“Social Protection Program and Policy Alternatives for Non-standard Workers in Korea”

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I. Introduction: Legal Problems of Atypical Work

The late 1980s witnessed a restructuring of the labor market and the emergence of atypical employment. Since then, atypical labor has become much more common, particularly in the wake of Korea's foreign currency crisis at the end of 1997. Groups of atypical workers sprang up all over the country. Their terms of employment stand in marked contrast with traditional regular workers.

Conceptually, atypical work is generally characterized by its contingency, transitoriness, different working conditions compared to regular workers in the same job, and precariousness of employment. In practice, however, atypical workers are to those engaged in 'atypical work,' which is different compared to work done by regular workers with regard to working hours, type of work done, legal relationships with employers, type of workplace, and duration of employment contract.

There are several types of atypical workers, such as part-time workers, dispatched workers (workers dispatched from employment agencies on a temporary basis), temporary or contractual workers, and workers in special employment arrangements who perform services under subcontracts or commission. In all cases, their numbers are increasing sharply. The reasons for this are the ongoing deregulation and increasing flexibility of the labor market. These changes had been occurring in the labor market well before the foreign currency crisis, but the crisis accelerated the change. The mass layoffs that were brought about by the crisis called for a major change in corporate strategy for human resource management and caused workers to more readily accept atypical employment as they were obviously under pressure to increase or completely replace lost household income.

Atypical forms of employment have long existed in advanced countries, particularly in Europe. These forms of employment have come into being as a result of deregulation and increased flexibility in labor markets and have been promoted as solutions to unemployment.[1] Some professional workers or those employees who seek

[1] Germany, in particular, has responded to the diversified forms of employment through deregulation of its labor laws, including an expansion of fixed-term employment contracts, deregulation on the dispatch of workers, and relaxation of the requirements on and more limited application of layoffs. The major idea behind a series of legal revisions in Germany was "fixed-term employment is better than long-term unemployment." The revisions were characterized by the fact that the deregulation was accompanied by 'compensation. '
Germany's efforts were essentially meant to combat unemployment, but their effectiveness in this regard

more free time have voluntarily opted for atypical employment.

Atypical employment in Korea has, nevertheless, given rise to serious problems. It has exacerbated working conditions and destabilized employment. Employers have replaced regular employees with atypical workers, putting the latter under the less favorable working conditions while having them perform the same tasks. Thus, they have used atypical employment as an expedient in order to reduce costs and avoid the more restrictive requirements of regular employment. In other words, atypical employment in Korea has clearly become a problem; it would be one thing if it was merely a result of transition in the labor market, such as changes in employment structure and flexibility, but it has also become a means by which employers can take advantage of workers.

In this light, there is a great need to protect atypical workers and, at the same time, to maintain flexibility in the labor market. To this end, improvements in the legal framework should be sought in order to guarantee atypical workers appropriate working conditions. This requires that we first formulate a definition of atypical workers, establish standards to identify atypical employment, estimate how many atypical workers there are, and determine what their working conditions are. Above all, it is necessary to establish principles in policy and norms for atypical workers that would harmonize and balance the internal and external labor markets in the entire labor market.

This paper intends to analyze the systems pertaining to each form of atypical labor, such as part-time employment, fixed-term employment, and dispatch employment. It will also analyze special employment relations and the interpretive and legal issues of atypical employment, and propose measures for the improvement of policy and the legal framework.

II. Protective Systems for Atypical Workers

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has not been widely praised. For example, critics say that liberalization of the dispatch of workers has simply allowed the replacement of regular employees with dispatched workers, not necessarily creation of new jobs. In addition, an easing of the restrictions on layoffs does not necessarily increase employment. Rather, it can promote layoffs of domestic employees and encourage companies to move their operations offshore. (See Kim So-Young, Changes and Trends in Labor Laws of Advanced Countries and Proposed Measures for Improvement of Legal Framework, Korea Labor Institute, Jan. 2001, pp. 37, 47.

1. Part-time Work

The Labor Standards Act (hereinafter LSA) newly stipulated the definition of part-time workers and the provisions on working conditions for part-time workers (March 13, 1997). The LSA states that the term "part-time worker" means "an employee whose contractual working hours per week are shorter than those of full-time workers engaged in the same kind of work at the pertinent workplace" (Article 21). Working conditions for part-time workers "shall be determined on the basis of the ratio of their working hours over those of full-time workers engaged in the same kind of work at the pertinent workplace" (Article 25). When employing part-time workers, employers are required to draw up labor contracts specifying the wages, work hours, and other terms and conditions and issue the contracts to those employed for part-time work. The requirement was necessary to prevent part-time workers from possible abuse stemming from the sometimes vague nature of their status as workers compared to regular, full-time workers.

Wages of part-time workers shall be, in principle, calculated on an hourly basis (hourly wages), and an employer may have a worker work overtime on condition that the employer and worker reach an agreement thereto. The Act has three requirements on the application of days off and leaves: First, at least one day off with pay per week; second, proportional application of monthly and annual leaves with pay; and third, menstruation and maternity leaves with pay for female workers. Atypical workers are to have the same number of days for menstruation and maternity leaves as regular workers. However, severance pay, leaves with pay, and monthly and annual paid leaves do not apply to part-time workers who work less than 15 hours per week.

It has been found that part-time workers have been granted better protection since the revision of the LSA in 1997. However, the problem of 'nominal' part-time workers, who actually work the same hours as regular employees but in less favorable working conditions, has yet to be resolved. In addition, the overlapping of part-time work and temporary employment in the labor market should be resolved. Given these problems, the institutional improvements pertaining to part-time work should be made according to the following principles:

First, part-time workers should be placed under the same working conditions as

regular workers (equal treatment), but they are to be granted appropriate working conditions with regard to the number of hours worked (proportional treatment). Second, abuse and misuse of part-time work in an effort to evade the law should be prohibited so that part-time work could yield the maximum possible benefit for all.

2. Fixed-term Employment (Contractual Employment)

Employment with a time limit or fixed-term employment refers to a form of employment with a fixed period of labor contract and is often called temporary work or contractual employment. In the past, fixed-term employment was largely used in simple supplementary jobs, but recently it has become common in professional and managerial jobs. Coupled with meritocratic labor practices, or the performance pay system, which came into being with the introduction of the annual salary system, it has now become common in every industry.

According to the Civil Law, the term of a labor contract may be more than three years (Article 659). The LSA, however, states that it shall not exceed one year, except in cases where there is no fixed term or a term is fixed as necessary for the completion of a certain project (Article 23).[2]

The provision can be summed up as follows: First, an employer and an employee may enter into a labor contract without fixing any term; Second, they can make a labor contract with a fixed term which does not exceed one year; And third, the contract may exceed one year if necessary for the completion of a certain project.

Customarily, a labor contract is signed with no fixed term specified.[3] This kind of labor contract is in accordance with the ideals of the LSA for long-term maintenance of strong labor relations and what is contracted.[4]

When the LSA was enacted, Article 23 was incorporated with an eye to preventing

[2] An employer who has violated the provision of Article 23 and made a labor contract whose term is more than one year is subject to a fine not exceeding five million won. The punishment is applied to only employers because the intent of Article 23 of the LSA is to prevent employees from being bound by a long-term labor contract.

[3] A labor contract by the age-limit system does not violate Article 23 of the LSA as it is a form of a labor contract without a fixed term and defines only the condition for the termination of the contract or the maximum limit of the contract period.

employers from binding employees by long-term labor contracts. However, with the changes in the labor market that have occurred, and particularly more recently, the effect of a labor contract with a fixed term of more than one year in the context of private law has been in dispute. Also in dispute is the question of whether an employer may refuse to renew a fixed-term labor contract at expiration in cases where the contract had been repeatedly renewed in the past. In addition, limiting the period of a fixed-term labor contract to less than one year has created job insecurity for those workers who need a contract of more than one year due to the nature of the business they are engaged in. In the workplace, repeated renewal of labor contracts with terms of less than one has been used as a means to avoid violation of the law.

In modern industrial society, reducing job insecurity stemming from the fixing of terms of contract has become more important than preventing curtailment of human liberty or forced labor that may otherwise occur as a result of not defining a certain period in a labor contract.[5] In this context, the provision of a labor contract term in Article 23 of the LSA has been criticized for not helping to effectively balance the supply and demand for labor and protecting workers' jobs. Therefore, in an effort to adjust to changes in modern industrial society, there has been discussion on the establishment of a legal principle on the Article such that it more strongly emphasizes job security than liberty to quit jobs.

Regarding fixed-term employment, the Article should be revised in order to guarantee job security and to prevent abuse of the system by employers seeking to avoid legal requirements. The revision should also take into account changes in industrial society and the labor market, and it should not hinder the efforts of jobless people and job seekers to enter the labor market. Improvement of the legal framework for fixed-term employment pertains also to job security of dispatched workers because regulations apply to temp-agencies offering part time workers.

3. Dispatch Work

Worker dispatch refers to a system in which an employment agency, while

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[4] See Kim Hyeong-Bae, Labor Standards Act, 1999, p.165.

[5] Kim Sun-Su, "Effects of a Labor Contract with a Fixed Term of More Than a Year," 1996, A Criticism of Judicial Precedents on Labor, ed. by Lawyers for a Democratic Society, 1997.

maintaining the employment relations after hiring a worker, has the worker engage in work for an employer in compliance with the employer's direction and orders in accordance with a contract on worker dispatch.[6]

In Korea, the Act on Protection, etc. for Dispatched Workers (hereinafter APDW) was enacted on February 20, 1998, after years of dispute, to regulate dispatch work. Its implementation was initiated on July 1, 1998. This form of employment had already become commonplace in the labor market. The Act was put into force in the recognition that the widespread practice of dispatch employment, if not brought under legal oversight, would lead to the proliferation of numerous unqualified employment agencies and thus lead to a deterioration in employment conditions of dispatched workers. Drafts of an act on dispatched workers (bills of 1991, 1993, and 1995)[7] that had been proposed previously were revised, and they eventually became the APDW.

Even before its enactment, the APDW was subject to contention between management and labor over the enactment itself and its contents. The disputes and conflicts were even more acute before and after the end of June 2000. At that time, a regulation came into force requiring that any dispatched worker employed at a workplace more than two years be considered as a regularly employed worker. The issue is still on the agenda for discussion at the Korean Tripartite Commission (KTC), which is comprised of representatives from labor, management, and government.

The purpose of the APDW is "to enhance the flexibility of the supply and demand of manpower by managing the worker dispatch undertakings properly and setting up the criteria such as working conditions for dispatched workers, thereby contributing to the employment stability and the welfare enhancement of dispatched workers" (Article 1). For the dispatch of workers to remain legal, it should be in accordance with the

[6] It is important to distinguish the worker dispatch from employment by subcontract because the form of subcontract or commission contract is often used to bypass the regulations of the Act on Protection, etc. for Dispatched Workers. At first glance, worker dispatch is similar to subcontracting in that the workers employed work for someone else in both cases. However, they are fundamentally different since a worker under the worker dispatch system works for an employer in compliance with the employer's directions and orders, while a worker by subcontract works as an assistant to a subcontractor in the subcontractor's business and is not under the directions and orders of a contractor. According to a notification issued by the Labor Ministry, two standards of the independence of labor management and the independence of business management should be met in order to gain recognition as a subcontract.

[7] For discussion on this process, see Kim Soh-young, The Legal Response to Changes in Employment Forms, Korea Labor Institute, May 1995, p.64 ff.

following:[8]

Except for direct production processes in manufacturing, the jobs to which the worker dispatch system may apply shall include those identified by the Presidential Decree (26 jobs) and those requiring specific expertise, skills, or experience (Clause 1, Article 5 of the APDW). Worker dispatch may also be used in cases where needed workers are unavailable due to maternity leave, illness, injury, or a temporary/occasional need to secure manpower (Clause 2, Article 5).

The length of dispatch period shall be determined as follows (Article 6):

The term of service for dispatched workers for a job requiring specific expertise, skills, or experience shall not exceed one year in principle. Provided that there is an agreement between the employment agency, the employer, and the dispatched worker, the period may be extended for one additional term not to exceed one year. In addition, if an employer continues to use a dispatched worker for a term exceeding two years, that worker shall be deemed regularly employed immediately after the expiration of the two-year period.

In cases where dispatch work is permitted due to maternity leave, illness, or injury, the term of employment shall expire when the regular workers return to work. Sick leave and holidays are other cases where worker dispatch is permitted. The term of employment of worker dispatch where there is a need to secure manpower temporarily or for seasonal factors or other such reasons shall be no longer than three months in principle. If there is an agreement among the parties concerned, the period may be extended for up to an additional three months.

The employment agency which dispatches workers for dispatch work is required to pay the wages and accident compensation. In a case where the employment agency is unable to pay the wages of a dispatched worker due to the employer's liability, the employer shall be jointly liable. An employer is responsible for work hours, leaves, and holidays, while the employment agency is responsible for annual leaves. The

[8] Dispatch of a worker or a use of such a worker is prohibited in the following cases: First, an employment agency shall not dispatch workers to firms where industrial disputes are taking place with a view to ending work stoppages (Clause 1, Article 16). This provision was designed to prevent replacement of striking workers, which could render a strike by the labor union ineffective, thus guaranteeing the rights to collective action of the labor union. Second, an employer who dismissed workers for managerial reasons under Article 31 cannot use dispatched workers for two years afterwards in principle.

provisions on dismissal in the LSA apply to an employment agency because it is party to the labor contract with the dispatched worker.

The APDW in Korea is similar to Japan's Act on Dispatched Workers in some respects, as shown in its provisions on the dispatch of workers to specialized jobs and the responsibilities and obligations of the employment agency and employer. The APDW also adopted some aspects of labor law in France and Germany.[9] For example, restrictions on dispatch of workers to ordinary jobs or the principle of equal treatment between regular and dispatched workers are analogous to those in France's dispatch act. The provision rendering a dispatched worker fully employed by an employer when the term of the worker's dispatch exceeds a specified term is a reflection of similar provisions of applicable laws in Germany and France.

Proposals for the protection of dispatched workers can be summed up as follows. Above all, improved measures to prohibit the dispatch of workers recruited by and registered with employment agencies and to restrict dispatch fees should be worked out to establish the legal status of dispatched workers and eliminate intermediary exploitation. In particular, the legal framework governing these workers must be set up because inadequate regulation on dispatch fees collected by an employment agency can lead to intermediary exploitation by the employment agency and employer as both could collude and agree on low wages for dispatched workers.

Changes need to be made to the list of jobs open without limitation to worker dispatch (presently, 26 jobs on the positive list). These changes must be based on sound

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[9] Japan's Act on Dispatched Workers was similar to Korea's APDW in that it also allowed the dispatch of workers in 27 jobs that require expertise, skills, and experience. The jobs applicable to the worker dispatch system had to be designated by the Government Ordinance (which corresponds to Korea's Enforcement Decree). Recently, however, Japan's statutes on the dispatch of workers have been rewritten to emphasize economic functions. A sweeping revision of related laws in 1999 liberalized liberalized (in a negative list system) all jobs under the worker dispatch system except harbor transport, construction, security, medical service, manufacturing (excluding transporting, storage, and packaging of products), and other jobs (involving collective bargaining of the company of an employer between personnel and labor management businesses in the negative list system. For the existing 27 jobs, the duration of worker dispatch is allowed for a period of up to three years.

Japan's worker dispatch system is different from that of Korea's in that dispatch of workers employed by an employment agency requires notification to the Minister of Labor, whereas the dispatch of workers registered with an employment agency requires a license from the Minister of Labor.

The acts on worker dispatch in France and Germany are faithful to the protection of dispatched workers through the elimination of intermediary exploitation and restriction on the replacement of regular workers. However, most European countries except France have eased regulations on worker dispatch over the past decade.

economic reasoning, taking into account the nature of jobs requiring expertise, skills, or experience that cannot otherwise be found and temporary labor shortages in the labor market.

Even in case a dispatched worker is deemed fully employed by an employer when the employer continues to employ the dispatched worker after expiration of a certain term of employment as prescribed in the provisions of Article 6 of the APDW, specific employment conditions, such as the term of labor contract, wage level, and working hours can be subject to dispute. The current statutory framework is not considered adequate in that it does not consider the original contract as changed into a contract with no fixed term and does not address the illegal dispatch of workers. A systematic and integrated review is necessary on measures for improvement of the APDW in its entirety and, further, for the improvement of the LSA regarding temporary employment.

4. Work in Special Employment Relations

Workers in special employment relations in Korea are those who provide labor under subcontracts or on commission. Such workers include golf caddies, private tutors, insurance salespersons, and express couriers.[10] The major labor law issues concerning these workers are the definition of such workers, the problem arising from the special form of labor they provide, and the range of their legal protection. Although commonly categorized into special employment relations, these workers are a greatly varied lot. They provide many different kinds of services in many locations and possess varying physical means of labor. They are only similar in that they are hard to define by the traditional definition of a worker. They provide a different form of labor compared to that of conventional workers who provide labor under the direct and specific directions and orders of an employer at the employer's workplace during fixed working hours.

Workers argue that the definition of a worker in the LSA and the definition of an employer in the Trade Union and Labor Relations Adjustment Act (hereinafter

[10] According to the Supplementary Survey of the Economically Active Population, done by the National Statistical Office in August 2000, the number of independent subcontractors, on-call workers, and telecommuters (or teleworkers or home-based workers) was 1,962,000, accounting for 15.2% of all wage workers. Among such workers in special employment relations, on-call workers numbered some 1,050,000 or 8.1% of the total wage workers, independent subcontractors totaled 655,000 or 5.1%, and telecommuters totaled 256,000 or 2.0%.

TULRAA) should be expanded and "economic subordination" should be included in the concept of a worker in the LSA. Management opposes such an expansion of the definitions of a worker and an employer in the LSA and the TULRAA. Employers claim that an expansion of the definition of a worker would result in the recognition of many independent self-employed people as workers, giving rise to an uncontrollable proliferation in collective bargaining with its respective explosion in costs.

The labor law discussions on workers in special employment relations in Korea can be summarized into two positions: One is that the definition of a worker in the LSA should be expanded in a revision of the law, or a concept of a semi-worker (or a quasi-worker) should be introduced into the law to grant them legal protection.[11] The other is that the court of law should judge the validity of each case based on comprehensive consideration of the concerned parties' labor-management relations and economic conditions.[12]

According to existing theories and judicial precedents, the judgment of whether a person is a worker or not as defined in the LSA is made depending on whether the person has "substantial and actual relations of dependence with an employer." The relations of dependence are largely determined by the two elements: First, whether a labor provider works under the direction and supervision of a labor receiver, and second, whether remuneration is paid in compensation for provided labor. The judgment of the second element is made in compliance with the recognition of the nature of the

[11] Labor prefers to the expanded definition of a worker in the LSA. A draft written by the Labor Ministry in 2000 proposed that a concept of "a person who is treated the same as a worker" be introduced in the LSA and that the provisions on "remuneration, restriction on dismissal, and insurance on industrial accidents" in the LSA be applied to them.

However, criticisms have been voiced against this proposal. First, there is the problem of how to justify the protection of only the three employment conditions of "restriction on dismissal without justifiable reason, remuneration, and insurance on industrial accidents." Should it be based on a survey of actual conditions of those workers, economic conditions, or on an employer's ability to pay?

Second, it has been argued that the proposal runs counter to the principle of equality when compared with the currently inadequate protection of the employees working at small workplaces employing fewer than four workers.

Third, most of what can presently be called quasi-workers are paid depending on their performance and their contract is terminated when they fail to perform adequately. Therefore, it is not quite reasonable to establish a provision on dismissal in this case.

Fourth, it may be possible, as in Germany, to categorize the concept of quasi-workers as subordinate to the concept of the self-employed and then apply some of the labor laws to protect quasi-workers. However, if quasi-workers are recognized as equal and independent compared to the worker and the self-employed, their protection should be pursued through a separate legislation.

[12] Kang Hui-Won and Kim Young-Mun, The Concept of a Worker and the Freedom of a Contract, Korea Employers Federation, 2001, p.388.

remuneration (1) as a compensation for providing labor for a certain period of time under the direction and supervision of an employer and (2) as a considerable guarantee of a person's livelihood.

It should be noted, however, that changes in production methods and diversification in the forms of employment in the future are highly likely to lead to a proliferation of marginal cases where the above-mentioned elements are simply inadequate to judge whether a person is a worker or an employer (or a self-employed person). This will lead to an increase in the number of labor providers who are neither workers nor employers. In the future, there will be a growing number of workers who cannot be neatly classified into any of the groups that are subject to comprehensive protection under the labor laws. In the future, there will be a growing number of workers who remain unclearly defined, somewhere between groups of those who are under complete protection of the labor laws and groups of those who are completely outside the protection of the laws.

There is clearly a need to interpret a person's dependent relations with an employer more flexibly while retaining the idea of protection in the labor laws as a fundamental guideline. A review of the matter from a legal perspective is also required.[13]

Advancement of industrial technologies and changes in the industrial environment in the future will presumably lead to the creation of even more forms of labor and jobs. This necessitates serious consideration of the legal concept of the semi-worker or quasi-worker or of allowing the court of law to judge each specific case by considering the state of the labor market and prevailing economic conditions. At this point, it is important to take into consideration the fact that for those workers who are in the overlapping areas between the goods and labor markets and in dependent relations only

[13] However, whether it is an interpretive or a legal approach, the discussion has unfolded without a clearly defined subject. In other words, the discussion has focused on whether those engaged in special employment relations should be included in the domain of labor laws or not, without defining exactly who they are discussing for the protection. Labor providers in the form of special employment relations can be classified into three groups: First, self-employed service providers (on freely-made labor-benefits contracts), second, those in the middle ground between the self-employed and workers, and third, those who need to be comprehensively protected by the labor laws. In this respect, fundamental questions should first be explored regarding whether it is possible in reality to incorporate those in special employment relations into the framework of the labor laws for protection according to uniform standards and whether doing so is desirable from an economic standpoint and the protection of workers. The important points at issue, therefore, are determining who should be placed under the protection of the labor laws (subject), by what standards (criteria), and how far the protection should be extended (scope of protection).

economically, there exist protective devices not only in the labor laws but also other laws, including the Commercial Act, Civil Act, Consumer Protection Act, Act on Regulations on Terms and Conditions, and the Monopoly Regulation and Fair Trade Act.

III. Conclusion: Proposed Approaches to Improve Policies and the Legal Framework for the Protection of Atypical Workers

1. Fundamental Orientation

The issue of atypical workers is important not only with regard to the shifting employment structure and increasing flexibility of the labor market, but also as it concerns corporate management and labor strategies. There is a tremendous need to work out policy and a legal framework both to address changes in the labor market and to protect workers, the basic purpose of the labor laws. As urgent as this may be, it requires very careful study and consideration as the issue concerns the creation of a new paradigm for the entire labor market.

Labor regards elimination of discrimination and organization of irregular workers as the major concerns of atypical workers. For the improvement of the legal framework, labor maintains that certain rules should be formulated concerning atypical employment to reverse the deterioration in employment conditions and job insecurity of atypical workers. Management views the problem of atypical workers as a labor market response to the overprotection of regular workers, as examplified by their high wages and the overly rigid regulation against dismissal.[14]

In short, it is difficult to create a "more flexible labor market" while simultaneously granting adequate "protection to atypical workers." This will require nothing shorter than establishing a vision of the labor market after thorough reflection on a flexible labor market and, more importantly, gaining a wider recognition of the many types of atypical workers and their widely varying working conditions.

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[14] The Tripartite Commission, "A Discussion on Measures for Atypical Workers" (Material for a meeting [A report of a meeting]), May 31, 2001.

As a matter of course, policy on atypical workers is targeted toward those workers who face discrimination in treatment or are excluded from social protection because they are engaged in atypical employment. However, it should also be noted that a wider spectrum of workers, including the jobless, who have found themselves outside social protection regardless of the forms of employment should also be taken into consideration. Both the positive and negative effects of such policy on this underprivileged stratum should receive due attention.

In the end, the basic principles of policy for atypical workers is promoting protection of atypical workers institutionally and quaranteeing flexibility of the labor market. Simply put, this is the pursuit of "flexicurity."

To this end, the government is advised to study the effects of atypical employment on workers and positively address the problem so that basic ideas of the existing laws, such as assurance of human worth and dignity (Article 10 of the Constitution and Article 1 of the LSA) and the principle of equal treatment (Article 11 of the Constitution and Article 5 of the LSA) may be upheld.

Policies and legal norms on atypical workers should be formulated along the following guidelines:

First, institutional devices must be worked out to prevent employers from replacing regular workers with atypical workers as a means of achieving cost reduction or bypassing the labor laws. Atypical work should be allowed only when management has temporary demand for labor or special skills and the voluntary needs of workers are recognized.

Second, the discussion of the problems of atypical workers should not be limited to the interests of workers and employers. Job seekers outside the labor market should also be considered. Institutional improvements should be sought with a view to reconciling the interests of regular and atypical workers, employers, the unemployed, and job seekers. In other words, from the perspective of employment policy, the unemployed and job seekers should not be hindered from entering the labor market.

Given the above guidelines, the basic principles of policy can be summarized as follows:

First, an employer should be allowed to use an atypical form of employment only when required to fulfill genuine managerial needs and, when used, an atypical worker should be treated equally as a regular worker. Discriminatory treatment and abuse of atypical work and workers by an employer cannot be prevented unless such a principle of equal treatment is firmly established. (Principle of Equality)

Excessive regulation on atypical work should be eased to promote flexibility of the labor market and employment. Deregulation would lighten the unnecessary burden of the labor laws on consumers and put more emphasis on agreement between labor and management. This will help workers achieve the freedom of self-determination and facilitate the adjustment to the changes in the economic environment. (Principle of Flexibility)

Atypical work should be subject to uniform standards in order to reconcile the protection of workers and flexibility of the labor market (Principle of Uniformity), but individual and specific statutory regulations should be worked out to address the diversity of the many forms of employment (Principle of Diversity). As in France and Germany, all forms of atypical work, including dispatched employment, should be governed through regulation on labor contracts with fixed terms. In addition, the experience of each country should be considered in equilibrium while abiding by international standards. (Principle of Universality)

In conclusion, atypical work policy targeted toward the labor market should seek to enhance the competitiveness of the economy, promote the job security of atypical workers, and create employment. On the other hand, atypical work policy targeted toward legislation should be designed to prevent atypical workers from discrimination vis-a-vis regular workers and clarify the requirements and procedures in atypical work contracts to discourage employers from engaging in any kind of arbitrary handling or abuse. Institutional improvements should be pursued with these objectives in mind.[15]

2. Proposed Measures for the Improvement of Policies and Legal Framework

1) Equal Treatment

[15] See Kim Soh-young, Diversification in Employment Forms and Proposed Measures for Improvement of Legal Framework, Korea Labor Institute, 2001, p.147-148.

The two problems at the heart of the atypical work issue in Korea is replacement by an employer of regular workers with atypical workers where the latter are required and discriminatory treatment of atypical workers with regard to employment and working conditions even when the services they provide are essentially the same as those of regular workers. It is commonly recognized that employers prefer atypical workers because they can easily be dismissed and incur lower costs.

This discrimination is primarily the result of a faulty institutional framework for the protection of atypical workers. Illegitimate practices on the part of employers are also a major factor, and these stem partly from inadequate supervision of labor practices.

There are two conflicting assertions that are currently being made concerning the protection of atypical workers. The first is that equal treatment between all atypical workers and regular workers should be thoroughly ensured.[16] The second is that legal protection of regular workers should be eased to narrow the gap in wages and employment conditions between regular and atypical workers.[17] According to this second argument, the solution to the problem of atypical employment is to resolve the gap between regular and irregular workers by easing or scrapping provisions that presumably provide overprotection for regular workers, such as those in the LSA governing dismissal and severance pay.

In order to prevent greater labor market flexibility from leading to more widespread atypical work, equal treatment should be ensured for those atypcial workers who in effect do the same jobs as regular workers. Reasonable treatment should be granted to those irregular workers who do jobs producing less value than regular workers.

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[16] Regarding this assertion, an opinion has been expressed that the argument that "there exist as a matter of course a legal principle requiring equal treatment between regular and irregular workers who provide labor of equal value" cannot stand under current laws. (Lee Seung-Gil, "Current Status and Challenges of Atypical Employment" in Labor-Management Forum (14th issue), Labor Economics Institute of the Korea Employers Federation, May 2001. P.74). According to Lee, under current labor laws, except some provisions in the LSA and the Minimum Wage Act, establishing employment conditions is basically left to be decided by changing situations in the labor market and autonomous transaction between labor and management.

[17] Park Gi-Seong, "Measuring Atypical Workers and Suggestions" in The Sizing and Actual Status of Atypical Workers (Academic Seminar 2001 of the Korea Labor Economics Society, Jan. 19, 2001) p.116; Bae Jin-Han, et al., The Actual Status of Atypical Employment and Proposed Directions for Policy Improvement, Korea Labor Economics Society (December 31, 2000), p.143.

If employers faced the same costs and legal obligations when using atypical workers in "standard" jobs, they would have no real incentive to replace regular workers with atypcial workers. In light of the labor laws, unreasonably discriminatory treatment of atypical workers duly runs counter to the legal ideal of worker protection. Hence, equal treatment of atypical workers should be ensured when their employment is in the form of a contract and the actual labor they provide is the same as that of regular workers.

In the case of atypical workers whose jobs are different from regular workers with regard to task, intensity, and responsibility, reasonably fair treatment is required. Unconditionally equal treatment between all atypical workers and regular workers regardless of the differences in the value of labor they provide would lead to a decline in job opportunities throughout the entire job market.[18]

Benefits for workers employed more than one year such as as protection against dismissal and accumulation of severance pay and annual leaves can be considered as additional remuneration for more-skilled labor. It is, therefore, in employers' interest for companies to use atypical workers for those jobs that are in high demand only temporarily or for jobs that require simple, repetitive work. Companies do not hire atypical workers for core jobs. Nonetheless, no job is completely the province of either regular workers or atypical workers. The suitability of a job for regular workers or atypical workers varies depending on a variety of factors, such as changes in product demand, in the nature of work resulting from information-networking and computerization, and in labor supply.[19]

As a consequence, unconditional equal treatment extended to atypical workers who perform different tasks and have different responsibilities compared to regular workers will likely undermine the flexibility of the labor market, rendering it slow to respond to changes in the economic environment. In addition, it is not appropriate from the perspective of employment policy because it will most probably discourage employers from hiring more workers.

It may seem obvious to one and all that uniform (equal) treatment should be ensured

[18] Eo Su-Bong, "Proposed Measures for Enhancing Basic Rights of Atypical Workers," Monthly Labor (May 2000), p.49.
[19] See Park Gi-Seong, Ibid. p.116.

to prevent unreasonable discriminatory treatment against atypical workers and that greater flexibility in the labor market should be promoted without leading to an uncontrollable spread of atypical employment.[20] In actuality, however, there should be different legal approaches to equal treatment of atypical workers doing the same jobs as regular workers and fair treatment of atypical workers doing less skilled and less value-added jobs than regular workers depending on the different forms and situations of employment. For fixed-term employment, the statutes should be formulated such that atypical workers whose contracts are repeatedly renewed are treated exactly the same as regular workers. For part-time employment, legal devices should be worked out to duly recognize as regular workers those part-time workers who do so much overtime work that they are in effect working full time.

In addition, legal measures need to be formulated to prohibit discrimination by stipulating the principle of equal treatment for each form of employment. It needs to provide, for example, that workers on contract with a fixed term shall not receive less favorable treatment than comparable workers with no fixed term. "Comparable workers" here means workers without a fixed term of employment at the same workplace as fixed-term workers in comparable jobs or in the same or similar line of business. In Germany, in cases where there is no comparable worker without a fixed term at the workplace in question, an applicable collective agreement shall be made or the worker shall be treated the same as workers engaged in the pertinent industry (Wirtschaftszweig).

The principle of "remuneration proportional to working period" is deemed to be appropriate in determining remuneration. In other words, the remuneration should be set in compliance with the ratios that are calculated by the standards of working period of comparable workers without fixed terms. In the case of part-time workers, the remuneration can be set according to the "hourly rate" of comparable regular workers.

[20] It has been argued largely from the labor world that the Equal Treatment Provision against discrimination in employment according to "social status" in Article 5 of the LSA should be interpreted to include discrimination by employment forms. The Article stipulates that "an employer shall not discriminate against workers by sex or discriminate in relation to the conditions of employment according to nationality, religion, or social status." Social status refers to an inherent social position that one is born in. The Equal Treatment Provision of the LSA is a specification of the ban on unequal treatment according to social status as prescribed in Clause 1, Article 11 of the Constitution. The term "social status" in the Constitution should be interpreted as an inborn status as the legal intent of the clause was to overthrow the feudal social position system. Therefore, discriminatory treatment according to differences in labor contracts concerning regular or temporary employment is deemed not to constitute discriminatory treatment according to social status.

The relationship of this remuneration principle with the principle of "equal wages for work of equal value" can be brought to question. Treatment in proportion to different working periods or working hours resides in the domain of proportional and relative equality. In contrast, the principle of the equal wages for work of equal value is in the domain of absolute equality. The principle of equal wages for work of equal value is specifically provided only in the Equal Employment Act, but it can also be derived from the principles of equal treatment in the Constitution and uniform treatment in the LSA. The former Act on Fixed-term and Part-time Employment in Germany prohibited "different treatment" (Ungleichbehandlung), whereas the revised version of the Act in 2001 prohibits "less favorable treatment" (Schlechterbehandlung).

Applying the principle of equal wages for work of equal value to atypical workers, however, can in practice be problematic in many ways. According to the Equal Employment Act, the criteria for work of equal value shall be the levels of skill, effort, responsibility, and working conditions, etc., which are required in carrying out the duties. (Clause 2, Article 6-2) One problem is Korea's relative lack of experience in job evaluation. Its inability to determine the value of job done through analysis of types of occupation, job description, function, responsibility, intensity of labor, and efficiency is so serious that it cannot differentiate between "equal work" and "same work."

Additionally, if a specific job is done completely by atypical workers at a workplace, there are, obviously, no comparable regular workers who do the equal work to allow for calculation of wages.[21] In this case, Korea should look to the example of Germany's statute calling for an applicable collective agreement or basing the standard on workers engaged in the pertinent line of industry. Otherwise, wages can be determined in comparison with those of regular workers who were employed and engaged in the same job before atypical workers were employed to do the same job.[22]

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[21] See Jo Sun-Gyeong, "Unproven Premises and Realities: The Legislative Intent of the Act on Protection, etc. for Dispatched Workers and the Falsehood of the Argument for Eased Regulations," Turning Dispatched Workers into Regular Workers: How? (A collection of presentations from the panel discussion on policy organized by the Korean Confederation of Trade Unions, May 19, 2000) p.70.

[22] Jo Sun-Gyeong holds that, regarding the implementation of the principle of equal wages for both male and female workers, the principle that the European Court of Justice (ECJ) adopted in 1980 shall be applied to equal treatment to dispatched workers. ECJ stated that the principle of equal wages for both sexes is not "limited to the situations where male and female workers are engaged in the same work in the same employment for the same period. [The wages for female workers] can be assessed according to those of their male counterparts who were employed in the same job before." (Jo Sun-Gyeong, Ibid.,

Absolute equality can be guaranteed also in concluding labor contracts, determining annual leaves, and drawing up and changing of the rules of employment. Annual leaves can be granted in proportion to the total length of time worked as in the statutory example of France. It is also necessary to furnish specific provisions in the law stipulating that atypical workers should not face unfavorable treatment by an employer in reprisal for merely having asserted their rights.

A proposal has been put forward to narrow the gap in bargaining power between labor and management. It calls for the establishment of an "unfair wage petition system (tentatively titled)" under which a worker may have recourse to an "Unfair Wage Correction Committee (tentatively titled)" if the worker has made an objection on wages to a labor inspector, a trade union, or the labor-management council and the employer disregarded the decision.[23]

2) Guarantee of Employment

The provisions limiting dismissal of workers in Articles 30 and 31 in the LSA apply to all workers. No workers, be they workers in fixed-term employment, part-time workers, or dispatched workers, may be dismissed (even for purely managerial reasons) without justifiable cause. Those provisions notwithstanding, employers perceive that atypical workers are easier to dismiss, and thus their lack of job security has become the major issue in atypical employment.

With respect to cases where "urgent managerial needs" for dismissal are recognized, an issue has been raised as to whether an employer can dismiss atypical workers first, before other workers. There is an applicable judicial ruling[24] which recognized the dismissal of temporary and daily workers first as fulfillment of an employer's obligation to make efforts to avoid dismissal of workers in general. This is one of the justifiable

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p.70)

[23] An Ju-Yeop, et al., Current State of Atypical Works and Proposed Policy Measures (1), 2001, Korea Labor Institute, p.275.

[24] "When the company, following closure of some places of business in fulfillment of its obligations to avoid or prevent dismissal, has transferred some of the regular workers from those closed places of business to the head office or other places of business, has arranged resignation of some other workers at their request, and has 'laid off temporary and daily workers in the first round of dismissal,' then a further dismissal on the remaining workers fulfills the obligation to make efforts to avoid dismissal as provided in the LSA if additional transfers of workers to other places of business is impossible due overstaffing at those other places of business." (Supreme Court precedent, January 12, 1990, 88 Daka 34094).

requirements for dismissal for managerial reasons.

Nonetheless, the layoff of atypical workers before regular workers is not always justified.[25] Other Supreme Court precedents propose that "criteria for selecting candidates for dismissal" also be considered including workers' length of service, age, performance rating, mastery of skills,[26] income of spouse, other wealth, and health. The interest of a company can only be of secondary concern. The primary consideration in selecting candidates for dismissal should be common standards related with the labor contracts of replaceable workers. Although there is legal precedent according to which the dismissal of workers with shorter lengths of service was justifiable,[27] setting priority of dismissal based solely on the form of employment is hardly valid. Instead, considerations such as whether or not the employment relations are effectively temporary, how closely the employment is connected with the company, and whether the temporary employment is less subject to social protection than regular employment should also be factored in.[28]

In practice, the job insecurity of atypical workers in the labor market boils down to the matter of the "conventional practices of the market" and the "term of labor contract" regardless of protective devices prescribed in labor laws. The issue of contract term is not reserved only to workers on fixed-term employment. It also pertains to dispatched workers and to most part-time workers as they are employed on a contractual basis. A reasonable improvement of the provisions on the term of labor contract in the LSA can, therefore, be the key solution to job insecurity not only for contractual workers but also for dispatched and part-time workers.[29]

Article 23 of the LSA was originally designed to prevent an employer from holding

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[25] Regarding this issue, there is a view that, when dismissal is needed for managerial reasons, deciding to lay off part-time workers prior to regular workers is a legitimate, reasonable, and common-sense action. (Lee Seung-Gil, Ibid., p.72). According to this view, part-time and regular workers are different in that the former are easily employed for a fixed term, while the latter are usually employed through strict recruiting processes without fixed employment terms in the expectation that they will work at the company until retirement. The principle of equal treatment, therefore, cannot be strictly applied to the selection of candidates for dismissal for managerial reasons.

[26] Supreme Court precedent, April 28, 1987, 86 Daka 1873; Supreme Court precedent, November 10, 1992, 91 Da 19463; Supreme Court precedent, December 28, 1993, 92 Da 34858; etc.

[27] See the Supreme Court precedent, May 9, 1996, 95 Gu 19784.

[28] See Jo Gyeong-Sin, "Legal Principles of Limiting Layoffs, Labor Law Review (10th issue), December 1999, p.351.

[29] Germany manages fixed-term and part-time employment in a joint regulation through the Act on Fixed-term and Part-time Employment that was implemented in 2001.

workers effectively in bondage. It has evidently failed to efficiently reconcile the supply and demand for labor or to protect workers' jobs. In this regard, it is imperative in interpreting Article 23 of the LSA that a new interpretive and legal approach be explored with a view to more stongly emphasizing the "guarantee of employment" than the "guarantee of the freedom to quit a job." In modern industrial society, it is more important to eliminate job insecurity stemming from fixing terms in labor contracts than to reduce the risks human bondage or forced labor that may result from not fixing such terms.

3) Provision of Opportunities for Vocational Training and Information on Employers

There are many reasons why atypical work is becoming more common. Besides an increase in companies' dependence on atypical employment, one of the reasons may be a lack of vocational training and opportunities for workers to develop their abilities. Employers are usually less interested in providing vocational training and other forms of support to atypical workers than to regular workers. Investment in vocational training for atypical workers, however, does not only offer them an opportunity to become regular workers, but it also benefits the company in the mid and long term as it helps motivate atypical workers to improve their job performance and increases their productivity.

For this reason, an employer is recommended to provide atypical workers information on recruitment of regular workers and appropriate vocational training and educational programs. Germany's Act on Fixed-term and Part-time Employment, enacted in 2001, stipulates that an employer arrange for fixed-term or part-time workers to participate in vocational training or educational programs. An employer is also required to provide a representative of workers in the workplace with information on recruitment of regular workers, including the number and ratio of fixed-term and part-time workers in the workplace.

A suggestion was made to make use of central and local government education and training budgets to help defray the training and education expenses borne by an employer.[30] According to this suggestion, vocational training should be provided at vocational training institutions, colleges and universities, and private institutes. Vocational trainees should be given information on education and training, and a

"voucher system" should to be introduced so that they can enroll in whichever of the many vocational training courses they want to take.

4) Principle of Requiring a Written Contract

The job insecurity of atypical workers could be resolved to some degree by requiring labor contracts be made in writing. Germany has recently revised its labor laws to partly formalize the hiring of atypical workers. The new laws require all fixed-term labor contracts, dismissals, termination of contracts, and agreed terminations be put into writing.[31] The German example shows what direction should Korea take to improve the legal framework for atypical employment.

Introducing the principle of formalities, which requires that contracts be made in writing, can have a substantial impact on labor relations. In Germany, it is widely believed that that putting all hiring and dismissal decisions in writing had improved the legal standing and job security of atypical workers. The parties concerned are induced to fully consider their intentions before actually entering into legal agreements. If this requirement is not met, the desired legal effects are not realized. Putting all such decisions into writing also greatly facilitates the fact-finding process in litigation proceedings.[32]

As mentioned above, the principle of formalities in juristic acts clarifies what juristic acts were performed when, serves as an evidence in case of disputes, and reminds the parties concerned of the legal meaning of their acts, causing them to act with greater care in juristic acts. In this context, adoption of the principle requiring contracts be made in writing is worth consideration for fixed-term and part-time labor contracts in an

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[30] Lee Seung-Gil, Ibid., p.85.

[31] Clause 4, Article 14 of the Act on Fixed-term and Part-time Employment (enacted in 2001) of Germany requires a fixed-term labor contract be made in writing to be valid. In other words, agreeing to a fixed-term labor contract that is not put in writing is automatically considered as concluding a regular labor contract without a fixed term. Article 623 of the Civil Law (Bürgerliches Recht, BGB) introduced a requirement of putting in writing to be legal any valid juristic acts that are highly significant under labor laws, such as dismissals, terminations of a contract, agreed terminations, conclusions of contracts to terminate labor relations, and agreements on entering labor relations with term fixed (fixed-term labor contracts). As a result, the traditional non-formalities in entering a labor agreement do not apply to a fixed-term labor contract. The principle requiring a conclusion of a labor contract to be in writing as prescribed in Article 623 of the Civil Law is not simply perfunctory but legally binding as a determining factor for valid legal actions. Simply put, a fixed-term contract not conforming to the requirement is invalid.

[32] Park Ji-Sun, Recent Trends in Labor Law Legislation in Germany, Labor Law Review (12th issue),

effort to establish the legal standing of atypical workers and ensure reasonable settlement of possible disputes.

BIBLIOGRAPHY

1. Bibliography in Korean

2001, p.261.

Kim Soh-young, The Legal Response to Changes in Employment Forms, Korea Labor Institute, May 1995

_____, "Labor Law Issues of Workers in Special Employment Relations," Social Changes and the Judicial Order, 2000

_____, Diversification in Employment Forms and Proposed Measures for Improvement of Legal Institutions, Korea Labor Institute, January 2001

_____, Changes and Trends in Labor Laws of Advanced Countries and Proposed Direction for the Development of Korean Labor Laws

_____, "A Definition of Golf Caddies as Workers" (A commentary on judicial precedents regarding a judgment by the Seoul Administrative Court), Labor Law Review, October 2001

Kim Yu-Seon, "Proposed Policy Measures for the Protection and Organization of Part-time Workers," Korea Labor and Society Institute, 1999

Kim Ju-Il, "A Study on Employment Structure and Management of Atypical Workers," Autumn Academic Conference by the Korea Personnel Management Society, November 2000

A Collection of Papers Presented at the Academic Seminar 2001 by the Korean Labor Economic Association, The Sizing and Actual Status of Atypical Workers, January 19, 2001

Bae Jin-Han, et al., Actual Status of Atypical Employment and Proposed Direction for Policy Improvement, Korean Labor Economic Association, December 31, 2001

An Ju-Yeop, et al., Actual Status of Atypical Workers and Proposed Policy Measures (I), Korea Labor Institute, 2001

Lee Seung-Gil, Current State and Challenges of Atypical Employment, Labor-Management Forum (14^{th} issue), May 2001

Lee Cheol-Su, A Legal Study on Part-time and Fixed-term Employment, Korea Labor Institute, 1998

Jeong In-Su, Actual Status of Dispatched Workers and Proposed Policy Measures, Korea Labor Institute, 1998

Choi Hong-Yeop, Issues and Challenges of the Act on Protection, etc. for Dispatched Workers, Democratic Law Review, 18th issue, August 2000

Joint Committee for the Abolition of the Worker Dispatch System, A Fact-finding Report on Indirect Employment 2000, 2001

2. Bibliography in Foreign Languages

(1) Japanese Bibliography

Kazuo Kanno, Labor Laws, 2000

Kazuo Kanno, et al., "Changes in the Labor Market and Challenges of Labor Laws," Study on Japan's Labor Magazine, 418th issue, 1994

Junichiro Mado, "Networking and Diversification of Employment," Quarterly Labor Laws, 187th issue, General Labor Institute, 1998

Mikio Yoshida, "Diversification in Employment Forms and the Concept of a Worker," Japan Labor Law Association Journal, 68th issue, General Labor Institute, 1986

Supervision Division, Labor Standards Bureau, Labor Ministry, written & ed., "Proposed Future Direction of Labor Laws: Focusing the Labor Contract Act (A report of the Labor Standards Research Association)," 1993

Ichiro Kitamuri, ed., "Both Sides of the Labor Laws," Prospects on Modern Europe Tokyo University Press, 1996

Satoru Nishitani, “Law and Economy Seen from the Perspective of the Argument for Easing Regulations of Labor Laws,” May 1999

_____, “Changes in Japanese-style Employment Practices and a System of Determining Labor Conditions,” Civil and Commercial Law Magazine, Vol.119, 4th & 5th issue, 1999

_____, “A Comprehensive Review of the Arguments for Easing Regulations of Labor Laws,” Quarterly Labor Laws, 183th issue, 1997

(2) European Bibliography

B. A. Hepple, Flexibility and Security of Employment, in: R. Blanpain (ed.), Comparative Labour Law and Industrial Relations in Industrialised Market Economics, Vol.1, Deventer, 1990.

Blande, Flexibilisierung und Deregulierung: Modernisierung ohne Alternative? in: Festschrift für Albert Gnade, 1992.

B. Veneziani,"The New Labour Force," R. Blanpain / C. Engels ed., Comparative Labour Law and Industrial Relations in Industrial Market Economies, Kluwer Law & Taxation Publishers, 1993.

Deregulierungskommission (Unabhängige Expertenkommission zum Abbau marktwidriger Regulierungen), Marktöffnung und Wettbewerb, 1991.

Industrial Relations Services, "European Industrial Relations Review," Issue 322, Nov., 2000.

Hromadka, Ein Arbeitsvertragsgesetz für Deutschland, *Wirtschaftsrecht* 1992, 346

Jacqueline O'Reilly and Colette Fagan, Part-time Prospects An international comparison of part-time work in Europe, North America and the Pacific Rim, London and New York, 1998.

Kathleen Barker, Kathleen Christensen, "Contingent Work," American Employment Relations in Transition, Cornell University, 1998.

Löwisch, Die Flexibilisierungsbestrebungen im deutschen Arbeitsrecht, 1988.

OECD, *Employment Outlook*, 1999.

R thers, Funktionswandel im Arbeitsrecht, ZfA 1988.

_____, Wandel der Industriegesellschaft-Möglichkeit und Grenzen des Arbeitsrechts, in: Scholz (Hrsg.), Wandel des Arbeitsrechts als Herausforderung des Rechts,

1988.

Zimmermann, Deregulierung der Arbeitsbedingungen-Gefährdung des kollektiven Handelns, in: Gaugler/Müller/Reuter/Zimmermann, Auflösung des Normalarbeitsverhältnisses?, 1988.

Zöllner, Flexibilisierung des Arbeitsrechts, ZfA 1988.

Zöllner/ Loritz, Arbeitsrecht, 5. Aufl., 1998.