Employment Laws Regulating Non-Regular Work in Korea
- An Introductory Guide -

Yun-Ku Chun

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ISBN : 978-89-7356-954-0 93330

Contents

List of Tables

List of Figures

1. Developments in the Non-Regular Work Laws

A. The Expansion of Non-Regular Work and Labor Laws

Reasons for the Growth in Non-Regular Work

Korea has been experiencing growth in its non-regular work in the labor market after the global financial crisis, like many OECD member countries. According to the OECD Employment Outlook (2012), non-regular workers made up about 23% of the total workforce in OECD member countries in 2001, and their share rose to 28.5% in 2011 (OECD, 2012). In Korea, the expansion of non-regular workers peaked at 37% in 2004 and has showed little or no change, ranging from 33% to 34%, since 2008, according to the Economic Activity Census 2012 of Korea (Statistics Korea, 2012). And 49% of the non-regular workers surveyed reported that they wanted their non-regular status, but 51% of the workers answered that they had no choice but to accept the status offered by their employers. There has been no social agreement about why non-regular work has continued to grow, but we can categorize the reasons as follows (Eun, 2008; Kim, 2008; Yoo et al., 2009).

✓ Employer demand: Employers have always showed strong motivation to use as many non-regular workers without legal limits as possible. There is no doubt that motivation from the employers' side has contributed to the rise of non-regular work in the labor market. Today, most multi-national corporations, medium-sized enterprises, and small businesses from Korea face global competition in their domestic or overseas markets. Thus, they have managed to reduce their costs, especially their labor costs. Most major corporations or conglomerates have focused only on labor cost cutting achieved through business restructuring. Because they could not easily enter into a technology-

intensive industry that requires highly skilled workers. Also, employers have come to realize that they can easily change regular jobs to various types of non-regular work at low cost, because of Korea's low union density and deregulation policy.

✓ Employee demand: There are some debates about whether many non-regular workers can be considered as voluntary participants in non-regular work relations. But it is clear that the regular jobs per se are shrinking in workplaces or businesses and that the unemployment rate has remained high. Thus, employees have fewer choices of jobs. Some scholars argue that women's participation in the labor market has increased steadily and that female workers voluntarily seek non-regular jobs, because they have a stronger tendency than male workers to reconcile their work with their family life.

✓ Government demand: The creation or preservation of domestic jobs becomes the most important aim in Korea's labor policy during global recession. Even though most of the non-regular jobs are of low quality in terms of wages and other employment conditions, the government has endeavored to induce major domestic companies and multi-national corporations to keep such jobs in their workplaces or in the domestic labor market. Thus labor policy has more focused on facilitating labor mobility in the domestic labor market than considering that non-regular workers lack job security in reality.

Issues of the Non-Regular Work in Labor Laws

Legal issues over non-regular work can be divided into issues related to legal enforcement and issues related to the differential treatment of non-regular workers in fact. Above all, the legal enforcement issue means that the existing labor laws don't work well for non-regular workers. Many non-regular workers are exempt

from the protections of labor laws. Even though some non-regular workers can be included in the scope of existing labor laws, law enforcement agencies often can't properly control and regulate many workplaces and businesses employing non-regular workers. In addition, many non-regular workers perform the same jobs that regular workers do in practice, but the non-regular workers can be exposed to discriminatory employment practices. These discriminatory practices have taken place in all aspects of employment, such as hiring, job evaluations, training, disciplinary action, promotions, job assignments, termination, and compensation, among others.

In 2001, the MOL (the then Ministry of Labor) made public an investigative administrative report that monitored major hotels, department stores, restaurants, and construction sites, and so forth, for a total of 527 workplaces and businesses employing many non-regular workers. According to the report, 396 of the workplaces (73%) did not observe labor laws for their non-regular workers. In 195 cases, employers paid their non-regular workers less than the minimum wage and, in 152 cases, didn't grant the workers annual holidays or vacation pay. Moreover, in 71 cases, the non-regular workers' weekly working hours exceeded the maximum hours set by labor laws. Furthermore, in 147 cases, and other labor standards were frequently infringed on by the employers (*Dong-A Ilbo,* 2001).

Unfortunately, many non-regular workers continue to be marginalized from the labor laws, and this situation has not improved for a long time. In 2009, the MOL (and the current MOEL, Ministry of Employment and Labor) published the Labor White Paper (2009) after monitoring 4,255 workplaces that employed non-regular workers and minors. The results presented in the paper are shown in Table 1. Most workplaces or firms employing non-regular

workers continued to provide their workers low-quality jobs with avoiding employer's liability on labor laws.

Table 1. Violations of Labor Laws about Non-Regular Workers

Workplace type	No. of work places	No. of workplaces with violations	Violation rate (%)	No. of violation cases	No. of violations per workplace
Private sector	3,021	2,797	92.6	12,299	4.4
Public sector	1,234	949	76.9	2,794	2.9
All	4,255	3,746	88.0	15,093	4.0

Note. From *2009 Labor White Paper*, by Ministry of Labor, 2009, Gwacheon: Author.

Nam et al. (2013) reported that non-regular workers still earn lower wages than do regular workers. According to the report, the wage differentials between non-regular workers and regular workers have not been narrowed, but have instead set in. The monthly wage earned by non-regular workers was 1,393 thousand won, or. 56.6% of the 2,460 thousand won earned by regular workers in February 2013. The report also noted that fixed-term non-regular workers, who are considered to be the non-regular workers with relatively good pay, earned 1,545 thousand won. This amount was about 62.8% of that earned by regular workers. Trends in wage differentials from 2008 to 2012 are shown in Table 2.

Table 2. Trends in Wage Differentials

(Thousand KRW)

Year and month	Worker type			
	All	Regular	Non-regular	Fixed-term
2008.8	1,846	2,127	1,296	1,489
2009.8	1,852	2,201	1,202	1,311
2010.8	1,949	2,294	1,258	1,360
2011.8	2,032	2,388	1,348	1,463
2012.8	2,104	2,460	1,393	1,542

Note. From "Wage Gap between Fixed-Term Work and Regular Work," by Jaeryang Nam, *Monthly Labor Review* [Korea Labor Institute], 95 (February 2013).

Furthermore, the work week for regular workers was 44.2 hours, whereas that for non-regular workers was 37.7 hours and for fixed-term workers was 39.3 hours. In addition, the monthly wage for fixed-term workers was 69.4% of that for regular workers, and that for all non-regular workers was 64.3% of that for regular workers, even after controlling for the number of the working hours per week.

Social Controversy Over Enactments of and Amendments to the Non-Regular Work Acts

The MOL proposed a temporary (temp) agency work bill in July 1993, and it triggered sharp controversies over the regulation of non-regular work. At that time, the MOL was preparing for the introduction of unemployment insurance, and it had been organizing the related labor laws since 1995. In the process, some proposed a new regulation system including so-called, alternative employment arrangements in the workplace. They expected that the

temp agency work could become one of the alternative arrangements and presented the temporary agency work bill. However, the National Assembly failed to pass the bill in October 1993. Pro-labor groups were very hostile to the bill because they thought that temp agency work, a form of tripartite employment relations, infringed on a fundamental labor right of agency workers and that such employment relations are not constitutional according to Korean labor laws. The pro-business groups' were also against the bill, but for totally different reasons. They argued that the bill was too strict in reference to the relations of temp agency work in workplaces. The bill was eventually referred to the then Committee of Labor Relations Reform for further discussions, but no agreement was reached.

In 1997 Korea was abruptly in a financial crisis, and the government established the Economic and Social Development Commission (hereinafter the ESDC) to cope with the crisis under a social corporatism system in 1998. The commission was composed of representatives of labor, business, and the public respectively. Since then, they reached a few agreements about non-regular work in the workplace. One of the agreements was to enact a temp agency work law allowing employers to legally use temp agency work in their own workplace subject to the 2-year rule and the positive job list.

Another kind of non-regular work law, the Fixed-Term and Part-Time Work Act, was enacted in December 2006. It was focusing on anti-discrimination against part-time and fixed-term workers in the workplace.

Since the early 2000s, the labor policy for non-regular work has emphasized mitigating the differential between regular workers and non-regular workers in the treatment of employment. In 2006, the National Assembly has amended the Temp Agency Work Act

(1998) to introduce provisions with respect to discrimination based on employment status. It also enacted the Fixed-Term and Part-Time Work Act, which prohibits less favorable treatment of fixed-term and part-time workers compared with comparable respective employees in the same workplace.

The controversy continues in Korean society over how to regulate the non-regular work. More specifically, the controversy is about whether the non-regular work laws should encourage non-regular work as an alternative employment in workplaces or not. Additionally, the controversy is over the scope of non-regular workers, or how to define the concept of non-regular work in law and in practice. In 2001, the ESDC established the Committee on Non-Regular Work to deal with issues related to the working conditions of non-regular workers. The committee issued a resolution on non-regular workers including the definition of non-regular work to be protected by labor laws in 2002. The definition of non-regular work has been a hotly debated topic at every step to enact or amend the acts relating to non-regular work. The reason is that non-regular work acts would apply to some workers subject to the definition. The definition is also important for labor statistics, because the scale of non-regular workers depends on how they are defined.

The ESDC's standards for non-regular work (2002) are divided into two factors, general and specific types. The MOL has employed these standards when collecting labor statistics. According to the standards, the general type is, the so-called, international standard employed by the OECD. It categorizes non-regular work according to temporary work and part-time work. Again, temporary work consists of fixed-term, agency, seasonal, and on-call work. However, the ESDC's standards added "the specific type" to

it and included the remaining scope of non-regular work. Details are as shown in Table 3.[1]

Table 3. Standards for Non-Regular Work

Type of work	Scope
General type	
Temporary	(1) Fixed-term workers under a fixed contract term (2) Workers who can't expect durability of employment but without a fixed term
Part-time	Part-time workers with working times shorter than full-time workers
Specific type	
Alternative	Agency workers, contract workers, on-call workers, telecommuting workers, and self-employed workers

Note. From http://www.moel.go.kr/policyinfo/protection/view.jsp?cate=1&sec=1.

There is a serious controversy about whether alternative work is excluded from the definition of non-regular work in the related acts. As shown in Table 3, the alternative work types have been categorized as the regular jobs because they generally don't have a fixed term in the employment contract. But it is true that most of the working poor or vulnerable workers perform work of these types. Vulnerable workers referred to as such because the working poor are always exposed to job insecurity and need some social protections. Pro-labor camps have counted vulnerable workers as non-regular workers when gathering labor statistics. In addition, they have asserted that non-regular work acts should apply to these workers in enforcing the acts (Kim, Y., 2008).

[1] Retrieved from www.moel.go.kr/issue/issue00/sub01_01_print.jsp.

B. Debates on the Non-Regular Work Acts in Labor Policy

On the Agenda of the Economic and Social Development Commission

In 2007, the Taskforce on the Non-Regular Work Acts was set up under the ESDC to address some topics related to future amendments to the Temporary Agency Work Act (2006)[2] and to the Fixed-Term and Part-Time Work Act (2006).[3] The taskforce was made up of pro-labor members, pro-business members, and some government representatives. It didn't agree on future amendments to the acts and didn't make a proposal to the National Assembly. Pro-labor members held that the acts must be amended to prohibit the use of non-regular work in workplaces or to prevent its expansion. However, pro-business members took the stance that more deregulation of the use of non-regular workers would help create jobs in the labor market.

In the conflicting opinions, government representatives declared their basic stance in four points. First, there is no evidence that the acts, that is, the Temporary Agency Work Act and the Fixed-Term and Part-Time Work Act, have affected the total payroll employment in the labor market, either positively or negatively. In other words, we can't say that the expansion of non-regular work either creates more jobs or hinders job creation. Second, it is true that some non-regular workers have been transferred to regular jobs, but most fixed-term jobs in workplaces have been contracted out as temp agency work or contract work since the enforcement of the acts. Third, the amendments to the Fixed-Term and Part-Time Act

[2] The title is Act on the Protection, Etc., of Dispatched Workers in the English version of the Korean Code.

[3] The title is Act on the Protection, Etc., of Fixed-Term and Part-Time Employees in the English version of the Korean Code.

need to raise the 2-year limit, improving the anti-discrimination procedure for non-regular workers and encouraging the change from non-regular jobs to regular jobs in workplaces. Fourth, the Temp Agency Work Act should be amended for drawing the line between temp agency work and contract work in practice. In 2009, the government proposed the Amendments to Fixed-Term and Part-Time Work including the 4-year limit when employing fixed-term workers. The proposal, however, was rejected by the National Assembly.

The debate over the National Labor Relations Commission (NLRC) complaint process has lasted since that time, because the acts have not been amended enough to resolve some controversial issues. The first issue is about whether the acts should entitle labor unions to file a complaint on behalf of their own members who have been discriminated against because of non-regular workers by employers. Now the Temporary Agency Work Act and Fixed-Term and Part-Time Work Act provide that only aggrieved agency employees, fixed-term employees, or part-time employees because of the employment status can file a charge of discrimination in the NLRC process. The second issue addresses the scope of comparable employees. The acts prohibit less favorable treatment of non-regular employees than comparable employees with same or similar jobs in the same employer's workplace or business. Thus, some argue that the scope of comparable employees could hinder the effectiveness of the anti-discrimination process, because an employer can easily undermine the principle of comparable employees by assigning specific jobs to non-regular workers alone, and not regular employees. The last issue relates to misclassified contract workers who worked as contract workers for longer than 2 years but whose employment status in substance would be considered that of agency worker by law. In reality, some employers have

used contract firms only for the purpose of employing workers in their workplace to circumvent the Temporary Agency Work Act.

The Scope of Non-Regular Work: Self-Employed Work

Self-employed work has long been at the center of labor controversies in Korea. The feature of self-employed work is that most workers doing this work are treated as so-called 'one-man companies' by tax and company laws. In addition, some self-employed workers perform their own jobs only for a specific employer but spend most of their work time outside the employer's workplace. They can't be directly controlled by the employer when performing their jobs. Furthermore, these workers enter not into an employment contract but a contract for work or services for employers. Typically, such workers are tutors in educational business, insurance agents, caddies at private golf clubs, drivers with transit-mixer-trucks, or chauffeurs. There is some public consensus that most self-employed workers are economically subordinated to a specific employer, under bad working conditions, and that they always face job insecurity, which requires some legal protections. But there is no social agreement about whether the legal protections can be provided by labor laws alone. Thus, Korea's labor laws have not yet included these workers in the definition of employee. There is, however, the issue of the employee who is misclassified as a self-employed worker by an employer but who falls substantially under the definition of employee according to labor laws.

As mentioned above, the ESDC's standards for non-regular work (2002) have categorized self-employed work as an alternative work type. In fact, self-employed work can be considered non-regular work and may be regulated by labor laws if the National Assembly passes a new act for self-employed workers similar to the Tempo-

rary Agency Work Act and the Fixed-Term and Part-Time Work Act. Thus, many scholars and some policy makers have recognized that the legal status of the self-employed worker is one of the questions about non-regular work to be answered in Korean society. But they have not reached an agreement about whether self-employed workers should be covered by the labor laws.

2. Fixed-Term and Part-Time Work Act (2006)[4]

A. Protection of Employment Conditions for Fixed-Term Employees

The Fixed-Term and Part-Time Work Act (2006) has been in force since July 2007. The act prohibits discrimination against fixed-term and part-time employees and provides an NLRC process to remedy unfavorable treatment of employees. Its coverage depends on the numbers of employees employed by an employer. At the time of this writing, the act covers workplaces or business of employers who regularly employ more than five employees, but family businesses are excluded, and domestic workers are not counted as employees of the employers. In addition, it covers all agencies of central and local governments regardless of the number of employees they employ.

The Scope of Fixed-Term Employee

A fixed-term employee is an employee who is employed under a fixed-term employment contract by employers (sec.2). The employment contract is the contract concluded between an employee and an employer, according to which the employee provides his or her own labor to the employer, who in return must pay wages for the work. An employee legally is a person who works in a workplace or business for any pay, regardless of the type of job being performed. Thus, fixed-term employees can enjoy all the labor rights provided by labor laws, except that the employment contract terminates upon the expiration of a specific term.

[4] The title is Act on the Protection, Etc., of Fixed-Term and Part-Time Employees in the English version of the Korean Code.

If an employer has available some vacancies for permanent jobs, he or she may preferentially employ fixed-term employees performing same or similar jobs in the same workplace. But this is not an employer's obligation nor the fixed-term employee's right. It is a kind of recommendation without enforceability.

The 2-Year Rule and the Exceptions

An employer shall not employ a fixed-term employee for longer than 2 years, and a contract exceeding 2 years will have no effect under the Fixed-Term and Part-Time Work Act (sec. 4). If the contract has been renewed several times, the 2 years are calculated by adding up all the periods. But there are some exceptions to the 2-year rule, according to which an employer can employ a fixed-term employee for longer than 2 years and the fixed-term employee is not considered a permanent employee under labor laws. Here are the details.[5]

If the duration of contract is

- to complete a specific project or to finish a work
- to fill a temporary vacancy during a permanent employee's absence because of a long leave or transfer to other workplaces
- to fix a training period for an apprentice employee

If the other party to the employment contract is

- a person over 55 years of age provided by the Act on Job Development for the Aged
- a person with a Ph.D. or a national license

[5] Refer to the Enforcement Decree of the Act on the Protection, Etc., of Fixed-Term and Part-Time Employees in the English version.

If the fixed-term jobs are

- to fulfill a need for professional skills and to be performed by professionals
- to be provided based on the social welfare or unemployment policy of the government

Last, if there are some justifications provided by a regulation under the act, an employer could be exempted from the 2-year rule

- if other laws stipulate the period of employment
- if the fixed-term employee is a military engineer or a lecturer in military science and security studies
- if the fixed-term employee is a specialist in the sectors such as national security, military, foreign policy, and reunification policy
- if the fixed-term employee works fewer than 15 hours per week
- if the fixed-term employee is a research assistant, lecturer, visiting scholar, adjunct-professor, or emeritus professor at a university
- if the fixed-term employee is a faculty in a public research institution controlled or funded by a central or local government, universities, and private enterprises

Legal Status of Fixed-Term Employees After Working Over 2 Years

If an employer has got some fixed-term employees to work in his or her own workplace for longer 2 years, even though there are no exceptions provided by the act, the fixed-term employees will be considered permanent employees based on other labor laws. This means that the expiration of the specific term can't be a just or good cause for unilateral termination as required by Section 23 of the Labor Standards Act (LSA).[6] The LSA provides legal protection from unfair dismissal to all employees, but the expiration of a

[6] The title is Labor Standards Act in the English version of the Korean Code.

contract is exempt from its protection. Because a permanent employee is an employee without a specific term of employment, if a fixed-term employee may be thought of as a permanent employee by the LSA, the employer can no longer assert that termination is not a dismissal but the expiration of the fixed term.

There is some controversy over how to arrange the terms and conditions of employment for employees whose status has changed from that of fixed-term employee. One view is that the employees would be treated according to the same conditions and terms as their previous fixed-term employment, except for the duration of the contract. The other is that the employer must make a new contract with such employees after they have worked over 2 years; otherwise, the employer must treat them to the same employment conditions or work rules as other permanent employees.

B. Protection of Employment Conditions for Part-Time Employees

The Scope of Part-Time Employees

The Fixed-Term and Part-Time Work Act defines a part-time employee as an employee whose agreed-on weekly working hours are less than those of full-time employees with the same or similar job in a workplace. The definition is provided by the LSA. Namely, the status of a part-time employee is determined subject to the comparable full-time employees' work time. The MOL has published the standards for part-time work as follows (Ministry of Labor, 2004).

Table 4. Scope of Part-Time Employment

Maximum no. of hours per week in a workplace	Number of agreed-on working hour per week	
	Full-time employees	Part-time employees
44	44	less than 44
40	40	less than 40

Note. From *Guideline on Applying the Labor Standard Act on Part-time Workers*, August 2004, Gwacheon: Author.

If an employer has made a part-time employee work more than the agreed-upon number of hours, the employee can be counted as a full-time employee in the workplace. For example, let's suppose there is a workplace with the maximum 40 hours per week and that the agreed-upon work time for part-time work is a maximum of 30 hours. In this context, if the employer has regularly required part-time employees to work 12 hours overtime per week, the employees would be seen as full-time employees by labor laws. But if the overtime work is not mandatory but optional, and if the employees have not regularly worked overtime, but only when needed, by labor law they retain their status as part-time employees.

The Pro Rata Rule in Employment Conditions for Part-Time Employees

The LSA provides some specific protections of employment conditions for part-time employees. A general principle is the rule of pro rata that part-time employees' pay, other fringe benefits, and working conditions should be arranged in proportion to those for comparable full-time employees. When employing a part-time employee, an employer is obliged to furnish the employee with a written contract that specifies pay, work hours, overtime work, and other employment terms. Even if the part-time employee works beyond the fixed number of labor hours, the employer doesn't have to compensate him or her for the extra work. Overtime pay is voluntary unless the extra work time exceeds the maximum labor hours

stipulated by the LSA. Pay for part-time employees should be calculated based on an hourly rate. A daily wage for part-time employees is calculated by multiplying the number of agreed-upon hours a day by the hourly rate.

An employer can offer part-time employees the same employment handbook or manual that full-time employees in the workplace receive. Otherwise, the employer can separately establish an employment handbook for part-time employees only. The employment handbook is a staff manual that an employer with more than 10 employees is liable for arranging and for furnishing to employees under section 93 of the LSA. The manual must include topics such as arrival and departure time for employees, meal breaks, holidays, pay rates and calculations, retirement system, occupational health and safety, and so on, under the LSA. If an employer tries to change such mandatory details of the handbook, in a way that is unfavorable to employees, he or she should get the majority consent of a labor union or an employee representative who is elected by a majority vote of all employees in a workplace. If the majority consent of the new handbook is absent, the handbook will be invalidated by the LSA.

In a workplace, if vacancies for full-time jobs occur, the employer may employ part-time employees performing the same or similar jobs on a preferential basis. According to the Fixed-Term and Part-Time Work Act, an employer can take account of the request submitted by an employee to alter his or her employment status from full-time to part-time based on studies or family reasons. But this doesn't mean that the employer has an obligation to employ such employees in the vacancies or to grant such requests. The act doesn't give a full-time employee the right to choose a part-time job instead of a full-time job. Thus, we can say that the act is just a kind of recommendation without any penalty or enforceability.

C. Remedy for Discriminations in Employment Terms and Conditions[7]

The Rule on Anti-Discrimination Based on Employment Status

The main purpose of the Fixed-Term and Part-Time Work Act is to prohibit employment practices that treat fixed-term and part-time employees less favorably than comparable employees, that is, permanent employees and full-time employees, respectively. The act stipulates that an employer should not deal with fixed-term and part-time employees less favorably than permanent and full-time employees, respectively, performing the same or similar jobs in his or her own workplace or business. Less-favorable treatment means that an employer discriminates against a fixed-term or a part-time employee on the grounds of employment type without reasonable justifications in all kinds of pay and other terms and conditions of employment.

Some labor scholars and the courts have presented that the act prohibits employment discrimination in every aspect of working conditions existing in the workplace, even if some terms and conditions of employment are not specified in a written contract of employment, a collective bargaining agreement, or a staff handbook. Such working conditions include all compensations by an employer, bonus on a regular basis, incentives based on business performance, and any fringe benefit packages. The definition of comparable employees in relation to a fixed-term or part-time employee is determined, based on any employee meeting the following requirements:

- A permanent or full-time employee, and
- Doing the same or similar jobs as a fixed-term or part-time employee, and

[7] This section is adapted from Park et al. (2006).

- Employed by the same employer to work in the same business or workplace with a fixed-term or part-time employee.

First, the act does not regulate the employment differentials between some fixed-term employees or part-time employees. A permanent or full-time employee can be compared only with a fixed-term or part-time employee, respectively, to determine whether any less-favorable treatments occur because of employment status. Second, the permanent or full-time employee should perform the same or similar jobs as a fixed-term or part-time employee. Whether they are the same or similar jobs or not depends on the job values, characteristics, replaceability, and so on. Last, they all should be employed by the same employer. But if there are no comparable permanent or full-time employees in the same workplace, regular employees in other workplaces controlled by the employer would be considered comparable employees.

NLRC Complaint Process for Discriminatory Treatment

A fixed-term or part-time employee, alleging discriminatory treatment, can file a charge of discrimination at a Regional Commission of Labor Relations (hereinafter, RCLR) under the NLRC.[8] The employee must file a charge within 6 calendar months of the date of the discriminatory practice. If the practice is ongoing, such as monthly wages, the time-limit is within 6 calendar months of the day on which the last discriminatory act occurred. The employee, as a petitioner, must submit a written complaint specifying the details of the discrimination. Otherwise, the complaint will be dismissed by the RCLR. The employer, as defendant, is required to

[8] In the English version of the Korean Code, according to the Labor Relations Commission Act, there are the National Labor Relations Commission, Regional Labor Commissions, and Special Labor Commissions.

show that there are no less favorable treatments for non-regular employees than for any regular employees, or that there are reasons justifying the differential treatment between the employees.

Furthermore, the Minister of MOEL also can order an employer to correct the discrimination, if a labor inspector from the MOEL discovers there is unlawful discrimination. If the employer fails to carry out such an administrative order, the Minister refers a written statement specifying the details of any discrimination to the NLRC and notifies the employer and the relevant fixed-term or part-time employees. Upon receiving the written statement from the Minister, the NLRC starts the complaint process for employment discrimination and furnishes the employer and the employees with an opportunity to present oral arguments.

After receiving a charge of discrimination by a fixed-term or part-time employee, the RCLR will convene a special committee on anti-discrimination to investigate the charge and to preside over a hearing. The special committee will comprise three members. In the hearing, the committee can order witness to attend at its discretion, or upon the request of the parties. The committee shall offer sufficient opportunities to submit all evidence in support of the complaint or the answer and to cross-examine all witness.

In the process, a RCLR or the NLRC can go to mediation upon the request of one party to the dispute or by mutual agreement, or by its own authority. And if one or more of the parties to an arbitral agreement in advance seek an arbitrator's decision in the process, the competent RCLR or the NLRC can issue not a remedial order but the arbitration award as the arbitrator. The parties to the dispute must submit the petition for mediation or arbitration within 14 days of the date of their complaint to the RCLR or the NLRC. Any RCLR shall make a consent decree or an award within 60 days of the day they went to mediation or received the petition for arbitra-

tion. The decree or the award has the same enforceability as the final judgment of the courts.

The RCLR will dismiss the complaint if they find that the employer didn't commit discriminatory practice. Otherwise, if discriminatory treatment of a non-regular employee has been verified during the process, the RCLR will issue a remedial order. The remedial order will be to cease and desist from any employment discrimination and to remedy the discrimination, which can include an order to correct the unfair rate of pay and other discriminatory practices as well as a monetary judgment.

The claimant or the respondent, that is, the parties to the dispute, must appeal to the NLRC for review within 10 days of receiving the dismissal order or the remedy of the RCLR. Upon the decision of the NLRC, the parties can only file an administrative suit in the administrative courts within 15 days of the decision. If the parties don't submit the petition for the decision of the NLRC, or don't go to the administrative courts for judicial review, the dismissal order and the remedy will be finalized. If the employer doesn't comply with the final decision to remedy for any discrimination, he or she is punished with fines not exceeding 100 million won. The complaint process is as illustrated in Figure 1.

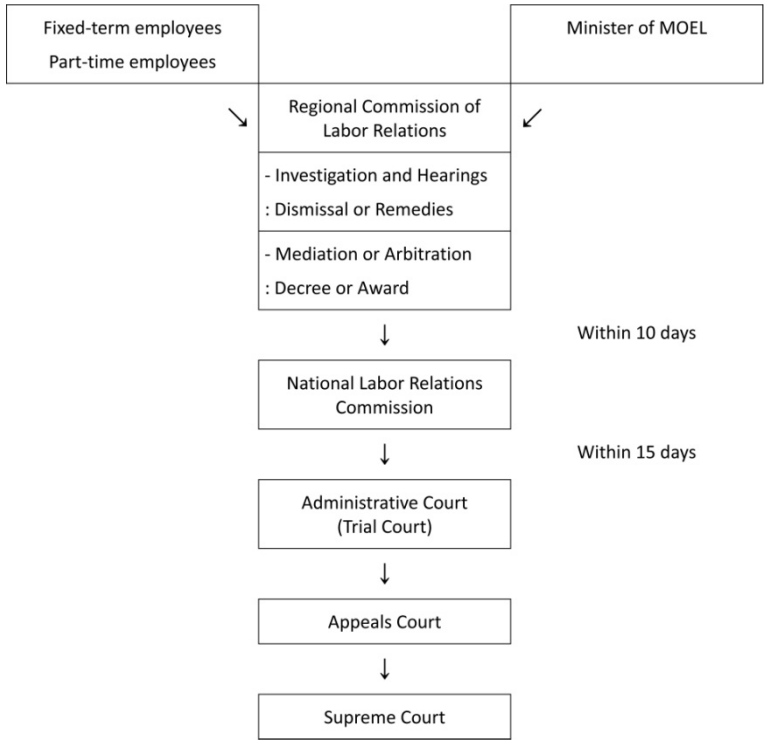

Figure 1. National Labor Relations Commission complaint process.

3. Temporary Agency Work Act[9]

A. Employment Agency Agreement and Employer's Liability in the Temporary Agency Work Act

Parties to the Temp Agency Work Relations

The Temporary Agency Work Act regulates temp staffing agencies, hirers (or clients), and agency employees in triangular employment relationships and protects such employees from less-favorable treatments compared with regular employees who are directly employed by a hirer. In temp agency work relations, a temp agency (or temp staffing company) hires agency employees in order to place them in a client's workplace. It is the client (or hirer) who employs the agency employees of the temp staffing company in practice and who supervises the employees' work, because the company and the hirer make a contract for service, a so-called, temp staffing agreement or employment agency contract. An agency worker is someone who has entered into an employment contract with a temp agency, but who works under the supervision of a hirer assigned by the employment contract. Temp agency work is differentiated from job placement, which does not make employment contracts with job seekers, but only refers them to an employer with vacancies. The former is legally the employer of agency workers, whereas the latter is not.

Under the act, a temp agency must obtain a staffing business license certified by the MOEL. There are two requirements for the license. One is enough assets to run the business, and the other is multiple clients to be assigned. If a staffing company can provide employees only for a few specific clients, the MOEL will not li-

[9] The title is Act on the Protection, Etc., of Dispatched Workers in the English version of the Korean Code.

cense the company to provide employment agency services. This is to prevent such firms from circumventing the employer's liability as specified in labor laws, because some employers can establish a staffing company, as an employment agency, to shift the liability on the company. The license must be renewed every 3 years. Figure 2 shows the temp agency work relations. If a firm permits a worker who has been provided by a staffing company without a business license to work, the firm and the company shall be subject to a fine of not more than 20 million won, or to imprisonment for not more than 3 years, or both.

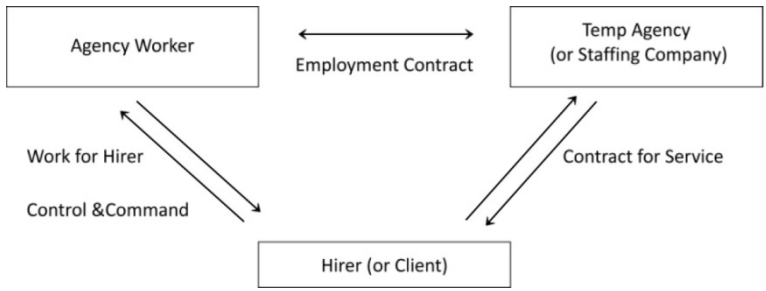

Figure 2. Temp agency work relations.

An employment agency and a hirer shall make a written contract for services, including such items as follows:

- number of agency workers
- details of jobs for agency workers
- grounds for using agency work and for temporary vacancies
- company name, location, and work site to be assigned
- supervisors directly controlling agency workers while working
- period of agency service and commencement date of the service
- work time, breaks
- paid holidays and leaves
- overtime, night, and holiday work and associated compensation

- occupational safety and health
- payment terms

If a contract for staffing service includes pay, work hours, or other working conditions that infringe on any labor rights specified in the labor laws, the contract is void. Both the agency and the hirer are liable for unlawful treatment of agency workers. The hirer shall provide the employment agency with documentation showing whether he or she is employing regular employees performing the same or similar jobs as agency workers. If so, the hirer also shall inform the employment agency of the employees' working conditions. The information is related to less-favorable treatments against agency workers than the regular employees who are employed directly by the hirer. Furthermore, the hirer shall not terminate an agency service contract because of an agency worker's gender, religion, social status, or labor activities. If the hirer violates any labor protection laws, including the LSA, the Occupational Safety & Health Act (OSHA), and the rules and regulations regarding agency workers, the agency can terminate the contract or suspend the assignment of agency workers.

The Positive List of Jobs for Temp Agency Work

The Temp Agency Work Act adopted the positive list system, which specifies permissible jobs for agency workers. Thus, any jobs excluded from the list can't in principle be assigned to agency workers. This means that an employer shall directly employ regular employees for these jobs. Above all, it is important that the list rules out all manufacturing jobs. Furthermore, the act limits permissible jobs according to job characteristics and the level of professional knowledge, skills, and career required to perform a job.

Under the act, the Temp Agency Work Regulations specify the list of 32 jobs or occupations that a firm or company is permitted to make agency workers perform in its own business, as shown in Table 5.

Table 5. Jobs for Which Temp Agency Work Is Permitted

Job classification	Type of business or occupation
Profession	Computer business, administrative service (management and finance), patent, certified librarian (archive professions), translator, creative jobs (performing arts), broadcasting (theatrical arts)
Engineer or technician	Computer, electricity, communication, education, arts, entertainment, sports, maintenance
Staff or clerk	Technical drawing, optics (electric equipment), office work, library (mail service), telephone operator, personal guard, assistant cook, travel guide
Service job	Attendant in gas station, shop assistant, telemarketer, chauffeur, building cleaner, janitor (watchman), parking attendant, delivery clerk (porter & meter-reader)

In principle, any job that is not on the list should not be assigned to an agency worker. Otherwise, an employer is obligated to directly employ a worker regardless of whether an employment agency exists. There are two exceptions to this in which an employer may use agency workers without infringing the act, even though the jobs and occupations are not specified on the list. First, when temporary vacancies result from regular employees' maternity leave, sick leave, or accident at work, and second, in the case of temporary and intermittent personnel shortages

However, the act stipulates that some occupations and jobs shall not be assigned to agency workers, without exception. The occupa-

tions are physical work on construction sites, jobs loading and unloading cargo in a harbor, jobs in the railway and distribution industry, union hiring hall, and harmful and dangerous work. Additionally, the Regulations enumerate the forbidden jobs as follows:

- jobs handling stones, rocks, or minerals associated with black lung disease
- occupations treating chemicals, minerals, and stones
- jobs performed by certified medical technicians and opticians
- driver jobs in passenger transportation services
- driver jobs in trucking services

The 2-Year Rule

The act provides that the term of the contract for agency services is fixed at 1 year, but can be extended for 1 year by mutual agreement. The extension period shall not exceed 1 year once. Thus, the total period of agency work can't exceed 2 years, unless the hirer shows an exception specified by the act, or if agency workers are 55 or older.

A hirer can use agency workers for a period exceeding 2 years, if his or her regular employees on maternity leave, sick leave, or leave because of an accident at work are expected to return in 2 years or more. If a hirer is furnished with agency workers by a staffing company in order to cope with temporary and intermittent shortages of staff or manpower, the term of the contract for the staffing service shall be no more than 3 months. But the term can be extended only once within 3 months, if the labor shortage remains and agency workers as well as parties to the contract agree to extend it.

The Hirer's Liability in Breach of the Act

A hirer shall be liable for employment practices conflicting with the act. An agreement between a hirer and an employment agency, in which unlawful things are included, is invalid. Furthermore the hirer should directly employ the agency workers covered by the contract, unless the workers clearly reject the direct employment. The details of agency work practices infringing on the act are as follows:

- to assign jobs from the unlawful occupations list to agency workers without any justifications provided by the act
- to use agency workers in occupations prohibited by the act
- to put agency workers to work exceeding 2 years
- to use agency workers provided by an employment agency without a lawful business license

A hirer who commits one or more of the above practices and who fails to perform the duty of direct employment is subject to a fine under 30 million won. However, the hirer can be exempted from the duty if he or she has initiated bankruptcy or reorganization procedures, if he or she is in bankruptcy in reality, or if natural disasters or other unavoidable circumstances have happened.

If a hirer directly employs agency workers, he or she should offer the workers the terms and condition of employment that depends on whether there are regular employees performing the same and similar jobs or not. If such regular employees, including fixed-term employees, have performed the same job, the workers' working conditions shall be equal to theirs. If such comparable employees don't exist, the employer may offer new terms and conditions of employment to the workers, unless the working conditions are worse than before.

B. Remedy for Discrimination in Employment Conditions and Terms

Less-Favorable Treatment Than for the Hirer's Employees in the Workplace

The Temporary Agency Work Act prohibits treating agency workers unfavorably based on their employment status. The comparable groups are the hirer's regular employees performing the same and similar jobs as the workers. In the case of discrimination, both the hirer and the agency are accorded the legal status of employer and are liable for the unfavorable treatment. They are not permitted to establish differential working conditions for agency workers in relations to the following items:

- all compensation furnished by employers
- bonuses on a regular basis
- incentives based on business performance
- other terms and conditions of the employment contract
- fringe benefits packages for employees

Even if some working conditions or fringe benefits are not specified in a written contract, a staff manual, or a collective agreement, they are not excluded from the anti-discrimination rule. But the rule is not applied to hirers who regularly have fewer than four employees.

Issues Over Filing a Complaint in the NLRC Process

The NLRC has jurisdiction over a charge of complaint submitted by agency workers alleging any unfair treatment as well as fixed-term and part-time employees. The difference is that the complaint

can be submitted against a hirer and a staffing agency as the respondents.

There is a controversy over the entitlement to petition for the NLRC process, because it is not clear whether some workers in illegal agency work relations could file a charge alleging less-favorable treatment than that enjoyed by regular employees in a hirer's workplace. Let's suppose that a hirer uses agency workers in occupations prohibited by the act or assigns jobs that are not permissible in the act to agency workers without justifications provided by the act and the Regulations. Such contracts for services, under which the workers have been placed in the hirer's business, are invalid. A contract for staffing services between a hirer and a staffing company without a business license is also void. In this case, the hirer is obligated to directly employ the workers up front. In such cases, there is debate about whether the workers can file a charge alleging employment discrimination for the period from the date when the work commenced to the date when the hirer directly employed the workers. Furthermore, when the agency workers have worked more than 2 years in a hirer's workplace, it is also a controversial issue whether the workers could be entitled to the remedy for unfair treatments over the past 2 years.

The Minister of MOEL also can order an employer to correct the discrimination, if a MOEL labor inspector finds unlawful discrimination. The process of handling the charge of discrimination follows the procedures provided by the Fixed-Term and Part-Time Work Act.

C. Contract Work Under the Temporary Agency Work Act

Legal Issues About Contract Work Relations Excluded From the Act

There are three parties to contract work relation—an employer, a hirer, and a contract worker—but the relations are not a form of triangular employment regulated by the Temp Agency Work Act. The act is based on the premise that a hirer in contract work relations can supervise a contractor's employees in performing jobs, but don't have any rights to control the employees as an employer in employment contract. The hirer, as a client, makes a contract for work with a contractor who is an employer of contract workers. Under the contract, contract workers are supposed to be placed in the client's business and to work for a hirer in practice.

Because the act doesn't cover contract work, a contractor is not required to get a staffing business license, and a hirer is not under any obligation imposed by labor laws for contract workers assigned in his or her workplace. Contract work has been categorized not as non-regular work, but as regular employment, on the grounds that the contractor is the only employer of contract workers. In summary, the theory of contract for work in relation to the contract work is as shown in Figure 3.

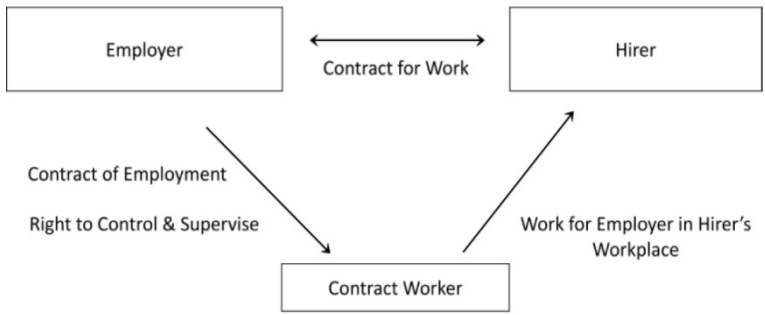

Figure 3. Contract work relations.

Guideline on Contract Work by the Administration

In my view, the Korean government seems to slightly modify its policy on contract work since 2010.According to the National Policy of Employment 2020, published in October 2010, the government has realized that contract work practices have called for regulations to substantially guarantee labor rights of contract workers. The policy said that contract work practices have expanded more since the enforcement of the Temp Agency Work Act of 2006. But the government didn't choose a strategy whereby the act could cover contract workers. Instead, it has changed the MOEL's guidelines to define labor standards for contract workers. In January 2011, the Committee on Advancement of the Labor Market (hereinafter CALM) under the National Tripartite Committee (ESDC) prepared a draft guideline for the MOEL, and the Guideline on Protection of Contract Workers was published in July 2011. The guideline is nothing more than the recommendation issued by the MOEL to employers. Details are as follows:

Employer's (Contractor's) Domain

- to make a written contract of employment
- to undertake the employer's liability as specified in the LSA, OSHA, Minimum Wage Act, and other social welfare acts,
- to reserve a reasonable pay for employees out of the price for contract work
- to run a job development program for employees
- to grantee an individual grievance procedure

Hirer's (Client's) Domain

- to assume joint and separate liability for unpaid wages of contract workers if there is just cause

- to set labor costs in the unit price above the minimum wage when making a contract for work with a contractor
- to inform a contractor of the measures taken to prevent occupational accidents and injuries
- to observe the LSA and the OSHA in relation to contract workers within the hirer's domain
- to pay for work within a reasonable time and not to compel a contractor to make unfair unit price for the work
- to make an effort to allow contract workers access to welfare facilities and benefit packages at work
- to furnish a room, equipment, and materials for a job development program for contract workers
- to keep in partnership with the individual grievance procedure for contract workers

Employer's and Hirer's Domain

- to make a written contract for work including details, method, and date of payment
- to make clear that a contractor, as a legal employer, has the right to control and supervise contract workers and that a hirer respects this right
- to fix the term of a contract for as long as possible or to ensure its renewal
- to give a month's notice of termination to a contractor when terminating the contract
- to maintain continuous employment and working conditions of contract workers, with a mutual consultation, when an old contractor is replaced with a new one
- to make an effort to inform a contractor and contract workers of vacancies and to preferentially hire the workers
- to respect contract workers' labor activities and not to terminate the contract or refuse to renew because of labor activities

- to give the employees' representative of contract workers an opportunity to participate in a labor council in the hirer's workplace

The Supreme Court's Decisions on Contract Work Relations

In 2008 and 2010, the Supreme Court of Korea made three important judgments on contract work relations. In fact, the decisions triggered the Guideline for Protection of Contract Workers (2011) of the MOEL, because it concerned the MOEL that the rules of the decisions would reclassify many contract workers as agency workers, who until then had been classified as regular employees by the MOEL. Below are the decisions.

The first is the August 2008 case (Supreme Court Decision 2007Du22320, decided September 18, 2008). In this case, workers had worked longer than 2 years under a contract for work between their own employer and the hirer. In the hirer's workplace, the workers were assigned to jobs that are not permitted by the Temporary Agency Work Act. And their employer, the contractor, did not have a staffing agency business license, required by the act. Then, the workers alleged that their own employer was not the contractor, but the hirer in substance, referring to the provision of the then act (1998) that considered a hirer to be the legal employer of the workers if the agency workers have worked in a hirer's business for more than 2 years, conflicting with the 2-year rule. The issue of law is whether the provision could be applied to the illegal contractual relations for the staffing service from the beginning. In other words, in this case, the contractor lacked the mandatory license for the service and the workers' jobs were not subject to the list of staffing jobs under the act. The Court held that even if an employer and hirer collusively violate the act and the staffing agency is unlawful from the start, the hirer is considered the employer of the workers under the section 6 of the act (1998).

In the second case, in July 2008 (Supreme Court Decision 2005Da75088, decided July 1, 2008), the contract for work was maintained between the hirer and the contractor, who was the alleging employer for 25 years. The workers had worked in the hirer's workplace under the contract, and the hirer was the contractor's only client. When the contractor closed the business, the workers alleged that the hirer had really been their own employer and that the hirer locking the workers out because of the closure of business constituted unfair dismissal. The Court held that the hirer had actually controlled and supervised the workers in performing their jobs and in determining their employment conditions. And it found that there was an implied-in-fact-contract of employment between the hirer and the workers, on the grounds that the contractor was nothing more than a personnel service agency without independence as a legal entity. However, the Court didn't rule on whether the contract work was substantively illegal agency work that conflicted with the Temp Agency Work Act.

The last case is the March 2010 case (Supreme Court Decision 2007Du8881, decided March 25, 2010). In this case, the Court ruled that even if a contract for work is valid by law and is not considered a contract for staffing service, the hirer could be liable for unfair labor practices against contract workers as far as he or she has been involved in them.

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