Employment Situations and Workers Protection in Korea

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Chapter 1 Introduction

I. Introduction

There have been a few case studies regarding the requirements for an employee to be eligible to fall under the employment protection laws such as the Labor Standards Act. However, with structural changes in the labor industry, such instances have increased, raising the question of to what extent the law should be applied. This article was written to explain the circumstances in Korea, and introduce the legal system regulating the various types of employment relationships, such as general employment relationships under subordination, triangular relationships, self-employment, and self-employment in situations of economic or other dependencies.

It should be noted that there is not a detailed explanation regarding the collective labor relations of such labor suppliers as subcontracted homeworkers and teleworkers in Chapter 5 (Self-employment in the situation of economic or other dependency). In Korea, the focus of discussion by practitioners and academics has been put on how to protect the individual labor rights of those irregular workers, rather than whether they have three collective labor rights or not. In this light, the Chapter 5 does not cover the collective aspect of these irregular workers labor relations in details.

II. Terminology

The concept of temporary employees as they appear in statistics in Korea differs according to the concerns and conveniences of the branch of the government conducting the research. Thus, the National Statistics Office defines a temporary employee as a salary paid employee whose contract term is not less than one month and less than one year in its Annual Report of Economically Active Population Survey. However, in Report on Labor Situations of Business , the Ministry of Labor defined a temporary employee as an employee, regardless of his position, with a fixed term basis of less than one month such as a temporary commissioner, an irregular employee, or a part-time worker who had been working for less than one month at the time of the study. Unless stated otherwise, the definition of a temporary employee that is used is the one set forth by the National Statistics Office.

The National Statistics Office and the Ministry of Labor also differ in defining a daily employee. The National Statistics Office defines a daily employee as a salary paid employee whose term of contract is less than a month, or a person who manages a business without a regular workplace. A daily employee in the latter sense includes peddlers, shoeshine boys (in the urban informal sector), and small-scale self-run businesses. Unless stated otherwise, the definition of a daily employee that is used is the one set forth by the National Statistics Office.

A disguised employment relationship means a labor relation formed to avoid the

related responsibilities of the labor laws, and achieve flexibility of employment. It is hard to say that these contracts were formed with the free will of the employees.

Finally, a labor supplier is a person providing material or labor in the form of subcontracting, employment, or delegation.

Chapter 2 Employment Relationships

I. The definition of employee under the law

1. Definitions under separate labor acts

Article 14 of the Labor Standards Act explicitly defines the concept of an employee with the effect of limiting the extent of the applicability of the Labor Standards Act. Article 14 states, the Term employee under this law is a person who provides labor for the purpose of wages in an industrial setting regardless of profession. In addition, Article 17 of the Act defines a contract of employment as follows: A contract of employment under this law means a contract formed with the purpose of providing labor for the employer and paying wages to the employee.

Therefore, a person providing labor, whether physical or mental, under the command of an employer for the purpose of wages is deemed an employee, be it a factory or non-factory employee. Hence, from an academic standpoint, an employee to whom the Labor Standards Act applies is a person involved in an actual subordinate relationship[1] who provides labor under the commands and orders of an employer.

The concept of employee under the Labor Standards Act is interpreted relative to the viewpoint of employee protection. For example, a managerial level employee ("boojang," or "kwajang") would be deemed an employee under the command of a CEO, while from the viewpoint of lower level employees would be seen as a supervisor exercising the rights of an employer. The regulations of the Labor Standards Act regarding workers compensation, retirement allowance and dismissal (Labor Standards Act Article 81 and thereafter, and Articles 30 to 34) do apply to managerial level employees.

The definition of an employee in the Industrial Accident Compensation Insurance Act[2] (Article 4 section 2), Industrial Safety and Health Act[3] (Article 2 section 2), Wage Claim Guarantee Act[4] (Article 2 section 1), Act on Promotion of Welfare of Workers in Small and Medium Enterprises[5] (Article 2-2), and Employee Welfare Fund Act[6] (Article 2 section 1) is identical to the one in Article 14 of the Labor Standards Act. Also, Article 2-1 of the

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[1] Kim, Hyung Bae (1998), Labor Laws, 10th edition, Parkyoungsa, p. 237.
[2] Law no. 4826, fully revised on December 22, 1994.
[3] Law no. 4220, fully revised on January 13, 1990.
[4] Law no. 5513, enacted on February 20, 1998.
[5] Law no. 4640, enacted on December 27, 1993.
[6] Law no. 4391, enacted on August 10, 1991.

"Act on Promotion of Welfare of Employees and Employment Security"[7] defines an employee for the purposes of that Act as "a person who supplies labor for the purpose of wages in an industrial workplace, regardless of the profession."

2. Definitions under the trade Union and Labor Relations Adjustment Act

Article 2 section 1 of the Trade Union and Labor Relations Adjustment Act states, "An 'employee' is a person who lives on an income such as wage or salary, regardless of the profession."

If there is no employment contract or subordinate relationship, judicial precedents deny a worker the status of an employee under the Trade Union and Labor Relations Adjustment Act, thus identically construing the concept of an employee under that Act and the Labor Standards Act.[8]

However, most academic views point out that an employment contract with an employer is not necessary to be eligible as an employee under the Trade Union and Labor Relations Adjustment Act, since there is a difference between the two definitions in that Act and the Labor Standards Act. Because actual employment pursuant to an employment contract is not an issue, a dismissed employee or unemployed person may be deemed an employee under the Trade Union and Labor Relations Adjustment Act.[9]

III. The definition of employer under the law

1. Definitions set forth in laws

Article 15 of the Labor Standards Act states, "The term 'employer' used in this act includes the owner of a business, a manager or a person who acts as the delegate for the owner of a business regarding employee matters." An employer defined in the above context designates an employer who has a duty to abide by the legal duties and responsibilities imposed by the Labor Standards Act on an employer, and not an employer in the context of a party to an employment contract. Thus, persons other than an employer as the party to an employment contract, who is naturally included as an employer as defined in the Act, may have the status of an employer for the purposes of the Act.

First of all, the owner of a business is naturally considered an employer, and in cases of private management, the manager is an employer, while in cases of corporations, the corporation is deemed an employer. Second, a manager is a person who has general responsibility for a business, has been authorized to delegate for the owner of the business

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[7] Law no. 5397, enacted on August 28, 1997.
[8] Supreme Court Decision 1970.7.21, 69-nu-152; Supreme Court Decision 1992.5.26, 90-nu-9438; Supreme Court Decision 1986.12.23, 85-nu-856; Supreme Court Decision 1995.12.22, 95-nu-3565, etc.
[9] Kim, Hyung Bae (1998), Labor Laws, 10th edition, Parkyoungsa, p. 513; Lee, Byung Tae (1998), New Labor Laws, Hyunamsa, p. 103.

for all or part of the business, and represents the business externally.[10] Therefore, the following are all considered employers: the representative executive of a joint stock company (Commercial Code Article 389 I), the executor in a joint-name or joint-venture company (Commercial Code Articles 200, 201, 207, and 269), the executive or manager of a limited company (Commercial Code Article 562), the legal representative when the owner of a business is a minor or interdict, and the manager of a company in the process of liquidation.

Finally, "a person who acts as a delegate for the owner of business regarding employee matters" means a person who has been authorized by the owner of a business to direct or manage the work of employees and determine working conditions and matters such as promotion, wages, welfare, and labor management.

The definition of an employer in the Trade Union and Labor Relations Adjustment Act is identical to the definition of an employer in the Labor Standards Act mentioned above.

2. Definition of employers in Miscellaneous Cases

When a company employs a subcontractor, the subcontractor becomes an employer if the employee is under the management of the subcontractor according to the employment contract. However, if the subcontracting company as a whole is under the management of the main contractor, then the main contracting company becomes the employer. There are suggestions that in cases of leases or delegations of management, the employer should be determined by who supervises the labor.[11]

III. Controlling standard set forth by precedents regarding employment relationships – subordinate relations

1. Position of precedents

Judicial precedents in Korea have consistently maintained the view that, "the subordinate relation is determined by actual labor relations such as the existence of command supervision relations, wages as a price for labor, the nature and content of labor between the employer and provider of labor regardless of the form of the labor supply contract, be it employment, contractual, delegation or anonymous, as long as there exists a user-subordinate relation between two parties,"[12] thus determining the status of an employer according to the existence of a subordinate relation. Therefore, an employment contract and labor relation will be recognized as long as a subordinate relation is acknowledged, regardless of the form of the contract.

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[10] Kim, Hyung Bae (1998), Labor Laws, 10th edition, Parkyoungsa, p. 237. Supreme Court Decision 1988.11.22, 88-do-1162.

[11] Kim, Hyung Bae (1998), Labor Standards Act, 6th edition, Parkyoungsa, p. 37

[12] Supreme Court Decision 1993.5.25, 90-nu-1731; i.e. Supreme Court Decision 1991.10.25, 91-do-1685; Supreme Court Decision 1991.7.26, 90-da-20251; Supreme Court Decision 1987.5.26, 87-da-604, etc.

The next precedents[13] express more concretely than before the standard for determining a subordinate relation, and the controlling factor in determining whether an employer is deemed one under the Labor Standards Act, as in the following.

"In determining whether one is an employee under the Labor Standards Act, the fact that an employee provided labor in the business or workplace, for the purpose of wages, under subordinate relations must be considered. In determining the existence of subordinate relations the following factors must be considered comprehensively; the employer decides the content of labor, the employee is subject to personnel regulations, the employer conducts supervises concretely and individually the execution of labor, the employee himself may employ a third party to substitute the labor, the possession of fixtures raw material or work tools, the nature of wage as a price for labor, existence of basic wage or fixed wage, collection of labor income tax through withholding income, the continuance of supply of labor and the exclusive control of the employer, the recognition of employee status by other laws such as the Social Welfare Act and the social economic situations of both parties".

To date, the precedents have maintained a consistent position.

2. The problem with the position of precedents

The precedents mentioned above have been criticized for narrowing the definition of employees in actual cases where employee status was in question.[14] The fundamental reasons for such a position have been denounced as follows.

First, the Supreme Court precedents emphasize too many traditional factors such as conduct/order relationships and subordination. Comparisons from substantially different perspectives and other factors, such as the business nature of labor suppliers, are given relatively less weight. Although the Supreme Court does take into account the business nature of labor suppliers by considering the possession of fixtures/raw materials/work tools, in determining the business nature, it does not take into account more important factors, such as the capacity for individual market access, professional or economic qualifications as a business, and the direct ownership or management of tools or facilities needed for an independent business.

Second, when considering conduct/order factors, their existence is interpreted in a classical/traditional sense. That is, the basic position of the Supreme Court interprets the existence of conduct/order as the submission to direct/concrete labor orders. However, since such direct/concrete orders are unnecessary in professional jobs and the forms of employment have diversified, orders are changing to indirect/general orders. Therefore, in determining the existence of conduct/order, the ultimate considerations should be who

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[13] Supreme Court Decision 1994.12.9, 94-da-22859.

[14] Kang, Sung Tae (1999), "The Regulation under Labor Laws of Home-work and Telework," Study on Labor Laws, Seoul National University Research Committee on Labor Laws, p. 51, footnote 35.

has the initiative in forming and terminating the labor supply relations (especially terminating) and whether the content and location of labor is determined indirectly/generally by the employer.

Third, the Supreme Court does not distinguish between factual signs (actual signs) and subsidiary signs (formal signs), and mechanically lists all factual signs. Subsidiary signs in this context signify matters that an employer may unilaterally decide using his socio-economic superiority such as the application of internal service/personnel regulations, the existence of basic wages or fixed wages, wages as the price for labor (the content of labor and method of payment), and recognition of employee status by other laws, such as tax laws (deduction of labor income tax) or the Social Welfare Act. Since the Supreme Court gives subsidiary signs the same weight as factual signs in determining employee status, the extent of the applicability of labor protection laws has been narrowly construed.

III. The relative concept of employee and employer

An employer under the Labor Standards Act includes the owner of a business, or a manager or delegate of the owner of a business. Thus, an employee, in the context of a labor contract, may be deemed an employer under the Labor Standards Act. For example, an employee, such as a factory superintendent, store manager, division manager, or labor director, who is authorized to command or supervise other employees in a factory or workplace, has a duty as an employer to fulfill the responsibilities set forth in the Labor Standards Act. Therefore, the concept of an employer under the Labor Standards Act is a relative one, as is the concept of an employee.[15]

IV. The extent of applicability of labor protection laws

1. The extent of applicability of the Labor Standards Act

Article 10 section 1 of the Labor Standards Act states that the Act shall be applied to all businesses or workplaces that have not less than 5 permanent employees, excluding businesses or workplaces that only use cohabiting relatives or home workers.

The phrase "not less than 5 permanent employees" does not mean that the employees are "always" not less than 5 employees, and the precedents[16] maintain that the Labor Standards Act shall apply if "normally" there are not less than 5 employees. This means that daily employees[17] are included as well as regular employees in the term "permanent employees."

2. The protection of employees in businesses or workplaces of not more than 4 permanent

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[15] Kim, Hyung Bae (1998), Labor Standards Act, 6th edition, Parkyoungsa, p. 38. Supreme Court Decision 1976.10.26, 76-da-1090.

[16] Supreme Court Decision 1987.4.14, 87-do-153; Supreme Court Decision 1987.7.21, 7-daka-831.

[17] A daily employee in this context is the definition used by the Ministry of Labor: "An employee employed according to the daily needs of the business, regardless of the position, who as worked for less than 45 days during the 3 months before the research date."

employees

Article 10 section 2 of the Labor Standards Act provides that parts of the Act are applicable to businesses or workplaces that have not more than 4 permanent employees. Article 1-2 of the enforcement decree of the Act[18] enumerates the specific articles of the Labor Standards Act that are applicable to those employees. This is viewed as progress for the protection of such employees compared to the old enforcement decree which did not have any provisions regarding the applicability of articles of the Labor Standards Act to businesses or workplaces with not more than 4 permanent employees. However, protection is weak in significant areas such as the restriction of dismissals (Labor Standards Act: "LSA" Articles 30-1 and 31), retirement allowances (LSA Article 34), extra payment for overtime (LSA Article 55), payments for suspension of business (LSA Article 45), yearly and monthly paid holidays (LSA Articles 57 and 59), and restrictions in employing females for harmful/dangerous jobs or nightshifts (LSA Articles 63 and 68). These articles do not apply to businesses or workplaces of not more than 4 permanent employees. As for workers' compensation, the application of compensation for suspension of work (LSA Article 82), compensation for the handicapped (LSA Article 83), and compensation to the family of a deceased worker (LSA Article 85) have been postponed until January 1, 2000. Only medical treatment compensation for recuperation (LSA Article 81) is applicable to these employees.

3. Employees with fixed term contracts

A fixed term contract may be used because of an objective need to establish a deadline to complete work, but in practice, it is more often used to avoid the responsibilities of an employer under the labor laws while permanently employing an employee as an ordinary employee. A fixed term contract was originally used for simple assistance jobs, but recently it has been frequently used for professional or management positions. Employment with a fixed term contract is known by various names such as fixed term service, substitute director, temporary employee[19], contractual employee, and part-time employee.

[Table 1][1] will be inserted

[Table 2][2] will be inserted

[Table 3][3] will be inserted

The main purpose of employing on a fixed term contract basis is for flexibility of

[18] Presidential Decree no. 15682, revised on February 24, 1998.

[19] According to the Ministry of Labor a temporary employee is a person hired for less than one month, regardless of the position such as a temporary commissioner, an irregular employee, or a part-time worker who had been working for less than one month as of the study date. Ministry of Labor, Report on Labor Situations of Business, 1995.

employment and cost reduction. By employing on a fixed term contract basis, an employer is not subject to the strict restrictions that limit dismissal under the Labor Standards Act, and may adjust the employment level depending on the fluctuations of the economy. Furthermore, by strategically using the employment period, an employer can save charges such as a retirement allowance, which would have to be paid to permanent employees. Such advantages for an employer become disadvantages for an employee. The status of a fixed term employee is relatively insecure and the working conditions are inferior. In regard to the renewal of an employment contract, a fixed term employee is strongly dependent on an employer, since in principle, the employer has the initiative for renewing the contract.

The related regulation in the Labor Standards Act is Article 23, which states that, "the term of an employment contract may not exceed one year, unless a term necessary to complete a project is fixed or an at-will contract." The actual interpretation and implementation of the clause can be understood by examining the precedents on fixed term contracts.

First, if the employment term of a contract is less than one year, unless the contract has been repeatedly renewed, it is legitimate regardless of the reasons for establishing the fixed term, and the employment relationship is terminated automatically upon the expiration of the fixed term. Second, when the fixed term exceeds one year, according to Supreme Court precedent[20] an employer may not assert termination of the employment relationship due to the lapse of one year, since the fixed term itself is valid. However, the employee may terminate the contract after the lapse of one year. Also, unless special circumstances arise, the employment relationship is automatically terminated upon the expiration of the fixed term, without any separate measures such as dismissal. Third, if the contract is implicitly renewed because the employee continues to provide labor after the expiration of the fixed term, the terms and working conditions shall be identical to those of the previous contract.[21] Fourth, even if an employee is employed on a fixed term contract basis, if the fixed term has become a mere formality due to repeated renewals of the contract, the employee becomes no different from an employee without a fixed term contract. Therefore, in this case the refusal of an employer to renew the contract, without a justifiable reason, is invalid as a dismissal.[22]

However, a view contrary to the precedents is necessary to interpret the intentions of Article 23 of the Labor Standards Act with respect to the employment security of an employee. First, even if a fixed term does not exceed one year, if there is no objective and reasonable reason for establishing the term, the contract should be viewed as one without a fixed term, therefore not terminating automatically upon the expiration of the term and requiring a justifiable reason for dismissal.[23] Second, when the fixed term exceeds one year, whether labor relations automatically terminate upon the expiration of the term

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[20] Supreme Court Decision 1996.8.29, 95-da-5783.
[21] Supreme Court Decision 1986.2.25, 85-daka-2096.
[22] Supreme Court Decision 1994.1.11, 93-da-17843.
[23] Oh, Moon Wan (1998.6), "The Laws of Irregular Labor," Journal of Social Science, Vol. 8 No. 1, University of Ulsan, p. 7 and thereafter.

depends on the existence of an objective reason for fixing the term and the free will of the employee.

4. Part-time employees

(1) The present situation of part-time employees

An employee working not more than 35 hours a week is considered the underemployed as well as a part-time employee, making it hard to view this as an employment form that reflects the trend of part-time employees under the legal definition. However, international institutions such as the OECD use such statistical definitions to understand the situation of part-time employees, and it may be useful in comparing the employment structure internationally. Therefore, the definition of part-time employees in the first sentence is based on the statistical definition of an employee working not more than 35 hours, and not on the legal definition of part-time employees (LSA Article 21).

[Table 4] will be inserted

According to the "Annual Report of Economically Active Population Survey" of the National Statistics Office, the trend of employees working not more than 35 hours is as indicated in Table 4. The ratio of part-time employees to the total number of employees generally decreased after the mid-1980s, with a slight increase in 1986 and 1992 when the economy suffered from recession. Employees working not more than 35 hours may be deemed as underemployed and are therefore sensitive to economic fluctuation. Although the ratio to total employees decreased as Korea suffered from a labor shortage, recent study[24] after the IMF crisis show that the employees working less than 36 hours increased to 1,876,000 in May, 1999 from 1,503,000 in May, 1998. Therefore, despite the recovery of the economy, there is a high possibility of an increase in the number of part-time employees compared to the period before the IMF crisis, when the ratio of employees working not more than 35 hours was considerably low compared to developed countries.

(2) Problems in the protection of part-time employees

The following is a discussion of the distinctive problems of part-time employment. First, companies frequently employ pseudo part-time employees. The original purpose of employing part-time employees was to make use of unemployed labor, especially married women who do both housework and work. However, pseudo part-time employees are altering this original intent, because although they are used to extend employment hours like regular employees, they receive lower wages and inferior treatment, so companies reduce their labor costs. Second, there is a trend of substituting regular employees with part-time employees. Although part-time employees fill in for regular employees, they are not employed as regular employees, resulting in insecure employment. Third, part-time employees are often excluded from benefits such as national pension, employment insurance, and company medical insurance, thus making it difficult to maintain a stable lifestyle. Fourth, the rights of part-time employees are insufficiently protected because the charters of many labor unions, which are organized by regular employees, do not allow

[24] HanKyeoRae Daily News, June 26, 1999.

part-time employees to join.

(3) The Labor Standards Act applied to part-time employees

Before the amendment of the Labor Standards Act on March 13, 1997, regulations regarding part-time employees were not included in the Act, and only existed as the "Standard for protecting the work conditions of part-time employee" which was not very effective since it had no legal basis. Therefore a new amendment was added to the Labor Standards Act in 1997.

Article 21 of the Labor Standards Act states, "a part time employee is someone whose employment hours per week is shorter than that of a regular employee," and provides for the protection of their employment conditions.[25] Article 25-1 states that the work conditions of part-time employees are calculated by the number of work hours of a regular employee in the same field of labor. Additional matters needed for calculation are provided for in the enforcement decree (LSA Article 25-2). The related significant portions of the enforcement decree are as follows.

First, "when the employer hires a part-time employee, he must draft a contract that expresses the work conditions such as wage working hours," and "the contract term, days of employment, the commencement and termination time of employment hours, hourly wages and other matters determined by the Minister of Labor must be expressed in the employment contract." (The enforcement decree of LSA Article 9-1 and Asterisk 1-2-1).

Second, for overtime work, an employer must express the content and extent in the employment contract/rules of employment and receive the employee's consent. Also, the parties must agree upon whether the employee is to be paid extra for overtime work (the above Asterisk 3).

Third, the above Asterisk 4 states the applicability of holidays as follows. An employer must: 1) provide a weekly paid holiday to part-time employees, 2) allow monthly and yearly paid holidays calculated by the hour (e.g. if the hourly wage of part-time employees is 1,000 won and the paid holiday is 56 hours, the wages for the paid holiday is 56,000 won), and 3) give female part-time employees a paid menstrual leave and maternity leave. In 3), there must be no difference in the period of leave from regular employees.

Fourth, a separate "rules of employment for part-time employees" is allowed (the above Asterisk 5-Ga). When altering or drafting such rules, the employer must take into account the opinion of the majority of the part-time employees, and must secure the consent of the part-time employees for any disadvantageous changes (the above Asterisk 5-Na).

Part-time employees working less than 15 hours per week may be excluded from the protection of the Labor Standards Act (LSA Article 25-3), and they are not subject to a

[25] Law no. 5309, revised on March 13, 1997.

retirement allowance, a weekly paid holiday, or monthly or yearly paid holidays (enforcement decree of LSA Article 9-3).

Because the availability of time is a significant concern for part-time employees, the restriction of overtime work is important.[26] Therefore, the intent of an employer to impose overtime work must be restricted by limiting the total of allowed overtime and reducing the difference between actual work hours and contracted work hours. Also, there are suggestions that a premium should be paid for overtime of contracted work hours (legitimately unpaid).[27] That is, it is important to prevent the use of pseudo part-time employees as substitutes for regular employees.

IV. An employee's status in a disguised employment relationship

(1) It is safe to say that the employment status of most employees in an "irregular employment relationship" is insecure at best. Many provisions of the labor protection laws simply do not apply to them nor are they able to form or join labor unions because of their status as "atypical." Only those "atypical" employees whose employment relationship is recognized by law are protected by the individual labor protection laws like the Labor Standards Act, and only then to a limited extent.

(2) Although most employers are able to hire employees under standard employment contracts, they prefer the "irregular" employment method because they are able to evade the application of the Labor Standards Act. In these "irregular" employment relationships, an employer is able to dismiss an employee with relative ease, creating an environment of insecurity among the employees. Furthermore, the pay and the working environment for "irregular" employees are relatively worse than those of regular employees, which renders the employment of even the regular workers insecure.

(3) Such disguised employment relationships correspond to traditionally existing labor relations, but some have appeared with the new employment trends. A prime example of the former is a subcontractor regulated by wage protection provisions of the labor protection laws. An example of the latter is the annual-contract-based employment which was introduced in the industrial adjustment period of 1992 to 1993 and expanded through the IMF currency crisis. This is also related to the abatement of lifetime employment practices.

Of all the frequently used methods for the formulation of these disguised employment relationships, the foremost is the subcontract system (i.e., merit-based and efficiency-based) under the civil law. This is not a new employment tactic, but rather a traditional method used primarily to evade the application of the Labor Standards Act. The same applies to the agency method. In addition, there is a

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[26] Kim, Hyung Bae (1998), Labor Standards Act, 6th edition, Parkyoungsa, p. 60.
[27] Oh, Moon Wan (1998.6), "The Laws of Irregular Labor," Journal of Social Science, Vol. 8 No. 1, University of Ulsan, p. 10.

method in which a short-term contract is repeatedly renewed, which occurs regardless of the contract types as allowed under civil law. This latter method has the effect of expanding the grounds for which an employer may dismiss an employee and reduces the labor costs of an employer because a retirement allowance does not have to be paid to short-term employees.

Meanwhile, new contract-based employment methods are being introduced in certain industries. The industries in which these methods are most pervasive are finance and commerce, which also happen to be areas in which permanent employment is being replaced by temporary employment. This phenomenon is a factor that contributes to the aggravation of insecurity in the workplace and the working environment, not only for temporary workers but also for permanent ones, by blurring the distinction between the former and the latter. One of the main reasons why banks prefer temporary employees is that it curbs union activity as well as reducing overall expenditure on wages.[28] Table 5 shows the temporary employment situation within the banking circles.

[Table 5] will be inserted

IV. The existence of disguised employment relationships and the legal resolution of related problems

In many disguised employment relationships with subcontractor or agency factors, the problem of the unilateral termination of a legal relationship (labor supply relationship) often arises between a supposed worker and a supposed employer. The supposed worker who was terminated, in order to challenge the termination, would argue that the termination was in violation of the regulation limiting termination in Article 30 of the Labor Standards Act. He would file this claim either with the labor relations commission or the court. In response, the supposed employer would argue that Article 30 of the Labor Standards Act would not apply to the claimant because he is not an "employee" within the meaning of the Labor Standards Act. Also, as a precautionary measure in case the above argument is not accepted by the court, the supposed employer would argue that he had a justifiable reason for terminating the supposed worker.

Therefore, before the commission or court can rule on the validity of the termination in light of Article 30 of the Labor Standards Act, it must first determine the employment status of the supposed worker who filed the claim. The same procedure would apply to other supposed workers who claim the protection of the labor protection laws.

Therefore, it is easy to see that in Korea, where no separate regulations apply to special types of labor supply contracts, a worker's status as an "employee" within the meaning of the law becomes critical in order to claim the protection of the labor protection laws.

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[28] Kim, Sang Gon (1997.10), "New Management Strategies and Employment Insecurity," Hanshin Dissertation Collection Special Edition, Hanshin University, p. 20.

Chapter 3 Triangular Employment Relationships

I. Dispatched Employees

Ever since its introduction in the mid-1980s and the ensuing legislative debate in 1993, the dispatched employee type of employment has been spreading rapidly in Korea. However, there is no exact figure to indicate the size of the worker dispatching business in Korea.[29] Table 6 is merely an estimate.

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According to information provided by the Ministry of Labor and the Commission for Reform of Labor Relations, the total number of both lawful and illicit dispatched laborers ranges from as low as 450,000 to as many as 550,000.[30] Of this number, about 300,000 to 400,000 are dispatched to security, janitorial, engineering and businesses that trade unions are permitted to dispatch employees to by the Employment Security Act. The remaining 150,000 or so, according to the above sources, are dispatched to the areas of manufacturing, building maintenance, and white-collar support.

II. The enactment of legislation regulating triangular employment relationships

Before the enactment of the "Law on Protecting Dispatched Workers" (hereinafter "Employee Dispatch Act"), dispatched employment, which creates triangular employment relationships, was allowed only in a limited number of areas. In other words, only workers in security, janitorial, and engineering work pursuant to a special law or a worker supply business under a union accord were permitted to be dispatched. However, the above law was enacted on February 20, 1998 (and enforced since July 1, 1998) in response to the need to regulate the proliferation of employee dispatching as a new form of employment.

III. The legal concept, type and target businesses of worker dispatching

1. Distinction between the concept of worker dispatching and worker supply business

"Worker Dispatching" refers to the situation where after a dispatching business employs a worker, in accordance with a labor dispatch contract, the worker is sent to work for a utilizing business under its orders and directions (Employee Dispatch Act Article 2 section 1).

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[29] There is a substantial difference between the estimate of employees in the form of dispatched employment; the Korea Labor Union estimates 300 thousand, the Korea Management Association estimates 100 thousand to 150 thousand, and the Korean Association of Dispatching Personnel estimates 400 thousand to 500 thousand.

[30] Oh, Moon Wan (1998.6), "The Laws of Irregular Labor," Journal of Social Science, Vol. 8 No. 1, University of Ulsan, p. 11.

Prior to the enactment of the Act, worker dispatching was perceived as worker supply in a broadened sense. However, in the case of "domestic" worker supply businesses, labor supplying specifically refers to the supply of workers by a trade union (Employment Security Act Article 33). Thus, worker supplying differs from worker dispatching in a legal sense. "Worker Supply Business" refers to a business that supplies workers under its control to other parties according to a supply contract between the trade union and the supplied business when an employment relationship or supervisory relationship between workers and the supplied business exists.

Consequently, in the case of a domestic worker supply business, aside from the fact that one is a trade union, the distinction between worker supply and worker dispatching is vague. Nevertheless, the Employment Security Act, currently in effect regulating the labor supply business, only punishes labor supplying businesses operating without permits, and does not regulate businesses that illegally procure workers and utilize them. Thus, the Employment Security Act doesn't adequately have prevented the expansion of illegal worker dispatching businesses and worker supplying businesses. From this perspective, the "Employee Dispatch Act" with the provisions of sanctions against manpower recipient company may be the grounds for repressing the growth of illegal dispatch of workers.

2. Business of labor dispatching

The "Employee Dispatch Act" in relation to the worker dispatching business defines permitted work and absolutely prohibited work. In addition, within permitted work, there is work that can use dispatched workers regardless of cause, and work that is permitted only for certain causes.

First, absolutely prohibited work refers to work where workers can never be dispatched (by worker dispatching businesses) regardless of the reason for the work, and employers cannot hire dispatched workers (Employee Dispatch Act Article 5 section 2). Prohibited work includes work at construction sites (the above section, item 1), loading and unloading jobs permitted by a worker supplying business by Article 33 of the Employment Security Act (item 2), work as a seaman as defined by Article 3 of the Seaman's Act (item 3), hazardous or dangerous work as defined by Article 28 of the Industrial Safety and Health Act (item 4), and work determined to be inappropriate for the protection of the workers by the order of the President[31] (item 5). In addition, workers cannot be dispatched for the public health job and for employment in work harmful to public morals (Employee Dispatch Act Article 42).

Second, permitted work regardless of the reason for dispatch, refers to work where the owner of a dispatching business can constantly dispatch workers and a manpower recipient company can use dispatched workers for a maximum of 2 years. This consists of 26 jobs, including work requiring expert knowledge and technology, but not the operation of the direct production process in the manufacturing industry (Employee

[31] Included are jobs with a possibility of pneumoconiosis such as medical jobs, or driving passenger cars or freight cars

Dispatch Act Article 5 section 1).

Third, temporarily permitted work refers to the use of dispatched workers to relieve a temporary shortage of workers in the business of an employer or at a place of business. Temporarily permitted work, according to the "Employee Dispatch Act," refers to instances where a need for workers arises due to a shortage of workers caused by pregnancy, disease or injury. The manpower recipient company can use dispatched workers temporarily and intermittently to relieve the shortage unless the work falls under the prohibited work as described by the Employee Dispatch Act, Article 5 section 2. A company seeking to temporarily use a dispatched worker must consult in good faith in advance with the trade union representing the majority of all the employees, or an employee representative (if no trade union is composed of the majority of all the employees). (Employee Dispatch Act, Article 5 section 3).

3. Types of Employee Dispatch

There are 3 types of employee dispatch, classified by the employment method between the worker dispatching business and the worker.

First is the regular type, where a dispatched worker is employed by a dispatching business regularly. At the request of a manpower recipient company, a dispatching business enters into a worker dispatch contract with that company and dispatches workers to that company. Second is the registration type, where a dispatching business registers workers to be dispatched. Upon the request of a manpower recipient company and the signing of a worker dispatch contract, the registered workers are dispatched. The third type is the recruitment type, where a dispatching business recruits workers upon a manpower recipient company's request, then signs a contract and dispatches workers. The recruitment type of employee dispatch is similar to job placement, but differs in that a dispatching business has an employer's responsibility to the dispatched workers.

According to a poll taken in 1993, prior to the enactment of the "Employee Dispatch Act," the recruitment type was the most prevalent, accounting for 73.1%, the registration type was 23.1%, and the regular type was the lowest at 3.8%.[32] In this regard, considering the motives for the definition of dispatched workers in the "Employee Dispatch Act," some contend[33] that the registration and recruitment types oppose the purpose of the Act. However, the Act can be read as not distinguishing between types[34], thereby unsettling the position of the dispatched workers.

IV. Employee dispatching under the guise of a contract in civil law

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[32] Jung, In Soo and Jin Ho Yoon (1993), The Present Situation and Policy Considerations for Worker Dispatching Business, Korea Labor Institute, p. 55-56.
[33] Kim, Hyung Bae (1998), Labor Standards Act, 6th Edition, Parkyoungsa, p. 815.
[34] Korea Labor Institute and Korea Economic Daily, (1998.8), The Actual Condition and Practical Use of the Worker Dispatching System, p. 8.

Originally, the meaning of a contract in civil law referred to a labor supply contract, which was contracted for the purpose of completing a job. For example, when a contract between two companies is made, the company which received an order (hereinafter the "supplying company") from an ordering company supervises the employees who are directly employed by the supplying company itself, and gets paid by the ordering company upon the completion of the job. Accordingly, the supplying company is an independent company and is responsible for any of an employer's duties, obligations and responsibilities under an employment contract.

Worker dispatching and work subcontracts are similar in that a worker dispatching company and an employee enter into an employment relationship, but they differ in whether the supervisor is the supplying company or the manpower recipient company. In other words, it is theoretically accurate to regard it as a subcontract when the supervisor is the supplying company, and as worker dispatching when the supervisor is the manpower recipient company. However, when a large number of companies that illegally dispatch employees register as trustor enterprises under contracts for work[35], it is very difficult to distinguish them in reality even though it might be possible in theory.

In the case of a manufacturing company's inter-company subcontract, the supervisor can differ in various situations. For example, when a main contractor delegates part of the manufacturing process to a subcontractor, in the following cases, the supervisor is: (1) the contractor, when the contractor supervises subcontract employees, (2) the subcontract company, when the subcontract company supervises subcontract employees, (3) the subcontract company and the contract company when they jointly share supervision depending on the departments and the work process, and (4) the contractor, when the subcontract company formally assigns a supervisor, but the actual supervising is conducted by the contract company. In accordance with the current "Employee Dispatch Act," with respect to the direct production process of the manufacturing industry, dispatch of an employee is only allowed to fill in a temporary need (Employee Dispatch Act Article 5 section 2, section 1). Therefore, there are many cases where employees are dispatched under the guise of inter-company subcontracts. For instance, we can easily find instances of a worker dispatching company using a subsidiary company; that is, a large corporation incorporates a subsidiary company to which workers are dispatched by an inter-company subcontract. Even in this case, by figuring out who the actual supervisor is, we have to decide whether the subcontract is a contract under civil law or employee dispatching disguised as an inter-company subcontract. Therefore, it is necessary to protect dispatched employees by properly controlling the application of the "Employee Dispatch Act."

V. Status of dispatched employees

1. The protection of individual employees under labor related laws

[35] A contract for work means that a given enterprise (the trustee enterprise) contracts with another enterprise(the trustor enterprise) to have the latter perform certain of the former's work.

¬ Formation of dispatched labor contract and prior notice of working conditions

The owner of a dispatching company and the owner of a manpower recipient company shall enter into a written contract on important issues such as work hours, wages, health and safety, etc. (Employee Dispatch Act Article 20). The owner of a dispatching company shall give prior notice of working conditions to dispatched employees (Employee Dispatch Act Article 26) and protect the rights and interests of dispatched employees.

Equal treatment

The owner of a dispatching company and the owner of a manpower recipient company shall not discriminate against dispatched employees in comparison to the same type of employees who work for the manpower recipient company (Employee Dispatch Act Article 21).

Prohibition of contract limiting direct employment of dispatched employees

The Act allows for the conversion of a dispatched employee into a regular employee by prohibiting contracts which limit the direct employment of dispatched employees between the owner of a dispatching company and the owner of a manpower recipient company, or between the owner of a dispatching company and dispatched employees (Employee Dispatch Act Article 25).

Examples of applications of the Labor Standards Act and Industrial Safety and Health Act

Since features of the worker dispatching system are the separated employment relationship and the conduct/order relationship, the main goal of the "Employee Dispatch Act" is to clarify the duties of a dispatching company and a manpower recipient company according to the labor related laws of dispatched workers (Employee Dispatch Act, Articles 34 and 35). However, according to the "Employee Dispatch Act," the labor related laws that a worker dispatching company and a manpower recipient company are subject to for the clarification of responsibilities between them are limited to the Labor Standards Act and Industrial Safety and Health Act. Of these, the important provisions are as follows.

First, the responsibilities of the owner of a dispatching company are wages, severance payments, and compensation for industrial accidents mentioned in the Labor Standards Act. Second, the responsibilities of the owner of a manpower recipient company are the work hours and holidays mentioned in the Labor Standards Act. The responsibilities under the Industrial Safety and Health Act originally belong to the owner of the manpower recipient company, but general health check-ups which should be continuous throughout employment are the responsibility of the owner of the dispatching company.

Finally, if the owner of a manpower recipient company terminates a dispatching employment contract without justification, or does not pay the owner of a dispatching company, and therefore the owner of the dispatching company is unable to pay wages to a dispatched employee, the owner of the manpower recipient company and the owner of the dispatching company are jointly responsible for paying wages to the dispatched employee.

The lack of protection for dispatched employees

One of the reasons for the diffusion of dispatched employees in Korea is that their wages are relatively low compared to regular employees. This is related to the fact that most dispatched employees are concentrated in untrained or semi-trained professions.[36]

[Table 7][4] will be inserted

[Table 8][5] will be inserted

According to the above research in 1995(The data in the tables is from 1995), before the enforcement of the "Employee Dispatch Act," 61.6% of the dispatched employees had been dispatched for over one year (showing that employees were not dispatched for temporary projects), and their wages were substantially lower than that of regular employees.

2. The protection of rights under collective labor related laws

The "Employee Dispatch Act" does not have any provisions about the protection of rights under the collective labor related laws. Although it is clear that dispatched employees may form trade unions or become members of existing trade unions, in practice, dispatched employees are usually not members of labor unions (either of the owner of a dispatching company or of a manpower recipient company). According to the "Research on Current Status of Dispatched Employees" conducted by the Korea Labor Institute in 1992, only 12% of dispatched employees belonged to trade unions. Table 9 shows the statistics related to the labor union memberships of dispatched employees.

[Table 9] will be inserted

However, whether dispatched employees may organize a labor union and demand collective negotiations with a manpower recipient company, in order to form a collective bargaining agreement, could be a problem. The Supreme Court of Korea[37] holds a negative view of a manpower recipient company being a party to a collective bargaining agreement, since it maintains the position that a party to a collective bargaining agreement must first be a party to an individual labor relation or similar subordinate relation. Thus, collective bargaining rights for working conditions, such as work hours, breaks, working environment or other conditions related to employment that could be a problem in providing labor to a manpower recipient company are not acknowledged, resulting in the instability of the status of dispatched employees.

VI Protection measures for dispatched employees

[36] Cho, Soon Kyung (1997), "The Reality and Myth of Dispatched Employees," Industrial Labor Research, Book 3 Vol. 1, Study for Korean Industrial Labor, p. 114.

[37] Supreme Court Decision 1993.11.23, 92-nu-13011

First, the most favorable type of dispatched employee from the viewpoint of employee protection, is a regular dispatched employee. Registration and recruitment dispatched employees makes the status of dispatched employees unstable since the owner of a dispatching company maintains the employment contracts only during the period of dispatch. In particular, recruitment dispatched employees are no different from job placement in practice, although they are distinguishable theoretically. However, the "Employee Dispatch Act" has no separate provisions on this matter, which may lead to substantial debates. Therefore, the "Employee Dispatch Act" or its enforcement decree should be amended to prohibit the use of registration or recruitment dispatched employees.[38] If prohibiting the registration type is difficult, at least the recruitment type, which is no different from job placement, should be prohibited.

Second, the basic labor rights of dispatched employees must be guaranteed. To do so, manpower recipient companies should be recognized as employers under collective labor related laws.

Third, the wages of dispatched employees should not be lower than those of regular employees in the same field, and legislation is necessary to guarantee a certain percentage of the dispatch fee a manpower recipient company pays to the owner of a dispatching company.

Chapter 4 Self-employment

Self-employees earn their income by labor, management skills, risk taking and recovery of funds. Unlike salary employees, self-employees must be independently responsible for economic/financial decisions, and bear the risk of failure. There are hardly any studies on the condition or protection of labor suppliers who are independent and not under subordinate relations. However, subcontracting or delegating labor suppliers are being studied as marginal cases of employee status, and recently has the establishment of venture companies or professional telework as an individual labor supplier due to the difficulty of job hunting begun to be studied. However, the latter case is not a big concern of the labor laws due to a general conviction that teleworkers are on equal terms with the other party of any work contract due to their professional skills, and only studies[39] on policies to encourage such employment have been conducted. Due to the lack of studies on self-employment itself, we cannot show any statistical data about it. However, Table 10 shows current changes in self-employment may be helpful in gaining insight about self-employment.

[Table 10][6] will be inserted

[38] Kim, Hyung Bae (1998), Labor Standards Act, 6th edition, Parkyoungsa, p. 815; Kang, Sung Tae (1998), "The Legislation on Dispatched Employees," Labor Laws no.8, p. 169.
[39] Kang, Hong Ryul and Jeon, Soo Ah (1997.9), Measures for Encouragement of Telework, Communications Research Institute/Korea Labor Institute; Kim, So Young and Uh, Soo Bong (1997.9), Research on the Encouragement of Telework (final report), Korea Labor Institute.

The term "self management occupation" in Table 10 means "a person who manages a business, farm, shop, or professional job without any paid employees," and the term "family employment" designates "a person who works 1/3 (18 hours) of the hours of regular employees, and helps to raise the income of the farm or business of the family, even though there are no direct profits or returns to oneself."

An independent explanation of self-employment in Korea is not significant because there are no important legal systems related to it other than the national pension and medical insurance which are applicable to all Koreans. Also, there are few studies on this matter since the concern of labor researchers is concentrated on labor relationships. Therefore, it seems appropriate to explain "self-employment in situations of economic or other dependencies" in a separate chapter.

Chapter 5 Self–employment in situations of economic or other dependencies

The labor suppliers in this category are not restricted to a workplace, and thus are barely subject to the orders of the other party (employer) of a contract. However, the continuance of the labor supply relation has a direct impact on the lives of these labor suppliers.

The following explains "subcontract or delegate labor suppliers," "proprietors of construction machinery" and "telework" as marginal cases of employee status. The former shall be explained separately due to the importance of home work in Korea. The judicial precedents and administrative interpretations recognize the employee status of this category in accordance with the actual subordinate relation, regardless of the name or form of contract. Therefore, I would like to note that this category in general is likely to be recognized as an independent labor supplier.

I. Subcontract and delegate labor suppliers

There is a category of labor suppliers who own the means and tools of production, such as a driver who owns a car, a stonemason, a briquet deliveryman, a Yugai businessman and an exclusive salary employee supplied with production material. In these cases, the means of production is either the property of the labor supplier or rented from an employer. Also, this category can be divided into cases that use a third labor force and cases that do not. According to Korean precedents and administrative interpretations, a labor supplier is not deemed an employee if the form of labor supply is subcontracted or delegated. Therefore, regardless of the express form of a labor supply contract, if the subordinate relation of the labor supply is recognized, the labor supplier is deemed an employee. However, if the actual nature, as well as the form, of a contract is that of a

subcontract or delegation, the labor supplier is not deemed an employee.[40]

The following is an example of different types of employment is this category.

1. Labor suppliers provided with means of production

First, the administrative interpretation of briqet delivery is "a briquet delivery man is not employed by the manufacturer of briquets, and his income comes from the difference of manufacturing price and customer price of briquets. Since he is not subject to substantive and individual conduct orders of the manager and his income derives from exploitation of the produce of the manufacturer of briquets, he is not considered as an employee under the Labor Standards Act."[41]

Second, as for a "Yugai businessman," the Supreme Court[42] stated "since he receives orders from the foundry manager or an employed salesman and purchases melted metal from the manufacturer on credit, and manufactures the product himself or by ordering an employee, then sells the product to the orderer priced by his discretion through the foundry manager deducting the price of melted metal, he is not deemed as an employee who receives wages from the manufacturer under the Labor Standers Act, although his work place is restricted and he collects payment from the manufacturer. Rather he is deemed as an independent profit earning business."

Third, there are cases deemed delegate contracts even though the workplace is provided by an orderer (the other party of a contract), and is not the residence of the labor supplier. The Supreme Court precedent[43] states, "this person usually works in the defendant's factory, but when there is no work load he will work in another factory in the same manner. If such person was not subject to orders of the defendant and received wages depending on the quantity of completed production then he is not deemed as an employee in subordinate relation under the Labor Standards Act, but viewed as a recipient of the delegate contract."

2. Home work

The concept of home work

Home work indicates production or service provided in a residence or workplace of the employee's choice without direct conduct/orders from the other party of a contract. Generally, the workplace is independent from the other party of a contract, and a home worker enters into a subcontract rather than an employment contract, and is not subject to direct commands from the other party. As for small scale venture businesses growing in the computer industry, they should be categorized differently since they overlap with telework. Therefore, the following describes home work and home workers in a narrow

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[40] Supreme Court Decision 1991. 7. 26 90-da – 20251, Supreme Court Decision 1991. 10. 25, 91-do-1685, Supreme Court Decision 1987.5.26,87-do-604 etc.
[41] Administrative interpretation: 1969.7.18, Legal Affairs law 810-7883.
[42] Supreme Court Decision 1989.7.12, 88-na-47613.
[43] Supreme Court Decision 1984.12.26, 84-do-2534.

sense.

The current status of home work in Korea

Using research conducted in December, 1994, the major products of the recipient companies employing home workers as well as regular employees (located in Seoul and its suburbs) are shown in Table 11.

[Table 11] will be inserted

Thus, according to Table 11, all of the researched businesses produced consumer products of light industry goods, most of which were everyday goods produced by the concentrated labor intensive methods of women, and are small scale businesses with limited funds. Since their products are mostly consumer goods, most home workers suffer from physical pains in the back or shoulders resulting from the work (61.5% according to Table 11), although they rarely suffer from major injuries (91.4% replied never or rarely), and when injured, the injuries were minor (major injuries were 1.2% of the total).

The reasons for beginning home work are shown in Table 12.

[Table 12] will be inserted

Hence, 83.5% of the reasons for doing home work were to assist family income, as co-work with housework, and to fill leisure time, showing that most of the home workers chose home work as a means of assisting the family income, carrying out housework, and also making use of leisure time. A notable observation is that most of the home workers who were researched were women who were considered full-time housewives in Korea. Therefore the usual reasons for home work in Western countries such as an increase of unemployment and lack of regular employment due to the flexible employment strategy of employers are not significant as reasons for the "home work in a narrow sense" in Korea. Table 13 shows the results of polls about the reasons why businesses entrusted home workers with production.

[Table 13] will be inserted

Eligibility of employee status of home workers

Most of the home work in Korea is in the form of small-scale subcontractors, and the employee status of home workers is still under debate. There are no precedents that directly deal with this matter, and only academic viewpoints fully recognize their employee status,[44] and partly recognize subordinate home workers and independent

[44] Kim, So Young and Moon, Moo Ki (1997.8), Research on the Actualities of Homework and its Institutional Protection., Korea Labor Institute, p. 8.

home workers within the category of home work[45] as employees. This is related to the fact that although self-employment and home work are conceptually distinguishable, in practice, it is difficult to distinguish the two.

The necessity of protection of home workers

First, home workers are typical examples of low wage employees since their income in many cases is only half the income of regular employees. Second, the content of home work is mostly mechanical tasks executed with basic skills that are acquired informally. Therefore, there is a necessity for institutions to provide wider opportunities of training for home workers so they can earn higher wages in the future. Third, there is an urgent need to resolve economic concerns such as low wages and maintenance of workload, and to improve inferior work environments.

V. The status of proprietors of construction machinery related to the Labor Standards Act

Previous administrative interpretations viewed drivers who owned automobiles such as taxis, freight trucks and construction machinery as employees since the company was the owner of the business (employer) even if the drivers conducted business with their own property. In comparison, judicial precedents viewed such workers as employees[46] or not[47] depending on the actual contents of the contracts.

Also, upon the full revision of the "Act on Construction Machinery Control,"[48] which was effective from January 1, 1994, an owner of construction machinery was allowed to conduct rental business.[49] Thus, in the case of construction machinery, an owner may register the machinery under his name and conduct business (usually an owner operates the machinery; individual rental is set forth in Article 13-2-3 of the enforcement decree of the Act on Construction Machinery Control), and a registered owner is deemed an (independent) owner of business. In the case of a collective rental business, each member (owner) may register as a representative, and is therefore not deemed an employee under a subordinate relation.[50]

As for taxis and freight trucks that are not deemed construction machinery under the "Act on Construction Machinery Control," and are still under a fee collection system, the employee status of a "owner of car and driver" is a matter that should be considered

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[45] Kang, Sung Tae (1999) "The Regulation under Labor Laws of Home-work and Telework," Study on Labor Laws, Seoul National University Research Committee on Labor Laws, p. 50 and thereafter.
[46] Supreme Court Decision 1992.4.28, 90-do-2415.
[47] Supreme Court Decision 1972.3.28, 72-do-334; Supreme Court Decision 1995.6.30, 94-do-2122.
[48] Full Revision 1993.6.11, Law no. 4561.
[49] To conduct rental business of construction machnery, a business license is necessary. However, under the previous "Act on Construction Machinery Management," one needed to possess 6-50 construction machines, therefore making it virtually impossible for owners to start businesses. Therefore, a company would receive a business license under the pretense of possessing the construction machinery of the owners, and the owner would conduct business by paying the company a collection fee. This was the same for taxis and freight trucks.
[50] Administrative Interpretation: 1994.7.25, Labor Standard 68207-1182.

depending on his actual labor relation.

VI. Telework

There is no broadly accepted definition of telework and the terminology itself has not been set, since telework has only recently been introduced in Korea. However, there are no debates on the fact that the workplace is separate from the project commander, and that processing equipment such as computers are used as a means of labor.

Telework can be divided into 3 categories depending on the ability of the teleworker, and the relation with the project commander. The first is "professional type" in which there is a higher demand than supply for the skill of a worker, and a worker has flexibility and superiority in determining his legal status. That is, a worker has greater influence in determining the workplace, work conditions and wages. This type may choose between an employee status and independent contractor status according to his will. The second is "intermediate type." The purpose of employing this type of teleworker is to make use of highly qualified females or economize the cost/personnel expenses for professional tasks (secretary, trade, development of study material, etc.). This type of worker is mostly constituted of highly qualified females, who are temporarily or physically unable to commute, and their wages are usually based on performance and the work has an independent nature. The third is "unsophisticated type." The purposes of this type of telework are to save office costs/personnel expenses, to flexibly respond to manufacture and labor problems, and to substitute workers in fungible tasks such as making simple programs, data inputting or computer processing.

The three categories are significant in determining the legal status of the workers. Thus, in the first and second categories, because the parties enter into contracts on equal terms due to the workers' skills, a contract may be deemed the true will of the worker. However, in the third category, it is difficult to deem a contract a reflection of the worker's desires, due to inequality, and the legal status of the worker should be determined according to the existence of subordination.[51] The form of telework employed by corporations in Korea from the viewpoint of contract terms is shown in Table 14.

[Table 14] will be inserted

However, the real problem is "subcontracted telework," since Korea does not have any separate laws for telework. Whether any provisions of labor laws are applicable to the "employee type teleworker" that Table 14 is premised on, is a question that remains to be resolved, but their treatment does not differ from regular employees from a legal standpoint. In comparison, "subcontracted teleworkers" fall under the labor laws if the workers are eligible as employees, but if not, they are not subject to any protection under the labor laws, resulting in the instability of their legal status.

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[51] Kang, Sung Tae (1999), "The Regulation under Labor Laws of Home-work and Telework," Study on Labor Laws, Seoul National University Research Committee on Labor Laws, p. 61.

Chapter 6 Conclusion

The following is a summary of the current status of labor suppliers of typical employment relationships, triangular employment relationships, and self-employment in situations of economic and other dependencies, in addition to the related problems that were mentioned above.

First, some employers use disguised employment relationships, although regular employment contracts are available, to avoid the responsibilities of labor laws. The ratio of these employees substituting for regular employees is growing, although they are subject to insecurity since employers may easily terminate employment contracts, and they receive lower wages than regular employees.

Second, the wages of dispatched employees are lower than those of regular employees, which is one of the reasons for the proliferation of dispatched employees in Korea. Also, there are no clear provisions in the "Employee Dispatch Act" distinguishing a regular dispatched employee, which is the most favorable type of employee dispatch, from other types of dispatched employees. Therefore, the "Employee Dispatch Act" or its enforcement decree should be amended to prohibit the registration or recruitment type of employee dispatch business.[52] If prohibiting the registration type is difficult, at least the recruitment type, which is no different from job placement, should be prohibited. Also, the 3 basic labor rights of the dispatched employees must be guaranteed. To do so, manpower recipient companies should be acknowledged as employers in industrial relations.

Third, labor suppliers under economic dependencies such as subcontracts, delegate labor suppliers, and home workers are not restricted to a workplace, and thus are barely subject to the orders of the other party (employer) of a contract. However, the continuance of a labor supply relation has a direct impact on the lives of these labor suppliers. Additionally, the wages of "home workers in a narrow sense" is only half the amount of the wages of regular employees in the recipient companies, and are thereby atypical examples of low wage labor. Also, there is a necessity for institutions to provide wider opportunities of training for home workers so they can earn higher wages in the future.

In conclusion, there is a necessity labor protection legislation for atypical employees and labor suppliers in economic dependencies. This could be accomplished by creating separate provisions in the existing laws such as the Labor Standards Act, or enacting new laws – such as an "Act on home work" – if necessary. The most important concern in enacting these laws is indicating the principle of equal wages for equal work for each employment contract. Besides the enactment of individual labor protection laws, the legal institutional guarantee of the 3 basic labor rights is necessary so that atypical employees may independently unite for the improvement of their working conditions.

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[52] Kim, Hyung Bae (1998), Labor Standards Act, 6th edition, p. 815; Kang, Sung Tae (1998), "The Legislation on Dispatched Employees," Labor Laws no. 8, p. 169.

[Table 1] Trend of Wage Workers in Korea per Term of Contract (regular, daily)

(Unit: one thousand persons, %)

	Total Employees	Wage Workers	
		Regular Employees	Daily Workers
1980	13,683	5,164(37.7)	1,300(9.5)
1981	14,023	5,374(38.3)	1,231(8.8)
1982	14,379	5,583(38.8)	1,256(8.7)
1983	14,505	6,009(41.4)	1,162(8.0)
1984	14,429	6,336(43.9)	1,295(9.0)
1985	14,970	6,714(44.8)	1,390(9.3)
1986	15,505	6,979(45.0)	1,454(9.4)
1987	16,354	7,662(46.9)	1,529(9.3)
1988	16,869	8,114(48.1)	1,496(8.9)
1989	17,560	8,662(49.3)	1,727(9.8)
1990	18,085	9,110(50.4)	1,840(10.2)
1991	18,612	9,519(51.1)	1,830(9.8)
1992	18,961	9,796(51.7)	1,772(9.4)
1993	19,253	10,033(52.1)	1,718(8.9)
1994	19,837	10,530(53.1)	1,767(8.9)
1995	20,377	10,935(53.7)	1,801(8.8)
1996	20,764	11,246(54.2)	1,797(8.7)
1997	21,048	11,338(53.9)	1,890(9.0)
1998	19,926	10,453(52.5)	1,738(8.7)

Reference: ( ) is ratio of employees to total number of employees (round off to the nearest to).

Source: The National Statistics Office, recorded tape of "Economically Active Population Survey" various years.

[Table 2] Trend for Temporary Employees

(Unit: one thousand persons, %)

	Temporary Employees			Wage Workers		
	Total	Rate of Increase	Relative Size	Total	Rate of Increase	Relative Size
1990	3,191		29.0	10,950		60.5
1991	3,263	2.9	28.8	11,349	3.6	61.0
1992	3,189	-2.3	27.1	11,751	3.5	61.0
1993	3,133	-1.8	27.1	11,568	-1.6	61.0
1994	3,420	9.2	27.8	12,297	6.3	62.0
1995	3,546	3.7	27.8	12,736	3.6	62.5
1996	3,868	9.1	29.7	13,043	2.4	62.8

Reference: The ratio of wage workers is a ratio to the total employees, and the ratio of temporary employees is a ratio to wage workers. Rate of increase is based on the rate of increase in the previous year.

Source: The National Statistics Office, recorded tape of "Economically Active Population Survey," various years.

[Table 3] Trend of Males and Females for Temporary Employees

(Unit: one thousand persons, %)

	Total Number of Males	Rate of Increase	The Ratio of Temporary Employees	Total Number of Females	Rate of Increase	The Ratio of Temporary Employees	Distribution Ratio of Females
1990	1,512		15.0	1,659		22.5	52.3
1991	1,522	0.7	14.6	1,741	4.9	23.1	53.4
1992	1,449	-4.8	13.6	1,740	-0.1	23.0	54.6
1993	1,402	-3.2	13.0	1,731	-0.5	22.4	55.3
1994	1,501	7.1	14.0	1,919	10.9	24.0	56.1
1995	1,563	4.1	13.1	1,983	3.3	24.1	55.9
1996	1,694	8.3	13.7	2,174	9.6	25.8	56.2

Reference: Rate of increase is based on the rate of increase in the previous year. "Distribution ratio of females" is the ratio of females in the temporary employees. The ratio of temporary employees is the ratio to the total employees for each gender.
Source: The National Statistics Office, recorded tape of "Economically Active Population Survey," various years.

[Table 4] Trend of Employees per Working Hour

(Unit: one thousand persons, %)

	Under 18 hours(A)	18-35 hours(B)	Under 35 hours (A+B)	Ratio of employees working under 35 hours to total employees
1985	112 (23.1)	995 (-13.7)	1,107	7.4
1986	145 (29.5)	1,530 (53.8)	1,675 (51.3)	10.8
1987	197 (35.9)	1,224 (-20.0)	1,421 (-15.2)	8.7
1988	169 (-14.2)	1,073 (-12.3)	1,242 (-12.6)	7.4
1989	214 (26.6)	1,154 (7.5)	1,368 (10.1)	7.8
1990	197 (-7.9)	1,033 (-10.5)	1,230 (-10.1)	6.8
1991	225 (14.2)	1,067 (3.3)	1,292 (5.0)	6.9
1992	259 (15.1)	1,081 (1.3)	1,340 (3.7)	7.1
1993	240 (-7.3)	1,035 (-4.3)	1,275 (-4.9)	6.6
1994	269 (12.1)	1,033 (-0.2)	1,302 (2.1)	6.6
1995	290 (7.8)	1,033 (0.0)	1,323 (1.6)	6.5
1996	293 (1.0)	1,005 (-2.7)	1,298 (-1.9)	6.3

Reference: the rate inside ( ) is the rate of increase in the previous year.
Source: The Natiuonal Statistics Office, "Annual Report on Economically Active Population Survey", various years.

[Table 5] Temporary Employment Situation within the Banking Circles

(Unit: persons, %)

Name of Bank	Number of Temporary Employees	Relative ratio of Temporary Employees
Chohung Bank	540	5.99
Commercial Bank	572	6.88
Korea First Bank	297	3.64
Hanil Bank	490	5.65
Seoul Bank	478	6.31
Foreign Exchange Bank	519	6.26
Shinhan Bank	550	11.46
Hana Bank	121	7.12
Boram Bank	119	7.57
Hanmi Bank	147	6.66
Donghwa Bank	213	9.83
Pyonghwa Bank	98	5.34

Source: Chosen Daily News, (August 13, 1997), "Banking: Circulation Business' approach to temporary employment."

[Table 6] Situation of Worker Dispatching Business (including security and janitorial)

(Unit: number of companies, persons)

The number of worker dispatching companies	The number of manpower recipient companies (not less than 30 employees)	The number of dispatched workers
3,573	3,954	225,000

Reference: Center for Labor Research; Korean Economic Newspaper, (August, 1998), "The situation of the workers dispatch policy and its use."

[Table 7] Average Weekly Working Days, Working Hours, Monthly Pay and Regular Employment Provisional Receipt of Money.

(Unit: day, hour, ten thousand won, %)

Category	Average
Average Weekly Working Days	5.86
Average Weekly Working Hours	58.21
Total Monthly Pay	75.82
Actual Receipt Amount	70.99
The ratio of dispatched employees' wages to that of regular employees	60.32(%)

Source: Cho, Soon Kyung(1997), "The Reality and Mith of Dispatched Employees", Industrial Labor Research, Book 3. Vol. 1, Study for Korean Industrial Labor, p. 114 .

[Table 8] Number of Dispatched Employment according to Working Period.

(Unit: persons, %)

Category	Number of Workers	Percentage
Less than 6 months	113	21.0
Between 6 months and a year	93	17.3
1-2 Years	95	17.7
2-3 Years	63	11.7
More than 3 years	173	32.2
Total	537	100.0

Reference: There was one no response.

Source: Cho, Soon Kyung(1997), "The Reality and Mith of Dispatched Employees", Industrial Labor Research, Book 3. Vol. 1, Study for Korean Industrial Labor, p. 116 .

[Table 9] Question of Joining Labor Union

(Unit: persons, %)

		Number of responses	Ratio		Number of Responses	Ratio

Question of Joining	Joining	63	11.9	* Worker Dispatch Business Trade Union * Labor Union for Recipient Company * Both * Other Labor Unions	24 34 1 6	36.9 52.3 1.5 9.2
	Not-joining	409	77.0	Total	65	100.0
	No response	59	11.1			
Total		531	100.0			

Source: "Research on Current Status of Dispatched Employees" conducted by the Korea Labor Institute in 1992.

[Table 10] Transition on the Pursued Ranking in Employment

(Unit: one thousand persons)

	Self Management Occupation		Family Employment		Regular Employees		Daily Workers	
	Nationwide	Non-Agricultural Occupant	Nationwide	Non-Agricultural Occupant	Nationwide	Non-Agricultural Occupant	Nationwide	Non-Agricultural Occupant
1980	4651	2273	2569	642	5164	4728	1300	932
81	4735	2330	2685	658	5374	4946	1231	937
82	4910	2640	2631	826	5583	5160	1256	953
83	4897	2676	2438	806	6009	5594	1162	934
84	4578	2606	2220	744	6336	6031	1295	1072
1985	4679	2799	2187	789	6714	6397	1390	1180
86	4868	2996	2204	836	6979	6665	1454	1269
87	4994	3135	2170	868	7662	7316	1529	1313
88	5093	3238	2167	891	8114	7771	1496	1316
89	5051	3188	2119	881	8662	8301	1727	1550
1990	5068	3273	2067	938	9110	8763	1840	1655

91	5230	3490	2033	982	9519	9148	1830	1661
92	5411	3705	1983	974	9796	9413	1772	1601
93	5432	3862	2070	1086	10033	9688	1718	1601
94	5521	4008	2020	1085	10530	10178	1767	1655
1995	5692	4253	1950	1088	10935	10573	1801	1672
96	5798	4421	1923	1117	11246	10886	1797	1679
97	5951	4617	1869	1109	11338	10982	1890	1776
98	5740	4420	1995	1131	10453	10170	1738	1622

Reference : Regular employees indicates "an employee who receives wage or salary and whose employment term is not less than a month."
Source: KLI Statistics on Labor(1999), Korea Labor Institute, p. 21.

[Table 11] Main Manufacturing Products of Home-Workers

(Unit: number of companies, %)

	Inchon/ Kyungki	Seoul	Total
Food and Beverage Products	0 (0.0)	2 (3.4)	2 (1.6)
Textile Products	0 (0.0)	1 (1.7)	1 (0.8)
Clothing, Fur	17 (27.0)	33 (55.9)	50 (41.0)
Leather, Bags, Shoes	4 (6.3)	4 (6.8)	8 (6.6)
Pulp, Paper Products	0 (0.0)	3 (5.1)	3 (2.5)
Other Machinery Products (home equipment)	22 (34.9)	6 (10.2)	28 (22.9)
Media, Telecommunications Equipment	9 (14.3)	1 (1.7)	10 (8.2)
Manufacturing products such as furniture	11 (17.5)	9 (15.2)	20 (16.4)
Total	63 (100.0)	59 (100.0)	122 (100.0)

Reference: The data is from the research conducted in December, 1994.
Source: Kim, So Young and Moon, Moo Ki (1997. 8), Research on the actualities of homework and its institutional protection , Korea Labor Institute, p. 44.

[Table 12] Reasons for Starting Home-Work

(Unit: persons, %)

	Inchon/ Kyongki	Seoul	Total
* Had no other job	67(9.2)	65(8.4)	132(8.8)
* Possible to do housework at the same time	202(27.2)	213(27.7)	415(27.7)
* Health problem	4(0.6)	14(1.8)	18(1.2)
* To contribute to household income	225(30.9)	247(32.0)	472(31.4)
* Resident is close to the factory	38(5.2)	54(7.0)	92(6.1)
* To use spare time efficiently	190(26.1)	176(22.8)	366(24.4)
* Fits with one's aptitude	2(0.3)	4 (0.5)	6(0.4)
Total	728 (100.0)	773(100.0)	1,501(100.0)

Reference: 1) Multiple responses
2) The data is from the research conducted in December, 1994.
Source: Kim, So Young and Moon, Moo Ki (1997. 8), Research on the actualities of homework and its institutional protection , Korea Labor Institute, p. 123.

[Table 13] The Reason for Entrusting Home Workers with Production

(Unit: reply from businesses, %)

	Inchon/ Kyungki	Seoul	Total
* Reduce labor costs	49 (34.3)	37 (31.6)	86 (33.1)
* Purchase difficulties for regular employees	49 (34.3)	39 (33.3)	88 (33.8)
* Trouble securing factories	16 (11.2)	10 (8.5)	26 (10.0)
* Unstable receiving of orders	28 (19.5)	29 (24.8)	57 (21.9)
* Insufficient dedication from typical employees	1 (0.7)	2 (1.7)	3 (1.2)
Total	143 (100.0)	117 (100.0)	260 (100.0)

Reference: 1) Multiple replies
2) The data is from the research conducted in December, 1994.
Source: Kim, So Young and Moon, Moo Ki (1997. 8), Research on the actualities of homework and its institutional protection , Korea Labor Institute, p. 61.

[Table 14] Hiring Conditions for Different Departments in Telework

(Unit: %)

	Information Handling	Managing	Computing	Editing	Design	Input of data	Translation	Total
Regular Work	100	100	7.9	25.0			5.6	8.5
Regular timeline							5.6	0.9
Temporary work							5.6	0.9
Temporary timeline			28.6	75.0	100	100	16.7	40.6
Temporary request			63.5				66.7	49.1
Total	0.9	0.9	59.4	3.8	0.9	17.0	17.0	100

Source: Kang, Hong Ryul and Jeon, Soo Ah (1997.9), Measures for Encouragement of Telework, communications Research Institute/Korea Labor Institute, p. 120.

[52] Choi, Kyung Soo (1997.7), The present situation of part time employees and policy – the promotion and protection of part time employment, Korea Labor Institute, p. 30.

[52] Choi, Kyung Soo (1997.7), The present situation of part time employees and policy – the promotion and protection of part time employment, Korea Labor Institute, p. 28.

[52] Choi, Kyung Soo (1997.7), The present situation of part time employees and policy – the promotion and protection of part time employment, Korea Labor Institute, p. 29.

[52] Cho, Soon Kyung (1997), "The Reality and Myth of Dispatched Employees," Industrial Labor Research, Book 3 Vol. 1, Study for Korean Industrial Labor, p. 114.

[52] Cho, Soon Kyung (1997), "The Reality and Myth of Dispatched Employees," Industrial Labor Research, Book 3 Vol. 1, Study for Korean Industrial Labor, p. 116.

[52] KLI statistics on labor (1999), Korea Labor Institute, p. 21.