Corona Virus Infections and Shut-down Allowances

I. Introduction

The spread of coronavirus infections has severely hampered business activity. All areas where an infected person has been are temporarily closed and infected individuals are quarantined. The Seoul Lotte Department Store was closed for a period of time, and the Gwangju Post Office was temporarily closed and then reopened. There are reports that Samsung Electronics in Gumi, North Gyungsang province might be temporarily closed. When a workplace is shut down and closed, it is difficult for the workers to survive, so the Labor Standards Act guarantees a wage of 70% on average as a shut-down allowance in case of closure for reasons attributable to the employer. It is possible to reduce a shut-down allowance if there is a huge disruption to the operation of the business to the point where the employer cannot continue to operate. In addition, the Civil Act states that if a worker is suspended due to the intention or negligence of an employer, the full wage shall be paid (Article 538), but if the business is closed through no fault of the employer, the shut-down allowance shall not be paid (Article 537). Payments can be divided into: (i) 100% pay, (ii) payment of shut-down allowances, (iii) reduction of shut-down allowances, and (iv) unpaid leave.

Here, I would like to explain the legal stipulations of shut-down allowances in accordance with the spread of coronavirus infections and to examine related cases in detail.

II. Spread of Coronavirus Infection and Companies' Countermeasures

1. The spread of coronavirus infections

Coronavirus infection is a respiratory infection caused by a new type of coronavirus that has spread worldwide since first being discovered in Wuhan, China in December 2019. It is spread when it penetrates an infected person's saliva, respiratory tract, or the mucous membranes of the eyes, nose, or mouth. After infection, the incubation period is 2-14 days (estimated), followed by a fever (above 37.5 degrees), respiratory symptoms such as coughing and difficulty breathing, and pneumonia.[1] On January 31, 2020, the Ministry of Employment and Labor applied "Class 1 Infectious Disease Syndrome" to coronaviruses in its Workplace Guidelines for the Prevention from Spread of Coronavirus Infections. According to Article 2 (Definition) of the Infectious Disease Control and Prevention Act (IDPA), "Class 1 Infectious Diseases" have a high mortality rate or a high risk of group outbreaks, so they should be reported immediately and require high-level quarantine, such as special isolation wards. Therefore, infected patients with first-degree infection should be hospitalized by an infectious disease management institution (Article 41 of the IDPA). Since no vaccines or treatments have been developed to date, hospitals are providing antiviral drugs or antibiotics to prevent secondary infections.

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[1] Naver Encyclopedia, Coronavirus Infectious Disease (COVID-19), checked on February 23, 2020: The official name COVID-19 stands for Co – Corona, VI – Virus, D – Disease, and 19 for the first reported year 2019.

2. Companies' countermeasures

(1) In case of individual infection: If an employee is infected during his personal activities, he/she will be quarantined and treated according to the relative infectious disease prevention method, and in case of suspension, there will be certain financial support in the government (Article 41 of the IDPA). In similar cases to this, it has been held as a principle that any absence would be considered unpaid leave because it was attributed to personal fault. However, if an employee is infected during a business trip, this is considered to be a work-related illness under the Industrial Accident Compensation Insurance Act (Article 34 of the Enforcement Decree of the Act).

(2) Shut-downs due to the presence of an infected person: If an infected person caught the infection at the workplace and the workplace is closed in order to prevent spread of the disease, this may not be regarded as attributable to the employer, and may be an exception to the payment of shut-down allowances.

(3) Closed to prevent infection: If an employer shuts down a workplace to prevent the spread of an infectious disease according to the law and the government's instructions, this may be considered an exception to the shut-down allowance. However, in the event of shut-down in order to prevent infection, shut-down allowance shall be paid.

(4) In case of shut-downs due to the lack of raw materials caused by the coronavirus: Shut-down allowances shall be paid. However, in case of a long-term shut-down, which causes enormous disruption to business operations, shut-down allowances may not be paid with the approval of the Labor Relations Commission (Article 46 of the LSA - Paragraph 2).

III. Legal Standards of Shut-down Allowances

1. Concept

According to the Labor Standards Act, when a worker is suspended for reasons attributable to the employer, the employer shall be required to pay at least 70% of the average wage (or 100% of the ordinary wage) (Article 46 (1)). However, if it is impossible to continue the business for unavoidable reasons, an amount that is less than the legal shut-down allowance may be paid if this is approved by the Labor Commission (Article 46 (1)). In order to guarantee the effectiveness of the shut-down compensation system, an employer who violates the provisions of shut-down compensation shall be sentenced to imprisonment of not more than three years or fined not more than KRW 30 million (Article 109).

Shut-down allowances are intended to guarantee workers' right to live by providing certain allowances when they are unable to work for reasons not attributable to them. On the other hand, if an employer is forced, for unavoidable reasons, to pay legal shut-down allowances until the business can no longer continue, this will cause excessive burden on the employer and will severely hinder operations, which may result in the insolvency of the company. This is why an exemption for shut-down compensation is stipulated.[2)]

'Shut-down' refers to a situation in which a worker is unable to provide work against his/her will despite being willing to provide the work under the employment contract.[3] Civil Act provisions relating to the shut-down of a business provide exemption of employer fault in case of a force majeure beyond the employer's responsibility.[4] However, if an employee fails to receive work due to the employer's fault, it is possible to claim the full amount of wages, and not just the shut-down allowance.[5] In cases like this, the Civil Act provisions have difficulty in proving the employer's intention or negligence, so the Labor Standards Act provides a shut-down allowance system to guarantee the minimum life standards of workers without relying on the Civil Act's risk-bearing principle.[6]

2. Requirements for shut-down allowance

As a requirement for shut-down, first, there must be fault attributable to the employer. Employer's fault is any reason that may arise within the employer's managerial influence.

Second, the business should not be closed due to force majeure. Force majeure means that the reason for the shut-down of a business should occur from outside and the employer could do nothing to control it. Typical examples would be natural disasters, war, and large regional blackouts.

Third, it is assumed that shut-down (full or partial closure) has taken place.

3. Amount of Suspension Allowances

(1) Full payment of wages

In case of a shut-down due to an employer's intention or negligence, the full wage shall be paid. This includes suspension without legitimate reason, forced leave, and unfair dismissal. In accordance with Article 538 (1) of the Civil Act, the employer shall pay 100% of wages, not shut-down allowances, when workers are suspended due to illegal activity by the employer. However, an interim benefit obtained during the same period may be deducted pursuant to paragraph 2 of Article 538 of the Civil Act.[7]

(2) Shut-down Allowances

In case of shut-down due to an employer's fault, an allowance shall be paid of at least 70% of the average wage. In principle, employer's fault is a management obstacle that occurs within

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2) Lim Jong-Ryul, Labor Law, 17th edition, Park Young-sa, 2019, p. 422; Jung Myung-hyun, Duality of Legal Characteristics for Shut-down Allowance, Justice Magazine (147), Korea Law Institute, April 2015, p. 253.

3) Supreme Court ruling on Oct. 11, 2012: 2012da12870.

4) Civil Act: Article 537 (Obligor's Burden to Bear Risk)
If the performance of an obligation of one of the parties to a bilateral contract becomes impossible by any cause for which neither of the parties is responsible, the obligor may not be entitled to counter-performance.

5) Article 538 (Impossibility of Performance due to Cause for Which Obligee is Responsible)
(1) If the performance of an obligation of one of the parties to a bilateral contract becomes impossible by any cause for which the obligee is responsible, the obligor may demand counter-performance. The same applies to cases where performance becomes impossible by any cause for which neither of the parties is responsible in the case of mora creditoris.
(2) In the cases of the preceding paragraph if the obligor has received any benefit by being relieved of his own obligation, he shall return such benefit to the obligee.

6) Labor Law Case Study Group, "Interpretation of the Labor Standards Act (III)", 2nd ed. Parkyoungsa, 2020, p. 121.

7) Supreme Court ruling on June 28, 1991: 90daka25277 (Damage compensation).

the scope of the employer's power and will include situations such as being closed due to shortage of funds, shortage of raw materials, decrease in order volume, reduction of market and output, shortage of raw materials in subcontracted factories due to the parent company's poor management, or shortage of operations due to insufficient funds.[8] A partial shut-down allowance shall be paid when only part of the workplace is closed or when working hours are reduced.[9]

(3) Reduction of shut-down allowances

In order to reduce shut-down allowances, an employer may have urgent cause to not continue business operations for unavoidable reasons, and will need to get approval from the Labor Relations Commission (Article 46 (2) of the LSA).[10] This means that if a company expects to go bankrupt, even if the employer is at fault, it may pay less than the legal shut-down allowance if so approved by the Labor Relations Commission.[11]

Conditions for the reduction of shut-down allowance require (i) as a substantial requirement, the inability to continue business operations for unavoidable reasons and (ii) as a procedural requirement, the approval of the Labor Relations Commission. Even if it is impossible to operate the business for unavoidable reasons, it is not possible to exempt or reduce shut-down allowances without obtaining approval from the Labor Commission.[12]

Shut-down allowances can be paid at less than 70% of the average wage, and can even be reduced in full.[13]

(4) Unpaid leave

Employer's fault under Article 46 of the Labor Standards Act refers to managerial obstacles that occur within the scope of the employer's power and includes situations such as financial shortages, shortage of raw materials, and market recession. If it is impossible to continue the business due to force majeure circumstances, this cannot be regarded as the fault of the employer.[14] Force majeure such as natural disasters cannot be seen as employer's fault because it is impossible for the employer to manage and control such occurrences. There is no obligation to pay shut-down allowances, regardless of whether the Labor Relations Commission has approved them.[15]

V. Application Cases for Shut-down Allowances

8) MOEL Guides: Gungi 68207-106, Sep. 21, 1999; Wage Policy Team - 711, Mar. 29, 2006
9) MOEL Guides: The Shut-down Allowance System, Labor Standards - 387, Feb. 13, 2000.
10) MOEL Guide: Gungi 68207-598, Feb. 28, 2000.
11) MOEL Guides: Standards of the Shut-down Allowance System, Labor Standards Team - 387, Feb. 13, 2009: Approval Process of Labor Commission Decision on Shut-down Allowance (by Employer) → Submission of Application for Approval of Reduced Shut-down Allowance (to the Labor Relations Commission) → Confirmation and Review (by related official) → Deliberation & Resolution (Judgement Committee, within 30 days) → Notification
12) Supreme Court ruling on Sep. 17, 1968: 68nu151.
13) Supreme Court ruling on Nov. 24, 2000: 99doo4280.
14) MOEL Guides: Labor Standards Team - 802, Feb. 16, 2010
15) MOEL Guides: Gungi 68207-598, Feb. 28, 2000

1. Full payment

(1) If an employee's (unfair) dismissal was invalidated or canceled, the employee's status as a worker would still be in existence, and it would be considered that the worker's failure to provide work was attributable to the employer. Article 538 (1) of the Civil Act may request the payment of all wages available for the dismissed period.[16)]

(2) If suspension of vehicle driving (discontinuance) measures against a worker was found to be unreasonable, in which case the employee was not able to provide work due to the employer's fault, the employer shall pay a shut-down allowance as prescribed by Article 46 of the Labor Standards Act. If, however, the employee is deemed unable to provide work due to intention or negligence of the employer, a claim for the full amount of wages under Article 538 (1) of the Civil Act shall also occur.[17)]

2. Payment of Shut-down Allowances

(1) If a contractor was given an order to suspend the operation by the government, if subcontractors also had to shut down their operations (which cannot be translated as force majeure), the subcontractors should pay shut-down allowances to their workers.[18)]

(2) If a contractor's removal of hazardous chemicals restricts access to a subcontractor's workers and if they fail to provide work, this is hardly considered to be force majeure beyond the scope of the employer.[19)]

3. Reduction of Suspension Allowances

(1) The Bupyeong plant closed for more than three months due to a sharp drop in sales after an incident with contaminated dumplings, and the inventory increased during this period. As a result, managerial difficulties can be understood as about 80 workers were dismissed for business reasons. Unless consumer confidence was restored in the near future, normal operation would be difficult. Therefore, it is possible to reduce the shut-down allowance if it is impossible to continue the business for unavoidable reasons (Incheon LRC 2004 Shut-down 1).

(2) Due to bankruptcy, deficits accumulated even after the company liquidation procedure began, and there was no alternative for normalization as attempts to sell the company were unsuccessful. In this case, unavoidable shut-down is a valid reason for the reduction of shut-down allowances ((Incheon LRC 2000 Shut-down 1).

(3) A situation in which a company goes to the brink of bankruptcy due to an unforeseen fire

16) Supreme Court ruling on Dec. 22, 1981: 81da626.
17) MOEL Guides: Wage/Working Hour Team - 711, Mar. 29, 2006.
18) Supreme Court ruling Sep. 10, 2019: 2019do9604.
19) MOEL guides: Labor Standards Team - 3535, May 30, 2018

is considered an unavoidable reason for the employer (NLRC 89 Shutdown 1)).

4. Unpaid leave

(1) An employer is not obliged to pay any shut-down allowance for a period of suspension due to interruption of work by a third party.[20)]

(2) Absence or leave of absence due to natural disaster or other similar instances, and disciplinary actions such as suspension from work, temporary suspension of work, illness, etc., shall not be regarded as a case of employer fault and shall not be reason for payment of a shut-down allowance.[21)]

V. Conclusion

The leave allowance system guarantees workers' right to survival by providing shut-down allowances in cases where the worker does not provide labor due to fault on the employer's part. At present, the spread of coronavirus infection is causing hard times for both companies and workers. If a company pays shut-down allowances without any income, it will be difficult to continue to operate in the future. On the other hand, if an employee cannot earn money due to a lack of a shut-down allowance, survival of the worker would also be a serious problem. When faced with a force majeure situation such as this, urgent measures are needed to guarantee employment through the payment of employment insurance funds.

How to Introduce and Use Flexible Working Systems

I. Introduction

Productivity depends on increasing production or achievements in a limited time. The term ‘52-hour week’ originated from the introduction of ‘one week’ in Article 2 of the Labor Standards Act, which states that "one week is seven days including holidays."[22)] A statutory work week is 40 hours, (a total of 52 hours with maximum allowable overtime of up to 12 hours per week). In order to achieve better results with a reduction of working hours, a flexible working time system that focuses on the characteristics of the work is urgently needed. In 2006 I provided wage consultation for a French company that was in charge of the operation of subway line 9, and what the manager told me is still vivid in my mind. "Koreans

20) Guidelines: Labor Standards Team - 2855, June 9, 2004
21) Lim Jong-Ryul, Labor Law, 17th edition, Park Young-sa, 2019, p. 423
22) The Labor Standards Act was revised on the concept of one week (March 30, 2018).

work 44 hours per week, but are less productive than those who work 32 hours per week" the French manager said. At that time, when I considered what he said, I thought it was because Korea was constantly working on extended work and holiday work due to the rigid working hours. Most Korean companies still work from 9 am to 6 pm, Monday through Friday. In order to be efficient during these traditional hours, an introduction of flexible working hours as allowed by the Labor Standards Act is urgently required.

The Labor Standards Act includes (i) flexible working hours, (ii) selective working hours, (iii) deemed working hours, and (iv) discretionary working hours. How to adopt and use these four flexible working systems is described in detail below.[23)]

II. The Flexible Working Hours System

1. Concept

'Flexible working hours' means a shortening of the working hours of other working days or other weeks instead of extending the working hours of particular days or weeks, so that the average working hours of a given period shall remain within the limit of statutory standard working hours (40 hours per week). For example, if you work 45 hours (9 hours x 5 days) in the first week and 35 hours (7 hours x 5 days) in the second week, the two weeks will have an average of 40 hours per week, and so it will not be necessary to pay overtime for the extended 5 working hours of the first week.

For the workers, increased leisure time as a result of a reduction in working hours, a decrease in the number of commuting days, and increased holidays, all of which cause a change in their biorhythms resulting in increased fatigue, is coupled with a decrease in real wages due to reduced overtime allowances.

From the perspective of the employers, labor costs can be reduced by increasing the efficiency of working hours and reducing the need for overtime by arranging working hours to proactively respond to market conditions and management, thereby avoiding the too-strict fixed statutory time system.

2. How to Introduce Flexible Time

(1) Introduction of flexible working hours within a two-week period

In order to introduce flex-time in two weeks, it must be prepared in advance through the establishment and revision of the rules of employment. In order for this system to be introduced through the employment rules, the opinion of the labor union, or workers representing the majority, should be heard, and consent should be obtained if introduction of the system will affect the workers disadvantageously.

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23) Ministry of Employment and Labor, "Flexible Working Hour System Guides", September 2019; MOEL, "Q&A for Flexible Working Hour System", December 2017.

(2) Introduction of flexible working hours within a 3- month period

This system requires labor-management agreement. The employer should receive a written agreement from the labor union which comprises a majority of the workers, or the employee representative for the majority of the workers. The contents of the written agreement must include (i) the scope of the covered workforce, (ii) the unit period, (iii) the working day in the unit period, and the working hours for each working day, and (iv) the validity period of the agreement.

1) The scope of covered workers does not necessarily have to include all workers, as it can apply to only some workers engaged in specific sectors, industries and occupations. However, it cannot be applied to young workers (between 15 and 18 years of age) or pregnant workers.
2) Since the unit period is within 3 months, it can be implemented in various unit periods such as 3 months, 2 months, 1 month, or 3 weeks.
3) The working day and the working hours for each working day must be specified. Workers should be notified of the work schedule before the start of the unit period by specifying the work day by work type and working hours by work day in the work schedule. Working hours in a particular week may not exceed 52 hours, and working hours on a particular day shall not exceed 12. If more than that, overtime work allowance must be paid.
4) There is no special limitation on the validity of written agreements. If an expiration date is set, an automatic renewal clause or an auto-expansion clause may be implemented in case the expiration date passes.

3. How to use Flexible Time

(1) Let's use the instance of a brick factory.[24] "We use a combination of sand, special cement, and water to make differentiated bricks in the factory. In January each year, temperatures drop below -20 degrees, and when the water completely freezes at this temperature, it is almost impossible to produce bricks. Therefore, workers come to work as usual and perform chores such as cleaning rather than producing bricks. But in March, the situation is completely different. As construction starts in earnest, there is no choice but to work overtime due to the large volume of brick orders." For this company, a flexible working-hour system could solve their problem. Workers could work 30 hours per week in January, 40 hours per week in February, and 50 hours per week in March. In this case, the average working hours per week would be 40 hours, which would mean the company is not obligated to pay an overtime allowance in March, even though the work week at that time exceeds 40 hours.

(2) For a luxury-brand store: December is the peak season, and so customers shop a lot and store workers work overtime. On the other hand, January is off-season and customers don't go to luxury brand stores as much, resulting in an overabundance of workers who must be paid, but have minimal production. In this kind of store, flexible working hours could reduce labor costs and enhance work efficiency. In December, during peak season, workers would work 52 hours a week, but in January, during the off-season, they could work just 28 hours a week.

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[24] Boksoo Kim, "The Practical Use of the Flexible Working Hour System" <Labor Law>, June 2018.

III. Selective Working Hours System

1. Concept

The Selective Working Hours System sets only the total working hours of the settlement period within one month, allows workers to arbitrarily select a working time for each work day per week within the standard working time range, and to freely determine their commute time for each day and each week. In other words, the system sets only the total working hours within one month and leaves the start and end times of working hours to the workers' discretion. Therefore, the selective working hours system gives workers the choice of commute times, enabling them to balance work and life to increase their work efficiency while improving their quality of life.

2. How to introduce a Selective Working Hours System

(1) Introduction through the employment rules: Employers must stipulate that the start and end times of work are left to each worker's discretion for a group of workers subject to selective working hours, through the establishment or revision of employment rules.

(2) Written agreement with the employee representative: To introduce a selective working hours system, a written agreement with the labor union or worker representing the majority of the workers is required. The written agreement shall include (i) the scope of workers subject to this system, (ii) the adjustment period (within one month) and the total working hours within the adjustment period, (iii) starting and finishing limit of working hours if a mandatory work period (core time) is in force, (iv) starting and finishing time of eligible hours for selection by workers (selective time), and (iv) standard working hours to become the basis for paid leave.

1) The scope of covered workers: In general, it is easy to apply the system to managers and supervisors who do not have strict restrictions on commuting, etc., and for professional, research, and office workers, where the emphasis is on quality rather than the amount of work. However, this system can be introduced in any workplace.
2) The settlement period and total working hours: The discretionary period for which the worker chooses to provide the work can be set within one month (two weeks or four weeks). The total working hours are usually calculated as the total sum of the contractual working hours within the settlement period (e.g. 40 hours x 30 days/7 days = 171.4 hours) prior to the introduction of the system. If the total working hours are set, even if the working hours in a given unit exceed the legal working hours per day or per week within the total working hours of the settlement period, they will not be considered extended working hours subject to O/T allowance.
3) Core working hours and selective working hours: A core working time is the time when the worker must work, and the selective working time is the time when the worker can decide which hours to work.
4) Standard working hours: Standard working hours refers to the working hours for one day, as set by labor and management, which becomes the basis of calculation for paid leave, etc. in the selective working hour system. For paid leave, it is considered that the standard working hours of 1 day are used.

3. How to use

(1) **General selective working hours system:** The selective working hours system is divided into mandatory working hours and selective working hours. Standard working hours, based on the calculation of paid leave, are from 09:00 to 18:00. For example, workers are given discretionary hours from 07: 00 - 11: 00 for coming to the office and from 15: 00 - 20: 00 for leaving the office. Mandatory working hours for all workers are between 11: 00 and 15: 00.

(2) **Jobs where it is difficult to verify working hours, and/or with high waiting times** (The 00 company specializes in renewable energy): Employees were dissatisfied because they did not get paid overtime due to difficulties in verifying their working hours. Also, for after-sales service, irregular overtime work occurred frequently and there were many waiting hours. The company introduced a selective working hours system on a monthly basis for the sales and AS teams through written agreements with labor representatives after consultation between labor and management. As a result, it was possible to adjust working hours according to work volume and reduce unnecessary waiting time and overtime work by carrying out flexible and efficient work.[25)]

(3) **Jobs related to irregular work types:** The 00 company, which is a refrigeration facility installation and management company, works according to the project schedules requested by clients and their companies, due to their unique natures. There was a lot of overtime hours due to irregular, nighttime and holiday work. The company therefore introduced a selective working hours system which allowed each worker to manage their time of arriving and leaving work according to the circumstances and demands of client companies. This has minimized unnecessary overtime. As a result, workers could adjust their working hours according to the schedule of their clients, which made it possible to reduce overtime caused by irregular working hours.[26)]

IV. Deemed Working Hours System

1. Concept

The Deemed Working Hours System is a system for recognizing working hours when it is difficult for workers to calculate all or part of their working time outside the workplace due to business or other reasons. In this case, in principle, the prescribed contractual working hours are considered to be worked. However, in the case where work in excess of predetermined working hours is normally required for performance of the work, the required time is generally regarded as working time. If labor and management have determined generally-necessary working hours in writing in advance, such working hours are regarded as working hours performed. The deemed working hours system outside the workplace is sometimes referred to as an authorized labor system, and was established to make working hours more rational in consideration of the increasing number of working hours outside the workplace due to the development of the

25) MOEL, "Flexible Working Hour System Guides", September 2019, p. 52.
26) Above guide, pp. 53-54.

service industry and the progress of automation. Difficulties in calculating such working hours include sales, AS service, business trips, taxi driving, reporters' work, and home-stay work.

2. How to introduce a Deemed Working Hours System

(1) Provision of work outside the workplace: Work outside the workplace should be judged after comprehensive consideration of the place of work and the type of work performed. A working place is a situation in which a worker deviates from the management of working hours at his or her own place of work. The form of work performance refers to the conduct of work without specific direction and supervision from the employer's working time management organization.

(2) Difficulty in calculating working hours: It is difficult to calculate working hours because the starting and finishing time when working outside the workplace are discretionary for the workers concerned, and because the workers concerned work the number of working hours due to each unique situation and working conditions involved. Therefore, if it is possible to calculate working hours when specific direction and supervision by the employer is applied directly to workers working outside, those workers are exempted from application of the deemed working hours system.

(3) How to introduce: If (1) and (2) above are met, workers' working hours, regardless of actual working hours, should be considered as working hours as either: (i) predetermined working hours, (ii) time normally required for the performance of the work, or (iii) agreed working hours between labor and management.

3. How to use

Overseas business trips: When traveling for long-distance overseas business trips or returning home, flight times, immigration procedures, and travel time are all likely to exceed actual working hours. In such cases, it is desirable to establish a written agreement with the worker representative. Generally, the company guarantees paid or alternative leave for the time required for the work because of overseas business regulations. In this regard, the courts and the Labor Ministry consider working time spent abroad as working hours.[27)]

V. Discretionary Work System

1. Concept

The discretionary work system is a system that requires the delegation of the method of work to the discretion of the workers, in light of the nature of the work.

Due to technological advances, information-oriented work, the increasing share of the service

27) Suwon District Court ruling on November 25, 2016: 2015 gadan 505758; Labor Ministry Guideline on June 14, 2001: 68207-1909,

industry, increase of knowledge labor, etc., workers have a lot of discretion in the way they work, and so their remuneration depends on the quality of their work rather than the number of working hours.

Professional work that requires creativity (such as R&D, information processing, system analysis, design work, news article composition, and editorial work) is not appropriately regulated by the number of working hours in the same way as for general workers. But it is preferable for both labor and management to leave working hours to the discretion of such professional workers rather than to control them.

2. How to introduce a Discretionary Work System

(1) Work falling under 'discretionary work'.

Work that may be considered discretionary work is limited to the work prescribed in Article 31 of the Enforcement Decree of the Labor Standards Act. The work must be at the discretion of the workers. They should not be given specific instructions as to how to perform, but this should not be left to the full discretion of the workers either, so the employer can direct the basic content of the work. However, the employer must not give specific instructions regarding the distribution of working hours.

(i) Research and development of new products or technologies, and research in the areas of the humanities or the social or natural sciences; (ii) Design or analysis for data processing systems; (iii) Gathering, compiling and editing of news in a newspaper, broadcasting or publication business; (iv) Design or creation of clothing, interior decoration, industrial goods, advertising, etc.; (v) Work as a producer or director in the business of producing broadcasting programs, motion pictures, etc.; and (vi) Consultation, advice, appraisal or an agency with the delegation or commission of others in the affairs of accounting, legal cases, tax payment, legal affairs, labor management, patents, appraisals, etc.

(2) There must be written agreement on statutory matters.

In order to introduce a discretionary work system, the employer must specifically identify the work concerned, as well as all other necessary items, through a written agreement with the employee representative. Statutory matters that must be included in the written agreement include: (i) provision as to the work to be provided; (ii) provision that the employer would not give directions to the worker regarding how to perform the work, and details concerning the allocation of working hours; and (iii) provision for the computation of working hours as determined by written agreement.

3. How to use

In order for the company to adopt and use discretionary work hours for certain occupations, departments, and duties within the organization, its application must include (i) the six discretionary work tasks mentioned above, (ii) discretionary rights in work performance must be allocated and (iii) there should be a written agreement with the worker representative.

VI. Conclusion

In order to improve the productivity of the company and improve the quality of life of the workers, it is necessary to introduce a working-hour system tailored to the characteristics of workers' jobs. Through this, it will be possible to create a desirable work culture where work and life are equally compatible.

Recess Periods and Designing a Working Hour System

I. Introduction

The purpose of a recess is to restore workers' fatigue and reduce the boredom caused by continual work, thereby enabling them to continue to work feeling refreshed and with a willingness to work.[28] A 'recess period' is the period of time during which a worker is free to rest without being directed or supervised by an employer.[29]

The Labor Standards Act states "Working hours per week shall not exceed forty hours excluding recess hours. Working hours per day shall not exceed eight hours excluding recess hours. In calculating working hours, waiting hours the worker spends while under the employer's direction and supervision for work shall be regarded as working hours." (Article 50 of the LSA). The recess period in the Labor Standards Act is excluded from working time, but time waiting for work is determined to be working time, not a recess period. Although the relationship between working time and recess period is clear, there is a vague distinction between 'waiting time' and 'recess period'. In designating working hours, it is possible to secure optimal working hours even within statutory working hours if the proper recess period is used in consideration of the characteristics of the work. In order to design a suitable working time system, the concept of recess periods, and the criteria for distinguishing between 'waiting time' and 'recess period' is explained, along with examples of some working time systems using relevant recess periods.

II. The Concept of a Recess Period and its Practical Use

1. Legal regulations

According to the Labor Standards Act, "An employer shall allow a recess period of 30 minutes or more for every 4 working hours and more than 1 hour for every 8 working hours during working hours" (Article 54 of the LSA). "Any person who violates the provision of

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[28] Kaprae Ha, 「The Labor Standards Act」 28th ed., 2016, p 323; Jongyul Lim, 「Labor Act」 17th ed., 2019, p 460.
[29] Government Guide: Bubmoo 811-28682, issued on May 15, 1980.

'recess period' shall be punished by imprisonment of up to two years or by a fine not exceeding twenty million won" (Article 110). "Working hours per week shall not exceed 40 hours excluding recess hours, and working hours per day shall not exceed 8 hours excluding recess hours, and waiting hours that the worker spends while under the employer's direction and supervision for work shall be regarded as working hours" (Article 50).

2. Free use of recess periods

'Recess period' means time which a worker is free to use away from the supervision and command of an employer during working hours.[30] Here, the term 'working hours' refers to the time when a worker provides work in a labor contract under the direction and supervision of an employer. Even if a worker is not actively working (i.e. waiting time, rest time, sleeping time, etc.), if it is a period of time when that free use is not guaranteed to the worker and is actually time under the control and supervision of an employer, this time is included in working hours.[31]

A recess period is part of the working hours from the start to the end of work, so even during a recess period it is unavoidable that a worker may still be subject to a certain level of restriction, such as the command and supervision of an employer to continue to carry out work. In other words, workers can be given free breaks, but at the same time there may be some restricted recess periods, depending on the nature of the work, when it is necessary to maintain continuity of work and efficiently respond to emergency situations. In this case, if workers are free to use the recess period beyond the command and supervision of the employer, even though they are restricted within the workplace or are not allowed to leave the workplace during the break without permission, these limitations, which may be required in order to meet objective criteria recognized in advance, can be accepted as a reasonable limitation as to where and how to use breaks.[32]

3. Scope and use of recess periods

(1) Principle: Article 54 (1) of the Labor Standards Act stipulates that an employer shall provide a recess period of 30 minutes or more in the case of 4 hours of work, or 1 hour or more in the case of 8 hours of work. This is the minimum standard for recess periods that employers must provide for workers who work continuously for specific periods of time.[33] Even if the recess period is provided and given in divided portions distinctive from working hours, as long as such recess periods are reasonable in view of the nature of the work and the working conditions, this cannot be regarded as a violation of the recess regulation.[34]

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30) Supreme Court ruling on April 14, 1992: 91da20548.
31) Supreme Court ruling on November 23, 2006: 2006da41990; Supreme Court ruling on December 5, 2017: 2014da74254.
32) Government Guide: The Legislative Office 16-0239, issued on August 19, 2016.
33) Government Guide: The Legislative Office 15-0847, issued on December 24, 2015.
34) Government Guide: Gungi 68207-3307, December 2, 2002.

(2) Working hours of less than 8 hours: Employers shall provide 30 minutes or more of recess period during the working hours to workers whose working time is more than 4 hours and less than 8 hours.[35] However, since this is the lowest standard, it is not a problem to provide more recess time.

(3) Divided recess periods: The Labor Standards Act does not provide any provision for dividing a recess period into 10 minutes for every hour or 20 minutes for every two hours. A breakdown of subdivided hours may not be admitted, as the purpose of a recess period is to provide rehabilitation from fatigue, promotion of work efficiency, prevention of work accidents, eating time and to meet other socio-cultural requirements.[36]

(4) Working hours exceeding 8 hours: In case of overtime work for more than 8 hours per day, a recess period of 30 minutes or more for 4 hours of overtime work and 1 hour or more for 8 hours or more shall be provided pursuant to Article 54 of the Labor Standards Act.[37]

III. Classification of Waiting Time and Recess Period

1 Judgment standard

(1) Working time and recess period

'Working time' refers to the time during which an employee provides work under the direction and supervision of an employer. Any waiting time is under the direction and supervision of the employer, and so shall be regarded as working time (Article 53 (3) of the LSA). On the other hand, 'recess period' refers to the time which a worker is free to use away from the command and supervision of an employer during working hours.[38]

(2) Waiting time and recess period

Both 'waiting time' and 'recess period' are common, in terms of occurring during working hours. The difference is that 'waiting time' is the time preparatory to engaging in work as soon as the employer instructs and is therefore under the direction and supervision of the employer. 'Recess period' on the other hand, is time which workers are free to use separate from the direction and supervision of an employer. Therefore, the distinction between the two is determined according to whether the worker can freely use the time available.[39] If the worker can clearly distinguish the recess period before starting work, and can freely use it with no direction or supervision of an employer, it must be regarded as a recess period, but if it is not known when there will be a work-related instruction from the employer while the worker is

35) Government Guide: The Legislative Office 15-0847, issued on December 24, 2015.
36) Government Guide: Gungi 0125-884, June 25, 1992.
37) Government Guide: Working condition guide team-722, February 6, 2009.
38) (2016.10) The Guideline of working hours and recess period for surveillance or intermittent work
39) Seonggil Lee, "Recess period in Labor Law", 「Labor Law」 April 2004, Vol. 155. Joongang Kyungjae

waiting, the time cannot be considered a recess period, but as working time.[40)]

2. Related cases

(1) Drivers for transportation companies

When workers of transportation companies, such as tour bus drivers, go to work and are not sure at what time they will be placed dispatched for work, and freely wait at the workplace, but when workers wait without knowing when they will be requested to work for the employer, such waiting time is not considered a recess period. However if, due to the nature of the work, it is not possible to uniformly set a certain recess period in advance, if the dispatch time of the day is clearly defined so that the distinction between the dispatch time (vehicle operation time) and waiting time is clear before work or on the day of work, and if the worker knows the waiting time in advance and if such waiting time is available freely beyond the direction and supervision of the employer, this is a recess period.[41)]

(2) Apartment guards

In this instance, apartment guards worked 24 hours from 07:00 to 07:00 the next day, and then rested. Among the 24 hours of work, the recess period consisted of 6 hours, and was divided into 1 hour for lunch, 1 hour for dinner, and 4 hours for night break (from 24:00 to 04:00). They were required to respond immediately if something urgent happened, even if it occurred during the night recess period. Although guards were wearing their work uniforms and took a nap during the night recess period, they were ready to react immediately in case of an emergency, and therefore such night rest periods should be regarded as working time.[42)]

(3) Goshiwon (long-stay inn) receptionists

Goshiwon receptionists do not have predetermined times set aside for recess periods. As visitors or new tenants do not have a fixed arrival time, the receptionists must remain in place without leaving the Goshiwon house. The owner provides the necessary work instructions without special time constraints, and receptionists must also fulfill unscheduled instructions. Although the receptionists did not have any special work to do, and although they took long breaks or studied during many of the waiting hours, such time is considered to be a waiting time for work, not a recess period completely free from direction and supervision.[43)]

(4) Postal vehicle drivers

Drivers working in the postal logistic service have often taken breaks (such as eating or sleeping) at work, while working every other day. However, these breaks were taken during

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40) Government Guide: Gungi 01254-12495, August 5, 1987.
41) Government Guide: Bubmoo 811-28682, issued on May 15, 1980.
42) Supreme Court ruling on December 13, 2017: 2016da243078.
43) Seoul Central District Court ruling on June 23, 2017: 2017no922.

gaps in time while waiting to provide labor between the time of going to work and leaving work at a specific time. In other words, such periods were not provided freely away from the employer's direction and supervision.[44)]

(5) Nursing assistants

The labor contract of nursing assistants who worked a three-shift schedule specified a four-hour rest period during the night shift and the availability of a night-time sleeping room. However, in reality they often could not sleep there due to emergency calls from patients at the nursing hospital where they worked. Such periods should be regarded as waiting hours for work.[45)]

IV. Recess Periods and Related Working Hour Cases

1. Recess periods in hotel restaurants

In many restaurants, there are times when it is not busy, such as between breakfast and lunch and between lunch and dinner, so the business closes for two to three hours per day. Workers who are preparing for their work are recognized as working, but other workers are allowed to use this time freely to go out or rest. In response to this, the Ministry of Employment and Labor presented this opinion: Article 54 of the Labor Standards Act only specifies the minimum standard of a recess period, but there is no regulation on the longest time. Therefore long recess periods (2-3 hours) exceeding statutory recess periods are acceptable, but unlimited long intervals during working hours are against the original intent of the recess system. In order to view such long breaks as a recess period under the Labor Standards Act, there must be objective reasons that can be generally recognized as necessary and socially valid in view of the nature of the work or the working conditions of the workplace. Such recess period should be decided in advance by collective agreement, employment rules, labor contract, etc., so that employers cannot change or extend it arbitrarily, and workers should be guaranteed to be able to use it free from the provision of labor.[46)]

2. Long recess periods at hotels

A break time system refers to a working hour system that allows workers to rest for a time period longer than the stipulated time of the law by using time when the work load is significantly less or non-existent (In case of hotel business, 14:00 ~ 17:00 break time is usually used). It is difficult to say if it is illegal for an employer to enforce a break time system for workers because the Labor Standards Act specifies only the minimum standard for a recess period with no maximum regulated limits.[47)]

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44) Supreme Court ruling on May 27, 1993: 92da24509.
45) Supreme Court ruling on September 8, 2016: 2014do8873.
46) Government Guide: Gungi 01254-1344, August 11, 1992.
47) Government Guide: Inspection 01254-6504, November 28, 1990.

3. Middle East construction workers' long recess periods

In the Middle East, it is objectively recognized that workers cannot work outside on construction sites where the temperature rises rapidly during the day. Instead, they work from 06:00 to 10:00, taking recess time from 10:00 to 16:00, and then working from 16:00 to 20:00, according to collective agreements, employment rules or labor contracts. During the recess period, workers are completely free from work-related activities. In such cases, even though the recess period is long, such long intervals between working hours can be recognized as recess periods.[48)]

V. Conclusion

Whether a break or waiting time set out in a labor contract falls within 'working hours' or 'recess period' cannot be judged exclusively according to a particular kind of business or type of work. It should be judged based upon considerations such as (i) the terms of the employment contract, the rules of employment, or collective agreement applicable to the workplace, (ii) the work provided by the employee and the specific type of work at the workplace, (iii) the employer's control and supervision of employees during recess hours, (iv) whether there is a freely-available resting place, and (v) other circumstances such as whether or not the worker's actual rest can be interrupted or whether there are situations which allow the employer to direct and supervise workers during recess hours.[49)]

A Study on Foreign Workers' Legal Rights and Available Remedies for Violations[50)]

Bongsoo Jung[51)]

- Contents -

48) Government Guide: Bubmoo 811-28682, issued on May 15, 1980.
49) Supreme Court ruling on June 28, 2018: 2013da28926.
50) Jung, Bongsoo, 「 A Study on the Employment System for Foreign Workers and Available Remedies for Violation of Their Legal Rights 」, Ajou University doctoral thesis, Dec. 2017. Based upon the aforementioned thesis, this paper is updated as of December 30, 2019.
51) Jung, Bongsoo, Labor Attorney, KangNam Labor Law Firm

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.[52] 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 mandatory subscription to Industrial Accident Compensation Insurance, but industrial accidents are not properly handled unless the work-related accident is a serious one.[53] 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.[54]

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

II. Individual Employment Relations

52) Supreme Court ruling on Jun. 25, 2015: 2007doo4995. Decided with all judges hearing (Withdrawal of union establishment certificate).
53) 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.
54) Supreme Court, Feb. 26, 2002. Verdict 2000da39063 (Reasonable discrimination is not discrimination)

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.[55] 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.[56]

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.[57]

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 Act, "No discriminatory treatment of working conditions on the grounds of nationality shall be made" and related penalties.[58] 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.[59] 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

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55)) Supreme Court ruling on Oct. 29, 2015: 2013 Da1051 (different wages according to different hiring methods)
56) Supreme Court ruling on Feb. 26, 2002: 2000 da 39063 (Reasonable discrimination is not discrimination)
57) 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.
58) 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.
59) Administrative Interpretation by MOEL on Mar. 10, 2000.

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.[60] 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.[61] 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.[62] The three cases above apply labor law 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.[63] 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.[64]

2. Annual Paid Leave

The provisions of annual leave for non-professional foreign workers are not specified in the standard labor contract[65] 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.[66] 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

60) Constitutional Court ruling Aug. 30, 2007: 2004 hunma 670 (Industrial Trainee System)
61) Supreme Court ruling Sep. 15, 1995: 94 nu 12067 (Rejection of accident as work-related).
62) Supreme Court ruling Jun. 25, 2015: 2007 doo 4995 (Cancellation of rejection of union establishment application).
63) Lee, Jun-il, 「Human Rights Act - Social Issues and Human Rights」, 7th Ed., Hongmunsa, August 2017, p. 4.
64) 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.
65) FEA Enforcement Regulations, Form No. 6 (Standard Labor Contract).
66), Lim, Jong-Ryul, “Labor Law”, 17th Ed., Park-young-sa, 2019, p. 454.

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."[67] 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."[68] Therefore, annual leave can be said to improve the quality of life for workers by granting time to engage in cultural aspects of life to the rest from work.[69]

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).[70]

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

67) Constitutional Court ruling on May 28, 2015: 2013 hunma 619 (Purpose for annual leave)
68) Supreme Court Dec. 26, 2003. Sentence 2011Da4629 Decision (Purpose for annual leave)
69) 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.
70) 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.

days. Here, if 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.[71)]

B. Related issues

Annual paid leave must also apply to foreign workers.[72)] 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."[73)]

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.[74)] Unused annual leave allowances are also to be reflected in the average wage for calculating severance pay. The right of non-professional foreign 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).

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71) 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.

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

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

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

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[75], 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.[76] 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.[77]

4. Evaluation

The employment conditions of non-professional foreign workers are particularly poor, and many violations of the Labor Standards Act continue to occur.[78]

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.[79]

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75) MOEL, "Working Guidelines on Accommodation and Housing for Foreign Workers and Collecting Related Costs", Office in charge of Foreign Workers, Feb. 6, 2017.
76) 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.
77) Amnesty International, "Exploitation and Forced Labor of Foreign Migrant Workers in the Agricultural Industry", p. 30.
78) 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.
79) Lee, Jun-il, 「Human Rights Act - Social Issues and Human Rights」, 7th Ed., Hong-mun-sa, Aug. 2017, p. 4.

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.[80)]

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 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.[81)] 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.[82)]

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80) Kim, Hyung-bae, "Labor Law", 24th Ed., Park-young-sa, 2015, p. 131.
81) 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).
82) Supreme Court ruling on Jun. 25, 2015: 2007 doo 4955 (Labor Union of illegal foreign workers recognized.)

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.[83)]

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."[84)] 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.

B. Related issues

Foreign workers can also seek to improve their working conditions by forming Labor Unions and signing collective agreements through collective bargaining.[85)] 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.[86)] 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.[87)] The labor union of these English instructors was established

83) 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.
84) Supreme Court ruling on Jun. 25, 2015: 2007 doo 4955 (Labor Union of illegal foreign workers recognized.)
85) Lim, Jong-Ryul, "Labor Law", p. 51.
86) 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.
87) Jung, Bongsoo, 「A Study on the WorkerWorker Status of Native Korean Instructors」, Master's Thesis, Graduate School of

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").[88] Second, under the Immigration Act, the determination of an illegal stay is only for enforcement purposes, and the basic rights of foreign workers must not be restricted.[89] Third, restricting the three labor rights for illegal workers can be said to induce illegal employment of foreigners and human rights violations and abuses.[90] 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.[91] 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.[92]

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.[93]

Labor, Korea University, Dec. 2013, p. 87.

88) 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.

89) 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.

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

91) 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.

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

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

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.[94)]

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).[95)] 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

94) Kim, Hyung-bae, "Labor Law", p. 1231.
95) Kim, Hyung-bae, "Labor Law", p. 1232; Ha, Gae-rae, "The Collective Labor Relations Act", Joongang Kyungjae, 2016, pp. 680-681.

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).

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.[96)]

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.

96) 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.[97] 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.[98]

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.

97) Lee, Sang-Kook, "The Industrial Accident Compensation Insurance Act (I)", 3rd Ed., Daemyung Publisher, Jan. 2014, p. 554.
98) Jeon, Kwang-seok, Park, Ji-soon and Kim, Bok-ki, "The Social Security Act", 4th Ed., Shin-jo-sa, 2017, p. 188.

(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,"[99] 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.[100] This has been confirmed by a Supreme Court case.[101] 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.[102] 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 injury/illness.[103]

(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.[104] 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.[105]

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99) 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.

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

101) 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."

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

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

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

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

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.[106] 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.[107] 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.[108]

B. Employment Insurance Act (EIA)

Employment insurance premiums are classified into unemployment benefits and premiums for employment stability and vocational skills development projects. 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).[109] Unemployment benefits are payable only when a worker is involuntarily unemployed and seeking work.[110]

(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

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106) 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.

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

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

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

110) 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;

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.

<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.

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.[111)]

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 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).[112)]

(2) Related issues

Systematic support for vocational skill development of foreign workers is necessary.[113)] 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.[114)] 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."[115)] In Germany, foreign workers are required to attend at least 600 hours of inclusive education.[116)]

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111) 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 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.

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

113) 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.

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

115) 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.

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."[117)]

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.[118)]

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.[119)] 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.[120)]

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.[121)]

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

116) Yoo Gil-sang and three others, "Research on Reorganization of Management System for Foreign Workers," Ministry of Employment and Labor, December 2012, p. 157.
117) Jeon, Kwang-seok, "The Korean Social Security Law", Jip-hyun-jae, 2016, p. 197.
118) Choi, Hong-yeop, "Social Security of Foreign Workers," p. 168.
119) Roh, Ho-chang and others, "Social Security of Foreigners," Immigration Law, p. 468.
120) National Health Insurance, "National Health Insurance Operational Guide in 2019", pp. 33-36.
121) 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.

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.[122] 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.[123] 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 to receive adequate care for chronic conditions, childbirth and other health issues due to the cost of medical care.[124] Medical insurance should also cover illegal workers so as to guarantee the basic rights of human beings.[125]

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

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122) 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.

123) 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.

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

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

(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.[126] The types of benefits under the NPA include old-age pension, survivor's pension, disability pension, and lump-sum refund.[127]

(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.[128]

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

126) 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.
127) National Pension Service, "A Practical Guide to National Pension Workplaces 2019," 2019, pp. 32-36.
128) 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).

pension, so they cannot receive a lump sum refund.[129] In this regard, the 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).[130]

<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.

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).[131]

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129) 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 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.

130) 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.

131) 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.

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. .[132)]

2. Insurances Exclusive to Foreign Workers

A. Departure Maturity Insurance

<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.

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

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.[133] 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.[134]

Employers are obliged to subscribe to Departure Maturity Insurance, Guaranty Insurance for unpaid wages, Foreign Workers' Care Insurance and Return-Expense Insurance.[135] 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).[136]

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.

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

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

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

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

136) 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.

become illegal residents in consideration of the purpose of the Foreign Employment Act.[137] 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".[138] 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.[139]

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.

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

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

138) 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.

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

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.

Foreign Domestic Workers in Singapore

Bongsoo Jung[140)]

Contents

Ⅰ. Introduction

The most well-known social problems in Korea are its low birthrate and aging society. Towards mitigation of these issues, the government has spent a massive amount on subsidies through its multi-child family policy, and has made every effort to increase the birthrate through government work and family support policy.[141)] However, there has not been any significant

[140)] Jung, Bongsoo, Labor Attorney, KangNam Labor Law Firm

improvement.[142] There are several reasons for the lower birthrate, but I'd like to look at two in particular: 1) women are delaying marriage and childbirth to develop their careers; and 2) raising children in Korea is very expensive. Hiring babysitters is one of the highest costs, amounting to approximately KRW 1.5 to 2.5 million per month. In particular, due to the considerable expenses involved in childcare for working couples, women usually quit their jobs when they are pregnant with their second baby. However, as Singapore, Hong Kong, and Taiwan pay only between KRW 400,000 and 600,000 per month for domestic workers, they can afford live-in help[143].

Singaporean women rarely quit their jobs after marriage, childbirth, or while raising their children.[144] This is possible because people in the middle class are able to employ low-cost foreign domestic workers to assist them. Singaporean domestic workers number 227,100 people, or 4% of Singapore's total 2016 population of 5.54 million.[145] The Singaporean government directly manages foreign domestic workers under a systematic and thorough management system that ensures it can continuously provide good-quality personnel.[146]

This study introduces Singapore's Foreign Domestic Servant Scheme and evaluates the related immigration policy. Based upon this Scheme, I would like to review whether this success in Singapore can be reproduced in Korea, and if so, what existing labor laws need to consider at the time of introduction of a similar program.

Ⅱ. The Foreign Domestic Servant Scheme in Singapore

141) Maeil Business News, "Birthrate remains at 1.12 to 1.19 despite investing KRW 150 trillion over the past 10 years", February 4, 2015

142) Maeil Business News, "40% of unmarried women do not intend to have a baby. Survey by the Federation of Korean Industries" August 12, 2016

143) The term 'domestic worker' is used to refer to domestic maids, including house helpers, housekeepers, babysitters, nannies, and house maids. Article 11 of the Labor Standards Act describes such workers as 'housekeepers', while the International Labour Organization uses the term, 'domestic worker'. Hereby I follow the term used by the ILO. (Reference: Youngsoon Kim, "The number and meaning of Korean domestic workers", 「Social Science Thesis Journal」 Vol. 45, Social Science Research Center, 2015, p. 64)

144) Statistics from the Korean Ministry of Employment and Labor and the Singaporean Ministry of Manpower as of December 2014: The Singaporean female employment rate stood at 60%, while the Korean female employment rate stood at 49.5%.

145) Hyejoon Kim, "People disappearing inside my city", 「Cogito」, Institute of Humanities at Busan University, 2011, p. 120; Hong Kong's domestic workers number 266,778 people (or 3.64%) out of a total city population of 7,020,400, as of the end of 2009 (Indonesians = 48.7%; Filipinos = 48.5%).

146) Source: National Statistical Office – Korea's Domestic Workers (2010-2013)

Year	2010	2011	2012	2013
Total Population	49,410,366	49,779,440	50,004,441	50,219,669
Domestic Workers	194,801	202,394	264,665	279,103
Domestic Workers as % of Total Population	0.39%	0.41%	0.53%	0.56%

The Foreign Domestic Servant Scheme in Singapore is managed under systematic government supervision. Namely, the government provides a stable supply of foreign domestic workers through its Work Permit system and also through a high employment tax. The government takes special measures to protect these foreign domestic workers through direct management of their health and safety. In the manufacturing industry, one foreign worker per two Singaporean workers is permitted for each company within the maximum quota available under the employment permit system as of 2015,[147] while foreign domestic workers can be hired under the Work Permit system without a maximum.[148]

Hereafter, I would like to look in detail at the employment procedure scheme for foreign domestic workers in Singapore and expenses that the employer should bear.

1. Background to the Foreign Domestic Servant Scheme

On June 5, 2016, the Singaporean newspaper, “The Straits Times” featured an article entitled “Can Singaporeans do without maids?” This news article was related to the announcement by the Indonesian government that it would limit the number of domestic workers going to Singapore if their domestic workers could not stay in dormitories outside the employers’ houses. The following excerpt from the feature article explains why and how the Singaporean government introduced and utilized foreign domestic workers[149].

“From the 1930s to 1960s, employing live-in help was the domain of expatriates and wealthy local employers. This was the time of the legendary amahs, women hailing mostly from Guangdong province in China and distinctive due to their plaited hair and "uniforms" comprising white blouses and black pants. Regarded as part of the family, they were figures of respect. Most families gave their amahs the leeway to discipline the children, allowing them to function as another "parent". But when Singapore industrialized from the late 1960s, more Singaporean women took up jobs in factories and offices, sparking a need for paid domestic help to look after the home. So the Government introduced the Foreign Domestic Servant Scheme in 1978, enabling women from neighboring countries, including the Philippines, Sri Lanka and Thailand, to be employed as paid domestic help. From a base of about 5,000 in the late 1970s, the number has grown, and there are about 227,100 foreign domestic workers here today. The labor force participation rate of married Singaporean women comprising citizens and permanent residents, meanwhile, has increased from 14.7 per cent in 1970 to 63.2 per cent last year. Unlike the much-loved amahs, maids today are treated by many families as an employee

147) Channel News Asia, “Not viable to relax foreign worker quota: Lim Swee Say”, an interview with the Minister of Manpower, June 3, 2015.
148) The Straits Times, “Hiring maids becoming more costly with tighter regulations”, January 19, 2015.
149) The Straits Times, “Can Singaporeans do without maids?” June 5, 2016

who happens to live in their home, say representatives of migrant workers' groups."

"[…]The skills required of a maid are also higher today. Some are expected to help children with ever-demanding homework and to have the computer skills to assist them; care for the elderly, which has become more complex in terms of nursing skills; and run the home, which involves operating sophisticated appliances and being able to cook according to dietary demands. And Singaporeans get all these comparatively cheaply. The services of a live-in Indonesian maid start from $815,[150] taking into account her salary and the monthly $265 levy, but excluding costs of insurance, food and medical care. There are levy concessions for families with young children and elderly parents. In contrast, a bundle of specialized services - for home cooked catered meals, weekly cleaning and caregiving for the elderly or children - could easily add up to more than $2,000[151] a month."

2. The Work Permit system for foreign domestic workers[152] and employment procedures[153]

When intending to employ a foreign domestic worker in Singapore, the employer shall prepare the necessary prerequisites and request the Ministry of Manpower for employment. If approved, a work permit will be issued within two weeks. However, as this process can be complicated, employers usually use a private employment agency and pay its service fees.

(1) Work permit details[154]

A work permit is generally issued to foreign-unskilled or semi-skilled workers for a period of two years, but can be renewed. Eligibility to maintain the work permit is as follows:

1) The employer shall comply with the following conditions:
   ① The employer shall hire a qualified foreign worker for the relevant work;
   ② The employer shall pay the fixed salary that was previously reported to the Ministry of Manpower;
   ③ The employer shall bear the costs of upkeep and medical treatment of the foreign employee;
   ④ The employer shall provide the foreign employee with acceptable accommodation;
   ⑤ The employer shall provide medical insurance to cover the costs of hospitalization and surgery;
   ⑥ The employer shall allow the foreign worker to be examined and treated by a doctor registered in Singapore. In cases where the foreign worker is not deemed suitable for work after medical evaluation, the Work Permit for the foreign employee shall be cancelled;

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150) Singaporean currency: KRW 822 per Singapore dollar as of September 2016; SGD 815 = KRW 669,930. In the event of eligibility for the concession rate, the employment tax of SGD 265 is reduced to SGD 60. In this case, the monthly cost becomes SGD 610, or KRW 501,420.
151) SGD 2,000 = KRW 1,844,000
152) Singaporean Ministry of Manpower, http://www.mom.gov.sg/passes-and-permits/work-permit-for-foreign-domestic-worker
153) Reference at Singaporean employment agency: http://www.homekeepermaidagency.com.
154) Singaporean law, 「Employment Of Foreign Manpower Act」

⑦ The employer shall pay the employment tax for each foreign worker;
⑧ The employer shall purchase a security bond for foreign workers (Malaysian workers excepted);
⑨ The employer shall not demand or receive any costs or benefits from the employment agency in relation to the employment of a foreign worker.

2) The foreign worker shall comply with the following conditions:
① The foreign worker shall be engaged in the job stipulated in the Work Permit, and work only for the employer;
② The foreign worker shall not be engaged in other business (including personal money-making business);
③ The foreign worker shall reside in the place designated by the employer;
④ The foreign worker shall consistently perform the job allowed under the Work Permit, and agree to a relevant civil servant requesting confirmation through inspection;
⑤ The foreign worker shall not marry a Singaporean or a permanent resident of Singapore inside or outside Singapore without prior report to the Ministry of Manpower;
⑥ The foreign worker shall not be pregnant or give birth in Singapore during the Work Permit unless that foreign worker has married a Singaporean or a permanent resident of Singapore after obtaining permission from the Ministry of Manpower. This regulation also applies to expired, cancelled, or revised periods on the Work Permit.

(2) The hiring process[155]

Hiring procedures can be classified into three stages.

Stage 1: Getting ready & selection
① Employer attends orientation program
② Look for a candidate. Employer should come to an agreement with domestic worker on employment terms (e.g. salary, rest days).

Stage 2: Before the foreign domestic worker's arrival in Singapore
③ Employer shall apply for a Work Permit from MOM (Ministry of Manpower). If the application is approved, MOM will send employer an in-principle approval letter.
④ Employer shall place a security bond with MOM.
⑤ Employer shall purchase personal accident and medical insurance for the foreign domestic worker.
⑥ Employer shall mail the in-principle approval letter (or notification letter) and an air ticket note to the foreign domestic worker.
⑦ If the foreign domestic worker will be working in Singapore for the 1st time, book online for the settling-in program (SIP) training course. Employer will need copies of the foreign domestic worker's passport and education certificate.

155) Adapted from the Singaporean government website: E-service, http://www.ecitizen.gov.sg/Topics/Pages/Foreign-domestic-helpers-How-to-hire.aspx

Stage 3: Upon the foreign domestic worker's arrival in Singapore

⑧ Within 3 days of the foreign domestic worker's arrival, employer shall send her for the 1-day SIP course (if foreign domestic worker is working in Singapore for the 1st time).

⑨ Within 14 days after arrival, employer shall send the foreign domestic worker for a medical examination.

⑩ Employer shall request online for MOM to issue the Work Permit. MOM will inform employer of when to collect the Work Permit.

⑪ Within 1 month of the foreign domestic worker's arrival in Singapore, employer shall make the 1st monthly levy payment.

3. Details of the Foreign Domestic Worker Scheme[156]

(1) Foreign domestic worker requirements

The hired foreign domestic worker needs to meet the following requirements: Female; From 23 to 50 years of age at the time of application; From an approved source country or territory, including Indonesia, Philippines, Myanmar, Sri Lanka, etc.; Minimum 8 years of formal education. According to comments by Singaporean citizens, foreign domestic workers are very popular and a majority of them have bachelor degrees from universities.

(2) Employer requirements and obligations

The employer shall be 20 years or older in age, own an appropriate house and have financial capability. The Singaporean government supervises the employer's responsibilities strictly. The employer shall not assign the foreign domestic worker to work other than housekeeping and shall not let her work part-time either. In the event an employer is caught assigning a foreign domestic worker illegally, a fine of up to SGD 10,000[157] will be levied. For the first violation, the employer will be barred from using foreign domestic workers permanently. In cases where the employer uses a foreign domestic worker without a qualified Work Permit, the employer shall be fined a minimum of SGD 5,000 to a maximum of SGD 10,000 or imprisoned for up to one year.

(3) Documents necessary for work permits

1) Security bond, medical insurance and personal accident insurance

When applying for a work permit for a foreign domestic worker, the employer shall submit a security bond and evidence of medical insurance and personal accident insurance. These three items can be purchased as one package.

A security bond is a binding pledge to pay the government up to SGD 5,000 if the employer breaks the law or the conditions governing the employment of a foreign domestic worker (Malaysians excepted). This security bond will be returned if the employer does not use the foreign domestic worker or once she returns back to her home country. However, if the employer or the domestic worker is found to be in violation of any of the conditions of the

156) Adapted from the Singaporean Ministry of Manpower website, http://www.mom.gov.sg, "Foreign domestic worker
157) Singaporean currency SGD 1 = KRW 822, therefore SGD 10,000 = KRW 8,220,000

work permit, if the employer does not pay her salary on time, or if the employer fails to send her back if she goes missing, the security bond may be forfeited. Provided, if the foreign domestic worker goes missing and the employer has made reasonable efforts to locate her and has filed a police report, half of the security bond (SGD 2,500) will be forfeited.

2) Medical insurance and personal accident insurance

The employer needs to buy medical insurance with coverage of at least SGD 15,000 per year for inpatient care and day surgery during the foreign domestic worker's stay in Singapore. The employer also needs to buy personal accident insurance with a minimum coverage of SGD 40,000 for the foreign domestic worker. This compensation should be made payable to her and her beneficiaries. The employer shall submit the information of insurance details when the foreign domestic worker's work permit is issued or renewed.

(4) Pre-employment medical examination for the foreign domestic worker

The employer needs to submit the documents of the foreign domestic worker's pre-employment examination before her work permit is issued. The employer must send the foreign domestic worker for a medical examination by a Singapore-registered doctor within 2 weeks of her arrival in Singapore. Her work permit will only be issued if she passes the medical examination. Otherwise, she will have to be sent home. The medical examination screens the foreign domestic worker for 4 types of infectious disease (tuberculosis, HIV, syphilis and malaria).

(5) Employers' orientation program

The employer needs to attend the Employers' Orientation Program (EOP) if the employer is hiring a foreign domestic worker for the first time or has changed workers frequently. First-time employers must complete the EOP at least 2 working days before submitting a work permit application. The EOP is a 3-hour program that will help employers understand their role and responsibilities as employers of foreign domestic workers.

(6) Settling-in Program

Employers must send first-time foreign domestic workers for the Settling-in Program (SIP) within 3 days after their arrival in Singapore (excluding Sundays and public holidays). The SIP is a 1-day orientation program to educate foreign domestic workers on safety precautions and life in Singapore. The employer shall pay for the costs and time spent for the foreign domestic worker to attend the SIP. The topics covered include introduction to Singapore, employment conditions, safety at home, and management of relationships and stress.

(7) Semi-annual medical examinations

During the foreign domestic worker's employment, the employer must send her for a medical screening every six months. This medical examination screens for pregnancy and infectious diseases such as syphilis, HIV and tuberculosis. If the foreign domestic worker fails the required results of this semi-annual medical examination, the employer must send her home immediately.

(8) Repatriation

The employer shall perform all the necessary duties to repatriate her to her home country once the foreign domestic worker's employment period is expired. The employer shall inform the foreign domestic worker of the expiration of her employment contract 2 weeks in advance, pay all outstanding wages, and cover costs of the flight and all others necessary for repatriation.

4. Working conditions[158)]

(1) Salary

Employers shall report the monthly salary of their foreign domestic workers on the work permit application. The employer shall pay the foreign domestic worker the monthly salary as reported on the work permit application given to the Ministry of Manpower. The employer shall pay the salary within 7 days of the end of the month.

The employer shall pay the foreign domestic worker her salary each month, and the salary period must not exceed one month. The employer shall not force the foreign domestic worker to deposit her money in a savings account.

The employer can transfer the salary directly to the foreign domestic worker's bank account in Singapore. If the salary is paid in cash, the employer must keep a record of the salary and the foreign domestic worker shall sign the record to confirm that payment has been made.

(2) Rest days and well-being

The employer is responsible for the health and well-being of the foreign domestic worker, and shall provide for rest days, proper accommodation, adequate medical care and safe working conditions.

To ensure that the foreign domestic worker gets enough mental and physical rest, the employer shall allow her to have a regular rest day. A paid rest day shall be given once a week, or an additional day's wage shall be paid or a replacement rest day given within the same month.

The employer shall provide the foreign domestic worker with proper accommodation. The accommodation shall be equipped with basic amenities, and the foreign domestic worker shall not sleep in the same room with a male adult or teenager. The employer shall also provide the foreign domestic worker with three meals a day.

(3) Employment contract and safety agreement

Employers are encouraged to sign employment contracts with their foreign domestic workers and are required to sign a safety agreement with the employees. Employment contracts are necessary to avoid disputes.

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158) Singaporean Ministry of Manpower website, http://www.mom.gov.sg, "Foreign domestic worker"

(4) Prevention of abuse and ill-treatment

Employers will face severe penalties if they are convicted of abusing a foreign domestic worker. The Ministry of Manpower takes allegations of abuse and ill-treatment of a foreign domestic worker seriously, especially if employers commit physical or sexual abuse. If the Ministry suspects that a foreign domestic worker is being abused or ill-treated, the police will investigate. If convicted, employers will face severe penalties under the law. Employers and their spouses will also be permanently banned from employing any other foreign domestic workers.

5. Expenses related to the use of foreign domestic workers[159), 160)]

The reason Singaporeans employ so many foreign domestic workers is due to compatibility between the necessities for life and the costs. Couples who both work outside and have children need help in raising their children. A particular need is when caring for elderly parents at home, someone like a nursing care housekeeper is absolutely essential. There is also significant demand for someone to prepare dinner for the family when the couple comes home exhausted after work. These aspects of two-income households are similar in Korea. However, in Singapore a family with young children can hire a domestic worker for about KRW 500,000 per month, which is a reasonable burden.[161)]

The details of expenses can be described as follows:

(1) Expected costs besides salary

1) Employment agency fee: between SGD 100 and SGD 2,000 (differs by agency)
2) Settling-in program: SGD 75 (if the foreign domestic worker is working in Singapore for the first time)
3) Applying for the Work Permit: SGD 30
4) Work Permit document: SGD 30
5) Employment tax for hiring a foreign domestic worker: SGD 265 per month (When a "concession rate" applies: SGD 60 per month. For the concession rate to apply, one of the following needs to be true: ① the family has a child or grandchild living with them who is a Singapore citizen and a maximum 16 years of age; ② the family has an elderly family member living with them who is a Singapore citizen and at least 65 years old; ③ the family has a person with disabilities living with them who needs assistance.
6) Security bond: SGD 5,000 (Can be substituted by a bank's security bond or guarantee)
7) Medical insurance: coverage of SGD 15,000
8) Personal accident insurance: coverage of SGD 40,000

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159) Singaporean government website, E-service, http://www.ecitizen.gov.sg , "Employment method for domestic workers"
160) Singaporean Ministry of Manpower website, http://www.mom.gov.sg, "Foreign domestic worker"
161) Korean per-capita income is USD 28,739, while Singaporean per-capita income is USD 56,319: nearly twice that of Korea.

Accordingly, expenses to be paid immediately, including employment agency fees and government employment tax will likely be between SGD 500 to SGD 2,600.

(2) Salary levels

There are many factors to consider when determining salary. Experience and relevant training are the main ones. However, a domestic worker's nationality may also play a part. Minimum salaries for Indonesians and Filipinas start at SGD 500 in Singapore, at SGD 450 for Myanmar workers, and SGD 400 for Sri Lankan workers. Recently, the Philippine government is looking to reduce the number of domestic workers entering Singapore, which will cause the salaries to increase accordingly.[162] Employment expenses together with government tax (SGD 265 per month, or SGD 60 at the concession rate) can be expected to equal between SGD 500 to SGD 800. This means foreign domestic workers can be hired for a total cost of between KRW 410,000 and KRW 650,000 per month. This represents expenses for using foreign domestic workers in Singapore equaling only 20-32% of what would need to be paid to Korean domestic workers (an average of KRW 2 million).

Ⅲ. Evaluation of the Use of Foreign Domestic Workers in Singapore

1. Management through Immigration Control

Immigration control in Singapore is well managed through regulated immigration policy. Singapore has taken advantage of the abundant supply of low-wage workers from neighboring countries. Since its introduction, the government has focused on three major categories in the course of managing the Foreign Domestic Servant Scheme.

(1) Continuous management of foreign workers

A foreign domestic worker running away from her place of employment is considered the employer's responsibility, and will result in the employer's security bond of SGD 5,000 (4 million Korean won) being forfeited, which forces the employer to make efforts to ensure his/her foreign domestic worker does not break her employment contract or terms of her entry visa. The government also supervises to ensure that the foreign domestic worker receives a health examination every six months to check whether she has any infectious diseases or has become pregnant. In cases where the employer uses the foreign domestic worker for other duties besides housekeeping work, the employer will certainly be punished. So, the foreign domestic worker is strictly monitored to retain her resident status, and is not allowed to work other jobs, but shall go back to her country upon expiry of her employment contract.

(2) Protections for foreign domestic workers

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[162] Money Smart blog, http://blog.moneysmart.sg/, "How much does it really cost to hire a domestic help in Singapore", July 9, 2015.

The employer shall bear all expenses necessary in hiring the foreign domestic worker. These include air tickets, the settling-in program, medical examinations, medical insurance and personal accident insurance, which shall not be transferred to the foreign domestic worker. The employer shall also provide accommodation and relevant items for daily life. In particular, the government listens to reports of abuse (whether verbal, physical or sexual) against the foreign domestic worker, and strictly punishes employers who engage in abuse.

(3) Employment levy and tax return

The employer shall pay the foreign domestic worker levy of SGD 264 per person every month, which is an employment tax equivalent to KRW 220,000. However, employers living with a child or grandchild of 16 years of age or younger, living with parents aged 65 years or older or with a family member with disabilities, shall pay a concession rate of SGD 60 (KRW 49,000) instead. The government levies a higher employment tax on people outside of these situations, to protect the affordability of the foreign domestic workers system for those who need it.

Besides the employment tax program for foreign domestic workers, Singapore also maintains an incentive tax program. In cases where a married woman continues to work, she will be reimbursed the total employment taxes she paid in return for employing the foreign domestic worker through the year-end income tax adjustment. This serves as an income tax incentive towards encouraging women to continue working, and does not apply to unmarried women or men (whether married or not).[163)]

2. Management through Labor Laws

(1) Salary

Since Singapore labor law does not apply to foreign domestic workers, her salary can remain lower than the minimum wage, while still remaining remarkably higher than what she would earn in her home country. This makes it advantageous to continue the Foreign Domestic Worker Scheme, but the large gap between what they earn and what their Singaporean counterparts can earn can leave the foreign domestic workers with a sense of comparative deprivation.

(2) Working hours and holidays

As there are no restrictions on working hours, the foreign domestic worker can be requested to work long hours, and may be subject to exploitation. Days off are required by law to be provided once a week, but these can be substituted with additional pay instead.

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163) Singaporean Tax Office, "Tax return regarding the Foreign Domestic Worker", https://www.iras.gov.sg

(3) Other working conditions

Physical, sexual, and verbal abuse and mistreatment are prohibited. If committed, the employer will be charged with a crime and banned from using foreign domestic workers again.

3. Evaluation

There are two ways to take advantage of the benefits of foreign personnel: one is to use highly-qualified professionals, and the other is to use cheap non-professional personnel to supplement manpower. The foreign domestic workers used in Singapore are to supplement the available non-professional manpower. This program to make the most of the foreign domestic workers positively affects female social activities and guarantees a comfortable home life.[164] Currently, Singaporeans use the foreign domestic workers very commonly, and their numbers make up 4% of the total population, while in Korea, the proportion of domestic workers is less than 1% due to the high costs.[165]

The two key elements for Singapore's successful foreign domestic workers program are its favorable internal/external environment and thorough management. The internal/external environment refers to the lack of sufficient manpower within Singapore and the abundance of that manpower in the neighboring countries. The countries sending domestic workers have supported their nationals going abroad to make money due to the low salaries and high unemployment rates in their countries. Domestic workers can earn several times more in a housekeeping job than working in their countries, and furthermore can directly experience an advanced culture, and so domestic work has been a considerably favorable job. The appropriate labor costs have been well-controlled due to the balance between personnel supply and customer demand. Internally, the Singaporean government has a strict and thorough management system for foreign domestic workers. This system includes employment taxes for each domestic worker, mandatory physical examinations, and strict enforcement of regulations, which have made it almost impossible for domestic workers to run away from their workplaces and stay in Singapore illegally. These factors have made the Foreign Domestic Worker Scheme possible and effective while remaining secure and manageable.

Ⅳ. Legal Protections for Domestic Workers & Introduction to Korea of Singapore's Foreign Domestic Servant Scheme

1. Legal Protections for Domestic Workers

(1) Global standards

164) Money Smart blog, "4 Reasons Singaporeans are So Reliant on Their Maid", http://blog.moneysmart.sg, June 14, 2016
165) Asia Economy Daily, "Domestic worker and nursing caregiver's working rules to be made---considering the introduction of standard employment contract", September 25, 2014

In 2011, the 100th General Assembly of the International Labour Organization (ILO) adopted the Convention Concerning Decent Work for Domestic Workers and a Recommendation. The major content of the Convention includes applicable regulation of domestic workers under labor laws just like other ordinary workers, such as reasonable working hours, one day off a week of 24 consecutive hours, restrictions against payment in kind rather than cash, clear statements of working conditions, and freedom of association.[166] As of May 20, 2014, the Convention has been ratified by 14 ILO member countries, most of whom are supplying domestic workers to other countries. Korea has not yet ratified the Convention, but legal enactment has been proposed by some lawmakers to conform to the standards of the ILO, but no legislative action has been taken.[167]

According to an ILO report on the status of domestic workers around the world, only 10% are protected by the host nation's labor laws that apply to ordinary workers, while 30% are completely excluded from all application of labor laws. This report also points out that about 70% are partly protected by related regulations in the host nation, although these regulations are not labor laws. Of particular note is that the two advanced nations of Korea and Japan exclude domestic workers completely from application of labor law.[168]

(2) Korean domestic workers and application of labor law

1) Reasons why domestic workers are excluded from labor law

Here, 'domestic worker' refers to persons employed for the purpose of assisting with housekeeping duties (cooking, cleaning, nursing, childcare, etc.).[169] We will now look at the reasons why domestic workers are excluded from labor law.

First, according to Article 11 of the Labor Standards Act, "This Labor Standards Act shall apply to all businesses or workplaces in which five or more workers are ordinarily employed. This Act, however, shall not apply to any business or workplace which employs only relatives living together, and to workers hired for domestic work." The Labor Standards Act stipulates in this article that domestic workers are excluded from application of labor law.

Second, relations between an employer and a domestic worker are considered private relations that do not fall under governmental authority.[170] The caregiver is usually engaged with a particular patient and provides exclusive nursing care, but if the caregiver works for a care-providing company and receives a wage in return for giving nursing care, the person is considered someone to whom the labor law applies.[171]

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166) Meeyoung Goo, "Legal Protection for Domestic Workers", 「Labor Law 」 No. 50, The Korean Labor Law Association, June 2014, p. 260.

167) "Public Hearing on Legalization of Domestic Workers – Representatives Choonjin Kim, Jungae Han", Korean National Assembly document, April 30, 2013

168) Kyunghyang Daily report, "Korean domestic workers are excluded from limits on working hours and minimum wage", January 9, 2013.

169) Jongyooul Lim, 「Labor Law」, 14th edition, Park Young Sa, 2016, p. 337.

170) Kaprae Ha, "A Study on the Legal Status of Domestic Workers", 「Labor Law 」 No. 37, The Korean Labor Law Association, March 2011, p. 216.

Third, a domestic employer is not considered a business or workplace, because he/she does not employ a domestic worker to seek profit or accomplish a business purpose, but simply for convenience.

2) Necessity for protection

Domestic workers, as pointed out in the ILO report, do not receive protection against low salaries, abusively-long working hours, and the loss of rest hours, suffer from mental, physical and sexual abuse, and have restrictions on their freedom of movement. Accordingly, considering the length of working hours while exclusively engaged with a particular family, it is necessary to protect the basic rights such as a minimum level of salary, maximum working hours, and guaranteed off-days.[172)]

2. Introduction of the Singaporean Model to Korea

(1) Preparation of relevant laws

Currently, foreign domestic workers cannot legally be employed inside Korea, except for overseas Koreans (H-2 visa holders).[173)] The Act on Foreign Workers' Employment, etc. deals with non-professional workers (E-9) and overseas Koreans (H-2) who are fully protected by Korean labor law. However, domestic workers are regarded as a special type of workers excluded from direct application of labor law, and so it is necessary to prepare special regulations or guidelines when considering introduction of foreign domestic workers in Korea.

(2) Security bond

In reviewing Singapore's Foreign Domestic Worker Scheme, the most impressive item to be reflected on is the security bond. In Korea, if a foreign worker disappears from the workplace, the employer is not responsible for it, but if this happens in Singapore, the employer's deposited security bond of SGD 5,000 is forfeited in most cases. As this represents a serious financial hit for most employers, they take extra care to ensure their foreign workers do not disappear.

(3) Protection programs for foreign domestic workers

Even though Korea has not yet ratified the ILO's Convention Concerning Decent Work for Domestic Workers, we need to thoroughly train and manage employers who will employ foreign domestic workers to ensure compliance with the measures suggested for foreign domestic workers such as reasonable working hours, provision of a weekly holiday, and written statements of actual working conditions. Just as in Singapore, Korea needs to introduce a systematic management system such as pre-employment and semi-annual medical examinations,

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171) Labor Ministry Guidelines: Labor Standards team - 5557, Oct 10, 2006.
172) Kaprae Ha, 「Labor Law」, 27th edition, Joongang Economy, 2015, p. 98.
173) Hyekyung Lee, "A Study on the Employment of Foreign Domestic Workers in Korea", 「Korean Demography」 Vol. 27, No. 2 (2004), The Korean Demography Association, p. 146.

secure accommodations, medical insurance, and provision of round-trip air tickets. In particular, it is necessary to create regulations against and remedy procedures for sexual/physical violence by the employer, long working hours, and violations of other human rights, and establish a system to protect foreign domestic workers.[174)]

3. Items to Consider before Introducing Foreign Domestic Workers to Korea

(1) Balancing supply of and demand for domestic workers

Singapore has used foreign domestic workers for the past 40 years, able to keep costs down because Singapore does not use an Employment Permit system to control employment, but a Work Permit system that allows it to maintain balance between supply and demand. In Korea, it is only possible to hire a limited number of foreign domestic workers and they must be overseas Koreans (H-2 visa holders) from China or Russia. As there is more demand than supply, the cost difference between hiring overseas Koreans as domestic workers and hiring native Korean domestic workers is insignificant.[175)] Here, the basic reason to introduce foreign domestic workers in Korea is due to the lower costs.[176)] In terms of this basic intent, keeping a balance between supply and demand in employing foreign domestic workers, Korea can also take advantage of the resulting cost-effectiveness over a long period of time just as Singapore has done through its Foreign Domestic Worker Scheme.

In the course of introducing such a foreign domestic worker scheme, it is desirable to take advantage of civilian employment agencies licensed by the government. Through competition between these employment agencies, it would be possible to maintain a sizable manpower pool so that employers can choose the most suitable workers for employment and keep costs down.[177)]

(2) Language and accommodation issues

In Singapore where the official language is English, there is no great difficulty in communicating with foreign domestic workers in English. Countries like the Philippines, Myanmar, Indonesia, and Sri Lanka that send foreign domestic workers can communicate in English, and many applicants from those countries have college degrees as well. However, in Korea, as English is hardly used in ordinary homes, there would be communication issues due to language. Foreign domestic workers would need to be able to speak some Korean to maintain basic communication. Therefore, more incentives would be needed to attract those who can speak Korean. On the other hand, there would be a number of Korean families who intend to hire Filipinas who speak English fluently in the interest of teaching their children how to speak English. Highly educated couples, especially, would prefer to hire foreign domestic

174) Meeyoung Goo, thesis quoted above, p. 289.
175) Leesoo Kang, "The Current Status and Employment Conditions of Domestic Workers", 「Society and History」 Vol. 82 (2009), Korean Sociological Association, p. 236.
176) Hyekyung Lee, thesis quoted above, p. 144.
177) Sunmee Kim, "Housekeeping Jobs Filled with Domestic Workers and Related Case Study", 「Korean Family and Human Resources Management Association」 Vol. 12, No. 4, November 2008, p. 29.

workers who can speak English well.

Regarding residence, most domestic workers in Singapore stay in the employer's home. This reduces the cost of keeping a domestic worker, and also makes it possible for the employer to have domestic maid service whenever needed. The average Korean home is a 30 pyeong apartment with three rooms, and giving the domestic worker one exclusive room would be best, but if the family is too large for this, the domestic worker can share a room with the employer's young child.

(3) Preparations to prevent illegal status

Along with the increased number of foreigners staying in Korea, which has surpassed 2 million people, or 4% of the entire population, the number of foreigners staying illegally has increased to 200,000. The most important point in employing foreign domestic workers is to keep costs down. Cases where foreign domestic workers run away from their place of employment and move to a better-paying job will render a foreign domestic worker scheme ineffective in this regard. Accordingly, before introducing any foreign domestic worker scheme, prior system measures need to be in place to make it difficult for foreign domestic workers to stay illegally. As explained above, one method is to hold the employer responsible through the threat of losing a significant security bond, but this would not be enough to prevent some foreign domestic workers from leaving to work better paying jobs. A more fundamental solution would be to punish people found to be employing illegal foreigners harshly enough that they would find it impossible to continue their business.[178] In addition to this, foreigners who are working illegally should be treated as law-breakers and punished as severely as possible under the Immigration Control Act.

Ⅴ. Conclusion

People and products cross borders freely in this era of globalization, integrating all nations into one great market. Singaporeans have taken advantage of the supply of cheap foreign domestic workers. Through this, the city state has increased its competitiveness by making the most of its female manpower by keeping child-rearing expenses low while improving quality of life. Koreans also need to take advantage of the supply of foreign domestic workers, as is done in Singapore, towards increasing the low birth rate and assisting highly-trained women to continue their careers while they raise their families.

Singapore introduced its Foreign Domestic Servant Scheme (FDSC) in 1978 to bring in foreign domestic workers. There are three factors behind the FDSC's success. First, there has

178) The Immigration Control Act: Article 94 (Penal Provisions): Any person to whom any of the following subparagraphs apply shall be sentenced to imprisonment with or without labor not exceeding 3 years, or to a fine not exceeding 20 million won: A person who has engaged in employment activities without a valid status of stay for employment in violation of Article 18.

been a greater supply of domestic workers from neighboring countries than demand for their services in Singapore. Second, it has been possible to maintain a secure supply for many years through strict immigration regulations that make it difficult for foreign domestic workers to work illegally. Third, Singapore's indirect supervisory administration makes efforts to protect the human rights of these domestic workers and improve their working conditions.

In order to take advantage of low-cost foreign domestic workers as Singapore has done, action must be taken to ensure three main points for success: ① maintaining the low cost of labor; ② preventing foreign domestic workers from working illegally; and ③ preparing protections for employment of current domestic workers while taking advantage of the lower cost foreign domestic workers.

First, how can we maintain a low cost of labor over a long period of time? If the costs end up being the same as hiring Korean workers, there is no benefit to hiring foreign ones. So, in cases where employers can hire domestic workers all the time without a maximum as is done in Singapore, the cost of the supply can be sustained due to price adjustments inherent in a balanced supply and demand. Second, how can we prevent foreign domestic workers from working illegally while other migrant workers are earning three times more money? Above all, the employer hiring a foreign domestic worker should be held directly responsible for that worker disappearing by means of forfeiting the employer's security bond. However, the only way to resolve this issue is through strict enforcement of immigration law for both Korean employers illegally hiring migrant workers, and the illegal migrant workers themselves. Company employers who have hired illegal foreign domestic workers should be punished harshly enough that it will be impossible to continue their business. At the same time, when such illegal foreign domestic workers are caught working illegally, they should be deported immediately after suffering legal and financial consequences serious enough to deter others. Third, how can we protect the employment of the current Korean domestic workers while taking advantage of the low cost of foreign domestic workers? One method is to levy an employment tax from domestic employers who benefit from hiring low-cost foreign domestic workers as occurs in the Singaporean taxation system. This employment tax can be used to support re-employment training for Korean domestic workers and create more suitable jobs for them.

노동법 앱 개발

App Development Project

2019.12.9.

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