relatives in Korea: Overseas Koreans aged 25 years or older who have resided in China or one of the former Soviet republics, those who have received an invitation from a family member registered in the family registration or his/her descendants, or from a blood relative (third cousin or closer) or a relative through marriage (first cousin or closer) as a registered Korean resident. ② Overseas Koreans with no relatives in Korea: such persons shall be selected through a Korean language test, random selection, etc.

**3) Issuance of visiting employment visa (H-2) and entry to Korea:** Overseas Koreans with relatives in Korea may enter Korea with an H-2 visa issued by a Korean embassy in a foreign country, while Overseas Koreans without relatives in Korea may enter with a visa issued after passing a Korean language test or through random selection.

**4) Employment training, physical check-up, application for employment:** Persons entering Korea for the purpose of visiting employment shall take employment training (20 hours or more) for domestic activities at an employment training institute (the Korea HRD Service), have a check-up to confirm his/her physical eligibility, and apply for employment during the training period.

**5) Issuance of a certificate for special employment**: Similar to the procedures under the Employment Permit System, the employer shall make an effort to hire Korean citizens first, before applying for and receiving a certificate for special employment from the Employment Security Center.

**6) Signing an employment contract:** The employer will sign the standard employment contract with the selected job-seekers who are also from a list three times larger than needed, and recommended by the Employment Security Center. The effective date of the employment contract is when the overseas Korean actually begins providing labor service. The employer shall submit the report of employment to the regional ESC, within 10 days after the overseas Korean begins to work for the employer.

### (3) Comparison of the Employment Permit System (EPS) and the Special EPS

| | Employment Permit System (EPS) | Special EPS |
|---|---|---|
| ① Employment period | 3 years (employment possible for maximum additional 2 years)<br>※Non-professional employment visa(E-9) | 3 years (employment possible for maximum additional 2 years)<br>※ Visiting employment visa (H-2) |
| ② Eligibility | Those registered for employment after the Korean language test and health checkup | -Overseas Koreans with relatives in Korea (no maximum)<br>-Overseas Koreans without relatives in Korea (limitations on numbers) |
| ③ Permitted businesses | Manufacturing, construction, service, and other businesses stipulated by the Foreign Workforce Policy Committee | The EPS's allowed businesses plus additional service businesses |
| ④ Job placement process | Korean language test → employment contract → enter Korea with E-9 visa → pre-employment training → assignment to workplace<br><br>※ Limitations on workplace changes | Entry with H-2 visa → Employment training → Recommended by the Employment Security Center or begin own job search → employment after signing an employment contract |
| ⑤ Hiring procedures | Effort to hire Korean workers → application for employment permission → Issuance of employment permission → employment after signing an employment contract | Effort to hire Korean workers → issuance of special employment permission from the ESC → employment after signing an employment contract<br>※ The employer shall report the employment to the ESC. |
| ⑥ Quota for employment | Maximum number of foreign workers set per workplace | Employers can fill their foreign worker quota with overseas Koreans (excluding construction and service industries). |

## III. Employment Permit System and Working Conditions

### 1. Employment contract

When hiring a foreign worker, the employment contract shall be based on the standard employment contract (from the ESC). This is to help prevent labor disputes regarding working conditions between the two parties and to protect the worker, who is in a weaker position than the employer. The employment contract shall address matters regarding contract period, workplace, duties, working hours and breaks, holidays, wages, etc. The contract period shall be stipulated as 3 years or less from the date the foreign worker enters Korea. However, if the employer receives permission from the ESC for employment extension, the employer may retain a foreign worker for up to an additional two years (for a maximum of 5 years). The workplace can change up to 3 times during the contract period, and permitted reasons for such changes are: ① Expiration of the contract period, mutual agreement for termination of employment, or cancellation of the employment contract due to reasons attributable to the worker; ② Suspension or cessation of business, or other reasons not attributable to the foreign worker (such instances shall not be counted as a workplace change); ③ Cancellation of the company's employment permission or receipt of an administrative order for restriction of employment of foreign workers; ④ Cases where a foreign worker cannot continue the employment due to unfair treatment from the employer, such as difference in working conditions or violation of contracted working conditions, etc.

### 2. Prohibition of discrimination on foreign workers

**(1) Application of labor laws:** General working conditions in labor law are applicable to foreign workers in the same way they are applicable to Korean nationals, including the prohibition against discrimination, prohibition against forced labor, and restrictions on dismissal. Overtime hours exceeding regular work hours, night work, and holiday work shall be paid with basic wages and additional allowances. Annul paid leave shall also be applied identically and unused annual leave days shall be compensated. In addition, statutory severance pay shall be given to foreign workers who have worked for at least one year upon termination of employment. However, the prohibition against discrimination in working conditions is not applicable because Korean citizens cannot be the target of comparison. The two year maximum term for workers to remain "temporary" also does not apply, as foreign workers fall under the Immigration Act first.

**(2) Application of 4 social security insurances:** ① The Industrial Accident Compensation Insurance Act applies to employers ordinarily hiring at least one worker, but this does not apply to agricultural and fishing companies that hire 5 persons or fewer, and it does not apply to construction projects not exceeding ₩20 million. In cases where a worker suffers an occupational injury or disease which is recognized as an occupational accident from the Employee Welfare Corporation, he/she can receive all expenses required for medical

treatment, suspension compensation of 70% of average wages during the suspended period, disability compensation if he/she is handicapped after recovery, and survivor's pension and funeral service assistance for his/her family in the event of an employee's death. ② Employment insurance applies to workplaces which ordinarily hire at least one employee, but for foreign workers, this insurance becomes voluntary upon consultation between the employee and employer. ③ National Health Insurance is mandatory for foreign workers as well as overseas Koreans working in the workplace (effective January 1, 2006). ④ Payment into the National Pension scheme is mandatory for any workplace where a worker between the age of 18 and 60 is hired. This also applies to workplaces hiring foreign workers.

## IV. Conclusion

It has been 20 years since Korea introduced the migrant foreign worker system. Foreign workers are not rare or strange anymore, but have played a very pivotal role in vitalizing small and medium-sized companies. This use of foreign workers has brought many advantages and profit, but at the same time has included some negative aspects. First, for low-skilled Korean citizens, it has become more and more difficult to remain employed. It is a harsh reality that low-skilled Koreans seem likely to continue receiving low wages. Second, the Employment Permit System is not a perfect system, in that the number of employable personnel is assigned equally according to the size of the company, as some small and medium-sized companies with superior technology or who are more competitive use this system simply to save on labor costs. As a result, some less-competitive small and medium companies that desperately need foreign workers cannot hire the necessary number of foreign workers due to a limited quota assigned to them based on company size. Quota flexibility would be a useful way to ensure more personnel are assigned to less-competitive small and medium-sized companies engaged in 3D jobs (dirty, dangerous, difficult). Third, since the Ministry of Employment & Labor has focused on labor policy related to the use of low-skilled foreign workers, many companies have difficulty hiring professional expatriates. As industrial competition between nations has become reality, it is becoming necessary to ensure the employment system in Korea is more open to hiring professional foreign personnel.

# Professional Foreign Personnel Employment (E-7 Visa)

## I. Necessity of employing professional foreign personnel

What companies need as they prepare for global competition is to provide world-class cutting-edge products and services at competitive prices. For this purpose, most Korean companies have used highly qualified Korean personnel, but in a world becoming one integrated market, maintaining world-class competitiveness is proving more and more difficult with such a limited supply of personnel. Accordingly, companies feel the need to hire from overseas those professional personnel that they cannot employ easily inside Korea. In addition, small and medium sized companies need to hire those highly qualified personnel at a reasonable cost. Employing such professional foreign personnel requires an E-7 visa.

Korean use of foreign personnel has been mostly focused on using them to solve a shortage of labor for small and medium-sized companies. As of the end of December, 2012, the number of foreigners staying in Korea is 1.44 million people, and is increasing every year. Of this number, 529,690 are eligible for employment, with at least 90% working manual jobs. The visas involved include E-9 (non-professional employment), H-2 (working visit for overseas Koreans), and E-10 (seafarer employment). Most of the remaining 10% hold E-1 through E-7 visas for professional employment: university professors (E-1), native speakers for foreign language studies (E-2), researchers (E-3), technicians for technology transfer (E-4), certified profession holders (E-5), art workers (E-6), and other professional job holders (E-7).

Generally, the E-7 visa is granted to personnel employed for professional positions, which covers various fields. In their plans to hire these overseas personnel, companies need to confirm whether visa issuance is possible, and then obtain eligibility from the Immigration Office for those personnel to stay in Korea, before initiating the hiring process. In this article, I would like to look into this employment process for hiring professional personnel, and government support systems for such hiring.

**<Types of Visa Available & Employment Status>**

| **Division** | | **Scope of Eligible Activities** |
|---|---|---|
| **Professional personnel** (50,264) | **Professor (E-1) (2,631)** | As foreigners qualified in accordance with the Higher Education Act, those who are engaged in education or research and instruction activities in technical colleges or higher, or equivalent institutions. |
| | **Language teaching (E-2) (21,603)** | As foreigners qualified for conditions stipulated by the Minister of Justice, those who are engaged in teaching foreign languages at foreign language institutes, elementary level or higher schools, their language institutes, or equivalent institutions. |
| | **Research (E-3) (2,820)** | Those who are engaged in research and development of natural sciences or industrial cutting-edge technology at various laboratories, due to invitations from public or private institutions. |
| | **Technology instruction (E-4) (160)** | Those who are engaged in providing professional knowledge regarding the natural sciences or technologies regarding specialized industrial fields due to invitations from public or private institutions. |
| | **Professionals (E-5) (694)** | As foreigners with certification as foreign lawyers, public accountants, doctors, and other nationally recognized professionals, those who are engaged in such professional fields in accordance with Korean law. |

| | | |
|---|---|---|
| | **Artistic work (E-6) (4,528)** | Those who are engaged in arts activities such as music, painting, and literature, or in entertainment, performances, plays, sports, advertising or fashion modeling, etc. for the purpose of earning money. |
| | **Particular activities(E-7) (17,451)** | Those engaged in activities specifically designated by the Minister of Justice, in accordance with contracts with public or private institutions. |
| **Simple manual working personnel** (479,426) | **Non-professional (E-9)(230,237)** | Those eligible for employment in Korea according to the Act on Foreign Workers' Employment. |
| | **Seafarer employment (E-10)(10,424)** | Those who have seafarer employment contracts on the condition of providing labor for 6 months or longer in companies that do business in accordance with the Maritime Transport Act or the Fishing Industry Act. |
| | **Working visit (H-2) ,(238,765)** | Those of foreign nationality in accordance with the Act on the Immigration and Legal Status of Overseas Koreans and who are 25 years or older. |

[Source : Ministry of Law, as of December 31, 2012]

## II. Process for Hiring Professional Foreign Personnel (E-7 Visa)

### 1. E-7 Visa holders (for specific activities)

Professional foreigners eligible for E-7 visas need to have the following characteristics in general. Firstly, the specialty, qualifications, technological and other skills of the corresponding foreigners shall be directly related to the companies where they are to work. Secondly, those foreigners shall not become engaged in simple labor, but professionally skilled or technical jobs. Thirdly, it shall be necessary to hire those foreigners because of the difficulty involved in finding Korean citizens to fill those positions. The E-7 visa encompasses 79 jobs, broken into two categories: 1) job activities determined by contract with public or private institutions and 2) cutting-edge technology jobs such as information technology.

| Fields | Eligible Applicants for E-7 Visa |
|---|---|
| Job fields based on contract with public or private institutions | - Foreign school teacher, foreign language editor at a public or private institution<br>- Those who provide technology, skills and professional knowledge necessary for positions at a public or private institution<br>- Those who are expected to contribute to the reinforcement of national competition in special positions at a public or private institution<br>- Directors or coaches expected to contribute to the promotion of sports by instructing athletes at sports organizations<br>- Foreign staff hired at embassies or foreign-government organizations<br>- Professional foreign personnel hired by foreign-invested companies, domestic branches of foreign companies and foreign individual companies<br>- Crew members hired by domestic ferry companies such as passenger liners and Mountain Diamond tourist boats |
| Cutting-edge technology jobs like IT | - Those who will be engaged in e-business such as information technology and electronic transactions, biotechnology, nanotechnology, advanced materials (metal, ceramic, and chemical), transportation machinery, digital electronics and environmental and energy fields, and have obtained recommendations from relevant ministers<br>· E-business for online commerce, and six other fields: Ministry of Trade, Industry & Energy<br>· Information technology: Ministry of Information & Commerce |

## 2. Issuance of the E-7 Visa

In order to hire professional foreign personnel in Korea, the company shall need to have issued an E-7 visa from the Immigration Office of the Ministry of Justice. Generally, the company can hire professional foreign personnel from abroad after receiving the Certificate of Eligibility for Visa Issuance for those personnel, and in some cases, it is possible to hire professional foreigners already staying in Korea by changing their visa status to E-7. The typical occurrence in cases like this is for foreign students graduating from Korean colleges with D-2 visas to have their visa status changed to E-7 after employment. The necessary documents for an E-7 visa are described in the following table.

| **Company** | **Foreign Employees** |
|---|---|
| 1. Application for the Certificate of Eligibility for Visa Issuance 2. Documents to verify the necessity for hiring foreigners<br>3. Documents related to establishment of business entity (A copy of business registration certificate, or a certificate of foreign invested company registration, etc.)<br>4. Employment Contract (Copy)<br>5. Documents to prove total sales of the previous year (Certificate of Withholding Tax or corporate financial statement)<br>6. List of insured employees by Employment Insurance<br>7. A letter of employment recommendation from the related administrator or organization director<br>8. Letter of guarantee (only for jobs that are restricted to changing or adding workplaces by notification of the Ministry of Justice)<br>9. Other documents stipulated additionally according to job | 1. A copy of passport<br>2. A copy of Resident Identification Card (only for Chinese)<br>3. Verification documents (Degree, Record of Employment, Resume, Certificate of Qualification / Awards or media report for related fields<br>※ Depending on the type of job application, it is necessary to submit Apostille or confirmation from the consular chief of their foreign mission for the career certificate. |

## III. Government Support Systems to Promote Employment of Professional Foreign Personnel (E-7)

Various government systems have been set up to promote the employment of foreign professionals, and in relation to E-7 Visa. There are three main systems, which are 1) the IT Card system of the Ministry of Information & Communication; 2) the Gold Card System of the Ministry of Trade, Industry & Energy; and 3) the Employment of Foreign Professionals Support system of the Small & Medium Business Administration.

### 1. IT Card System (Ministry of Information & Communication)

The IT card system is an institutional system designed to attract to Korea leading foreign personnel and plays an important role in 1) helping to meet the shortage of IT professionals and acquiring advanced technology, issuing the relevant Minister′s recommendations in the course of hiring them, and 2) in mitigating the rising cost of domestic IT professionals while globalizing the Korean IT industry. Corporate entities intending to hire overseas IT engineers are eligible for employment recommendation by applying to the Korea IT Ventures Association (KOIVA). KOIVA will review the prospective employee′s qualifications and evaluate the cutting-edge technology he or she possesses, and then issue a Letter of Employment Recommendation from the Minister of Information & Communication.

| | |
|---|---|
| **Qualifi-cations** | ○ Those who have worked in the field of information technology, online commerce, or electronic business for five years or more;<br>○ Those who have been engaged in the corresponding field for two years or longer, with a bachelor′s degree; and<br>○ Those who have obtained a bachelor′s degree or a Master′s degree from domestic colleges, and received an employment recommendation from the Minister of Information & Communication |

**2. Gold Card System (**Ministry of Trade, Industry & Energy**)**

The Gold Card System is designed to attract overseas technical personnel by providing them preferential treatment under the Immigration Control Act through employment recommendations issued by the general secretary of the Industrial Technology Foundation on behalf of the Minister of Trade, Industry & Energy to companies intending to hire overseas technical personnel, and subsidizing the issuance of E-7 visas. The relevant fields are information technology and e-business like online commerce, biotechnology, nanotechnology, advanced materials (metal, ceramic, chemical), transportation material, digital home appliances, environment and energy, etc.

| | |
|---|---|
| **Qualifi-cations** | ○ Those who have worked in the relevant field for 5 years or longer;<br>○ Those who have been engaged in the corresponding field for two years or longer, with a bachelor′s degree; and<br>○ Those who have obtained a bachelor′s degree or a Master′s degree of relevant majors from domestic colleges, with or without experience in the relevant fields |

3. Employment of Foreign Professionals Support system (Small & Medium Business Corporation:SBC)

This system was introduced to support small and medium enterprises (SMEs) in obtaining access to advanced technology through employment of the necessary overseas personnel from Russia, India, and other nations to eliminate the shortages SMEs face in the relevant fields and contribute to the promotion of international competitiveness through the development of new technologies.

| | | |
|---|---|---|
| **Fields** | | ○ Manufacturing (SMEs in accordance with the SME Basic Law)<br>○ Knowledge-based service industries (24 fields such as information processing and other computer-related businesses, research & development, engineering services, etc.) |
| **Qualifications** | | ○ Graduates in the fields of technology or marketing:<br>-- PhD holders;<br>- MA degree holders + 2 years′ experience (no experience required for graduates of Korean universities);<br>- Bachelor′s degree holder + 5 years′ experience<br>○ Those with 10 years′ or more experience |
| **Subsidy** | **Living expenses & airfare** | ○ 10 - 30 million won per person per year<br>* Amount of subsidy depends on academic degree, experience, previous annual salary, etc.<br>○ Airfare (One-way economy ticket): paid along with living expenses |
| | **Talent hunt** | ○ Searches by applying companies or through headhunting agencies registered with the SBC<br>* Subsidy per person: 2 million won for employment in the capital area and 3 million won for other areas |
| | **Period** | ○ Employment shall be maintained for at least three years, during which the subsidy is available. |
| | **Number** | ○ Up to 4 persons per company will be subsidized. |

## IV. Conclusion

Nowadays, hiring foreign professionals is no longer an option, but is becoming essential. In a global market with worldwide competition, those with better technology and able to provide more competitive products survive. This requires companies to work hard to acquire world-class, highly-trained personnel from many fields at a reasonable labor cost. The E-7 visa is designed to facilitate such acquisitions in an effort to support companies in maintaining and improving their competitiveness.

# Blind Spots in Labor Law Protection for Native English Instructors

## 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. No remedy possible for dismissals occurring two months before contract expiry

If a native English instructor is dismissed two months or less before the expiration of the contract, they cannot find remedy in reality. The Labor Relations Commission needs about 60 days from the time of receiving a claim for unfair dismissal, to hold a judgment hearing and make its decision. A claim for reinstatement or remedy will expire if a native English instructor's contract expires during the remedy process. This period of time represents one of the blind spots in Korean labor law.

### 3. 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.

**4. Limitations in application of orders to make monetary compensation**

Monetary compensation may be requested by the native English instructor in lieu of reinstatement in an unfair dismissal dispute. In the event the Labor Relations Commission (LRC) rules in the instructor's favor, the employer shall compensate the instructor instead of reinstating him or her. However, for fixed-term employees, this monetary compensation system can be useless in actual practice, as the employer can appeal the Commission's decision with the National Labor Relations Commission. The contract period (and therefore, the employment visa) of the native English instructor may expire during this appeal process. In this case, the National Labor Relations Commission judges that the remedy for monetary compensation shall not be dealt with by the Labor Relations Commission, but by civil court, and the first decision by the LRC is canceled. Native English teachers find it almost impossible to pursue a monetary compensation lawsuit in civil court, due to the fact that they are not permitted to get another job as long as the lawsuit is ongoing.

**5. 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.[37]

**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.[38]

[37] Supreme Court ruling on December 9, 2010, 201da58490: Unpaid severance pay for foreign teachers at International Foreign School
[38] Seoul district court ruling on December 9, 2010, 2011gahap121413: C language institute's unpaid severance pay

**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.

**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.

# A Case of Unfair Dismissal[39] and Governing Law

## I. Summary and Main Points of Dispute

A Korean American (hereafter referred to as "the Employee") who had worked for the Incheon city government for two years moved to a subsidiary of an American parent company (the subsidiary hereafter referred to as "Company A") established to develop the Incheon-Songdo City project. After working as vice-president for four years, the employee was suddenly dismissed on January 21, 2011 due to a lack of work. He was informed of the dismissal by the American parent company (hereafter referred to as "Company B"). In the dismissal notice, Company B requested that the employee sign an agreement to resign, offering the employee compensation in the form of four years' severance pay (equivalent to the Employee's number of service years), but the Employee refused. Instead, the Employee applied for remedy against Company A with the Seoul Labor Commission on February 15, 2011 to get legal protection against what he considered unfair dismissal.

Company A claimed that the Employee belonged to Company B and was dispatched to Korea to do work for Company B. According to Company A, Korean labor law did not apply to the Employee because his salary was paid to his American bank account by Company B, and because the Employee was covered by the American national pension and medical insurance, and worked under Company B's direction. Company A added that even though the Employee had the position of vice-president with Company A, Company B had personnel management rights for him, so the Employee could not apply for remedy against Company A.

Here, the main points of dispute are, 1) whether Company A played the role of employer or not with the Employee, and 2) whether Company B, located in a foreign country, was the real employer having employment relations with the Employee, and if so, does Company B have legal obligation regarding employment of the Employee. After reviewing these points substantially, I would like to explain this labor case in detail.

- January 21, 2011: the Employee was suddenly dismissed (with written notice)
- February 15, 2011: the Employee filed for remedy against Company A for unfair dismissal

- April 5~8, 2011: the Employee withdrew the case; in a few days, he filed again against both Company A and Company B.
- June 3, 2011: just before the judgment hearing, both parties agreed on a settlement, followed by the Employee withdrawing the case.

## II. The Employer's Claim

1. "In estimating a business and workplace in application of the Labor Standards Act, in cases where a branch office, detached office, and plant are located separately and operated independently for management of labor and accounting, each such location is regarded as a separate workplace respectively" (Labor Standards-8048). According to this explanation, Company A and Company B are different business entities.

[39] Seoul 2011buhae274: Labor Attorney Bongsoo Jung represented the Employee.

2. The Employee was sent by Company B to Company A as a dispatched employee. His salary was paid to his American bank account by Company B, and he was covered by an American national pension plan (401K) and corporate medical insurance (COBRA). Company B paid these premiums for the employee.

3. For foreign-invested companies, it is a very general practice that employees dispatched by foreign parent companies fulfill their duties assigned by the foreign parent company while working with the Korean branch and its employees. This dispatched Employee did not receive any directions from or work for Company A, but usually took supervisory duties in determining how well Company A followed Company B's directions. Therefore, the Labor Standards Act does not apply to this dispatched Employee as he belonged to Company B.

4. When considering that the Employee signed an employment contract with Company B, who also gave him work directions and other responsibilities, paid his salary directly, and covered his American national pension and medical insurance premiums, the Employee cannot be regarded as a person to whom Korean labor law applies, so the case should be dropped.

**III. The Employee's Claim**

1. From the time he was hired in Korea by Company A, the Employee had worked for Company A, and was dismissed after four years of carrying out his duties with Company A. The Employee could not help but file for remedy against Company A for unfair dismissal. When Company B dismissed the employee for managerial reasons, it had to satisfy content and procedural requirements for dismissal for managerial reasons, but Company B did not have any justification to dismiss the Employee.

2. When a foreign director is dispatched temporarily to a Korean branch office during his employment and receives directions and supervision from the head office, than the foreign country's labor laws apply to that employee, and Korean labor law does not. However, if the foreign director signs an employment contract with the Korean branch office and provides labor service to the Korean branch, Korean labor law applies to that director.

3. The Employee 1) had performance evaluations by the president of Company A, 2) had once received from Company A a rejection notice for renewal of the employment contract, 3) had his name and position on Company A's organization chart, the headcount report, and operating procedures document, and his job description stipulated that the Employee reports to the president of Company A, 4) was supervised and directed by Company A, 5) had Company A stipulated as an employer on his 'Tax Clearance Certificate' issued by the National Tax Service, 6) received pay slips every month and reimbursement for expenses from Company A, and worked wherever Company A assigned him.

**IV. Case Details and Conclusion**

1. After both parties' statements had been submitted, it was realized that in practical terms, Company A could not be the final decision-maker in whether to dismiss the Employee. Due to this, the Employee understood that if he filed against Company A as his only employer, his application for remedy against unfair dismissal would be rejected, so the Employee withdrew his application for remedy against only Company A. He then filed for remedy again, this time listing Company B as his employer, as well as Company A. He also claimed in his second filing that the governing law on labor disputes according to Article 28 of the "Conflict of Laws" was local labor law. Company B intentionally ignored the first application for remedy, but when it too was included as an employer, Company B proactively intervened in the case. In the end, just before the judgment hearing, Company B agreed to settle with the Employee for financial

compensation of ₩180 million on June 3, 2011, whereupon the Employee withdrew his application.

2. The Employee referred in this case to Article 28 of the "Conflict of Laws" regulation, which states that, even though jurisdiction in a labor dispute related to the employment contract is stipulated as belonging to the court in a foreign country, Korean labor law and its compulsory rules apply to employees working in a Korean branch office of a foreign-registered company. The Employee's contract signed with Company B stipulated that any disputes arising over employment conditions between the parties shall be the jurisdiction of the laws of the US state of Georgia. However, Article 28 of the "Conflict of Laws" clarifies contract-based employment relations. Even though Company B was authorized in actuality to dismiss the Employee, for as long as the Employee provided labor service in Korea, the Korean Labor Standards Act (and other labor laws related to protecting employment conditions) shall apply to the Employee, and jurisdiction shall be in Korea.

## V. Reference: Governing Law and Related Labor Case

### 1. Details of Governing Law

**The Conflict of Laws**

**Article 28 (Employment Contracts)** 1) For employment contracts, regardless of the governing law that both parties agreed, it is not possible to ignore the employee protections endowed by compulsory rules of the resident country related to the governing law stipulated by Paragraph 2.

2) If neither party chose the governing law, the employment contract usually follows the law of the country where the employee provides labor service ordinarily. If the employee does not provide labor service in a particular country, the governing law shall be the law of the country where the business office exists that hired the employee.

3) With employment contracts, the employee can take legal action against the employer in a country where the employee provides labor service ordinarily or provides labor service ordinarily at the end of employment. If the employee does not or did not provide labor service ordinarily in a particular country, the employee can take legal action against the employer in the country where the business office that hired him is located.

4) For employment contracts, a judicial suit by the employer against an employee shall be filed only in the country where the employee's habitual residence is, or where the employee provides labor service ordinarily.

5) Both parties in the employment contract can agree on international jurisdiction in writing. However, this agreement can only be effective in either of the following cases:

1. Where a dispute has already occurred, or
2. Where the employee is allowed to file in a court in a different jurisdiction in addition to the court stipulated in this Article.

### 2. Judicial Ruling Quoting Governing Law (Appellate Court 2005nu16668)

"In the employment contract agreed between the employee and the company, it is regulated that interpretation and application will follow the laws of Cyprus, and that disputes related to employment will follow the jurisdiction of the Cyprus court. However, when the employee was informed of his dismissal on January 10, 2004, he was ordinarily working as an executive director in a Korean branch office employing more than five employees, located in Korea. In this case, despite the details of the employment contract, the Korean Labor Standards Act and other labor laws shall apply to the employee, and will be applied under the jurisdiction of the Korean legal system, according to Article 28 of the "Conflict of Laws." As the employee was dismissed through termination of the employment contract, the National Labor Commission can determine whether dismissal is justified or not. Dismissal is unfair when the reason for dismissal cannot be admitted as justifiable."