Korean labor law: Foreign Workers: Labor Rights & Limitations in Korea

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I. Introduction

Since the late 1980s, Korea has suffered a rapid increase in labor costs, coupled with a labor shortage in the 3D jobs of small- and medium-sized companies (SMEs), and since 1993, has introduced foreign workers through the Industrial Trainee System. An Industrial Trainee does not have the legal status of a worker, but rather, has a trainee status with limited protection under labor law. Many social problems such as human rights abuses, corruption in introducing foreign workers, and illegal stays occurred under the Industrial Trainee System because these had been left to the civilian institutions rather than the government. To resolve these problems, in August 2003, the Act on the Employment, etc. of Foreign Workers (hereinafter referred to as the "Foreign Worker Employment Act") was enacted to introduce an Employment Permit System. The Employment Permit System is for non-professional foreign workers (E-9 visa) and visiting workers (H-2 visa).

The Foreign Worker Employment Act aims at promoting a smooth supply of manpower and the balanced development of the national economy by introducing and managing foreign workers systematically (Article 1). In other words, the purpose of the Act is to supply foreign workers to fulfill the labor shortage in the 3D jobs of SMEs, but not to provide labor law protection for foreign workers. However, when foreigners enter the country and work, they become residents of our country, and should be protected as human beings under the Constitution. The constitutionally-guaranteed human rights include the Labor Standards Act (Article 32) the three rights of labor (Article 33), and the four social insurances (Article 34). This means that there has been a conflict between the purpose for introducing foreign workers and the rights of those workers. In the paragraphs following, I will look at the content of this conflict and system improvement.

II. Recognition of Worker's Status for Foreign Workers (1991 - 2003)

Until introduction of the Foreign Worker Employment Act in 2004, Korean labor law did not apply to foreign workers, and they were not treated as workers, but as trainees. A Thai worker who entered the country with the status of an industrial trainee and became an illegal foreign worker due to overstaying his contract period, had a work-related accident on December 10, 1992. The "trainee" applied for medical treatment under the Industrial Accident Compensation Act, and the Supreme Court concluded that an injured foreign worker would be entitled to Industrial Accident Compensation

Insurance coverage as long as he or she was providing labor service to earn money.[1] This was the first court case to be accepted as an occupational accident for illegal foreign workers, and has since become the precedent in instances of similar incidents. This court ruling confirmed two significant facts. First, it stipulated that "the purpose of the Immigration Control Act is to monitor the illegal stay of foreigners to protect domestic workers, and to regulate the employment eligibility of foreign workers in order to prohibit those not qualified for employment." Therefore, the Immigration Control Act is a law for punishing those who violate the immigration laws, but cannot deny the legal rights achieved after delivering such work, and cannot deny a worker's status accumulated over a long period of time. Second, when evaluating the worker status of the foreign worker, the court recognized the illegal foreign worker's status through a practical standard rather than simply formal content.

After this Supreme Court ruling, work-related accident and severance pay cases for illegal foreign workers have been positively recognized.[2]

III. Recognition and Limitations of the Fundamental Rights of Foreign Workers (2004-2014)

There were two important Constitutional Court decisions during this period. In 2011, there was a violation of the constitution regarding the Labor Ministry Guidelines called, "A Guide to the Protection and Management of Foreign Workers." There was also a case which was rejected when foreign workers claimed the Industrial Trainee System was unconstitutional due to the lack of freedom to choose an occupation.

1. Decision on claims that the Industrial Trainee System was unconstitutional

The Industrial Trainee System was introduced November 1993 by the Ministry of Justice, but there were a lot of human rights violations due to the lack of labor law protection for foreign workers. To resolve this issue, on February 14, 1995, the Ministry of Labor introduced some provisions to the Labor Law for industrial trainees through the Ministry of Labor's operating procedures, "Guidelines on the Protection and Management of Foreign Workers as Industrial Trainees."[3] The foreign workers

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[1] Supreme Court ruling on September 15, 1995, 94nu12067: Recognizing work-related accidents for illegal foreign workers

[2] Supreme Court ruling on August 26, 1997, 97da18875: Severance pay for illegal foreign workers
Supreme Court ruling on October 10, 1997, 97nu10352: Recognition of IAC Insurance for industrial trainees

[3] Applicable labor law: Labor Ministry Guidelines (Article 8: Protection of Trainees) ① Prohibition of violence and forced labor, ② Regular, direct, and cash payment for trainee wages, and settlement of payments, ③ Training periods, recesses and holidays, overtime work, night and holiday work, ④ Paying more than minimum wage and its payment, ⑤ Confirmation of industrial safety and health, and ⑥

demanded judgment by the Constitutional Court, which ruled that the System violated the equal rights guarantee in Article 11 of the Constitution.[4]

In this decision, the Constitutional Court "recognized the basic constitutional rights of foreign workers. Foreign workers do not have all basic rights indefinitely but in principle do have basic rights only within the scope of 'human rights', not 'Korean people's rights' … Work-related rights include not only the 'right to demand a position to work at', but also the 'right to demand a healthy working environment.' Foreign workers only have the right to demand a healthy working environment, and this right includes the fundamental rights which prevent the violation of human dignity, such as the right to make demands for things such as a healthy working environment, fair compensation for work, and the guarantee of reasonable working conditions."

The Constitutional Court stipulates, "Even if an industrial trainee is under the Industrial Trainee System, if the trainee provides labor service to an employer under the supervision of that employer, he or she is actually in a labor relationship, providing labor and receiving money in the name of a beneficiary. In this case, if the trainee receives different working conditions compared to other workers, it is arbitrary discrimination."

2. Freedom to choose a workplace

Five foreign workers submitted a petition to the Constitutional Court that Article 25 (4) of the Foreigners Employment Act violated the right to work, the freedom to choose a job, and the right to pursue happiness by restricting the foreign workers' movement of workplaces to three times in a three-year period. In the decision, the Constitutional Court ruled that this Article 25 (4) was not unconstitutional because foreign workers were not entirely restricted in consideration of the legislative purpose of this law.[5]

First of all, the Constitutional Court stated that foreign workers have the freedom to choose a job as the fundamental right of a human being. In other words, the freedom of job choice, which is a problem in this case, is closely related to human dignity, value, and pursuit of happiness, and is the right of all humans, not of just the Korean people.

The Constitutional Court stated, "The legal provisions of this case (Article 25 (4)) were introduced to protect the employment opportunities of domestic workers by restricting the uncontrolled transfer of jobs to foreign workers, and to facilitate the

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Coverage of Industrial Accident Compensation Insurance

[4] The Constitutional Court decision on August 30, 2004 hunma670: Unconstitutionality of the Industrial Trainee System

[5] The Constitutional Court decision on September 29, 2011, 2007hunma1083, 2009hunma230, 352(combined), (Freedom to choose an occupation)

efficient supply of foreign workers to SMEs through efficient employment management of those foreign workers, and to ensure a balanced development of the economy. The provisions of this case allow foreign workers to change workplaces up to three times during their stay of three years and to change workplaces additionally if there are unavoidable reasons as prescribed by Presidential Decree, and so do not infringe on the freedom to choose a job."

The dissenting opinion in this decision was that, “Even if you are a foreigner, if you were granted permission to work under the procedures set by the Republic of Korea, legally entered the country, have lived in Korea for a considerable period of time, acquiring and maintaining a certain type of living relationship, as a foreigner you must still be granted human dignity and value during the period of your legal stay, and the freedom to choose the means to maintain a living, including the freedom to choose a job. The provisions violate the principle against restricting basic rights, and the principle against excessive restriction of the freedom to choose a job.” Foreign workers are not allowed to change their jobs at will during the first three years, due to their three years’ employment contract, and after expiration of that 3-year contract, they do not have the option of selecting a place of work. Considering that employers can choose foreign workers unilaterally, it can be seen that foreign workers are not free to change jobs. According to Article 52 (3) of the UN Convention on Foreign Workers' Rights, foreign workers should be entitled to the freedom to choose a job after two years of their first employment.

VI. Extended Application of Labor Law and Limitations (2015-present)

At this time, there was a ruling by the Supreme Court and a decision by the Constitutional Court regarding foreign workers. In 2015, the Supreme Court recognized illegal foreign workers’ right to organize a labor union. In 2016, the Constitutional Court decided to impose a mandatory exemption on foreign workers' retirement allowances as constitutional.

1. Labor union for illegal foreign workers

On April 24, 2005, 91 foreign workers residing in the Seoul, Gyeonggi and Incheon regions established the 'Seoul Gyeonggi Incheon Migrant Workers' Labor Union' (hereinafter called the ‘Migrant Workers’ Union’), and submitted the establishment report to the Seoul Regional Labor Office. The Ministry of Labor requested supplementary information on the list of union members when it was determined that illegal foreign workers composed the majority of its membership. When the union did not submit the supplementary documents, the Ministry refused to

recognize the union. The Migrant Workers' Union filed a lawsuit that the dismissal of the establishment report was against the law. The Seoul Administrative Court ruled that it was reasonable to refuse to confirm the establishment of the Migrant Workers' Labor Union. The first trial stated, "Foreigners who stay illegally in contravention of the Immigration Control Act are strictly forbidden to work, so they are not workers under the labor law because they are not in a legal position to maintain and promote their working conditions and enhance their status."[6] However, the Seoul High Court ruled that it was illegal to refuse to recognize establishment of the Migrant Workers' Labor Union and overruled the first judgment. The second trial stated, "It is a worker who is able to establish a labor union that realistically provides labor in Korea, while living by wages, salary and other similar income."[7]

The Supreme Court ruled in line with the 2nd trial that, "Under the Labor Union Act, a worker is a person who provides work under the supervision of an employer and lives in exchange for wages, including those who are temporarily unemployed or who are seeking jobs, as well as those who are engaged in a particular employment. A person who provides work under a subordinate relationship with others and earns wages in exchange for work provision is a worker under the Labor Union Act as long as the worker's status under the Labor Union Act is recognized, whether or not such worker is a foreigner, or whether or not it is included in the scope of workers under the Labor Union Act without discrimination."[8]

The dissenting opinion in the Supreme Court states, "Unlike the Labor Union Act, the Immigration Control Act prohibits the employment of foreigners who are not entitled to employment, through the provision of employment restrictions. Foreigners who are employed without a working visa are subject to forced eviction and punishment. As a result, the employment of foreigners becomes legally possible by acquiring the qualification for a working visa, as does the suspension of a working relationship with foreigners without a working visa; the employer may terminate the employment contract of a worker on the grounds that he/she is not eligible for employment at any time. Foreigners who are not entitled to employment cannot be regarded as 'workers who normally want to work' to start with, and even those who have already been employed are not guaranteed the survival of their labor agreement. Even though they are automatically included in the concept of workers, it is also not legal for them to stay in Korea. It is doubtful whether it is possible to maintain or improve their working conditions through collective bargaining with an employer or

[6] Seoul Administrative Court ruling on February 7, 2006, 2005goohap18266: Refusal to recognize the Migrant Workers' Labor Union.

[7] Seoul High Court ruling on February 1, 2007: Recognition of the illegal Migrant Workers' Labor Union.

[8] Supreme Court ruling on June 25, 2015, 2007doo4995 (Recognition of Illegal Migrant Workers' Labor Union)

concluding collective agreements on the assumption that a working relationship will be established or continued."[9]

2. Departure Guarantee Insurance

The Departure Guarantee Insurance will be paid within 14 days of when a foreign worker departs Korea, from the deposit that the employer has saved (in an amount equivalent to 8.3% of his/her monthly wages at a designated financial institution) in exchange for severance pay. On January 28, 2014, the National Assembly revised the Foreign Worker Employment Act regarding the period of payment of the Departure Guarantee Insurance because of the increase in the number of illegal foreign workers, stating that it was to be paid 'within 14 days from the time when the insured left Korea'. In response, the claimants (foreign workers) demanded a judgment by the Constitutional Court that Article 13 (3) of the Foreign Worker Employment Act, which limits the payment period of the Departure Guarantee Insurance to within 14 days after departure, violates the basic rights of the applicants.

The Constitutional Court stipulated, "Illegal foreign workers are at risk of being exposed to various crimes such as wage delays and assault, and because of this vulnerability, there is a high possibility of human rights violations such as forced labor. There is always a possibility of various social problems such as accidents, without expectation of support from labor inspectors. In addition, the domestic effect of the illegal stay of simple functional foreign workers generally increases social integration costs and may have a negative impact on the domestic employment situation. Therefore, even if the Departure Guarantee Insurance in this case has the nature of a retirement allowance for a worker, it is inevitable that a link is made between the time of payment after departure (for the purpose of preventing illegal stays) and the various problems caused by an illegal stay. The provisions of the Act do not infringe on the labor rights of the applicants."[10]

In contrast, the dissenting opinion in the Constitutional Court states, “the objection clause stipulates, ‘The purpose of the judgment is to prevent the illegal stay of foreign workers, and set the deadline for payment of the Departure Guarantee Insurance benefit, which is in the nature of severance pay, within 14 days of departure.’ It does not take into account the nature of severance pay and it is difficult to recognize its legitimacy. If severance pay is not paid quickly after the termination of employment, the lives of the relevant worker and his/her family will be negatively affected. The

[9] Professor Jonghee Park stated the same opinion in his thesis paper: “Studies on Judicial Rulings Regarding the Rejection of Labor Union Registration of Illegal Foreign Workers,” 「Labor Studies」, Volume 20, Korea University Labor Research Center, 2010, p. 23.

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

linking of timing to the payment of the Departure Guarantee Insurance benefit violates the basic character of severance pay, and so the judgment clause infringes the rights of foreign workers."

V. Conclusion

Foreign workers should be treated the same as domestic workers if they are regular workers providing work. In reality, however, Korea discriminates against foreign workers on the basis that it is faithful to the legislative purpose of the Foreign Workers Employment Act. Looking at the decisions of the Constitutional Court and Supreme Court precedents, the labor rights of foreign workers have improved greatly, but there are still many areas of institutional discrimination. In order to accept foreign workers as a permanent part of the labor force in the future, foreigners should be recognized as workers and residents as is the case for domestic Koreans.