The Confusing Administrative Interpretation from the Ministry of Employment and Labor on Calculating Severance Pay

I. Introduction

The recent administrative interpretation of severance pay calculations by the Ministry of Employment and Labor (MOEL) is causing confusion in many companies.[1] If a worker who receives 2 million won per month in fixed wage has worked for one year and resigns, he must receive 2 million won in severance pay (total wage for 3 months: 6 million won/90 days x 30 days average wage). However, the MOEL guidance says it should be 2,296,650 won and is ordering companies to be punished if they do not pay the additional 296,650 won. In the case of ordinary wages, if the monthly salary, 2 million won, is divided by 209 monthly contractual working hours, the hourly ordinary wage is obtained (2 million won/209 hours). If this hourly ordinary wage is multiplied by 8 hours, which is the contractual working hours in a day, the normal wage for one day is calculated (hourly wage 9,569 won x 8 hours = 76,555 won). Since the daily ordinary wage is higher than the daily average wage, multiplying the daily ordinary wage by 90 days becomes 2,296,650 won (76,555 x 90 days of daily ordinary wage). This recent administrative interpretation states that, citing Article 2 (2) of the Labor Standards Act (LSA), if the hourly average wage of a worker is lower than the hourly ordinary wage, that hourly ordinary wage shall replace the hourly average wage.

However, this administrative interpretation violates the method for calculating severance pay under the current Employee Retirement Benefit Guarantee Act (the ERBG Act) and does not fit the interpretation of the law by the courts. The ERBG Act states that the principle of calculating severance pay is based on the average wage, and in particular, 1/12 of the total wage for the defined contribution (DC) retirement pension is specified. Court rulings also state that, in calculating average wage, the basic principle is to use the ordinary living wage of workers.[2]

Hereby, I would like to look at where the contradictions in the MOEL's administrative interpretation occur, and also examine in detail whether it is appropriate to use ordinary wage rather than average wage in the calculation of severance pay.

II. Reasons Why Ordinary Wage is Higher than Average Wage

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1) Han Kyung-hee, "Is the higher ordinary wage more often used than the average wage in calculating severance pay?" Korea Apartment Daily, Sep. 15, 2020; Goh Hee-kyung, "Disputes in calculating severance pay at an apartment workplace due to ordinary wage being higher than average wage... Why?" Apartment Management Newspaper, July 24, 2020.

2) Supreme Court ruling on Nov. 12, 1999: 98da49357.

1. Reduction of statutory working hours

What is at issue here is that Article 2 (2) of the Labor Standards Act states that if the average wage is lower than the ordinary wage, the ordinary wage shall be the average wage. This provision did not change even when, on March 29, 1989, the existing statutory working hours per week were reduced from 48 hours to 44 hours per week. And on September 15, 2003, the statutory working hours per week were reduced to 40 hours, but there was no change to the provision. That is, the contractual monthly working hours are 240 hours in the 48-hour workweek system, 226 hours in the 44-hour week system, and 209 hours in the current 40-hour week system. Therefore, at the present time, contrary to the purpose of this article, the average wage must be lower than ordinary wage.[3] In other words, the average wage obtained by dividing the total wage by 30 days is actually lower than the ordinary wage, as the ordinary wage becomes the amount obtained by dividing the wage for 20 days by 30. On the other hand, since the ordinary wage is 6 days a week including the weekly holiday allowance, the monthly ordinary wage is divided by 25 days. In this way, the ordinary wage is always higher than the average wage.

2. Changes in the wage structure

In December 2013, the Supreme Court ruled on a very important case related to ordinary wage that regular annual bonuses and various monthly allowances were included.[4]

As a result of this ruling, the annual fixed bonus system, which was the basic framework of Korean company wage structures, was abolished in 2014. The ruling simplifies wage structures. In other words, Korea's wage structure has come to consist of basic wages, legal allowances, and incentives since then, which increased the level of ordinary wages greatly.

III. Method for Calculating Statutory Severance Pay and Problems with Recent MOEL Guidelines on Calculating Severance Pay

1. How to calculate statutory retirement pay

The ERBG Act stipulates that severance pay is calculated as average wage equivalent to 30 days for each year of the relevant worker's continuous service. In the defined benefit (DB) pension system, an amount calculated as the average wage of 30 days for each year of continuous service is deposited into the retirement pension account. In the defined contribution (DC) retirement pension system, 1/12 of the total annual wage is deposited into the retirement pension account. This is equivalent to 8.3% of the annual

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3) Koo Kunseo, "Strange severance pay calculation," Korea Economy Daily, Jan. 16, 2022.
4) Supreme Court ruling on Dec. 18, 2013: 2012da89399, 2012da94643.

salary. Because a defined contribution (DC) retirement pension system pays a fixed amount each year, it cannot be recalculated later because the ordinary wage is higher than the average wage.[5] As such, it can be said that severance pay is clarified by calculating the average wage, which is the total wage, in the ERBG Act.

In this way, severance pay and retirement pension are calculated with the average wage, which is the total wage. The reason for calculating and paying the average wage is to protect the living wage of workers and to match a certain wage level in terms of severance pay or accident compensation. The Labor Standards Act provides three ways to protect the level of average wage. First, if the average wage is lower than the ordinary wage, it is stipulated that the ordinary wage shall be the average wage (Article 2, Paragraph 2). Second, the calculations of average wage exclude the probationary period of workers, periods of absence due to reasons attributable to the employer, periods of maternity leave, periods of recovery from work-related illnesses or accidents, periods of childcare leave, periods of legal industrial action, etc. This is an exception to the calculation of average wage, and is a limited enumeration provision to prevent the average wage from being unreasonably low in special cases for workers.[6] Third, despite the exceptions to the above Enforcement Regulation to the Labor Standards Act, if the average wage fluctuates significantly due to the worker's accidental circumstances, the notice on special cases for calculating the average wage determined by the MOEL (Article 4 of the Enforcement Decree to the LSA) is applied.[7]

2. Problems in using ordinary wage when calculating severance pay

Currently, the MOEL is saying that severance pay should be calculated using ordinary wage when the average wage is lower than ordinary wage.[8] However, in principle, severance pay should be based on calculations using the average wage, and ordinary wage should help to prevent a decrease in severance pay if average wage is lower. Currently, the severance pay and defined benefit (DB) retirement pension plan under the ERBG Act are calculated as the average wage of 30 days for each year of continuous service. One-twelfth of the total annual wage for defined contribution (DC) retirement pension plans is taken as a reserve fund. According to this guideline, all calculations of retirement benefits that currently reflect average wages should be converted to reflect ordinary wages (Article 12 of the ERBG Act). If this happens, the calculation system of the ERPG Act will be broken, resulting in chaos. In other words, the administrative interpretation of the MOEL is not in line with the interpreted purpose of this Act, as it results in the use of the ordinary wage as a supplement to the average wage used in the calculation of severance pay.

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5) Supreme Court ruling on Jan. 14, 2021: 2020da207444.
6) Supreme Court ruling on July 25, 2003: 2001da12669.
7) Supreme Court ruling on June 25, 2020: 2018da292418.
8) MOEL Guidelines: Labor Standards-3405, Aug. 25, 2020.

IV. Purpose of Average Wage in Calculating Severance Pay and the Clause to Use Ordinary Wage in Exceptions

1. Purpose of using average wage in calculating severance pay

The severance pay system was introduced to ensure that companies can guarantee an income for their workers in their old age when there was no old-age pension in Korea. Therefore, the calculation of severance pay using average wage, which is the total amount of wages, was prepared in consideration of the fact that there is no disadvantage by reflecting the ordinary living wage of workers.[9] Since the total wage is the average wage, it has always been higher than ordinary wage, which reflects only fixed and regular wages. For this reason, Article 46 of the Labor Standards Act stipulates that 70% of the average wage or 100% of the ordinary wage must be paid as leave of absence allowance for periods attributable to the employer. This is because the use of average wages is the basis for severance pay regulations and accident compensation for workers. However, ordinary wage is calculated for the purpose of calculating hourly wage, and so such ordinary wage is used when calculating paid allowances stipulated in the Labor Standards Act, such as overtime pay and unused annual allowance under the Labor Standards Act. Because ordinary wages refer to fixed and pre-promised wages paid for the contractual working hours when a labor contract is drawn up, while the average wage is paid according to the rate of attendance at work, it does not decrease.

2. Reasons for placing the clause to use ordinary wage in exceptions when calculating severance pay

The basic principle of average wage is to calculate the ordinary living wage of workers as a matter of fact. Severance pay is based on the average wage for the same reason.[10] According to Article 2 (2) of the Labor Standards Act, if the total wage decreases due to abnormal work, the average wage will be lower than the normal wage, so then the ordinary wage is used.[11] The precedent also stipulates that if the amount calculated as the average wage is lower than the ordinary wage of the worker concerned, the ordinary wage shall be the average wage in Article 2 Paragraph 2 of the Labor Standards Act. The purpose for this is to guarantee the minimum average wage in case the wage is significantly lower than in normal cases due to reasons attributable to the worker or an inability to work normally due to reasons attributable to the worker during the three months prior to the occurrence of the reason for calculating the average wage.[12] Here, ordinary wages refer to fixed wages in advance

9) Supreme Court ruling on April 12, 1994: 92da20309; Supreme Court ruling on Nov. 12,1999: 98da49357.
10) Supreme Court ruling on Nov. 12, 1999: 98da49357.
11) Gwangju Appellate Court ruling on Dec. 22, 2015: 2004nu1062.

that are set to be paid regularly and uniformly regardless of the actual provision of work. For this reason, Article 2 (2) of the Labor Standards Act is used in cases where the average wage falls short of the ordinary wage.[13)]

V. Conclusion

Severance pay is the wage calculated as the average wage of 30 days per year of a worker's continuous service. Here, the average wage falls short of the ordinary wage in situations in which workers are not protected by law, such as for absenteeism or personal leaves. At present, the ordinary wage is often higher than the average wage even in general cases, not just in special cases. This is because the standard calculation formula for ordinary wages is calculated on the basis of 6 days (including weekly holidays) in the 40-hour work week system, while average wage is calculated on the basis of 7 days a week. Accordingly, the provision in Article 2 (2) of the Labor Standards Act shall be added as a supplement when the average wage is lower than the ordinary wage, because the average wage shall be applied in accordance with the purpose of the Act. This is because, as can be seen with the MOEL's recent administrative interpretation, if the formula for calculating severance pay with ordinary wages is established, the severance pay systems in the Retirement Benefit Guarantee Act must be revised completely.

When Workplace Harassment Occurs, What Measures Should an Employer Take?

I. Introduction

Korea's workplace culture has a long tradition of top-down military-style hierarchies, but a new workplace culture is emerging as the workplace harassment prevention law is strictly applied, going in a desirable direction where individual personality is respected. A superior has the right to direct the work, and a subordinate has the duty to perform the work accordingly. However, if excessive work orders, abusive language, or threatening shouts are repeated, the moral rights of workers will be infringed.[14)]

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12) Seoul Administrative Court ruling on July 1, 1999: 98gu19789.
13) Supreme Court ruling on June 28, 1991: 90daka14758; Supreme Court ruling on Dec. 26, 1990: 90daka12493.
14) Supreme Court ruling on Feb. 10, 1998: 95da39533: Whether the employer is liable for compensation for harassment in the workplace.

For this procedure to deal with workplace bullying, Article 93 of the Labor Standards Act (Preparation and Reporting of Employment Rules) No. 11 mandates that “the measures to be taken in cases of occurrence of workplace harassment” be stipulated in the rules of Employment Accordingly, all workplaces employing 10 or more people must act in accordance with the details of workplace harassment stipulated in those rules of employment. In other words, the employer must responsibly handle reports of harassment between workers in the workplace. Even when such harassment is reported to the Labor Office, the Labor Inspector’s scope of investigation is limited to whether the employer has conducted an objective investigation into workplace harassment in accordance with Article 76-3 of the Labor Standards Act (Measures in the case of workplace harassment), whether appropriate measures have been taken according to the results of the investigation, and whether reasonable measures have been taken to protect the worker victim(s).[15)]

Therefore, if an employer receives a report on workplace harassment or recognizes that workplace harassment has occurred, that employer shall, without delay, conduct an objective investigation to confirm the facts of such report or witnessed harassment. In this regard, I would like to review the desirable way to handle workplace harassment and look in detail at appropriate company actions.

II. A Case of Workplace Harassment and Follow-up Measures by the Company

1. Facts

The company is a branch of a multinational corporation, and in Korea, it is managed by each department head for its own operation without a control center. The branch manager did not have authority to exercise personnel or business operation rights.

There were many cases where a certain female director (perpetrator) yelled at the branch manager or company executives and abused them. A number of employees complained about the abusive language, insulting words, and sexually harassing remarks, claiming they amounted to workplace harassment.

(1) At around 10 a.m. on April 4, 2022, according to the statements of a number of witnesses, the perpetrator's raised voice was heard coming from a conference room where the perpetrator and the branch manager were alone. Even though the director did not outrank the branch manager, it is unacceptable for the perpetrator to use abusive language with the Korean branch manager and shout at him where many junior employees could hear, considering his age and job experience.

15) Ministry of Employment and Labor, “Manual on Judgment, Prevention and Handling of Workplace Harassment,” Feb. 2019.

(2) Between March 3 and May 11, 2022, the perpetrator used sexually harassing language with the male sales manager four times. ① “You are pretty. You are working hard.” ②"Our conclusion is that the pretty boy can brag about the company," ③"With pretty boys, and ④"The prettiest boy should do it."

(3) On March 10, 2022, the perpetrator called manager A from another department on the phone and said, “You are the one who failed to meet the target,” “How long do I have to waste my time writing emails like this to you,” etc. The perpetrator’s language was abusive and included insulting remarks while undermining the performance of this manager.

(4) The perpetrator used abusive language or insulting words against a number of employees.

a) The perpetrator wrote the following about a specific employee in an e-mail she sent to the head of the sales department and CC’d several employees. “Where else is there such a manager in his 30s who can’t write emails properly or even introduce himself?”

b) The perpetrator mentioned to assistant manager C in her marketing department: “Of the sales team members, Mr. Yoon and Mr. Han are surplus manpower.”

c) The perpetrator spoke openly about the branch manager to other employees. “The branch manager has no influence, and he has no connections with head office executives. He’s a country man from a poor background.”

2. Details of the company's response actions

The company had difficulties determining on its own investigation because the perpetrator and employee victim were the managing director and the branch manager of this foreign company, so an external labor law firm was asked to investigate. The perpetrator was disciplined according to the results of this investigation.

This author’s labor law firm, which received the request to investigate the reports of workplace harassment, confirmed prior information from the company, as well as the victims, perpetrator, and witnesses. In addition, prior to the investigation, investigators received a written confidentiality agreement from each related interviewee so that they could prevent secondary damage from occurring in the future.

This labor law firm first conducted interviews and written investigations with the employee victims. In addition, multiple witnesses were interviewed to confirm the facts. Finally, through an interview with the perpetrator, it was able to confirm the facts of the situation at the time, and the perpetrator was given opportunity to explain her actions.

With these objective findings, the company held a disciplinary committee meeting in accordance with the rules of employment, and explained the facts to the perpetrator and gave her an opportunity to explain her actions in light of the confirmed facts.

Finally, the disciplinary committee decided on a six-month salary reduction and a severe warning on the perpetrator's work record.

III. Guidance on Employer Actions When Workplace Harassment Occurs

1. Guiding principle

When a report of workplace harassment is received, or such an incident is seen by the company's personnel manager, that manager shall conduct an objective investigation with related employees to confirm the facts without delay. Here, "related employees" refers to the alleged victim, the alleged perpetrator, and coworkers who witnessed the event(s). Prior to starting an investigation, it is necessary to ensure that the related employees sign a confidentiality agreement to prevent secondary damage from the investigation.[16)]

2. Initiate investigation and take appropriate actions promptly

When a workplace harassment report is received, the employer shall investigate the persons concerned without delay. This is because, first, there is a need for the alleged victim(s) to receive prompt relief if the harassment actually occurred. Second, over time, memories of facts fade. Third, if a prompt investigation is not carried out, the employer may be deemed to have failed to take measures required by law.

When an investigation into a person is initiated, employer actions can include allowing the alleged victim(s) to work from work or go on paid leave if requested by the alleged victim(s) so that additional damage does not occur between the alleged victim and the alleged perpetrator.

3. Ensure the investigation is objective

Investigations are conducted beginning with the alleged victim(s). As far as possible, the facts shall be clearly established according to the six basic outline of Who, What, Where, When, Why and How. Check if any concrete data exists such as cell phone voice recordings, KakaoTalk (or other messenger service) messages, and e-mails. When investigating an alleged victim, that person's psychological and emotional situation should be considered. Investigations are carried out by checking the facts from the alleged victim's point of view, and above all, the investigators need to listen for the immediate needs of the alleged victim.

The second part of the investigation secures the statements of relevant persons who can confirm or reject the facts described in the alleged victim's statement. At this stage, it is necessary to focus on the facts, not the opinions of the alleged victim. It

16) Lee, Sang-gon, "A Study on Improving the Workplace Harassment Law," Ajou Graduate School Ph.D. thesis, Aug. 2020, pp. 141-143.

is also necessary, for simplicity, to interview only the essential persons. And for better objectivity, to interview two or more employees on each major aspect of the report to secure corroboration of statements.

The third part of the investigation is interviewing the alleged perpetrator. It is necessary to verify the accuracy of the claims made by the alleged victim(s) and related persons. During the investigation, the person in charge must avoid deciding for him or herself whether the alleged perpetrator is guilty or not. In addition, by looking at the situation for the perpetrator at the time of the alleged harassment, it is necessary to listen to the details of the reason(s) given for the act and to confirm whether the act is necessary for work. If possible, the perpetrator should be informed that the primary purpose of the investigation or disciplinary process is to improve the workplace atmosphere, not to punish.

In the process of investigating the related employees, there are many things that can be missed by written records alone. Therefore, it is necessary to supplement the investigation with recordings.

Investigations are conducted by the HR department within the company, but if the harassment is related to the HR department or the employer is the alleged direct perpetrator, entrusting the investigation to an external expert for a fair investigation of the facts can increase the trust of the related employees and ensure that the investigation is carried out objectively.

4. Judgment of facts and appropriate dispositions of the company

After confirming the facts in a report of workplace harassment, it is necessary to determine whether the relevant act(s) fall under what has been determined to be workplace harassment. In this regard, since the person in charge is not a legal expert, it is better to understand the legal view, based on the facts, through a request sent to the Ministry of Employment and Labor or seeking the opinion of a labor attorney with related experience.

If the facts of the case are confirmed and workplace harassment is recognized to have occurred according to a legal expert, a disciplinary committee shall be convened to determine the disciplinary action in accordance with the company's in-house rules of employment. Of particular note is that the disciplinary committee should check the facts and give the perpetrator an opportunity to explain, so that the reasons for disciplinary action remain clear.

Once a disciplinary committee decides on the type of disciplinary action, objective facts such as the degree of workplace harassment, the length of service and role of the perpetrator, and whether or not there has been a previous violation must be taken into consideration to prevent abuse of the authority to discipline. In this case, the employer can increase victim and perpetrator acceptability of disciplinary action only by

explaining the disciplinary actions to the victim(s) and hearing their views beforehand. If the alleged victim's report of workplace harassment is confirmed to be true during the investigation process, appropriate actions for the victim(s) can include a change of workplace, a change in job assignment, or a granting of paid leave, ideally in accordance with the victim's stated preference. Whether that is possible or not, the victim's preference should at least be heard.

Finally, the company must remind the perpetrator, victim(s), and employees involved in the investigation to strictly adhere to the confidentiality agreement they signed in relation to the investigation process. Revealing the investigation findings to the public may result in additional damage that may be undesirable for both sides.

V. Conclusion

In calculating whether workplace harassment has occurred, the scope of actions that are appropriate to the performance of work can be ambiguous. If the workplace harassment leads to a court decision, this will result in damage to the alleged perpetrator, the alleged victim(s), and the company organization. Lawsuits over workplace harassment claims can also lead to undesirable consequences, so it is best to resolve such reports fairly and in accordance with the company's internal procedures. To this end, HR managers need training to deal with such reports, and workers must be aware that workplace harassment can occur anywhere, and they may unexpectedly find themselves engaging in workplace harassment, or suffering from it.

Cases of Workplace Bullying & Sexual Harassment and Disciplinary Committee Decisions

I. Summary

Last month, I received a request from a public institution (hereinafter referred to as the "Company") to participate as a member of their disciplinary committee. A female fixed-term worker (applicant) submitted a grievance counseling application stating that the male team leader (defendant) had repeatedly engaged in workplace harassment, sexually harassed her, and abused his authority, all of which led to her resignation. On August 16, 2022, the Company received the grievance counseling application, formed a grievance handling committee, and investigated the applicant's workplace harassment

and sexual harassment claims. They investigated the applicant, the witness, and the alleged perpetrator, in that order. On September 15, 2022, the grievance handling committee requested convening of a disciplinary committee after determining that the allegations were indeed workplace harassment and sexual harassment. On October 18, 2022, the company convened a disciplinary committee consisting of two internal and three external members according to the procedures in Company disciplinary regulations. The disciplinary committee dismissed the case, judging that while the defendant's actions were inappropriate, they could not be regarded as workplace harassment or workplace sexual harassment as stipulated in labor law.

Most disciplinary committees lead to a process for disciplinary action, but in this case, the details presented by the applicant alone could not be regarded as workplace harassment beyond the appropriate scope of work, and although the alleged sexually harassing words and actions were inappropriate, a third party could not feel sexual shame. Accordingly, the committee dismissed the claim. The facts and criteria are described in the following.

II. Workplace Bullying & Sexual Harassment

1. Workplace bullying and sexual harassment described by the applicant

The applicant is a team member who was hired by the Company as a two-year contract intern, and the defendant is the leader of the team where the applicant was placed. The details of the claims of harassment and sexual harassment in the workplace by the applicant were as follows.

(1) Bullying at work

1) During working hours on March 22, 2022, the defendant said to the applicant, “In the second-half evaluation of 2021, your evaluation was the lowest among your co-workers who were hired during the same period. If you wish to receive a full-time position, you will need to smile and otherwise be cheerful at work and greet people well. Then the senior executives will give you a good evaluation.” The applicant claimed that the team leader, who has the right to decide on contract extensions, made unnecessary comments under the guise of performance evaluation, which caused her a lot of stress.
2) Between May and July 2022, the defendant took the applicant and other team members to a place where he went to smoke on the roof of the office building. The applicant did not want to go to the place, but she had to because the defendant made announcements or wanted to discuss work-related things there. Later, the frequency decreased after some co-workers resisted going to the rooftop together. However, these meetings on the rooftop continued on occasion, where

the defendant smoked.

(2) Sexual harassment in the workplace

1) On April 29, 2022, when visiting an eel restaurant with team members for lunch, the defendant remarked to the team, “Let’s get some [sexual] stamina from eating eel today!” His remarks made me feel uncomfortable.
2) On July 14, 2022, during a business trip to the city, the applicant and the defendant visited the old downtown of Yongsan. While driving, the defendant made the statement, “Ajumma wouldn’t be able to get here,” in the sense that it would be difficult for inexperienced female drivers to drive the area due to its geographical characteristics. The applicant was offended by the defendant's “blatant stereotyping sexism.”
3) During lunch at the Company cafeteria on August 5, 2022, the applicant said that she would not drink the omija tea on the menu. In response, the defendant asked, "Isn't omija tea good for women?" which the applicant claimed made her feel uncomfortable.

During the face-to-face investigation by the Company's grievance handling committee members, the applicant explained that the reason for her resignation was due to the bullying and sexual harassment by her superior at work. The applicant resigned on August 21.

2. Actions taken by the company

On August 16, 2022, after receiving an application for grievance counseling from the applicant for the related case, the Company immediately investigated things face-to-face, looking with the applicant at the claims she raised as well as interviewing three references, and then supplementing with other information. After further investigation, the Company reported the results to the Grievance Deliberation Committee on September 15. On September 29, the Grievance Deliberation Committee reviewed the case and determined that it amounted to harassment and sexual harassment at work, and asked the Disciplinary Committee to take disciplinary action.

III. Criteria for Determining Workplace and Sexual Harassment in Related Cases

1. Criteria

(1) Bullying at work

“No employer or employee shall (i) cause physical or mental suffering to other employees or deteriorate the work environment (ii) beyond the appropriate scope of

work (iii) by taking advantage of superiority in rank, relationship, etc. in the workplace" (Labor Standards Act, Article 76-2). Only if these three requirements are met can a judgment be made that workplace harassment (bullying) has occurred.[17]

The factors and criteria suggested by the court can be used to determine whether workplace harassment has occurred. This shall be decided by considering and evaluating the following collectively: "① the relationship between the alleged offender and alleged victim, ② the motive and intention of the act, ③ the timing, place, and situation, ④ the details of the alleged victim's explicit or presumed reaction, ⑤ the content and extent of the act, and ⑥ the repetition or continuity of the act."[18] Simply put, it is possible for an employer to infringe on human and personal rights or worsen the employment environment with position (power relations), related work (work relations), or other actions unwanted by the receiving party that are outside the scope of the relevant work (harassment, abusive language, etc.).[19]

(2) Sexual harassment in the workplace

"Sexual harassment in the workplace refers to the deterioration of the employment environment by employers, superiors, and workers using their positions in the workplace or by expressing towards other workers sexual language or behavior in relation to work, or by giving employment disadvantages or causing sexual humiliation as a condition thereof" (Article 2 of the Equal Employment Act). Sexual harassment in the workplace has the potential to occur anywhere inside or outside the workplace, and occurs when a superior uses his/her position or the actions/words are related to work. For example, sexual harassment that occurs in a car while on a business trip or at a business-related meeting is also sexual harassment in the workplace.

The decisive criteria for judging sexual harassment in the workplace: (1) Whether the alleged victim felt sexual humiliation or disgust due to the act is the main fact. It is considered sexual harassment if the alleged victim felt sexual humiliation and disgust due to the act. (2) At this time, whether or not the alleged perpetrator intended to sexually harass cannot affect the criteria for judgment. (3) A normal and average person must be able to feel sexual humiliation or disgust on the part of the alleged victim.[20]

2. Application to case

(1) Judgment on claims of workplace bullying

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17) Ministry of Employment and Labor, "Manual on Judgment, Prevention and Handling of Workplace Harassment," Feb. 2019, pp. 10-14.

18) Supreme Court ruling on Feb. 10, 1998: 95da39533.

19) Kim, Elim, "Gender Equality and Law," Korea National Open University Press and Culture Center, 2013, p. 242.

20) Supreme Court ruling on June 14, 2007: 2005du6461.

1) The defendant said to the applicant, “In the second-half evaluation of 2021, your evaluation was the lowest among your co-workers who were hired during the same period. If you wish to receive a full-time position, you will need to smile and otherwise be cheerful at work and greet people well. Then the senior executives will give you a good evaluation.”

   Regarding this part, the applicant argued that it was equivalent to abuse of authority or harassment in the workplace. The applicant was about to switch to a full-time position just before the end of the two-year labor contract period. The defendant stated that, as her team leader, his words were supposed to help the applicant improve her working relations by correcting her negative attitude as a team leader, and that such remarks did not constitute an abuse of power. When judging the background to and purpose for the defendant's remarks and whether they were repetitively stated, it cannot be regarded as harassment in the workplace, as it is judged that the senior gave advice in the process of leading the junior to a full-time job.[21)]

2) “From May to July 2022, the defendant took me to a place on the roof of the office building where the defendant could smoke and talk about work. As there work-related announcements were given or group discussion took place there, I felt peer pressure to go too.” As a non-smoker, the applicant must have felt uncomfortable attending a meeting while a senior and other team members smoked on the roof of the office building. However, judging from the grounds such as the continuity of the rooftop meetings, coercion using power relations, and the subordinate's intention to reject, the defendant's behavior was undesirable, but doesn’t lend well to a definition of workplace harassment. Because these rooftop meetings did not last, and considering that they were to change the mood, it is difficult to see it as bullying in the workplace.[22)]

(2) Criteria for judging claims of sexual harassment in the workplace

1) When the team members visited an eel restaurant for lunch, the team leader said to the team members, "Let’s get some [sexual] stamina by eating eel today!" His remarks made the applicant feel disgust. Regarding this, the criteria for determining sexual harassment in the workplace is based upon the feelings felt by the victim. Also, if a person with common sense feels sexual humiliation from the victim's point of view, it can be called sexual harassment. However, in this case, going to an eel restaurant during lunchtime cannot be seen as sexual harassment from a general point of view, considering that it is to rejuvenate the body through a special health food.[23)]

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21) Similar case: Supreme Court ruling on July 22, 2003: 200do7225.
22) Similar case: Supreme Court ruling on Feb. 10, 1998: 95da39533.

2) On a business trip to the city, the applicant and the defendant visited the old downtown of Yongsan. While driving, the defendant made the statement, “Ajumma wouldn’t be able to get here,” during their conversation, meaning it would be difficult for inexperienced drivers to drive there due to the geographical characteristics. Ajumma refers to full-time housewives and middle-aged women.[24] The defendant’s words mean, generally speaking, that the average woman drives too cautiously, but it is difficult to say that women would reasonably feel sexual humiliation in response.

3) During lunch at the in-house cafeteria, the applicant said that she would not drink omija tea on the menu. In response, the team leader remarked, “Isn’t omija tea good for women?” This part is generally based on the fact that omija is good for women.[25] This remark does not fall under workplace bullying, as it was merely recommending omija tea for the purpose of drinking together.

IV. Disciplinary Committee's Decision to Dismiss

1. Main details of the Disciplinary Committee’s decision meeting

On October 25, 2022, the Company Disciplinary Committee held a hearing according to the Company's disciplinary regulations. The committee consisted of 5 members: 2 internal and 3 external. As internal members, the employee representative of the labor-management council and the head of the Company's Audit Office attended, and as external members, the head of the audit office of an external public company and two certified labor attorneys attended. This labor attorney was appointed as the chairman. The chairman made a statement that disciplinary action should be aimed at punishing workers who violate the company's regulations, thereby preventing recurrence and restoring order in the company.[26] In addition, I suggested to the committee that they should decide whether the defendant's actions amounted to workplace harassment and workplace sexual harassment. The head of the Audit Office, an in-house disciplinary committee member, also gave the opinion that this case could not be viewed as bullying because it did not meet the requirements for workplace bullying, and that it could not be thought that an ordinary person would have felt sexual humiliation. Regarding this, some disciplinary committee members said that the defendant's actions amounted to sexual harassment in the workplace and bullying in the workplace. In this regard, there was sufficient discussion among the committee, which

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23) Similar case: Supreme Court ruling on June 14, 2007: 2005doo6461.

24) Internet encyclopedia ‘Namu Wiki’ keyword search for “Ajumma.” Ajumma refers to middle-aged women. In everyday life, if a woman looks middle-aged, people often call her ajumma.

25) Reporter Jang In-seon, “Omija Tea Instead of Ice Coffee – A Wise Summer for Menopausal Women,” Health Trend, July 8, 2019, and many other related materials.

26) Jung, Bong-soo, “Lawful Dismissal Manual”, 2nd ed., K-Labor Press, June 2022, p. 39.

reached the view that the defendant's actions were not to the extent of bullying in the workplace and sexual harassment in the workplace as a whole.

The disciplinary committee gave the defendant an opportunity to explain himself at the hearing before a final decision was made. The defendant took an attitude of self-reflection, saying that he would gladly accept any decision because he had caused psychological injury to the applicant due to his undesirable behavior.

The defendant was asked about the reasons for her resignation. He replied that the applicant had said many times that she wanted to be hired by a large company that paid a lot more because this public institution didn't pay enough, and that he had heard that she'd passed the entrance exam and would be hired by a large company.

2. Background to Decision

The Company's rules of employment cover dismissal, suspension, demotion, salary reduction, and reprimand as appropriate disciplinary actions. And if disciplined, the employee wouldn't be able to resume team leadership for 1 year, nor be eligible for promotion during that period. In this case, any disciplinary action would result in the defendant losing his position and eligibility for promotion for one year, during which his salary would be frozen. While the defendant's conduct could not be regarded as desirable, the level of punishment in the Company's disciplinary regulations were seen as excessive in this case.

The Disciplinary Committee decided on the fundamental content of whether the conduct actually corresponded to workplace harassment or sexual harassment in the workplace. Of the 5 disciplinary committee members, 3 concluded that the defendant's actions were not workplace bullying or workplace sexual harassment, while the remaining 2 members were of the view that the inappropriate behavior was not serious, but reason for minor disciplinary action. In the end, the disciplinary committee decided that this case was not worthy of disciplinary action with a 3:2 opinion, and dismissed the call for disciplinary action.

Ⅳ. Feature Articles

Feature Articles: Foreign Workers

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Main Contents of the Labor Law on Employment Protection for Foreign Workers

Bongsoo Jung[27)]

ABSTRACT

Most of the human rights violations involving foreign workers occur with non-professional foreign workers. Visiting overseas Korean workers have the freedom to choose their workplace, so there is not much difference in labor law protections from their Korean workers. For professional foreign workers, there are some limitations on labor protections in certain areas, but those differences can be resolved by transferring to another workplace. However, there are many limitations for non-professional foreign workers in the protections they receive under Korean labor law.

The working conditions stipulated in the Labor Standards Act are governed by the principle of equal pay for equal value work regardless of whether the workers are Korean nationals or not. The principle is that the worker is paid equal to the amount of work he or she has done. There may be differences between foreigners and domestic workers depending on their language abilities and work proficiency, but when treatment violates the principle of proportional input, this difference can be deemed unjustifiable discrimination.

Foreign workers, unlike Korean nationals, receive minimum wage regardless of their years of service. Annual paid leave, which is guaranteed under the Labor Standards Act, is also not enforced for foreign workers, and there is almost no monetary compensation for unused annual paid leave. In addition, unlike retirement allowance, the Departure Maturity Insurance is paid to foreign workers only upon leaving the country.

The exercise of the three labor rights by foreign workers is the only opportunity to improve their working conditions. The Labor Standards Act sets the minimum standards, but without union activity, wage increases or improvement in working conditions cannot be expected. Since this is the case, foreign workers need to engage in labor union activities. If union membership is restricted, the alternative is to activate the labor-management council system to improve their welfare and access to rights through a large number participating and cooperating.

The social insurances for foreign workers must be insured to protect them in principle. Employment Insurance is not compulsory. Unsubscribed foreign workers cannot receive unemployment benefits, nor Employment Insurance support for maternity leave or parental leave. Non-professional foreign workers should be excluded from application of the National Pension Plan as their short-term visa status does not allow them to meet the requirements to receive old-age pension.

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- Contents -

I. Introduction
II. Individual Employment Relations
III. Collective Labor Relations
IV. Social Insurance and Insurances Exclusive to Foreign Workers
V. Conclusion

I. Introduction

Most of the human rights violations involving migrant workers occur with non-professional foreign workers. Visiting overseas Korean workers have the freedom to choose their workplace, so there is not much difference in labor law protections from their Korean workers. For professional foreign workers, there are some limitations on labor protections in certain areas, but those differences can be resolved by transferring to another workplace. However, there are many limitations for non-professional foreign workers in the protections they receive under Korean labor law. Some examples follow.

① Non-professional foreign workers are not free to change workplaces. They must remain at the same workplace for three years unless there are justifiable reasons for the change of workplace.

② Wages remain at the minimum wage regardless of their skills or how many years of experience they have.

③ Despite the fact that the right to annual paid leave occurs when they work for at least one year (Article 60 of the Labor Standards Act or "LSA"), most non-professional foreign workers do not receive it.

④ Foreign workers can only receive their severance pay when they return to their home country, not when their employment terminates.

Korea's three labor rights ("right to organize union, right to collective bargaining, and right to collective action") are guaranteed in collective labor relations, and a labor union of illegal workers has even been officially recognized as a legitimate union.[28] Nevertheless, it is impossible in reality for a company-unit foreign labor union to have continuity in its activities, as all non-professional foreign workers are fixed-term workers, and employers can control the collective behavior of foreign workers. Therefore, it is impossible to actually exercise their three labor rights.

Regarding social insurances, ① Foreign workers are protected by means of

28) Supreme Court ruling on Jun. 25, 2015: 2007doo4995. Decided with all judges hearing (Withdrawal of union establishment certificate).

mandatory subscription to Industrial Accident Compensation Insurance, but industrial accidents are not properly handled unless the work-related accident is a serious one.[29] ② Most workplaces do not subscribe their foreign workers to employment insurance as it is not mandatory. ③ For this reason, non-professional foreign workers cannot receive benefits during their unemployment period after termination of employment.[30]

I would like to examine these problems in detail and propose desirable solutions.

II. Individual Employment Relations

1. Prohibition of Discrimination

In terms of criteria for determining discrimination, the court proposes two principles: treating the same things differently and different things in the same way. The first requirement in determining whether discriminatory treatment exists is that, there must be an identical working group to compare with the situation facing the person claiming to have been discriminated against.[31] Second, discrimination can be deemed justifiable even in the same workplace with workers who are engaged in the same occupation when the discrimination is according to reasonable standards in consideration of various conditions such as the details of the work and the working conditions.[32]

A. Application to foreign workers

As foreign workers have the “right to a decent work environment”, the same labor standards apply to them as to Korean workers.[33]

Discrimination against foreign workers, visiting overseas Korean workers, and illegal workers without Korean nationality may occur. The Foreign Employment Act (FEA) stipulates that “Workers shall not be treated unfairly because they are foreign workers” (Article 22). However, there is a limit to the enforcement of anti-discrimination regulations, as this article does not have a related penalty provision, and only covers non-professional workers in the employment-permit system. Therefore, discrimination based on nationality shall fall under the provision in Article 6 of the Labor Standards

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29) National Human Rights Commission of Korea, “Investigation on the Human Rights Situation of Foreign Workers in the Construction Industry,” Research Report on the Human Rights Situation in 2015, p. 9.
30) Supreme Court, Feb. 26, 2002. Verdict 2000da39063 (Reasonable discrimination is not discrimination)
31)) Supreme Court ruling on Oct. 29, 2015: 2013 Da1051 (different wages according to different hiring methods)
32) Supreme Court ruling on Feb. 26, 2002: 2000 da 39063 (Reasonable discrimination is not discrimination)
33) Constitutional Court of Korea ruling on Sep. 29, 2011: 2009 hunma 230352, (Merged); Lee Sang-yoon, “The Status of Foreign Workers under Labor Law,” 「Justice」, Korea Law Institute, Dec. 2002, p. 59.

Act, "No discriminatory treatment of working conditions on the grounds of nationality shall be made" and related penalties.[34] The Ministry of Employment and Labor (MOEL) also provides guidelines for the remedy of rights (identical to those that apply to Korean workers), even if there are violations of immigration law, such as the worker working illegally at workplaces covered by the Labor Standards Act.[35] However, if there is a justifiable reason for discrimination, exceptions shall be granted. In principle, discrimination is prohibited, but the following is regarded as justified:

① Discrimination based on skill level, Korean language proficiency, and years of service in working conditions;

② There may be discrimination based on the contract period of fixed-term workers; and

③ Discrimination related to the Immigration Control Act in terms of visa details.

B. Related issues

Here are some examples of discrimination over nationality.

① The Constitutional Court of Korea judged that in cases where industrial trainees have actual working relations under the name of training, under the direction and supervision of the employer, providing labor and receiving money in the form of allowances, it is difficult to justify excluding them from the main points of labor standards.[36]

② A foreigner (A) of Thai nationality entered the country as an industrial trainee but was injured while working illegally. Worker A filed for medical treatment, but the Labor Welfare Corporation did not permit the accident to be deemed an industrial accident because Worker A was an illegally-employed foreigner. However, the Supreme Court made it clear that while illegal workers are subject to crackdowns, they are still protected by labor law for work already provided.[37]

③ On May 3, 2005, foreign workers in Seoul and Gyeonggi-do filed for establishment of a Labor Union with the Seoul Regional Labor Administration, but their application for establishment was rejected because some members were illegal workers. A protracted court dispute over recognition of the union took place, but on June 25, 2015, the Supreme Court judges collectively recognized establishment of a union consisting of illegal workers.[38] The three cases above apply labor law

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34) Article 114 of the Labor Standards Act is the penalty provision, which stipulates that a fine of no more than 5 million won shall be imposed.

35) Administrative Interpretation by MOEL on Mar. 10, 2000.

36) Constitutional Court ruling Aug. 30, 2007: 2004 hunma 670 (Industrial Trainee System)

37) Supreme Court ruling Sep. 15, 1995: 94 nu 12067 (Rejection of accident as work-related).

to foreign workers in the same way as for Koreans, but the origin of discrimination came from their status as foreign workers.

There are many cases of discrimination against workers offering general labor because they are foreigners, on the basis of nationality, differences in skill, and their fixed-term employment. In practice, foreign workers are paid the minimum wage regardless of their work experience or length of service. In contrast, Koreans are paid at least twice the minimum wage and in accordance with how long they have been providing work. This can be regarded as discrimination by nationality.[39] Although discrimination is prohibited on the basis of nationality, it is difficult to prove that discrimination against foreign workers is on the basis of nationality.[40]

2. Annual Paid Leave

The provisions of annual leave for non-professional foreign workers are not specified in the standard labor contract[41] and such leave is rarely granted in reality. Annual leave, however, is an essential part of a labor contract to be included under Article 17 of the Labor Standards Act, and of course this legal leave must be granted in return for work.

Annual leave is intended to be in addition to paid weekly leave in order to ensure worker health and cultural experience.[42] The Constitutional Court stipulates that “If a break or weekday is primarily intended for the physiological recovery of workers who have accumulated physical and mental fatigue due to daily or weekly work, annual paid leave will be taken without a reduction in wages. By allowing them to make their own decisions, they ensure that workers are free from work for a certain period of time and have the opportunity to enjoy social and cultural life.”[43] In response, the Supreme Court explains, "It is intended to provide workers time for mental and physical recreational opportunities and improve quality of life by exempting workers from working for a certain period of time."[44] Therefore, annual leave can be said to

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38) Supreme Court ruling Jun. 25, 2015: 2007 doo 4995 (Cancellation of rejection of union establishment application).

39) Lee, Jun-il, 「Human Rights Act - Social Issues and Human Rights」, 7th Ed., Hongmunsa, August 2017, p. 4.

40) Lee, Soo-yeon, “Work from Female Foreign Workers and their Universal Rights,” Korean Social Law Review, No. 33, Korean Social Law Association, Dec. 12, 2017, p. 128.

41) FEA Enforcement Regulations, Form No. 6 (Standard Labor Contract).

42), Lim, Jong-Ryul, “Labor Law”, 17th Ed., Park-young-sa, 2019, p. 454.

43) Constitutional Court ruling on May 28, 2015: 2013 hunma 619 (Purpose for annual leave)

44) Supreme Court Dec. 26, 2003. Sentence 2011Da4629 Decision (Purpose for annual leave)

improve the quality of life for workers by granting time to engage in cultural aspects of life to the rest from work.[45]

A. Application to foreign workers

The international standards for annual paid leave and the standards in Korea's Labor Standards Act can be divided and compared by ① vacation days and occurrence requirements, ② method of use, ③ provision of annual paid leave, and ④ compensation for unused annual leave.

On an international basis, the ILO (International Labour Organization) has adopted Convention No. 52 Annual Paid Leave (1936) and Convention No. 132 Annual Paid Leave (1970) (C132) for annual leave. (1) In any case, in relation to the number of leave days and occurrence requirements, a minimum of three weeks must be granted for one year (Article 3 of C132). Workers who have not worked for a year have the right to paid leave in proportion to the period worked (Article 4). ② In relation to the use of annual leave, it may be divided, but should consist of at least two uninterrupted weeks (Article 8) and must be given within one year from the date of eligibility for leave (Article 9). ③ Annual paid leave must be paid during working days (Article 7). ④ For unused annual leave, workers who have worked for the minimum working period (six months) shall be entitled to paid leave, or in lieu of paid leave, shall be compensated (Article 11).[46]

According to the Korean Labor Standards Act, annual paid leave (Article 60) presupposes the use of leave, but specifies compensation when not used.

① Looking at the number of vacation days and the occurrence requirements, 15 days of annual paid leave should be given to workers who work at least 80% of one year. Workers who have worked for at least three years must be given paid leave, plus one day for every two years of continuous work in excess of the first year, with a maximum of 25 days (paragraph 4).

② In the method of use, annual leave should be granted at the time when the worker requests it, but if the leave at the time requested by the worker is seriously disruptive to operation of the business, the period may be changed (paragraph 5). Paid leave can be used continuously over a specific day or several days. Here, if

45) Kim, Hong-Young, Improvement of Annual Leave for Securing Rest, 「Labor Law Research」, First Half of 2016, No. 40, Seoul National University Labor Law Association, p. 165.

46) Park, Il-hoon, 「A Study on the Legal Aspects of the Annual Paid Leave System」, Master's Thesis, Korea University Graduate School, Dec. 2014, pp. 125-140.

the worker requests specific dates (Leave claim right), the employer can adjust it in consideration of the work situation (right to change timing).

③ The guarantee of annual paid leave refers to the leave being granted on working days for the worker (paragraph 5). Therefore, weekly holidays or contracted holidays shall not be included when calculating how much annual leave is used.

④ With respect to compensation for unused annual leave, the leave shall be forfeited if it is not exercised within one year. However, this shall not apply in cases where the worker concerned has been prevented from using the leave due to any cause attributable to the employer (paragraph 7). This means that if a worker fails to use annual paid leave, the employer must pay an allowance for unused annual paid leave.[47)]

B. Related issues

Annual paid leave must also apply to foreign workers.[48)] In the Foreign Employment Act (FEA) Enforcement Rules (Annex 6), the Standard Labor Contract does not specify annual paid leave, which is mandatory under the Labor Standards Act. It prescribes that “items not stipulated in the contract will follow the items stipulated in the Labor Standards Act”. In reality, most business owners do not grant annual paid leave to non-professional foreign workers. A report by Amnesty International in October 2014 states, "No migrant worker interviewed by Amnesty International received any annual leave or annual leave allowance."[49)]

Non-professional foreign workers are also never compensated for annual paid leave. On the other hand, the annual paid leave regulations are applied to professional foreign workers in the same way as they are for Koreans. In 2011, the Supreme Court acknowledged the employment status of native English instructors in a lawsuit over their status filed by 24 native English instructors, and decided that the employer had to pay weekly allowance, annual leave work allowance and severance pay for the working period.[50)] Unused annual leave allowances are also to be reflected in the average wage for calculating severance pay. The right of non-professional foreign

47) Supreme Court ruling Dec. 26, 2013: 2011 Da 4629 (Unused annual paid leave allowance is wage); Lee, Su-yeon, “Ensuring Labor and Universal Rights of Foreign Women Workers,” p. 112; Ministry of Employment and Labor, "Employment Permit System," p. 25.

48) Choi, Hong-Yeop, “Long-term Employment of Foreign Workers,” Labor Law No. 48, Korean Labor Law Association, Dec. 2013, p. 444.

49) Amnesty International, “Exploitation and Forced Labor of Foreign Migrant Workers in the Agricultural Industry”, Document No. ASA 25/004/2014, Oct. 2014, p. 30.

50) Supreme Court ruling Jun. 11, 2015: 2014 Da 88161 (Employment status of native English instructors)

workers to annual paid leave must be enforced, and if they do not use annual paid leave, they must be paid an allowance equivalent to the number of annual paid leave days. When employment is terminated, any unpaid annual leave allowance and severance pay reflected in average wage calculation can be recalculated and the payment made for the difference, with the employer paying their final wages and allowances within 14 days after the date the employment is terminated. Any delay in payment shall be subject to 20% interest per year as defined by the Labor Standards Act (Article 37).

3. Minimum Wage

A. Application to foreign workers

The purpose of the Minimum Wage Act (MWA) is to provide stability to workers' financial situation and improve workforce quality by guaranteeing a minimum level of wages. It applies to all businesses or workplaces (Article 1 and 3). The Labor Standards Act applies some regulations to businesses or workplaces that employ five or more permanent workers, while the Minimum Wage Act applies to all workplaces with at least one worker. The MWA also applies to foreign workers, including overseas Korean workers. The MWA does not apply to additional allowances for overtime, holiday work or night work, and meal or housing allowances, but fixed and regularly-paid meal allowances are considered ordinary wages (Articles 5 and 6).

B. Related issues

Disputes in standard work contracts for non-professional foreign workers are often around an employer deducting the cost of lodging from ordinary wage. According to recent MOEL administrative guidelines[51], meal allowances can be deducted from wages, but the limit is 20% of the monthly ordinary wage. As a result, wages can be withheld for accommodations and meals. In fact, this can be seen as a violation of the principle of full payment of wages.[52] In addition, foreign workers in rural areas are often excluded from standards on maximum working hours, rest and holidays under Article 63 of the Labor Standards Act.[53]

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51) MOEL, "Working Guidelines on Accommodation and Housing for Foreign Workers and Collecting Related Costs", Office in charge of Foreign Workers, Feb. 6, 2017.

52) Article 43 of the LSA and Supreme Court ruling Oct. 23, 2001: 2001 da 25184; Lee, Soo-yeon, "Work from Female Foreign Workers and their Universal Rights," p. 113.

53) Amnesty International, "Exploitation and Forced Labor of Foreign Migrant Workers in the Agricultural Industry",

4. Evaluation

The employment conditions of non-professional foreign workers are particularly poor, and many violations of the Labor Standards Act continue to occur.[54]

In principle, the working conditions set forth in the Labor Standards Act are to be applied to all workers, regardless of whether they are domestic or foreign workers. In reality, however, non-professional foreign workers are often discriminated against in working conditions. Differences may exist because of language and work proficiency, but this difference is relatively small and the present situation amounts to overall discrimination by nationality.[55]

Non-professional foreign workers, unlike their domestic counterparts, are paid minimum wage regardless of the length of their service. Annual paid leave, which is guaranteed under the Labor Standards Act, is not enforced for them, and almost no compensation is paid for unused annual paid leave. Deducting the cost of accommodation and meals while paying the minimum wage brings with it the possibility that the full payment principle is violated. Farming and fishing villages, particularly, often do not pay the monthly wage specified in the standard labor contract in the off-peak seasons.

III. Collective Labor Relations

1. Guarantee of the Three Labor Rights

A. Application to foreign workers

The purpose of establishing a union is to improve working conditions through the exercise of the three labor rights. 'Working conditions' refers to the contents of labor contracts such as wages and working hours, and 'other economic and social status of workers' refers to the overall living profits of workers including working conditions such as welfare and social security within the company.[56]

Foreign workers cannot afford to improve working conditions at the current minimum wage unless they ask for a wage increase through collective activities of the union. Therefore, to improve their working conditions, it is necessary to establish Labor Unions and engage in such collective activities. Foreign workers shall also be

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p. 30.

54) Choi, Hong-yeop, "A Task for Promoting Human Rights for Foreigners in the New Government," 2017 Immigration Symposium, Korea Immigration Society, Jun. 6, 2017, p. 199.

55) Lee, Jun-il, 「Human Rights Act - Social Issues and Human Rights」, 7th Ed., Hong-mun-sa, Aug. 2017, p. 4.

56) Kim, Hyung-bae, "Labor Law", 24th Ed., Park-young-sa, 2015, p. 131.

entitled to the right to independent association, the right to collective bargaining, and the right to collective action (the three labor rights) guaranteed under Article 33 (1) of the Constitution. Foreign workers can join a Labor Union or create a union consisting only of foreigners.

Until the recent ruling, the Ministry of Employment and Labor stated that it was impossible for illegal workers to establish or join a Labor Union.[57] In connection with this case, on April 24, 2005, 91 foreign workers living in Seoul, Gyeonggi, and Incheon sat up the Seoul Gyeonggi Incheon Migrant Workers' Union and submitted a report of establishment to the Seoul Regional Labor Office, but their report was rejected. Then, the migrant Labor Union filed a lawsuit against the Labor Office in 2005 for its rejection, but the regional court dismissed their lawsuit. However, the Appeal Court and the Supreme Court canceled that dismissal.[58]

The lawsuit against the rejection of union establishment was finally decided by the Supreme Court on 25 June 2015 along with the decision of the High Court that a union of foreign workers which included illegal workers was acceptable as a legitimate labor union so as to guarantee the three labor rights. The Supreme Court stated, “According to the former Labor Union Act, workers are those who provide work under subordinate relations with others and live on wages in return. This should include not only those employed by a particular employer, but also those who need the three labor rights protected, including those who are temporarily unemployed or looking for work.” It recognizes the broader concept of workers in the Labor Union Act than that found in the Labor Standards Act, and recognizes those living on wages, temporary unemployed, and even job seekers that do not belong to a specific workplace.[59]

Regarding the violation of the Immigration Act, the Supreme Court stated, “The Immigration Act is to prohibit the actual act of hiring foreigners without employment qualifications. It is hard to prohibit legal effects such as rights under labor laws accorded to workers in a working relationship already established.”[60] Even though a foreign worker is an illegal worker, the court has confirmed that they have the right to enjoy workers' rights under Labor Union Act.

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57) The position of the MOEL and the First Deliberation was that the illegal workers could not have the three labor rights recognized (Seoul Administrative Court ruling on Feb. 7, 2006: 2005 goohap 18266: Union rejected).

58) Supreme Court ruling on Jun. 25, 2015: 2007 doo 4955 (Labor Union of illegal foreign workers recognized.)

59) Lim, Jong-Ryul, “Labor Law”, pp. 53-55; Korean Labor Law Research Group, “A Commentary on the Trade Union and Labor Relations Adjustment Act” (I), Park-Young-Sa, 2015, p. 75.

60) Supreme Court ruling on Jun. 25, 2015: 2007 doo 4955 (Labor Union of illegal foreign workers recognized.)

B. Related issues

Foreign workers can also seek to improve their working conditions by forming Labor Unions and signing collective agreements through collective bargaining.[61] Indeed, it is not easy for individual foreign workers to receive remedy for disputes from an employer. Language is only part of the problem. The real issue is often to the vulnerability to disadvantageous retaliation by that employer. One Labor Union activity is to allow foreign workers to protect themselves. For this reason, it is a justifiable solution for foreign workers to establish Labor Unions to secure and improve working conditions.

In fact, some other foreign workers (native English speakers) established a labor union in Avalon Institute in Yeonsu-gu, Incheon in September 2009, and secured better working conditions through collective bargaining.[62] In November that year, when six native English instructors received late overtime pay from their employer upon orders from the Ministry of Employment and Labor, the employer of the school fired the lead instructor. As a result, concerned about their own job security, the remaining five English instructors set up a labor union to guarantee fair treatment.[63] The labor union of these English instructors was established under the protection of the Labor Union Act in Korea, and collective agreements were also signed through collective bargaining. However, the institute recruited new native English instructors on the premise that they would not join the labor union, and the original instructors' contract periods expired eventually, so the number of union members gradually decreased to nothing. Looking at the process of establishment, activity, and extinction of the native instructor's union, it is confirmed that the right to exercise the three labor rights is difficult in reality for foreign workers.

There has been much debate about the recognition of unions established for illegal foreign workers. The logic behind such recognition is that, first, foreign workers without qualifications for employment can also exercise the three labor rights to improve working conditions because they are still workers under the Trade Union & Labor Relations Adjustment Act ("Labor Union Act").[64] Second, under the Immigration Act, the determination of an illegal stay is only for enforcement purposes, and the

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61) Lim, Jong-Ryul, "Labor Law", p. 51.

62) ① Report on the establishment of a labor union (Director of Yeonsu-gu, Incheon Metropolitan City): Document number - Regional Economic Division-40378, Nov. 23, 2009; ② Jung, Bong-soo, "Establishment of Foreign Instructor Labor Union," Labor Law Magazine, January 2010; "Collective Agreement with Foreign Instructor Union," Labor Law Magazine, August 2010, ③ Incheon Regional Labor Relations Commission, "Application for Mediation of Labor Disputes in Avalon Education Union (2010 Mediation 6)", May 13, 2010.

63) Jung, Bongsoo,「A Study on the WorkerWorker Status of Native Korean Instructors」, Master's Thesis, Graduate School of Labor, Korea University, Dec. 2013, p. 87.

64) Jun, Hyung-Bae, "Labor Rights of Foreign Workers," Korean Labor Law Review, No. 18, Korean Society of Comparative Labor Law, Apr. 4, 2010, p. 150.

basic rights of foreign workers must not be restricted.[65] Third, restricting the three labor rights for illegal workers can be said to induce illegal employment of foreigners and human rights violations and abuses.[66] The logic of not recognizing a labor union of illegal workers or restricting the three labor rights is as follows. First, a labor union is to improve working conditions through collective bargaining. Illegal workers cannot improve their working conditions because they are not guaranteed by law.[67] Second, since the activities of labor union officers who are illegal workers, are restricted to the exercise of the three labor rights, it can be said that the activities of unions can be related to political movements requiring revision of the Immigration Act. Third, it is doubtful whether a union of illegal workers can be protected by Labor Union Act, while it is possible for illegal workers to join existing Korean workers' unions. So even if unions of illegal workers are not recognized, such workers can still join and be active in an existing union.[68]

The Supreme Court recognizes the right of a union of illegal foreign workers to exist because illegal workers are still workers as defined by the Labor Union Act, regardless of whether they are foreigners, or whether they are eligible for employment.[69]

2. Vitalization of the Labor-Management Council

A. Application to foreign workers

The labor-management council under the Act on the Promotion of Workers' Participation and Cooperation (hereinafter referred to as the "Workers' Participation Act") is designed to seek industrial peace and contribute to development of the national economy by promoting the common interests of labor and management through the participation and cooperation of both workers and employers (Article 1 of the Workers' Participation Act). The labor-management council is not intended to maintain and improve working conditions through confrontational struggles with the labor union, but to establish a cooperative relationship between labor and management through participation and cooperation.[70]

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65) Supreme Court ruling Sep. 15, 1995: 94 noo 12067 (Application of Industrial Accident Compensation Insurance to illegal foreign workers), which defined the nature of the Immigration Act as an enforcement regulation; Choi, Hong-Yeop, "The Current Status and Issues of Foreign Employment," Labor Law Research, Seoul National University Labor Law Research Association, Dec. 2008, p. 207.

66) Kim Sun-il, "Establishing a Labor Union for Unemployed Foreign Workers," 35, Judicial Development Foundation, Mar. 3, 2016.

67) Park, Jong-Hee / Kang, Sun-Hee, "Operation and Improvement of the Legal System on Protecting the Human Rights of Migrant Workers," Korea Law, Vol. 50, Korea University Law Institute, 2008, p. 436; Jeon, Yun-gu, "Legal Status of Foreign Workers in the Prohibition of Discrimination," Korean Labor Law Review, No. 28, Korean Society of Comparative Labor Law, Aug. 8, 2013.

68) Kim, Sun-il, "Establishing a Trade Union for Unemployed Foreign Workers," 35, pp. 374-375.

69) Supreme Court ruling Jun. 25, 2015: 2007 doo 4955 (Trade union of illegal foreign workers recognized.)

Labor-management councils have the following characteristics that differentiate them from a labor union: First, there is a legal requirement to set them up in businesses or workplaces employing 30 or more workers (Article 4). Second, the function is to have management participate. The reporting obligation of the employer is to share information with the worker representative on matters relating to overall management plans and performance, quarterly production and performance matters, and manpower planning (Article 21). Third, the labor-management council is obliged to establish a dual function regardless of whether a union is established (Articles 11, 18 and 31).[71] Therefore, the labor-management council, which is legally mandated to establish a cooperative labor-management relationship, can take advantage of its function as a mandatory organization within the workplace.

Through the labor-management council system, foreign workers can resolve discriminatory treatment, unpaid wages, unfair dismissal, and industrial accidents through internal workplace remedies. Foreign workers also have the right to represent the workers, and have the right to be elected by workers to represent foreigners in the labor-management council as representatives, and the right to elect workers' members (Article 6). Since the labor-management council has procedures for handling worker grievances, claims from foreign workers that their rights are being infringed can be settled through labor-management consultations (Article 20). In addition, in the workplaces with more than 30 workers, a labor-management council is required to establish a grievance handling committee (Chapter 5). An employer must notify the relevant worker of any actions taken and the results of other processing within 10 days of hearing grievances (Article 28).

B. Related issues

Labor-management councils are limited in the relief they can offer foreign workers regarding rights infringements, as such councils cannot force a decision regarding the grievance. Instead, they can only make suggestions to the employer, who then decides what to do. In Chapter 5 of the Workers' Participation Act, while the employer has to engage in the grievance-handling process and notify the worker of any action within 10 days of hearing the grievance, there are no legal penalties if the employer refuses to do anything about the grievance. This lack of penalties means there is a limit to internal remedy for grievances (Article 28).

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70) Kim, Hyung-bae, "Labor Law", p. 1231.

71) Kim, Hyung-bae, "Labor Law", p. 1232; Ha, Gae-rae, "The Collective Labor Relations Act", Joongang Kyungjae, 2016, pp. 680-681.

By properly implementing the Workers' Participation Act in the workplace, companies can pursue sustainable growth and development while protecting foreign workers' basic rights.

3. Evaluation

Exercise of the three labor rights is the only way for foreign workers to improve their working conditions. The law sets minimum standards only, requiring union activity for wage hikes or improvements to working conditions. Foreign workers can, of course, establish Labor Unions, demand collective bargaining and go on strike to improve working conditions. Even illegal workers can establish and join Labor Unions. However, there are restrictions on behavior for illegal workers as they are violating current immigration law, and Labor Union activities may be limited by the political activities of foreign workers. Nevertheless, foreign workers need to be able to exercise their labor rights as their working conditions will not improve without a union.[72)]

The Workers' Participation Act aims for the fulfillment of joint labor-management interests through participation and cooperation, making cooperative relations possible for both workers (including foreign) and employers. Therefore, the labor-management council system, which is mandatory at workplaces with at least 30 workers, must be established. If foreign workers are given the opportunity to participate as worker committee members, they can deal with the grievances of foreign workers, improve working conditions, improve productivity, and protect worker welfare and rights.

IV. Social Insurances and Insurances Exclusive to Foreign Workers

1. Social Insurance for Foreign Workers

There are four major insurances: Industrial Accident Compensation Insurance, Employment Insurance, National Health Insurance, and the National Pension Plan.

72) Roh, Jae-cheol, 「A Study on the Legal Status and Protection of Foreign Worker Rights」, Dong-A University PhD Thesis, Dec. 2009, pp. 150-151.

<Table 1> Social Insurances and their Application to Foreign Workers

		Non-professional foreign workers (E-9)	Oversea Koreans H-2, F-4	Professional foreign workers E-1～E-7	Illegal workers
Industrial Accident Compensation Insurance		Applied	Applied	Applied	Applied
Employment Insurance	Unemployment allowance	Optional	Optional	Optional	Not applied
	Vocational development, Job security	Applied	Applied	Applied	Not applied
National Health Insurance		Applied	Applied	Applied (exceptions allowed)	Not applied
Long-term Care Insurance		Excluded	Visiting &Working: excluded; Overseas Korea: Applied	Applied (exceptions allowed)	Not applied
National Pension		Applied	Applied	Applied (Reciprocal)	Not applied

Source: Choi, Hong-yeop, “Social Security of Foreign Workers,” p. 175; Roh, Jae-cheol and Ko, Jun-ki, “Problems in and Improvements to Social Insurance Law for Foreign Workers,” p. 126.

(i) Industrial Accident Compensation Insurance applies to foreigners as well, but the remaining social insurances vary in application. (ii) Regarding Employment Insurance, most foreign workers stay in Korea temporarily, so it is often optional. (iii) National Health Insurance is naturally applicable if a foreign worker is employed at a workplace. (iv) National Pension is naturally applied in principle, but the principle of reciprocity means it varies in accordance with relations with each foreign country.

The following describes in detail the application of social insurances with foreign workers.

A. Industrial Accident Compensation Insurance (IACI) Act

IACI premiums are fully paid by the employer, and are calculated by multiplying the total income of all workers in the workplace by the insurance rate announced by the government according to the business’ risk level. In applying the industrial accident insurance premium rate for the same business, if the premium benefits to workers exceed 85% or less than 75% of the previous three years of premium payments, the premium rate applied to the business is determined up to 50% higher or lower for the next business year.[73] As a result, industrial accident insurance premiums may increase the following year if a lot has been paid out in IACI benefits, which will affect the

company's intention to apply to IACI as it can expect higher premiums.[74]

Insurance benefits shall be paid at the worker's (or survivor's) request if a worker at a workplace covered by IACI has an injury, illness or accident requiring at least four days of medical care. Types of insurance benefits include nursing care, leave of absence, sick compensation pensions, disability, survivor, nursing care, funeral expenses, and vocational rehabilitation.

(1) Application to foreign workers

Since the IACI Act stipulates in Article 1 (Purpose) that its purpose is to "compensate workers for work-related accidents promptly,"[75] foreign workers must be protected. Regardless of their eligibility for working visas, all are covered by the IACI Act. If a foreigner is injured while providing work, whether he or she is an industrial trainee or an illegal foreign worker, the accident will be compensated for as an industrial accident.[76] This has been confirmed by a Supreme Court case.[77] Workers are subject to workers' compensation in the event of a work injury, regardless of whether they are Korean workers or illegal workers. The Supreme Court has made it clear that illegal stays are subject to crackdowns, but that illegal residents should also be covered by industrial accident insurance in the sense that workers must be protected by labor law for labor already provided.

The IACI Act is a social insurance system in which the State carries out compensation on behalf of the employer under the Labor Standards Act if a worker is injured or ill from work. Accident compensation is applied to all businesses or workplaces using workers, taking into account the risk, size and place of business. The following types of work are not covered by the IACI Act (Article 6): ① household service ② businesses with fewer than five workers in agriculture, forestry, fishing and hunting, etc.[78] Therefore, in the event a business or workplace is not covered by the IACI Act and has an industrial accident requiring medical treatment for three days or less, the Labor Standards Act requires the employer to compensate for the work

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73) Lee, Sang-Kook, "The Industrial Accident Compensation Insurance Act (I)", 3rd Ed., Daemyung Publisher, Jan. 2014, p. 554.

74) Jeon, Kwang-seok, Park, Ji-soon and Kim, Bok-ki, "The Social Security Act", 4th Ed., Shin-jo-sa, 2017, p. 188.

75) For the purpose of Article 1 of the relevant laws of the Four Major Social Insurance Acts, the IACI and employment insurance protect workers, and national pension and national health insurance protect citizens. Therefore, the IACI is naturally applied to foreigners as workers.

76) Jeon, Kwang-seok et al, "The Social Security Act", p. 163; Choi, Hong-yeop, "Social Security of Foreign Workers," pp. 158-159.

77) Supreme Court ruling Sep. 15, 1995: 94 noo 12067 (Withdrawal of decision on disapproval of medical treatment): This is the first case confirmed as a work-related accident involving illegal industrial trainees. "The immigration control statute restricts employment of foreigners only to prohibit the actual act of hiring those without employment qualifications. It is hard to think that even the effects of legal rights, such as the rights of labor laws, will be prohibited."

78) Enforcement Decree to the IACI Act, Article 2 (Exclusion of Application of Law), Paragraph 6.

injury/illness.[79]

(2) Related issues

There are legal and environmental limitations in relation to industrial accident insurance and foreign workers. Legal restrictions are related to application of the Industrial Accident Compensation Act, as workplaces hiring fewer than 5 workers and engaged in agricultural, livestock, and fishery work receive limited coverage for accidents are excluded from work-related accident compensation.[80] Most agriculture and livestock farming workplaces employ fewer than 5 workers, so there is no industrial accident insurance coverage, and the employer must deal with work accidents him or herself. As an individual employer has a limited amount of property, an injured or ill worker may not be able to receive sufficient compensation.[81]

The environmental limitations of the IACI Act are as follows. First, the industrial accident rate among foreign workers is higher than among workers who are Korean nationals. The reason is that foreign workers do not communicate well in Korean, so safety instructions are not delivered correctly, and they often work in poor workplaces that do not have industrial safety facilities.[82] Second, illegal foreign workers are at risk of forced deportation, so they do not want to get medical treatment unless they are seriously injured. Companies do not want to apply for work-related compensation, but only pay for medical treatment, leaving foreign workers without Industrial Accident Compensation Insurance coverage and vulnerable to permanent effects of injuries.[83] Third, when an industrial accident involves a foreign worker, the employer is afraid that his/her IACI premiums will increase or he/she may be audited by the Labor Office due to work-related accidents frequently occurring at the workplace. There is also the risk of disadvantageous consequences from the Labor Office, and so they pay the medical fees directly for foreign workers. This is often accepted by foreign workers because they do not know the industrial accident compensation system.[84]

B. Employment Insurance Act (EIA)

Employment insurance premiums are classified into unemployment benefits and premiums for employment stability and vocational skills development projects.

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79) Korea Labor Welfare Corporation, "Handbook of Workers' Compensation and Employment Insurance in 2019 and Employment," pp. 7-8.

80) Noh, Ho-Chang, "Migrant Women and Social Security Law," Journal of Migration and Gender Law," Aug. 2017, pp. 26-27.

81) Amnesty International, "Exploitation and Forced Labor of Migrant Workers in the Korean Agricultural Industry," pp. 36-37

82) National Human Rights Commission of Korea, "Survey of the Human Rights Situation for Foreign Workers in the Construction Industry," Human Rights Situation Survey 2015 Research Report, p. 9.

83) Choi, Hong-yeop, "Social Security for Foreign Workers," Democratic Law No. 22, The Korean Society for Democratic Law, 2002, p. 160.

84) Choi, Hong-yeop, "Social Security for Foreign Workers," pp. 160-161.

Unemployment benefit premiums are borne by both workers and employers, while employers are responsible for employment security and vocational skills development projects (Article 6 of the EIA).[85] Unemployment benefits are payable only when a worker is involuntarily unemployed and seeking work.[86]

(1) Application to foreign workers

Employment insurance grants benefits to eligible people to prevent undue hardship from unemployment, promote employment, develop the vocational skills of workers, and promote job-seeking activities. It thereby contributes to the economic and social development of the nation (Article 1 of the EIA). Employment insurance applies to all businesses or workplaces in principle, with exceptions in consideration of the size of business. It applies to all workers because its main purpose is to provide stability for unemployed persons, so does not apply if those persons do not need help or are protected by other insurance. Those excluded from employment insurance are: ① 65 years of age or older, ② Those working fewer than 60 hours a month (15 hours a week), ③ Civil servants under the National Civil Service and Local Public Service Act, ④ Those to whom the Private School Teachers Pension Act applies, ⑤ Sailors under the Seafarers Act, ⑥ Foreign workers who are not eligible for residency. However, foreigners with status of residence may subscribe and benefit.

As previously stated, employment insurance is divided into unemployment benefits and employment stability and vocational skills development projects. Unemployment benefits of course include unemployment benefits, but also maternity leave allowances and childcare leave benefits. Therefore, foreigners cannot receive maternity leave benefits and childcare leave benefits as well as unemployment benefits if they do not have employment insurance. If a foreign worker who is staying for employment in Korea does not intend to receive unemployment benefits, he or she may not subscribe.[87]

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85) Korea Labor Welfare Corporation, "Working Guide for Industrial Accident Compensation Insurance and Employment Insurance in 2019", pp. 7-46.

86) Employment Insurance Act. Article 40 (Eligibility Requirements for Job-Seeking Benefits)

1. The unit period of insurance under Article 41 during the 18-month period (hereinafter referred to as "base period") prior to the date of separation shall be not less than 180 days in total;
2. Despite his/her willingness and ability to work, he/she shall be out of employment (including cases where he/she operates a business for the purpose of making profit; hereinafter the same shall apply in this Chapter and Chapter 5);
3. The reasons for separation shall not be any of the reasons for restricting eligibility for benefits under Article 58;
4. He/she shall be actively seeking reemployment;

87) Korea Labor Welfare Corporation, "Working Guide for Industrial Accident Compensation Insurance and Employment Insurance in 2019". Unemployment allowance is excluded for foreign workers in principle. However, foreigners are also eligible in the following cases. (Enforcement Decree to the Employment Insurance Act, Article 3: Excluded Workers)

(1) Foreigners pursuant to Article 12 of the Enforcement Decree to the Immigration Control Act who have status of residence (D-8), corporate investment (D-8), and trade management (D-9) in accordance with the principle of

<Table 2> Foreign Worker Eligibility for Employment Insurance (as of Dec. 2016)

Status of Sojourn	Application	Status of Sojourn	Application
A-1 (Diplomat)	×	E-1 (Professor)	○ (Optional)
A-2 (Government official)	×	E-2 (Foreign language instructor)	○ (Optional)
A-3 (Agreement)	×	E-3 (Research)	○ (Optional)
B-1 (Visa exemption)	×	E-4 (Technology transfer)	○ (Optional)
B-2 (Tourist/transit)	×	E-5 (Professional employment)	○ (Optional)
C-1 (Temporary news coverage)	×	E-6 (Artistic performer)	○ (Optional)
C-3 (Short-term visit)	×	E-7 (Designated activities)	○ (Optional)
C-4 (Short-term worker)	○ (Optional)	E-9 (Non-professional employment)	○ (Optional)
D-1 (Artist)	×	E-10 (Crew worker)	○ (Optional)
D-2 (Student)	×	F-1 (Visiting or joining family)	×
D-3 (Industrial trainee)	×	F-2 (Resident)	○ (Compulsory)
D-4 (General trainee)	×	F-3 (Accompanying spouse/child)	×
D-5 (Journalism)	×	F-4 (Overseas Korean)	○ (Optional)
D-6 (Religion)	×	F-5 (Permanent resident)	○ (Compulsory)
D-7 (Supervisor)	○ (Reciprocal)	F-6 (Marriage to Korean Citizen)	○ (Compulsory)
D-8 (Corporate investor)	○ (Reciprocal)	G-1 (Miscellaneous)	×
D-9 (International trade)	○ (Reciprocal)	H-1 (Working holiday)	×
D-10 (Job Seeking)	×	H-2 (Working visit)	○ (Optional)

Source: Korea Labor Welfare Corporation, “Working Guide for Workers and Workers' Compensation and Employment Insurance 2017,” p. 18.

※ ‘×’ denotes those foreigners ineligible for employment insurance.

Professional foreign workers (E-1 to E-7) can continue to stay on their job search visa (D-10) for six months after termination of their employment contract. However, unemployment benefits are limited for non-professional foreign workers (E-9) even if

reciprocity.

(2) However, the applicant whether he/she can join or not, shall be subject to the discretion of the applicant with the status of residence under Article 23 (1) of the Enforcement Decree to the Immigration Control Act.

(3) Residents (F-2), permanent residents (F-5), and resident spouses (F-6) who are allowed to stay for long periods of time under Article 12 of the Enforcement Decree to the Immigration Control Act) are eligible for employment insurance.

they subscribe, as they are subject to compulsory deportation if they cannot find another job within 3 months after termination of their previous employment contract (Article 25, paragraph 3 of the Foreign Employment Act). Unemployment benefits are the basic item of social insurance in view of the last hold that workers can depend on when there is no economic return due to unemployment. Therefore, foreign workers should also be able to protect their right to live during a period of unemployment by subscribing to the unemployment benefit portion of employment insurance mandatory rather than optional.

Premiums for employment security and vocational skills development projects under Employment Insurance are all paid for by the employer. Therefore, workers can participate in a variety of education related to the development of their vocational skills, and can develop their own education programs with the support of employment insurance. The amount a company can receive for employment security and vocational skills development projects shall be less than the amount paid in employment insurance premiums (240/100 for workplaces receiving preferential support).[88)]

(2) Related issues

Systematic support for vocational skill development of foreign workers is necessary.[89)] This will encourage the retention of skilled and professional workers rather than just non-skilled workers. In addition, many labor-management conflicts and industrial accidents occur due to insufficient communication abilities and a lack of understanding of Korean culture. Therefore, policy consideration is required for the development of vocational skills for foreign workers by utilizing the vocational skills development project under Employment Insurance.[90)] Article 43 of the UN Convention on the Rights of Foreign Workers states that foreign workers shall enjoy equal treatment with their host country workers in relation to "① the use of vocational guidance and job placement services, ② the use of vocational training and retraining facilities and institutions."[91)] In Germany, foreign workers are required to attend at least 600 hours of inclusive education.[92)]

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88) Jeon, Kwang-seok, "Korean Social Security Law", Jip-hyun-jae, 2016, pp. 416-420.

89) Insurance premiums for employment insurance are divided into unemployment benefits and premiums for employment security and vocational skills development projects. Fifty percent of the unemployment benefit portion is paid by workers and 50% by employers, but foreign workers are also beneficiaries of the employment security and vocational skills development projects paid by the employer. Reference: Article 16-10 (Report on Total Amount of Remuneration, etc.) of the Act on Collection of Premiums for Employment Insurance and Industrial Accident Compensation Insurance.

90) Jeon, Gwang Seok et al, "Social Security Act", p. 197.

91) Choi, Hong-yeop, "UN Convention on the Rights of Migrant Workers and the Reality of Labor Law in Korea," Youngnam Law No. 31, Yeungnam University Institute of Law, Oct. 2010, pp. 525-528.

92) Yoo Gil-sang and three others, "Research on Reorganization of Management System for Foreign Workers," Ministry of Employment and Labor, December 2012, p. 157.

If a worker chooses to subscribe to Employment Insurance, he/she cannot get the basic benefits provided by social insurances. Professor Kwang-seok Jeon has stated, “It is not reasonable to limit beneficiaries simply because they are foreign subscribers to social insurance. The Social Insurance Act regulates the legal relationship between paying premiums and providing benefits should be equivalent in the event of a social risk. Therefore, in the Social Insurance Act, the legal relations related to paying premiums should be integrated with the legal relations related to payment of salaries.”[93)]

For non-professional foreign workers, it is difficult to receive stable unemployment benefits because Article 25 (3) of the Foreign Employment Act stipulates that they must leave the country if they cannot find employment within three months after termination of their employment contract. Increasingly, however, the importance of unemployment benefits is on the rise due to introduction of the extension of the long-term stay in Korea. Foreign workers must also be enrolled in unemployment benefits before they can receive maternity leave benefits or childcare leave benefits. Therefore, it is necessary to review the optionality for foreign workers in subscribing to employment insurance.[94)]

C. National Health Insurance Act (NHIA)

National Health Insurance aims to improve public health and social security by providing insurance benefits for the prevention, diagnosis, treatment, and rehabilitation of injured and ill people, as well as assist with costs of childbirth and death, and promote health (Article 1 of the NHIA). National Health Insurance is a compulsory insurance that is divided into workplace and regional insurers. Currently, it covers about 97% of all citizens, with other medical services covered under the Medical Benefits Act, which is a form of public assistance for beneficiaries of the Basic Livelihood Subsidy.[95)] The self-employed who do not employ workers, daily workers employed for less than one month, and part-time workers who work less than 60 hours a month are not required to subscribe.[96)]

The insurance premiums for subscribing workers are an amount calculated by multiplying the standard monthly salary by the premium rate, with 50% of the premiums borne by workers and 50% by employers (Article 69). Therefore, the premiums are paid according to the individual's standard monthly salary.[97)]

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93) Jeon, Kwang-seok, “The Korean Social Security Law”, Jip-hyun-jae, 2016, p. 197.
94) Choi, Hong-yeop, “Social Security of Foreign Workers,” p. 168.
95) Roh, Ho-chang and others, “Social Security of Foreigners,” Immigration Law, p. 468.
96) National Health Insurance, “National Health Insurance Operational Guide in 2019”, pp. 33-36.
97) National health insurance premiums are 6.46% of monthly income, with 3.23% each respectively to the employer and the worker. And long-term care insurance premium is added 8.51% respectively to the employer and the worker based upon monthly national health insurance premiums.

Long-term care insurance is a social insurance system separate from National Health Insurance. It was introduced in July 2008 due to aging of the population and the necessity to care for the elderly. It provides essential care services such as face washing, bathing, meals, assistance with using the toilet, and nursing care for elderly persons unable to move alone due to age-related diseases such as dementia and stroke.[98] Long-term care insurance premiums are equivalent to 8.51% of National Health Insurance premiums.

(1) Application to foreign workers

All business and local subscribers covered by National Health Insurance are required to pay premiums. However, foreign workers (E-9) and visiting Korean workers (H-2) under the employment permit system in the Foreign Employment Act and in Article 7 (4) of the Long-Term Care Insurance Act can be exempted through a separate application process through a nursing care insurance subscriber. All other foreign workers who do not have a basis for exemption are automatically subscribed to long-term care insurance and pay the premium along with the health insurance premium.

(2) Related issues

Foreigners and overseas Koreans are eligible for health insurance if their status of residence is recognized by relevant laws. Employers of native English instructors are required to subscribe for the 4 social insurances, but they often fail to do so for National Pension and National Health Insurance.[99] This is because there is no real penalty for failing to subscribe to National Health Insurance. If non-Koreans are not workplace subscribers, they must be classified as local subscribers and join the compulsory system. However, if they sign contracts with new employers every year, they will not be protected as a local subscriber because their place of residence is unclear.

Article 109 of the NHIA, paragraph 4, states that foreign workers who are staying illegally are not covered by health insurance. Although Korea has about 366,566 illegal workers as of June 2019, this exclusion means they (and their families) find it difficult

98) Article 2 (Definition) of the Long-Term Care Insurance Act. 1. "Elderly people," etc. are those aged 65 years or older or those under 65 who have age-related diseases such as dementia or cerebrovascular disease. 2. "Long-term care benefits" means services such as physical activities, household support or care, or cash to pay for such assistance for those who are deemed unable to carry out daily necessary activities on their own for the previous six months.

99) Lee, Byung-Woon / Go, Jun-ki, "The Current Status and Problems of Health Care for Foreign Workers," Hanyang Law, 31, Hanyang Law Society, Aug. 2010, p. 333.

to receive adequate care for chronic conditions, childbirth and other health issues due to the cost of medical care.[100] Medical insurance should also cover illegal workers so as to guarantee the basic rights of human beings.[101]

D. National Pension Act (NPA)

The National Pension Scheme is a system that pays old-age pensions to citizens who reach a certain age, or pays the pension to the citizen's family if the pensioner is disabled or dies (Article 1 of the NPA). The National Pension Scheme was enacted on January 1, 1988, when the NPA came into effect. Initially, it applied only to workplaces hiring 10 or more workers, but then gradually expanded to every company. (Article 6). However, civil servants, soldiers, and private school workers subject to the Civil Service Pension Act, the Military Pension Act, and the Private School Pension Act, respectively, are excluded from membership. The National Pension Plan is divided into workplace subscribers and regional subscribers, and it is mandatory for workplaces that use one or more workers at all times to be subscribed. Excluded from workplace subscribers are the self-employed who do not employ workers, daily workers employed for less than one month, non-employed workers, or part-time workers who work less than 60 hours a month. Premiums are in proportion to income, with 50% borne by the worker and 50% by the employer.[102] The types of benefits under the NPA include old-age pension, survivor's pension, disability pension, and lump-sum refund.[103]

(1) Application to foreign workers

Foreigners working in workplaces are subject to the National Pension Act (Article 126) and foreign nationals residing in Korea shall, of course, become business or regional subscribers. However, if the law equivalent to Korea's NPA in the foreigner's country of citizenship does not apply to Republic of Korea nationals living there, the national pension system in Korea corresponding to the national pension shall be taken as the principle of a reciprocity with foreign countries Those not covered by the National Pension Scheme are those here on temporary stay visas or without income.[104]

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100) Lee, Byung-Woon / Go, Jun-ki, p. 335.

101) Choi, Hong-yeop, "Social Security for Foreign Workers," pp. 162-164.

102) As of 2010, the National Pension premium is charged 9% of standard monthly income, which is each distributed to 4.5% respectively to the employer and the worker.

103) National Pension Service, "A Practical Guide to National Pension Workplaces 2019," 2019, pp. 32-36.

104) Excluded foreigners: (1) Those who have stayed without permission to extend their stay in accordance with Article 25 of the Immigration Control Act; (2) A person who has not registered as an alien under Article 31 of the Immigration Control Act or who has been issued an order of forced eviction under Article 59 (2) of the same Act; (3) Status of residence (D-1), Study abroad (D-2), Technical training (D-3), General training (D-4), Religion (D-6), Visiting living (F- 1) Person with companion (F-3) and others (G-1).

<Table 3> Countries with Reciprocal Agreements Regarding National Pensions

Applicable countries (73)	The USA, Canada, Russia, Japan, China and other countries
Workplace-based-only applicable countries (36)	Ghana, Gabon, Grenada, Taiwan, Laos, Lebanon, Mexico, Mongolia, Vanuatu, Venezuela, Belize, Bolivia, Bhutan, Sri Lanka, Sierra Leone, Haiti, Algeria, Ecuador, El Salvador, Yemen, Jordan, Uganda, India, Indonesia, Zimbabwe, Cameroon, Kazakhstan, Kenya, Costa Rica, Ivory Coast, Congo, Columbia, Kyrgyzstan, Thailand, Paraguay, Peru
Non-applicable countries (22)	Nigeria, South Africa, Nepal, East Timor, Malaysia, Myanmar, Bangladesh, Vietnam, Saudi Arabia, Singapore, Iran, Egypt, Cambodia, Pakistan, Georgia, Maldives, Belarus, Swaziland, Armenia, Ethiopia, Tonga, Fiji

Source: National Pension Plan, “A Practical Guide to National Pension Workplaces 2019,” 2019, p. 36.

National Pension applies to foreign nationals when they are employed at a workplace that must subscribe to it. To receive the pension benefit, the foreign national must have paid into the national pension for at least 10 years and reach the age of 60. This is not easy for most foreign workers to do. In this case, a lump-sum refund will be given, which will be handled in accordance with the social security agreement Korea has with that national’s country of citizenship. Lump-sum refunds are only given to those nationals from countries with such social security agreements with Korea (see Table 3-8).

However, since most of the sending countries in the employment permit system do not have social security agreements with Korea, most foreign workers are ineligible for the national pension, so they cannot receive a lump sum refund.[105] In this regard, the

105) Concerning pension entitlements, the Constitutional Court recognizes the property rights by the following logic. “In order for rights under public law to be protected by the constitution's protection of property rights, it must meet the following requirements. First, public rights must be attributed to the rights of individuals and made available to the benefit of the individual (private usefulness). Second, they are acquired not by unilateral benefits of the state but by labor, investment or special sacrifice of the rights of the individual. It should be

failure to receive lump sum refunds despite the inability to receive old-age pension benefits raises the issue of a serious limitation on property rights. It also pays foreign workers in countries that do not. In addition, the National Pension Act was amended in January 2015 in accordance with the decision of the Constitutional Court in recognition of the property value of national pensions (Article 126 of the NPA).[106)]

(2) Related issues

It is difficult for foreign workers to receive the Korean old-age pension because they must contribute for a minimum ten years and then reach the age of 60 (Article 77 of the NPA).[107)] Therefore, foreign workers who do not meet these requirements can receive the national pension benefit as a lump sum refund when they leave the country.

Non-professional foreigners stay for a short time and most return to their home countries within three to five years. In this case, the national pension paid in the meantime will be received as a lump-sum refund. The national pension premium is 9% of a worker's total income, with workers and employers each paying 4.5%. Therefore, application of the National Pension on non-professional foreign workers who are unlikely to receive the benefits is an additional tax on the employer. The old-age pension for non-professional foreigners with short-term stays cannot help them as thjey are leaving Korea before their eligible date.[108)]

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equivalent to the benefits paid (the substantial self-contribution of the beneficiaries), and third, it should contribute to the survival of the beneficiaries. Through these requirements, the right of unilateral benefits of the state, such as social assistance, is excluded from the protection of property rights, and is protected to a degree similar to that of judicial property only if the status of social law is an equivalent to its benefits. Public rights to be received are recognized. In other words, public property rights of that nature are included in the protection of property rights only if the legal status of the public law is so strong that it is comparable to business property rights and deprivation is against the principle of the rule of law." Constitutional Court of Korea decision Jun. 29, 2000: 99 Hunba 289; Constitutional Court of Korea decision on May 28, 2009: 2005 Hunba 20.

106) Jeon, Kwang-seok, "Korean Social Security Law", p. 274. Noh, Ho-Chang, "Immigrant Women and Social Security Law," Journal of Migration and Gender Law, Vol. 9, 2ho, Ehwa Women's University Gender Law Research Center, Aug. 2017, pp. 34-35; Lee, Dahae, "Citizenship and Labor Citizenship to Protect Migrant Workers", p. 175.

107) In accordance with the National Pension Act of 2007 (No. 8541ho), the pension age began to be adjusted from 2015, with 1 year's delayed benefit at each every 5 years, and from 2033, the right to benefits was changed to 65 years old.

108) Lee, Soo-yeon, "Ensuring Labor and Universal Rights of Foreign Women Workers," p. 128.

2. Insurances Exclusive to Foreign Workers

A. Departure Maturity Insurance

Departure Maturity Insurance replaces severance pay but accumulates at the same rate. It is payable when the foreign worker leaves the country(Article 13 of the Foreign Employment Act: FEA). The employer must pay a monthly premium of 8.3% of a worker's monthly ordinary wage stated in the employment permit system (EPS). This is to prevent late payment of severance pay and is limited to non-professional employment (E-9) and visiting overseas Korean workers (H-2) in the EPS.[109] Departure Maturity Insurance is operated in lieu of the retirement allowance under the Retirement Benefit Security Act (RBSA), with the benefits paid to foreign workers when their employment relations end and only if they have worked for at least one year at the same workplace. This second stipulation means that the departure maturity insurance is paid on the premise that the foreign worker is leaving Korea. The Constitutional Court decided that payment of severance pay when leaving Korea would be in line with the purpose of the Foreign Employment Act, even if retirement benefits were paid on the basis of departure, rather than on the premise of terminated employment relations. However, the Court's dissenting opinion stated that severance pay should be paid within 14 days since it is a living wage.[110]

Employers are obliged to subscribe to Departure Maturity Insurance, Guaranty Insurance for unpaid wages, Foreign Workers' Care Insurance and Return-Expense Insurance.[111] When an employer re-employs a foreign worker, he/she shall extend the existing insurance coverage period of the Departure Maturity Insurance and Guaranty Insurance for unpaid wages (Article 13 of the FEA).[112]

If a foreign worker has worked for less than one year after the Departure Maturity Insurance is purchased, the insurance will not be paid to the foreign worker but return to the employer instead. insurance benefit will be returned to the. Since the departure maturity insurance is paid in lieu of retirement allowance, it must be paid within 14 days after employment relations end in accordance with Article 36 of the Labor Standards Act. However, due to the nature of the employment of foreign workers, such insurance must be paid out immediately after the foreign worker goes through airport security.

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109) Lee, Ryong Ryong, "Foreign Workers and Oversea Koreans", Park Moon Gak, 2014, pp. 475-476; Ha, Gae-Rae, "Labor Standards Act", pp. 1031-1032.

110) Constitutional Court of Korea ruling Mar. 31, 2016: 2014 Hunma 367 (Departure maturity insurance accepted as constitutional).

111) If they do not subscribe, they will be fined up to 5 million won.

112) Ministry of Employment and Labor, "2019 Manual of the Employment Permit System", May 5, 2019, pp. 449-487; Jung, Ki-sun, "Foreign Survey on Foreigners in 2013: Employment and Social Life in the Employment Permit System and Foreign Visitation Employment," Ministry of Justice, Immigration and Foreign Policy Division, p. 35; Yu, Gil-sang et al, "Evaluation of the Employment Permit System and Improvement", p. 27.

<Table 4> Insurances Exclusive to Foreign Workers

	Departure Maturity Insurance	Guaranty Insurance	Return-Expense Insurance	Accident Insurance
Purpose	Reduce the burden of severance pay	Preparation against non-payment of wages	Remove the burden of purchasing a return-home ticket before departure	Death, disability or disease not related to work
Sources	Article 13, Enforcement Decree 21	Article 23, Enforcement Decree 27	Article 15, Enforcement Decree 22	Article 23, Enforcement Decree 28
Insurer	Employer	Employer	Foreign worker	Foreign worker
Joining time	Within 15 days from the effective date of the labor contract	Within 15 days from the effective date of the labor contract	Within 80 days from the effective date of the labor contract	Within 15 days from the effective date of the labor contract
Premiums	Monthly deposit: 8.3% of monthly regular wages	For 1 year (15,000 won), 2 years (25,400 won)	Lump sum / 3 installments (400,000-600,000 won); varies by country	One-time payment: 3 years / 20,000 won (differs by age and gender)
Paying the premiums	Insured amount, but if the payment is insufficient, the employer pays the difference.	Unpaid wages are subsidized, up to a maximum 2 million won.	Deposit amount, (if the deposited amount is held for more than 30 months, interest will be paid).	-Death: 30 million won -Disability: 30 million won -Disease (death, disability): 15 million won
Benefits paid	When the foreign worker departs after working for at least one year.	When an employer delays payment of wages.	When the foreign worker leaves the country (except for temporary departures).	Upon death of a foreign worker, or occurrence of disability or disease.

Source: MOEL, 2019 Manual of Employment Permit System, p. 452.

In order to prevent illegal stays, the Departure Maturity Insurance is only receivable when the foreign worker is at the airport to return home. However, if a foreign worker enters the employment permit system and changes workplaces several times in five years, it is discriminatory treatment that the Departure Maturity Insurance cannot be received because he/she did not leave the country. The Constitutional Court deemed the provision constitutional, explaining that it is a reasonable way to prevent human

rights violations if foreign workers become illegal residents in consideration of the purpose of the Foreign Employment Act.[113] However, the dissenting opinion states that "preventing the illegal stay of foreign workers is accomplished by setting the period of payment for the Departure Maturity Insurance, which has the property of retirement allowance, within 14 days of leaving the country. It is difficult to consider this justified because it does not take into account the nature of the retirement allowance".[114] Therefore, when a foreign worker changes workplace, it should be possible to receive the insurance money even if the worker does not leave the country.[115]

B. Guaranty Insurance

The employer is obliged to purchase Guaranty Insurance against late payment of wages for their foreign workers (Article 23). Since this Guaranty Insurance is paid to the foreign workers in lieu of the unpaid wages, the insurance company pays the unpaid wages first, then charges the company for the amount equivalent to the paid arrears. Foreign workers whose wages have been unpaid must first report the fact to the Labor Office of the Ministry of Employment and Labor. However, there is a maximum payout of 2 million won. The amount of wages outstanding will be billed directly to the employer or processed in the same way as for Koreans who have not been paid their wages. In addition, even if a foreign worker receives all unpaid wages through the Ministry of Employment and Labor, it is questionable how effective the Guaranty Insurance will be if it is received through investigation of the Labor Ministry Office. . Therefore, if the employer **approves** the unpaid wages, the wages should be paid to the foreign worker through Guaranty Insurance.

C. Return Expense Insurance and Accident Insurance

Return Expense Insurance is mandatory to reduce illegal stays by encouraging foreign workers to leave the country when their period of stay expires and to help them have the money necessary for returning home (Article 15 of the Foreign Employment Act). Payment of insurance premiums must be made within 80 days of the date of entry (E-9 Non-professional Foreigners) or the start of the labor contract (H-2 Visiting overseas Korean Workers). The benefit shall not be paid for temporary departures, but only if the foreign worker leaves the country due to expiration of the employment contract or expiration of the status of residence.

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113) Constitutional Court of Korea ruling Mar. 31, 2016: 2014 hunma 367 (Departure maturity insurance accepted as constitutional)

114) Constitutional Court of Korea ruling on Mar. 31, 2016: 2014 hunma 367 (Departure maturity insurance accepted as constitutional) Dissenting judges Jung-mi Lee, Lee- soo Kim, and Ki-seok Seo.

115) Roh, Ho Chang, "Normal Review of Some Issues in Foreign Employment," pp. 217-218.

Foreign workers (E-9, H-2 status of residence) must be registered for Accident Insurance within 15 days of the effective date of the labor contract in preparation for death, disability or illness unrelated to work (Article 23). Accident insurance premiums vary depending on gender and age. As insurance premiums are low, insurance benefits are limited. A maximum of 30 million won is paid if a foreign worker dies or acquires a disability, and 15 million won for illness. In other words, if you are hospitalized for a personal illness and receive surgery or long-term care, the benefits from this insurance are not enough to cover such large medical expenses.

3. Evaluation

The four main insurances for foreign workers are granted natural benefits. With Industrial Accident Compensation Insurance, there is insufficient compensation to workers injured/ill from industrial accidents at workplaces hiring fewer than five workers in rural areas. If Employment Insurance is voluntary and foreign workers become unemployed or find another job, most will be excluded from maternity leave or parental leave. Illegal residents are excluded from National Health Insurance coverage. Paying into the National Pension Scheme is mandatory for non-professional foreign workers (E-9), even though it is impossible, under the short-term visa system, for them to stay long enough to be eligible for the benefits. which is another burden that the employer should pay as the employer's burden in premiums. So, the National Pension should be excluded from the mandatory social insurances.

In terms of insurances exclusive to foreign workers, there are many things needing improvement. Although the Departure Maturity Insurance, which is paid in lieu of retirement allowance, is paid on the premise of the worker leaving Korea, even if the foreign worker stays for a long time, he/she may not receive that money. Guaranty Insurance is also limited in effectiveness because it is provided on the premise that the Labor Office confirms that wages have indeed not been paid. The amount of reserves are so small and the limitations so great with Accident Insurance that the benefits are largely inconsequential. Insurance premiums need to be raised to a level that reflects the need.

V. Conclusion

The working conditions stipulated in the Labor Standards Act are governed by the principle of equal pay for equal value work regardless of whether the workers are Korean nationals or not. The principle is that the worker is paid equal to the amount

of work he or she has done. There may be differences between foreigners and domestic workers depending on their language abilities and work proficiency, but when treatment violates the principle of proportional input, this difference can be deemed unjustifiable discrimination.

Foreign workers, unlike Korean nationals, receive minimum wage regardless of their years of service. Annual paid leave, which is guaranteed under the Labor Standards Act, is also not enforced for foreign workers, and there is almost no monetary compensation for unused annual paid leave. In addition, unlike retirement allowance, the Departure Maturity Insurance is paid to foreign workers only upon leaving the country.

The exercise of the three labor rights by foreign workers is the only opportunity to improve their working conditions. The Labor Standards Act sets the minimum standards, but without union activity, wage increases or improvement in working conditions cannot be expected. Since this is the case, foreign workers need to engage in labor union activities. If union membership is restricted, the alternative is to activate the labor-management council system to improve their welfare and access to rights through a large number participating and cooperating.

The social insurances for foreign workers must be insured to protect them in principle. Employment Insurance is not compulsory. Unsubscribed foreign workers cannot receive unemployment benefits, nor Employment Insurance support for maternity leave or parental leave. Non-professional foreign workers should be excluded from application of the National Pension Plan as their short-term visa status does not allow them to meet the requirements to receive old-age pension.

The Work Visa System for Employing Foreign Workers

I. Introduction

Foreign workers are classified according to visa status: (i) non-professional foreign workers, (ii) overseas Korean workers (working-visit workers and overseas Koreans), and (iii) professional foreign workers. Only foreign workers with non-professional and working-visit status are subject to the Act on Employment Etc. of Foreign Workers (hereinafter “Foreign Employment Act”), while overseas Koreans and professional foreign workers are subject to the Immigration Control Act and general labor laws.

Non-professional foreign workers are employed as short-term circulating workers that stay for a certain period based on the Foreign Employment Act to supplement the workforce in Korea. However, overseas Korean workers voluntarily enter the country for economic reasons and are able to stay for a longer time. Companies invite professional foreign workers to work here to harness their professional knowledge, and so employment procedures are complicated but staying long-term is possible. Since foreign workers are introduced to address Korea's needs, it is desirable that they be introduced in a way that maximizes Korea's own interests. Recently, the proliferation of illegal immigrants has raised awareness of the need for more careful management of the foreign employment system. For this reason, I would like to examine specifically the system for employing foreign workers in Korea.

<Table 1> Status of Foreign Employment in Korea

	Total Persons/Percent	(i) Non-professional Workers		(ii) Overseas Koreans				(iii) Professional	(iv) Illegal Workers
Visa Type		E-9 Non-professional	E-10 (Shipcrewmen)	H-2 (Working visit)	F-4 (Overseas Korean	F-5 (Permanent resident)	(Visit/residence (F-1, etc.)	Professor etc. (E-1/E-7)	-
Persons		276,811	16,010	243,339	432,485	90,214	93,571		
Total Persons	**1,523,153**	**292,821**		**859,609**				**47,156**	**323,267**
% of all Foreign Workers	**100**	**19.2**		**56.4**				**3.1**	**21.2**

Source: Ministry of Justice, "Monthly Immigration Statistics", June 2018.

II. Non-professional Workers

1. Eligible Workers & Jobs

Non-professional foreign workers (E-9) are invited from 16 countries such as China, countries from the former Soviet Union, and Southeast Asian countries to supplement SME workforces in Korea's "3D" jobs (dirty, dangerous, difficult). To be eligible for employment, such workers must pass strict selection procedures such as a Korean Proficiency Test, a technical test, and a physical examination to facilitate their adaptation to a Korean workplace.

Non-professional foreign workers were introduced through the General Employment Permit System in 2004, starting in manufacturing, construction and agriculture and expanding to fisheries in 2016.[116)]

116) Bongsoo Jung, 「A Study on the Employment System for Foreign Workers and Available Remedies for Violation

Manufacturing companies must have fewer than 300 regular workers or less than KRW 8 billion in capital as a prerequisite to employing foreign workers. The allowable number of foreign employees varies by the size of the company, but is usually about 10-20% of the total workforce. The allowable number of employees in a construction company is 5 persons if the average annual construction revenue is less than KRW 1.5 billion, and 0.4 per KRW 100 million over 1.5 KRW billion. An agricultural company with 10 or fewer employees can employ up to 5 people regardless of no Korean worker employed, up to 20% of the total workforce. In the fishery industry, foreign employees can be used only on fishing vessels of less than 20 tons, which are not subject to the Seamen' Act, and can make up to 40% of the total fishing workers per ship.[117)]

2. Employment Procedures

The detailed procedures for employment within the Employment Permit System is as follows.[118)]

(1) Efforts to hire Korean workers: Employers seeking to hire foreign workers first apply at the local employment center. In an effort to ensure Korean workers have enough jobs, employers seeking to hire foreign workers are obliged to seek Korean workers first: 14 days through the employment center, and 7 days through newspapers, broadcasts, daily information magazines, and other media.

(2) Application of employment permit for foreigners: If an employer is unable to hire suitable Korean workers despite his efforts to do so, the employer may apply for a foreign employment permit at the employment center, within 3 months after completion of the local employment effort.

(3) Issuance of employment permits: When an employer asks the employment center to issue a work permit, the center will introduce some foreign workers (three times the number requested), from whom the employer will select those most eligible for the employment. Employment permits are then issued.

(4) Making an employment contract: Upon issuance of an employment permit, the employer shall send a standard employment contract to the KHR(Korea Human Resources) Corporation, who shall then send it to the dispatching agency of the sending country. When the sending agency of the sending country contacts the foreign workers selected by the employer and confirms their intention to enter into an employment contract, the standard employment contract sent by the employer is finalized and sent back to KHR, after which the employment contract is concluded.

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of their Legal Rights 」, Ajou University Doctorate Thesis Paper, 2018, pp. 73-108; Hongyup Choi, 「A Study on the Labor Law Status of Foreign Workers」, Seoul University Doctorate Thesis, 1997, p. 93; Kaprae Ha, 「A Study on the Theory of Legislation for the Use of Foreign Workers」, Donggook University Doctorate Thesis, 2003, p. 157.

117) Ministry of Employment and Labor, 「Employment Permit System in 2016」; MOEL, 「Easy to Understand Employment Permit System in 2016 」, 2016.

118) MOEL website: Employment Permit System (https://www.eps.go.kr/). Date accessed: December 20, 2017.

(5) Application and issuance of visa issuance certificate: When an employment contract is concluded, the employer can obtain a certificate of visa issuance from the immigration office. Once a certificate of visa issuance is issued, the employer sends its certificate of a temporary visa to the relevant workers by means of the sending agency of the sending country.

(6) Orientation training for foreign workers: When foreign workers enter Korea with a non-professional employment visa (E-9), escorted by the sending agency, they are taken to the KHR Corporation representative at Incheon International Airport. They are then taken to the employment institutions allocated for training of persons from each country and industry, and will receive job orientation for 2-3 days (16 hours). If health checkups reveal no interfering health concerns and the foreign workers are able to complete their orientation, the corresponding employers will pick up the ones assigned to them in their notification from the employment training institution.

(7) Reporting any changes to employment of foreign workers: If a foreign worker is no longer employed, has been injured, has died, or has had the employment contract renewed, the employer should report such changes to the employment center.

(8) Change of workplace for a foreign worker: In principle, foreign workers should continue to work for three years at the workplace through which they first gained their employment visa. However, where it is recognized normal working relations are unreasonably difficult to maintain due to a temporary suspension or shutdown of the workplace, unlawful delay in payment of wages etc., foreign workers are allowed to change jobs a maximum of 3 times in such cases as a way to better protect their basic human rights. Employment contracts are allowed to be extended twice, for a total of two years with each extension.

(9) Cancellation of the employment permit and suspension of access: The employment permit will be canceled if the employer breaches the wage obligations or other employment conditions contracted with the employee before the employee entered the country. In addition, any company that employs foreign workers without obtaining an employment permit shall have their access to foreign workers suspended for three years.

(10) Korea’s four social insurances and specific insurances for foreign workers:

① Four social insurances: Of the four major insurances for non-professional foreign workers, registration for the national pension, national health insurance, and industrial accident insurance are mandatory. Unemployment insurance is optional, and only those who subscribe are eligible for unemployment benefits and a variety of employment insurance subsidies.

② Specific insurances: The employer shall subscribe to departure-guarantee insurance and insurance to guarantee on-time payment of wages within 15 days after hiring the foreign worker. Foreign workers are required to have insurance covering their return expenses within 80 days of becoming employed and have their own injury insurance within 15 days.

III. Overseas Korean Workers

1. Eligible Workers & Jobs

Overseas Korean workers are divided into working-visit workers (H-2) that perform non-professional functions and resident workers (F-4) that provide professional services. All overseas Korean workers can work freely inside Korea, but those in the non-professional working-visit category are limited to a maximum of five years and are subject to restrictions under the Foreign Employment Act.

The number of industries allowed to hire workers in the H-2 group has increased from construction and some service industries (6 services) in 2004, to manufacturing, agriculture, fisheries and 29 services (food, housekeeping etc.). As of 2016, the scope has expanded to 41 manufacturing, construction and service industries.

The Foreign Workforce Policy Committee has set and managed the total number of working-visit overseas Korean workers every year because of the potential for conflict with domestic workers, such as those in construction and food and lodging, and determined the total number of people, 300,000, allowed to be in Korea at any given time.[119] F-4 visas are issued to overseas Korean workers who have graduated from university or a higher education institution and are less likely to engage in simple and manual work, and those who are 60 years of age or older. The Ministry of Justice did not issue F-4 visas to overseas Koreans from China and the nations making up the former Soviet Union until 2010, but has gradually been extending such issuance to those meeting certain conditions since then. These F-4 holders are required to renew their visas every three years if they wish to stay longer.

2. Employment Procedures

Working-visit overseas Korean workers with H-2 visas are: ① foreign nationals aged 25 or older, or their descendants, living in China and the former Soviet Union and who were Korean nationals at the time of birth, who are Korean citizens with an address in Korea, or who have been invited by blood relatives within 8 degrees of kinship or by relatives through marriage within 4 degrees of kinship; or ② those who have no domestic relatives or domestic family members but are selected by a certain procedure such as a Korean language test or a random lottery, etc.

Foreign nationals[120] are issued an H-2 working-visit visa from a diplomatic mission

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119) MOEL, 「2017 Employment and Labor White Book」, p. 422.

120) Immigration Office of the Ministry of Justice, 「Operational Manual for Overseas Korean Workers」, 2016, pp. 1-40; Gilsang Yu et al, 「A Study on Improvement of the Management System for Foreign Workers 」, MOEL, 2012, pp. 8-12.

abroad, complete their orientation training by the KHR Corporation after entering Korea, and register themselves with the Korean government through the KHR Corporation or an employment center. Employment is then possible through introduction to an available job registered with the employment center or independent job search activities.

An employer who wishes to hire a working-visit overseas Korean has to follow a certain procedure. This includes (1) making efforts to hire a Korean national first. However, the employer can hire a working-visit overseas Korean at his or her discretion. (2) The employer can also receive from the employment center three times as many job seekers as needed, and makes a standard employment contract after selecting the personnel desired. The employer shall then report such employment to the employment center nearest the location of the workplace within 10 days from the date of employment of the overseas Korean. (3) The term of the employment contract shall be determined by agreement between the parties but shall not exceed three years of employment. It can be extended for one year and ten months after the first three years' stay. Overseas Korean workers on visiting-work visas are allowed to change jobs freely, unlike other foreign workers.

IV. Overseas Professionals

1. Eligible Workers & Jobs

To achieve global competitiveness, companies must provide world-class, high-tech products or services of the highest quality and at competitive prices. Most of Korea's top domestic talent has been directed at achieving these goals so far, but with the world being integrated into one huge market, domestic talent alone cannot maintain national competitiveness anymore. There is an increasing need to hire excellent personnel that cannot be found locally.[121)]

Eligibility of professional foreign workers is determined by the qualifications for certain status of residence: academic background, experience, qualified certificates and expected wage level. There are seven visa types: E-1 for professors, E-2 for native language teachers, E-3 for R&D researchers, E-4 for technicians involved in technical transfers, E-5 for persons professionally qualified, E-6 for entertainers and E-7 for professional workers. Korea has also introduced various systems to support employment of foreign experts: 1) the IT Card visa system for the Ministry of Information and Communication; 2) the Gold Card visa system for the Ministry of Industry and

121) Joonmo Jo /Kyuyoung Lee/Sangdon Lee/Sungjae Park, "National Policies on Attracting Foreign Professionals", Immigration Office of the Ministry of Justice, 2009, pp. 97-120.

Commerce; 3) the Science Card visa system for the Ministry of Science; and 4) the visa system to support the introduction of foreign professionals for SMEs.

2. Employment Procedures

Companies hiring professional foreign workers are exempt from the normal requirement to hire Korean workers first, and various regulations such as labor market tests do not apply. However, in the interest of promoting the employment of Korean workers, opinion letters of relevant government ministries are inquired to submit to the immigration office in the course of obtaining the related visa. In general, the procedures for recruiting professional foreign personnel are as follows: ① Once the employer has found the necessary personnel and created an employment contract, ② the employer obtains a visa issuance recommendation from the related government ministries. ③ The employer sends the visa issuance confirmation to the Ministry of Justice. ④ If a visa issuance certificate is sent for the relevant worker, the foreign worker is issued a visa at a Korean embassy or foreign mission, and ⑤ the employee is allowed to enter Korea to work.

V. Conclusion

Non-professional foreign workers face a variety of potential human rights violations because they are managed under employer-friendly policies. It is difficult for such personnel to change jobs, and may do so only if the reason for the change can reasonably be attributed to their employer. They can stay for three to ten years, but cannot invite their family members or live together with them. There are limitations to their protection under labor law because they are forcibly sent to their home countries when the employment is terminated.

For overseas Korean workers, there is a lack of systematic education on social integration. The exclusive focus on employment results in a lack of support for their own development. Compared to working conditions for overseas Korean workers from developed countries, those from China and the former Soviet Union are being discriminated against. Workers from advanced countries are allowed to enter and exit freely with the F-4 visa they receive upon entering Korea. On the other hand, overseas Korean workers from China and the former Soviet Union who do not have relatives in Korea must go through H-2 visa issuing procedures, which involves a selection process requiring an official Korean test or a lottery.

Hiring overseas professional personnel is not a simple process due to the vague classification of foreign professionals and rigorous employment procedures. Towards more systematic management of the introduction of a specialized foreign workforce, a dedicated government department is needed that consolidates the existing responsibilities presently spread among a variety of government departments into one, along with a more organized system of qualification standards.

인사관리 앱 개발 (Mobile App)

기본서 Basic Guides	1. 노동법전 2. 노동법 해설 3. 노동 사건 사례	1. Labor Law 2. Labor Law Guide 3. Labor Cases
동영상 (Video)	YouTube GO	Korean and English videos (each 20 categories)
매뉴얼 Manual	1. 구조조정 2. 해고 3. 외국인 고용과 비자 4. 노동조합 5. 임금 6. 근로시간, 휴일, 휴가, 7. 비정규직 근로자 8. 근로계약 9. 산업재해보상보험 10. 취업규칙 11. 근로감독 준비 12. 고용보험 13. 노동위원회 14. 남녀고용평등 15. 직장내 괴롭힘 방지 16. 노사협의회 17. 산업안전보건법 18. 부당노동행위 19. 국민연금, 국민건강보험 20. 근로감독 체크리스트	1. Workplace Restructuring 2. Dismissal 3. Foreign Employment and Visa 4. Labor Union 5. Wage 6. Working Hours, Holiday, Leave 7. Irregular Workers 8. Employment Contract 9. Industrial Accident Compensation Insurance 10. Rules of Employment 11. Labor Inspection Preparation 12. Employment Insurance 13. Labor Relations Commission 14. Equal Employment Act 15. Workplace Harassment Prevention 16. Labor Management Council 17. Industrial Safety and Health Act 18. Unfair Labor Practices 19. National Pension, Health Insurance 20. Labor Inspection Checklists
외국인 Foreigner	출입국관리법과 외국인 (기고글, 동영상, 비자36가지)	Immigration Laws and Foreigner Workers (Law, Articles, Video, Visa)
근로계약 Employmt Contract	근로계약 자동작성 (5가지 기본 틀을 가지고 작성) (정규직, 기간직, 시간제)	Making Employment Contracts based on 5 basic templates (Regular, fixed-term, and part-time)
자동계산 Automatic Calculation	1. 연차휴가, 2. 퇴직금 3. 4대보험, 4. 퇴직소득세 5. 산재보상 (장해보상, 유족보상)	1. Annual Leave, 2. Severance Pay 3. Social Insurance Premiums 4. Retirement(Severance) Income Tax 5. Industrial acc
Labor Auditing	1. 인사감사	1. Labor Auditing

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