

## Korean labor law: Annual Paid Leave and Migrant Foreign Workers (E-9)

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### I. Introduction

According to Annual Paid Leave (Article 60) of the Labor Standards Act (LSA), employees who work 80% or more a year will be given a 15-day paid leave. For employees who have worked for three years or more, one day's paid leave is added for every two years of employment, up to a total of 25 days. However, in instances where incurred annual leave is not completely used, the employer shall compensate for the unused portion by paying ordinary wages. In Korea, the use rate of paid annual leave is only 50%, and the unused leave is compensated for. This does not fit with the purpose of annual paid leave, which was designed to rehabilitate the exhausted minds and bodies of employees through paid vacation, enabling them to live comfortable lives.

Especially for the non-professional foreign worker, regulations on annual paid leave are not specified in the standard labor contract, and employers do not actually grant the annual paid leave, nor do they compensate for it. In this regard, I would like to carefully review the standard rules of annual paid leave and the issue of excluding their application of annual paid leave for foreign workers.

### II. Purpose of Annual Paid Leave and Legal Standards

#### 1. Purpose of annual paid leave

Annual paid leave is intended to provide paid leave (separately from paid weekly holidays) in order to allow workers to realize a healthy and relaxed lifestyle.<sup>1</sup> More specifically, the Constitutional Court stated the purpose of the annual leave: "Rest hours or weekly holidays are primarily for the physiological recovery of workers who have accumulated physical or mental fatigue due to daily or weekly work. Annual paid leave is designed to give workers freedom from work for a period of time and to have the opportunity to engage in social and cultural civic life by providing a voluntary leave period without a loss of wages."<sup>2</sup> As for this, the Supreme Court also explains, "It is the purpose of providing an opportunity for mental and physical recreation and improving cultural life by exempting workers from the obligation to work for a certain

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<sup>1</sup> Jongryul Lim, 「Labor Law 」, Park Young Sa, 2016, page 454.

<sup>2</sup> Supreme Court ruling on May 28, 2015. 2013 hunma 619 (The purpose of annual paid leave)

period of time."<sup>3</sup> Therefore, the objective of annual leave is to improve the quality of life of workers by adding aspects of cultural life in terms of relaxation from work.<sup>4</sup>

## 2. Comparison of international and national standards for annual paid leave

The international standard for annual paid leave and the Korean standard as per the Labor Standards Act can be compared by dividing them into ① the number of leave days and requirements for the occurrence, ② method of use, ③ the guarantee of annual paid leave, and ④ compensation for unused leave.

The International Labor Organization (ILO) has adopted the Convention concerning Annual Holidays with Pay, 1936 (No. 52) and the Convention concerning Annual Holidays with Pay (Revised), 1970 (No. 132). ① In relation to the number of leave days and the requirements for occurrence, "In any case, a minimum of three weeks must be given for a year (Article 3), and an employee who is less than one year shall be entitled to paid leave in proportion to the period of service for that year" (Article 4). ② Regarding the use of annual leave, "Annual leave shall consist of at least two weeks to be given without its division, even though it can be used in separate days (Article 8), and annual leave shall be granted within one year after the entitlement of annual paid leave" (Article 9). ③ Annual paid leave should be given as paid during the working day (Article 7). ④ For unused annual leave, "Workers who have worked for the minimum period of six months shall be entitled to paid leave or compensation equivalent to the period of unused annual leave" (Article 11).<sup>5</sup>

The annual paid leave (Article 60) in the Korean Labor Standards Act prescribes the use of leave in principle, but also specifies compensation for unused days.① As for the number of leave days and the requirements for the occurrence of annual paid leave, "An employer shall grant 15 days' paid leave to a worker who has registered not less than 80 percent of attendance during one year (Article 1). After the first year of service, an employer shall grant one day's paid leave for each two years of consecutive service in addition to the 15 days' paid leave to a worker who has worked consecutively for 3 years or more. In this case, the total number of leave days including the additional leave shall not exceed 25 (Article 4). ② Regarding the use of annual leave, "An employer shall grant paid leave upon request by a worker. However, the leave period concerned may be changed, if granting the leave as requested by the worker might cause serious impediment to the operation of the business (Article 5). Paid leave can

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<sup>3</sup> Supreme Court ruling on December 26, 2003. 2011 da 4629 (The purpose of annual paid leave)

<sup>4</sup> Hingyoung Kim, "System improvement for annual paid leave to secure rest", 「Study on Labor Laws」, 2016 Volume 40, Seoul University's Labor Law Society, page 165.

<sup>5</sup> Ilhoon Park, 「A Study on the Legal Issues of the Annual Paid Leave System」, MA degree thesis at Korea University Graduate School, December 2014, pp125-140.

be used continuously over a certain day or several days. Here, if a worker requests a leave day by designating a desired date (a claim for a leave), the employer can adjust the date of the leave in consideration of the work. ③ In relation to the guarantee of annual paid leave, the annual paid leave shall be granted as paid off-days on the normal working days of the worker (Article 5). Therefore, annual paid leave shall not be granted on weekly holidays, unpaid holidays, or other paid holidays. ④ Regarding compensation for unused annual leave, "the annual paid leave will expire if not exercised for one year" (Article 7). This means that in the event that an employee fails to use the annual paid leave, the employer shall pay the employee for the unused paid leave.<sup>6</sup>

### III. Labor Law Application to Foreign Workers and Annual Paid Leave

#### 1. Expansion of Labor Law Application to Foreign Workers

The Act on Foreign Workers' Employment, etc. (hereafter the Foreign Workers' Employment Act) was designed to promote a smooth supply and demand of manpower and the balanced development of the national economy, through the systematic introduction and management of foreign workers (Article 1). The purpose of the law is to provide foreign workers with employment in the 3D industries of SMEs with insufficient manpower; not to protect the foreign workers with labor laws. However, as foreigners enter the country and live and work together, they become residents of our country, and residents must be protected with the human rights guaranteed by the Korean constitution. These constitutionally-guaranteed human rights include labor rights, protection of working standards, and prohibition of discrimination under Article 32 of the Constitution (three rights of labor under Article 33), and social insurance under Article 34. Foreign workers have recently been securing precedents in the obtaining of human rights after a long period of stay in Korea.

The Supreme Court ruled in a case in 1995 that an accident involving an illegal foreign worker who is a worker applicable to Korean labor law should be recognized as an industrial accident by the Industrial Accident Compensation Insurance Act. This was the first case to recognize an illegal foreigner as an employee, and an illegal foreigner's occupational accident was also recognized as an industrial accident for the first time.<sup>7</sup> Again, in 1997, the first case occurred in which the retirement allowance

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<sup>6</sup> Supreme Court ruling on December 26, 2013. 2011 da 4629 (Unused annual leave allowance is regarded as wage.)

<sup>7</sup> Supreme Court ruling on September 15, 1995. 94 nu 12067 (Recognition of an illegal worker for the industrial accident)

was paid to illegal aliens.<sup>8</sup> In 2011, the Constitutional Court made it clear that foreign workers employed under the Employment Permit System also have the freedom to choose their occupation as a basic human right.<sup>9</sup> In addition, in 2015, the Supreme Court recognized a labor union composed of illegal foreign workers as a labor union protected by the Trade Union and Labor Relations Adjustment Act.<sup>10</sup> Through these major cases, the labor rights of foreign workers have gradually been expanded.

## 2. Actual status of the use of annual paid leave for foreign workers

Annual paid leave should be applied to foreign workers as well. The “Standard Employment Contract” stipulated in the Foreign Workers’ Employment Act (Annex 6) does not specify an annual paid leave requirement, which is mandatory in the Labor Standards Act. Article 11: “The matters not specified in this contract shall be as stipulated by the 「Labor Standard Act」”. In reality, most employers do not grant annual paid leave for non-professional foreign workers. According to a report by Amnesty International in October 2014,<sup>11</sup> “None of the migrant workers interviewed by Amnesty International had received annual paid leave or unused annual leave compensation.”

Non-professional foreign workers have not received any paid annual leave or compensation for related days at all. On the other hand, in the case of professional foreign workers, the annual paid leave regulations are applied in the same way as for Koreans. In 2011, the Supreme Court recognized the worker status of native English instructors in worker status verification lawsuits filed by 24 native English instructors, and ruled that the employer would pay the weekly holiday allowance, compensation allowance for unused annual paid leave and severance pay for the duration of the work.<sup>12</sup> The unused annual paid leave allowance was included in the average wage for severance pay calculation. In other words, the Labor Standards Act was applied equally to professional foreign workers as to Koreans. Therefore, non-professional foreign workers must also be guaranteed an annual paid vacation, and when paid annual leave is not used, an allowance equivalent to the annual paid leave days must be paid. Once employment ends, the employer must add the unused annual paid leave allowance for the calculation of average wage related to severance pay. Any delayed

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<sup>8</sup> Supreme Court ruling on August 26, 1997. 97 da 18875 (Recognition of an illegal worker for the severance pay)

<sup>9</sup> Constitutional Court’s ruling on September 29, 2011. 2007 hunma 1083 and 352 헌법재판소 (Foreign workers’ freedom to choose their occupation.)

<sup>10</sup> Supreme Court ruling on June 25, 2015. 2007 doo 4995. (Recognition of illegal foreign workers’ labor union)

<sup>11</sup> Amnesty International, “Exploitation and forced labor for Foreign Workers in the Korean agricultural industry”, Document number ASA 25/004/2014, October 2014, page 30.

<sup>12</sup> Supreme Court ruling on June 11, 2015. 2014 da 88161 (Confirmation of employee status for native English teachers)

loss of wages is to be calculated at the rate of 20% per annum, as stipulated in the Labor Standards Act, for the period from the day after 14 days from the date of leaving to the day when payment is made.

#### IV. Annual paid leave for foreign workers

##### 1. Guaranteeing annual paid leave

The ILO and the EU's annual paid leave regulations, in principle, prohibit the substitution of unused annual leave for benefits and exempt monetary compensation only at the end of employment.<sup>13</sup> Korea still pays for unused annual paid leave because using annual paid leave is not widely accepted. In order to eliminate this monetary compensation, the principle of promoting the use of annual leave is stipulated in Article 61 of the Labor Standards Act. If a worker fails to use the annual leave despite the measures promoting the use of annual paid leave, the annual leave shall expire and the employer shall be exempted from liability for compensation. In addition, in order to encourage the use of leave, it is encouraged to collectively take paid annual leave through the substitution of paid leave on particular working days (Article 62 of the Labor Standards Act).

If foreign workers are allowed to use annual paid leave and visit their home countries for 15 working days (3 weeks) a year, it would allow them to relieve their individual stresses and become refreshed in their workplace, while the employer can reduce labor costs by avoiding the responsibility of compensation.

##### 2. Compensation allowance for unused annual leave

If a worker's employment ends before his or her annual paid leave is used, the worker will be compensated for unused annual paid leave days.<sup>14</sup> Therefore, if he or she ceases employment without ever using annual paid leave, he/she can receive 15 days' additional ordinary wage for unused leave days for one year, 30 days for service of 2 years, and 45 days for 3 years of service.

##### 3. Concerning severance pay and compensation for delayed wages

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<sup>13</sup> ILO Convention (No. 132) – Article 5; EU Guide, Number 2003/88/EC – Article 7 (2)

<sup>14</sup> Supreme court ruling on May 27, 2005, 2003da 48549, 2003da 4855: The right to use Annual Leave as paid days off is acquired definitely as remuneration for labor when the employee has worked for a one-year period. As soon as the employee acquired the right of Annual Paid Leave, his employment was terminated due to retirement, etc. before using his Annual Paid Leave. In this case, while the right to use Annual Leave requires continuous labor service, this cannot be granted due to retirement. However, the right to request Annual Leave allowance does not require continuous labor service and so shall be compensated as a paid allowance. Accordingly, the employee can request the Annual Leave allowance equivalent to the whole number of Annual Leave days unused up to the employment termination date.

When calculating the severance pay of an employee, the annual paid leave allowance that occurred before the cessation of employment, regardless of whether the employee received compensation for unused annual paid leave days or not, should be included for the amount equivalent to 3/12 based on the average wage calculation.<sup>15</sup> However, this is not the case if there is no unused annual paid leave. For unpaid annual paid leave allowance and benefits, an additional amount of severance pay, to be recalculated after including compensation allowance for unused annual paid leave, shall be paid.

If a worker's employment ends, an employer shall pay the wages and other money or valuables within 14 days after the cause for such payment has occurred (Article 36 of the LSA). If an employer fails to pay wages and severance pay subject to be paid pursuant to Article 36, delay interest shall be payable within the range of the interest rate prescribed by the Presidential Decree within 40/100 of the number of days delayed from the next day to the payment date (Article 37 of the LSA). Here, the rate determined by the president is "20/100 per year" (Article 17 of the Enforcement Decree of the LSA).

## V. Conclusion

It has been 25 years since the official introduction of foreign workers in 1993. As of December 31, 2016, there were about 530,000 foreign non-professional workers (E-9) and Korean descendants (H-2) among the various types of foreign workers<sup>16</sup>, and there would be more than 700,000 million if we included approximately 2 million illegal foreign workers. Many of these do not receive paid leave or any unused annual leave allowance. They are an indispensable work force, usually staying in Korea from three to ten years in the 3D industries, where Korean people are reluctant to work for low wages. These workers' rights should be guaranteed to enable continuous working relationships and for the foreign workers to be utilized for a long time. It is my opinion that the treatment of foreign workers can be improved through the use of annual paid leave.

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<sup>15</sup> Labor Ministry, "Guidelines for the right to ask for annual paid leave, and paid allowance for unused annual leave", Wage/working hours policy team-2820, September 21, 2006.

<sup>16</sup> Immigration Office statistics on December 31, 2016.

Non-professional workers (E-9) : 279,187; Korean descendant (H-2) : 254,950.