Legislation on the Protection of Workers' Personal Information: Analysis and Comparative Study

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Abstract

1. Introduction

The necessity of this study begins with the fact that the development of information and communication technology has dramatically changed the way employers handle workers' personal information. Employers can collect workers' personal information secretly, across time and space, and in large quantities in various fields, and in particular, they can integrate personal information even if it is fragmented. Workers' personal information collected by users soon becomes a new "power" for users. The asymmetry of information makes workers even more dependent on users. Originally, workers are personally subordinated to the employer while providing labor, but this asymmetrical subordination of information puts them in a double disadvantage and forces them to voluntarily submit to the employer by censoring themselves.

In addition, with the expansion of electronic labor surveillance, workers are under pressure of being constantly monitored, but there is no current legislation to properly regulate this problem, so employers and workers should be covered by the general provisions of the Personal Information Protection Act, and in special cases, the Protection of Communications Secrets Act, the Act on the Protection and Use of Location Information, and the Act on Promotion of Information and Communications Network Utilization and Information Protection may be applied.

Since there is a lack of legislation, the purpose of this study is to suggest the direction and content of new legislation to protect workers' personal information and to set the limits of electronic labor surveillance. To this end, a comparative legal study is conducted to identify the problems of the current legislation and to find an appropriate model.

2. Limitations of Current Legislation on the Protection of Workers' Personal Information

Personal information is an object for both protection and transaction (processing). For example, in order to hire a bus driver, an employer asks the driver's license number, which is personal information. In other words, the job seeker trades his or her personal information for employment. Therefore, it is crucial that the aspects of protection and transaction of personal data

strike a balance. While acknowledging the employer's authority over the transaction of workers' personal information, measures are needed to prevent their misuse or abuse of such information.

Since there are no separate regulations protecting workers' personal information, any issues that arise must be resolved through the Personal Information Protection Act by substituting "workers" for "an information subject" and "employers" for "a personal information controller." However, the Personal Information Protection Act does not consider the superiority or inferiority of power in labor relations and assumes equality of power between the information subject and the information controller. Therefore, it stipulates the 'consent' of the information subject as a requirement for the collection and use of personal information. However, in reality, it must be recognized that the consent of workers who are inferior in power cannot be voluntary. Therefore, labor law intervention is necessary and a collective decision-making method (Rules of Employment, Collective Agreement, and Labor-Management Council Resolutions) must be established.

The Personal Information Protection Act stipulates a case where employers (information controller) are allowed to collect and use workers' personal information without the consent of workers (information subject), that is, when collecting and using worker's personal information is necessary to attain the legitimate interests of employers, and such interest is manifestly superior to the rights of workers. However, according to the Act, the collection of such information shall be allowed only to the extent it is substantially related to the legitimate interests of employers and does not go beyond a reasonable scope. Here, the wordings of the regulations are very abstract, and questions arise as to what "the legitimate interests" of employers mean, what is the thing "substantially related to the legitimate interests of employers," and how far "a reasonable scope" extends.

Therefore, this study proposes that the legitimate interests of employers be based on the right to direct labor and the right to manage facilities; the substantial relevance should be closeness to the work; and the reasonable scope should be limited to the complementarity of the means.

There is an issue as to whether employers can access workers' emails and the contents of their computer's hard disk. From the employer's perspective, there is a need to prevent the leakage of security and confidential information so an unconditional ban of such access is not possible. Rather, certain restrictions are needed, but there are no such provisions in the current law. In the Protection of Communications Secrets Act, censorship is limited to "mail", and wiretapping is limited to when telecommunications are "in the process of being transmitted and received". The Criminal Act stipulates that a person is liable for the crime of violating secrecy only when he accesses information by using a "secret device", and the Act on Promotion of Information and Communications Network Utilization and Information Protection also requires that information be

stored through “an information and communications network”.

Personal location information is different in nature from general personal information, and if misused or abused, there is a risk of infringing on the health or safety of the information subject in real time or in the future. This raises the need for certain protection regulations but the Act on the Protection and Use of Location Information allows the collection and use of location information simply with the consent of the subject of personal location information, raising concerns about the indiscriminate collection and abuse of location information by employers. As with the amendment to the (former) Federal Information Protection Act in Germany, restrictions on the collection of information for the purpose of worker safety or during working hours are necessary.

3. Comparison of the Protection of Workers’ Personal Information in Major Countries

In Germany, the right to self-determination of personal information is strongly protected as a fundamental constitutional right by deriving the "right to information self-determination" from the Basic Law. As the issue of illegal surveillance and control of workers emerged as a social problem, the Federal Information Protection Act was amended in 2009 to introduce regulations on workers' personal information protection. In 2017, in order to reflect the contents of the EU's General Data Protection Regulation (GDPR), the Federal Information Protection Act was amended again with changed regulations on workers. The main contents of the Act include limiting the purpose of processing personal information of employees (for business purposes), ensuring the authenticity of consent, and complying with the principles of the GDPR.

Germany’s legislation on the protection of workers’ personal information is evaluated as insufficient compared to the provisions of the GDPR. In 2023, the European Court of Justice ruled that the Data Protection Act of the state of Hesse, which contains the same provisions as Article 26 (information processing for employment-related purposes) of the Federal Information Protection Act, does not comply with the EU’s GDPR. As a result, Germany is currently in the process of revising its regulation on workers’ personal information.

Another feature of the Germany’s legislation on the protection of workers’ personal information is its collective decision-making approach. Works Constitution Act of Germany stipulates that the introduction and use of “technical equipment for monitoring the behavior or work performance of employees” is a joint decision of the works council and the employer.

In the case of email monitoring, the majority view in Germany is that it is not permissible to install a system that automatically monitors emails, even for business purposes, because it violates the right to privacy, as in the case of phone call monitoring.

Similar to Korea, Japan has enacted and enforced the Personal Information Protection Act and

provides guidelines for employment relationships. This applies not only to the handling of workers' personal information in general, but also to workplace surveillance. However, if employers' electronic labor surveillance violates provisions prohibited by individual laws such as the Telecommunications Business Act, the Wire Telecommunications Act, and the Radio Act, employers will be subject to punishment under the relevant law. Unlike Korea, there are special provisions protecting workers' personal information within labor relations laws such as the Employment Security Act, the Worker Dispatching Act, and the Industrial Safety and Health Act. Such differences have implications for Korea.

Although Japan's legislation on personal information protection is not very developed, it is necessary to pay attention to the proposals of Japan's Personal Information Protection Committee rather than the legal system. For example, in the case of electronic labor surveillance, the committee proposes that the purpose be specified in advance and notified to workers, that the authority of the person responsible for conducting surveillance (monitoring) be specified, and that employers consult with labor unions regarding the collection and use of personal information of workers in employment relations. Since the personal information guidelines of the telecommunications business cannot guarantee the authenticity of workers' consent regarding their location information, the Committee recommends that employers ensure that workers are aware their location information is being provided to employers, such as through notifications on mobile phones.

In Australia, the Privacy Act (1988), a general law on personal information, has been enacted as a federal law, and the country's states and territories also have their own privacy law. Regarding electronic labor surveillance, the Australian Capital Territory (ACT) has a separate special law. Since the federal Privacy Act does not have a separate employment relationship provision, so the generalizations about employers and workers still apply. Specifically, in the ACT's workplace privacy law, the scope of "workers" is expanded to include wage workers, contract workers, vocational trainees, and even volunteers; and when worker surveillance is conducted, workers must be informed of the purpose, method, and timing of surveillance. Secret surveillance, which may be a controversial issue, is allowed for exceptional cases, but what should be noted is that it requires submission of an application to administrative agencies with certain requirements and is subject to government supervision.

4. Conclusion and Implications

Based on the contents and implications of the above foreign laws, we suggest the following directions for improving the Korean legal system. First, a new chapter on labor should be added to the Personal Information Protection Act. The Personal Information Protection Act can then be made

into a truly integrated and general law. While labor laws such as the Labor Standards Act are bound to apply only to wage workers in a narrow sense, revising the Personal Information Protection Act has the advantage of being able to include job applicants, labor providers (dependent self-employed workers), vocational trainees, retirees, etc. in the scope of workers. In addition, the principles of "business closeness" and "complementarity" can be added as principles for processing personal information about workers. Other provisions that can be stipulated are the automatic collection of workers' personal information, the collection of personal information from fixed or mobile video devices, and the restrictions on employers' requirements for location information processing.

If the establishment of a new chapter on labor within the Personal Information Protection Act is to protect workers by stipulating minimum requirements for processing workers' personal information, revising other laws—the Labor Standards Act and the Act on the Promotion of Employees' Participation and Cooperation—to include workers' collective decision-making methods would be necessary to ensure the authenticity of "consent," an element within the above requirements and to specify the operation methods within the workplace.

First, Article 17 (Clear Statement of Terms and Conditions of Employment) of the Labor Standards Act must clarify that the processing of workers' personal information is part of the terms and conditions of employment, requiring employers to explain the process when signing an employment contract. In addition, Article 93 (Preparation and Reporting of Rules of Employment) must stipulate that there should be a collective decision-making process, such as discussion or consent of the majority labor union or the entire group of workers, when processing workers' personal information.

Furthermore, in the Act on the Promotion of Employees' Participation and Cooperation, it would be worth considering making "installation of surveillance equipment for employees within a workplace" (Article 20(1)(14)), which is currently a matter for consultation by a labor-management council, a matter for resolution by the council (Article 21).

Additionally, an analysis of the legislative proposals submitted in the 21st National Assembly regarding the regulations on the protection of workers' personal information and workplace surveillance is as follows. Two amendments to the Labor Standards Act, one amendment to the Act on the Promotion of Employees' Participation and Cooperation, and one legislative bill on guaranteeing the rights of workers were proposed.

Rep. Kang Eun-Mi's bill to amend the Labor Standards Act provides the definition of surveillance equipment, and clarifies that the processing of workers' personal information must be specified to workers when signing a labor contract, and that labor surveillance is prohibited in principle and allowed in exceptional cases such as safety. In particular, it proposes that there should

be no alternative means as the operating principle of the surveillance system (the principle of complementarity). It also clarifies that workers' personal information collected illegally cannot be used as evidence in court, disciplinary proceedings, and personnel evaluations.

Rep. Song Ok-Joo’s bill to amend the Act on the Promotion of Employees’ Participation and Cooperation proposes to regulate the installation of surveillance equipment as a matter for resolution by a labor-management council, which is currently a matter for consultation.

Finally, Rep. Lee Soo-Jin's legislative bill on guaranteeing the rights of workers proposes to declare the protection of the personality, privacy, and personal information of workers, including wage earners, as a universal right, and requires that matters concerning personal information be specified when concluding and issuing written contracts.