

Application of Korean Labor Laws at Foreign Embassies & Limits on their Korean Employees

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I. Introduction

There are 96 foreign missions in Korea in the form of embassies, consulates, and culture centers, etc., where several thousand Korean employees work. In the process of advising various foreign embassies, the most frequently asked question is whether the embassy is required to pay severance pay to its Korean employees. This is because severance pay systems do not exist in the foreign embassies' home countries, and the system means that a considerable amount of additional money should be paid if the employee has a long service record. These embassies need the approval of their governments before paying out any unexpected additional expenses.

Korean labor law applies to all employees working inside Korea in accordance with the principle of territorial privilege for jurisdiction. Labor law violations are subject to criminal punishment because of their compulsory provisions, but for Korean employees working in foreign missions in Korea, their employers are diplomats who are exempted from criminal prosecution under the 'Vienna Convention on Diplomatic Relations'¹, which makes it very difficult to enforce labor law should it be violated by these diplomats. Korean labor law protects the fundamental rights of employees by providing restrictions on dismissal, guarantees of payment of wages and severance pay, compensation for industrial accident, and guarantee of the three primary rights of labor, etc. So, as judicial precedent and Labor Ministry guidelines regulate the protection and limitations of labor law, it can be very confusing for embassies and their Korean employees to understand the applicability of that law. Accordingly, here I would like to look into related laws, judicial rulings and Labor Ministry guidelines and seek a clearer understanding.

¹ This Convention refers to the agreement between nations to guarantee the status of diplomatic agents, and was agreed in Vienna on April 18, 1961. Korea confirmed it in its National Assembly on January 27, 1970 (Treaty number 365).

(1) The Constitution of the ROK (Paragraph 1 of Article 6) stipulates, "Treaties duly concluded and promulgated under the Constitution and generally recognized rules of international law shall have the same force and effect of law as domestic laws of the Republic of Korea."

(2) The Convention (Paragraph 1 of Article 31): A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of (a), (b) and (c).

II. Basic Principles

1. Related Laws

Employment contracts made between Korean employees and their embassy employers does not have stipulated regulations that must follow Korean labor laws, but according to the applicable principle of territorial privilege for jurisdiction in Korean territory (Article 12 of the Labor Standards Act), labor laws apply to all Korean employees. Even illegal migrant workers² are protected by Korean labor law. The Act Regarding the Conflict of Laws (Article 28)³ stipulates, “For employment contracts, regardless of the governing law that both parties agreed to or did not choose, it is not possible to ignore the employee protections endowed by compulsory rules related to the governing law of the resident country.” The Labor Standards Act (Article 15) also stipulates that a labor contract which establishes working conditions failing to meet the standards required in this Labor Standards Act shall be null and void to that extent. Those conditions invalidated by the preceding sentence shall be governed by the standards provided for in this Labor Standards Act. For an example, in cases where an employment contract between both parties does not specify severance pay, the employer shall pay severance pay in accordance with the Labor Standards Act.

2. Labor Ministry Guidelines

Labor Ministry guidelines⁴ regarding application of the Labor Standards Act to employees working in foreign embassies stipulates that “as the principle of territorial privilege for jurisdiction is generally accepted, foreign embassies in Korea are not exempt from Korea’s domestic laws unless there has been an agreement between the two countries where this is specified. Provided, as foreign embassies have diplomatic immunity, there is no jurisdiction of the court in Korea to enforce domestic laws (regarding applications for remedy of unfair labor practice or lawsuits seeking nullity for dismissal) in accordance with the Supreme Court ruling on November 14, 1989 (case number: 89noo4765). Accordingly, it can be expected that enforcing domestic laws will have considerable limitations.”

² Seoul Incheon migrant workers union case (Supreme Court ruling on June 25, 2015, 2007doo4995

³ The law regulates the principle of international jurisdiction and the governing law regarding international legal relations.

⁴ Labor Ministry Guidelines: Geungi 68207-3085, on September 11, 2001

3. Court Precedents

Nevertheless, the Supreme Court upheld the jurisdiction of the Korean court in a lawsuit seeking nullity of a dismissal of an employee who had been hired by the US military and worked on a US military compound. The related high court originally rejected the lawsuit because the employee had named the US government as the defendant even though the US government did not have jurisdiction in Korea, but the Supreme Court allowed the jurisdiction to be able to take legal action against the US government in Korea. The Supreme Court ruled, “according to the customary international law, the activity of a nation’s sovereignty is excluded from another nation’s jurisdiction in principle, but it is not international law or part of normal international relations that exempt the other nation’s right of jurisdiction over judicial actions. Accordingly, unless the diplomats’ judicial actions are considered actions of sovereignty, or, due to closed relations with this, there is a special condition that the execution of jurisdiction can result in unfair intervention of sovereign activities, our nation’s court can assume jurisdiction against the home nation of an embassy regarding labor issues related to diplomats.”⁵ This means that jurisdiction can be assumed when an employee takes legal action against the home nation of an embassy rather than the embassy itself.

III. Application of Labor Laws

1. Application of the Labor Standards Act

(1) Cases of unfair dismissal⁶

An employee named Ahn was hired by the Austrian Embassy from May 1, 1997 without a fixed period for employment, and worked there until termination of employment in 2010. When the Austrian Embassy dismissed the employee due to its reduced budget, the employee took legal action against the Republic of Austria. The Seoul District Court (Civil Court section 41) ruled in favor of Ahn in his lawsuit seeking nullity of the dismissal on April 6, 2014, stipulating “The Republic of Austria shall pay 95 million won in back wages. Additionally, the Embassy shall pay Ahn the monthly wage equivalent of 2.5 million won from the first day of the last month he was employed until the date that Ahn can be

⁵ Supreme Court ruling on December 17, 1998, 97da39216

⁶ This news reported by Newsis reporter, Hong Sei-hee on April 6, 2014, and quoted by multiple major newspapers such as Joongang Daily and Law Times. Documents of the ruling by this case’s court (Seoul Central District Court) were not released.

reinstated.” The Court explained, “Ahn was not involved in the Embassy’s sovereign activities, but performed an assisting role of support for embassy employees in terms of Korean language skills. Ahn’s employment contract and dismissal were not related to the Embassy’s sovereign activities, but closely related to employment-related judicial activities as one party to contract relations.” It also added, “Even though a Korean court assumed jurisdiction regarding Ahn’s dismissal, there is no concern that it intervened in the Embassy’s sovereign activities unfairly. The ruling was decided by reference to a ruling made in 1998 in a lawsuit seeking nullity of a dismissal of a Korean employee who took legal action against the US government, which stipulated, “Unless there is a special condition that the execution of jurisdiction can result in unfair intervention in sovereign activities, our nation’s court can assume jurisdiction against another nation regarding labor issues related to diplomats.”

(2) Severance pay system

It is generally recognized that embassies in Korea have the duty to pay severance pay to their Korean employees. However, there are some disputes on whether embassies should pay severance pay to domestic workers such as housekeepers or gardeners.

(3) Application of the Industrial Accident Compensation Insurance Act

An embassy is a workplace to which the Labor Standards Act applies, but the enforcement of Korean law is restricted due to the employer’s diplomatic status under the Vienna Convention on Diplomatic Relations. If the employer has an obligation for compensation according to the Industrial Accident Compensation Insurance Act, it is granted that the embassy shall be considered the employer to take up industrial accident compensation insurance. In the event of a work-related accident, the embassy shall compensate the injured employee(s) in accordance with regulations in the Labor Standards Act on work-related accidents. In cases where there is no jurisdiction in Korea regarding the execution of Korean laws, it would be impossible to enforce the law by withdrawing overdue premiums in a compulsory manner.⁷ Accordingly, there are considerable restrictions in place on enforcing domestic law should a work-related accident occur.

2. Collective Labor Relations

Guaranteeing the three rights of labor would be difficult to accept by embassies. When Korean employees in the French Embassy established a labor

⁷ Supreme Court ruling on April 25, 1997, 96da16940

union and elected a union chairman on June 10, 1988, the Embassy dismissed the chairman immediately. In response, the labor union filed an application for remedy of unfair labor practice with the Labor Relations Commission and also filed a lawsuit seeking nullity of dismissal with the Seoul District Court against the ambassador of the French Embassy. These two cases were dismissed because there was no jurisdiction given to the ambassador, who was also a diplomat with the related immunity. The following Supreme Court ruling explained, “Even though dismissing the labor union representative can be considered an unfair labor practice, if he could not be reinstated to his previous job by the Labor Relations Commission through an order for remedy, it can be regarded that the labor union representative’s position is lost⁸.” There have been no cases similar to this since then, but it is generally recognized that labor unions are not tolerated at embassies.

3. The Four Social Security Insurances

(1) Employment Insurance and Industrial Accident Compensation Insurance

These insurances are compulsory for businesses and companies that hire at least one employee ordinarily. Provided, businesses in the fields of agriculture, forestry, fisheries or hunting, for which four workers or fewer are employed by a person who is not a corporation, are excluded. Accordingly, although embassies are companies required to pay into these two compulsory insurances, Employment Insurance⁹ and Industrial Accident Compensation Insurance cannot be enforced as compulsory insurances due to the special situations of the embassies, so embassy employees cannot receive benefits from these two insurances. Accordingly, in cases where an employee has a work-related accident, he must enter a claim for compensation under Korea’s Labor Standards Act to the embassy’s home country directly.

(2) National Pension and Health Insurance

For all companies ordinarily hiring at least one worker, subscription to the national pension and health insurance plans is mandatory. However, according to a news report, few embassies do so¹⁰.

IV. Wider Application of Labor Laws

⁸ Supreme Court ruling on November 14, 1989, 89noo4765

⁹ Labor Ministry Guidelines: Employment Insurance-1333, March 3, 2005

¹⁰ Daily Labor News: “Blind spot of social security insurances for Korean employees working in foreign embassies”, reported on October 13, 2003.

1. Typical Labor Cases (News report)

According to a YTN news report on January 31, 2009, Min Jung-Bae, who had been working as a driver for the Indian Embassy since 2002 was dismissed on the last day of 2008. He received verbal notice on termination of his employment just one day before and was informed that, according to Indian law, he could not continue to be employed by the embassy once he reached 60 years of age and would not receive severance pay either. In this case, how can remedy be received? First, Mr. Min should apply for remedy for unfair dismissal with the Seoul Labor Relations Commission against the Indian government, not the Indian Embassy. Also, the employee should make a claim for unpaid severance pay through the Seoul District Labor Office. The aforementioned Supreme Court ruling in December 1998 stated “unless the diplomats’ judicial actions are considered actions of sovereignty, our nation’s court can assume jurisdiction against the home nation of an embassy regarding labor issues related to diplomats.” Therefore, the employee can take legal action for unfair dismissal or unpaid severance pay in a Korean court against the Indian government.¹¹

2. Desirable Direction for Application of Labor Law

Thousands of Korean employees working at foreign missions in Korea have been in the blind spot for protection under Korean labor law. When employees cannot be protected by labor laws, it is as if they are not guaranteed the basic protection of their fundamental rights protected by the Constitution. If the employees cannot receive severance pay, which is part of the wages paid in return for the labor provided, it can be regarded that they have worked as exploited workers. Generally, foreign embassies are considered “special” workplaces due to their diplomatic immunity and are excluded from the host nation’s jurisdiction according to international law. However, as matters such as applications for remedy for unfair dismissal, compensation for work-related accidents, claims for unpaid wages, and related cases are directly related to employees’ natural rights, they should be implemented promptly and equitably as evidence of the protection of the people’s fundamental rights. Accordingly, the Ministry of Employment & Labor should provide, in an expeditious manner, clearer guidelines on labor laws as they apply to thousands of Korean employees working in foreign embassies and related foreign missions.

¹¹ Supreme Court ruling on December 17, 1998, 97da39216