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Employment & Labour Law 2019

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A practical cross-border insight into employment and labour law

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Chapter 26

Korea

Steve Ahn

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SEUM Law

1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main source of employment law is the Labour Standards Act which covers a broad range of common and fundamental issues related to employment such as minimum working conditions, employee wages, discrimination, termination and workplace safety.

There are a number of other statutes that cover specific subjects such as the following:

Severance	■ The Employment Retirement Benefit Security Act.
Minimum wage	■ The Minimum Wage Act.
Part-time and temporary agency workers	■ Act on the Protection of Fixed-term and Part-time Workers. ■ The Act on the Protection of Temporary Agency Workers.
Social insurance	■ The National Pension Act. ■ The Medical Insurance Act. ■ The Employment Insurance Act. ■ The Industrial Accident Compensation Insurance Act.
Labour unions and labour councils	■ The Trade Union and Labour Relations Adjustment Act. ■ The Act on the Promotion of Workers' Participation and Cooperation.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The Labour Standards Act protects all "workers", meaning any person, regardless of occupation, that offers labour for the payment of wages.

There are separate laws in place to protect "part-time workers" (those working 15 hours or less per week), "fixed-term workers" (those who have agreed to work for a fixed period), and "temporary agency workers" (those who are employed by a temporary agency and dispatched to work at a client's workplace). There are also statutes to specifically protect construction workers and foreign workers.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Contracts of employment must be in writing and specify the key terms such as the amount of wages, required work hours, designated holidays, paid annual leave and the number of days of annual paid leave.

1.4 Are any terms implied into contracts of employment?

Employers are required to provide employees with the minimum terms required under the Labour Standards Act; thus, it can be viewed that the minimum terms under the Labour Standards Act are implied, even if a contract of employment does not explicitly provide for such terms. If the company has adopted employment rules or other workplace policies, such rules will also apply to the parties even if not explicitly stated in the employment contract. The terms of any collective bargaining agreements negotiated between the employer and employees must also be respected.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The Labour Standards Act requires employers to provide minimum terms and conditions of employment including, minimum terms with respect to wages, severance, work hours, overtime pay, leave, termination and mass layoffs. Other laws such as the Minimum Wage Act and the Employment Retirement Benefit Security Act also require employers to provide minimum terms and conditions.

In 2018, a couple of major changes to the minimum terms and conditions went into effect. Most notably, minimum wage was increased significantly in 2018. Minimum wage is usually increased at a rate consistent with inflation. However, in 2018, the minimum wage was increased by a considerably higher rate (16.4%) based on the new presidential administration's policies. Furthermore, the Minimum Wage Act was amended to remove exemptions that previously applied to unskilled labour workers on probation. In 2019, an amendment will go into effect which clarifies the meaning of wages for the purposes of calculating minimum wage.

Also, beginning May 2018, employees in their first year of employment with a company became entitled to 11 additional days of annual leave under an amendment to the Labour Standards Act. Under the pre-amendment Labour Standards Act, employees were not entitled to any annual leave during their first year of service. Employees would earn annual leave only upon completion of one years' service, provided an employee could use annual leave that he/she expected to earn upon completion of the first year of service in advance (a maximum of one day per month) and have it deducted from the annual leave earned upon completion of the first year. Under the amended Labour Standards Act, employees earn one day of leave per month during the first year of service in addition to the annual leave that employees earn upon completion of the first year.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Any terms and conditions of employment can be negotiated through collective bargaining. However, most collective bargaining agreements focus on wages, work hours and paid leave. Bargaining usually takes place at the company level. Most company-specific trade unions are members of an industry trade union organisation. If a company does not have a company-specific trade union, the industry trade union organisation may handle the collective bargaining directly.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The Trade Union and Labour Relations Adjustment Act ("**Trade Union Act**") sets forth the rules with respect to the formation and operation of trade unions. Trade unions must file a report with the Ministry of Employment and Labour ("**Ministry of Labour**"), stating their title, location, number of members, the contact information of their representatives and other matters.

2.2 What rights do trade unions have?

Trade unions have the right to negotiate and enter into collective bargaining agreements with employers and conduct "industrial actions" (strikes, lock-outs and other similar activities) in accordance with the Trade Union Act. Trade unions also have the right to seek dispute resolution through mediation and/or arbitration with the Labour Relations Commission ("**LRC**"), which is an administrative organisation established under the Ministry of Labour.

2.3 Are there any rules governing a trade union's right to take industrial action?

The Trade Union Act sets forth various rules with respect to industrial actions, and trade unions are responsible for managing industrial actions to comply with the rules. First, a trade union must obtain a majority vote of its members by an anonymous ballot, approving the industrial action. When conducting the industrial action, the trade union must ensure that it conducts the action lawfully, avoiding interference with persons who intend to work. The trade union must also ensure that the action does not threaten others to participate in the action and does not involve violence or cause an interference which may endanger public safety. Employers, on the other hand, must not hire new employees or engage existing employees to perform any work interrupted by the industrial action, provided employers can decide not to pay employees who have stopped working as part of the industrial action.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Employers with 30 or more employees must establish a "labour-management council" composed of members of management and employees, which holds meetings quarterly to discuss matters affecting employees. The labour-management council must be comprised of an equal number of representatives from management and employees with three to 10 members from each side. Members representing the employees must be elected by a majority vote of the employees or by a trade union, if there is a trade union representing a majority of workers.

The Act on the Promotion of Workers' Participation and Cooperation specifies which matters require a report to the council (such as overall management plans, production plans and the financial status of the company), which matters are subject to consultation by the council (setting up or amendment of work rules, employee stock option plans, installation of surveillance facilities within the workplace, etc.) and which matters require the council's approval (establishment of plan for education and training, establishment of welfare facilities and employee welfare fund, etc.).

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

The Act on the Promotion of Workers' Participation and Cooperation provides that the following matters are subject to a resolution of the labour-management council: (i) establishment of a basic plan for education and training of workers; (ii) establishment and management of welfare facilities; (iii) establishment of an in-house employee welfare fund; (iv) matters which are not resolved by the grievance handling committee; and (v) establishment of labour-management joint committees.

2.6 How do the rights of trade unions and works councils interact?

Generally, there is little overlap in the rights of trade unions and works councils. The rights of works councils are more limited as they only have the rights provided specifically by statute. Trade unions, however, can engage in collective bargaining which can cover any terms and conditions of employment. Thus, trade unions usually negotiate key terms such as wages while works councils address administrative and operational matters.

2.7 Are employees entitled to representation at board level?

Board members are appointed by shareholders and employees do not have any right to representation at the board level.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Employees are provided protection under the Labour Standards Act from discrimination based on gender, nationality, religion and social status. There are also laws prohibiting age discrimination as well as discrimination against persons with disabilities. Employers are also prohibited from discriminating against fixed-term, part-time and temporary agency workers as described under question 3.6.

3.2 What types of discrimination are unlawful and in what circumstances?

Employers must provide equal opportunity with respect to recruitment and hiring. Employers are also prohibited from providing less favourable terms or conditions to employees based on the grounds described under question 3.1.

Sexual harassment is also prohibited under the Equal Employment Opportunity and Work-Life Balance Assistance Act. The National Assembly adopted amendments to the Act in November 2017 that require employers to comply with stricter laws in this respect. Beginning May 2018, employers became subject to heightened obligations, including the requirement to hold sexual harassment prevention training annually and to take more robust action upon receiving a sexual harassment complaint. Violations of sexual harassment in the workplace became subject to more severe punishments as well.

3.3 Are there any defences to a discrimination claim?

With regards to discrimination claims, there are no legal defences under statute or court precedent to exempt liability such as a business necessity or occupational qualification rule.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees can file a claim with the LRC or file a civil lawsuit before the courts. Employees can also file a report with the Ministry of Labour to cause an investigation into the company.

If an employee is willing to settle a claim, the employer can enter into a settlement agreement with the employee before or after a claim is filed. Employers cannot settle claims with employees in advance for claims that have not yet vested (e.g., via a waiver clause in the employment agreement).

3.5 What remedies are available to employees in successful discrimination claims?

For discrimination claims alleging unfavourable treatment, the employee can seek monetary damages. For a termination claim, the employee can seek reinstatement as well as back pay.

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Yes. Every part-time, fixed-term and temporary agency worker has the right to the same basic pay and other working conditions as regular employees performing the same or similar job. Temporary agency workers may have a right to permanent employment under certain conditions.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Maternity leave is 90 days, although women who are pregnant with two or more children at one time are entitled to a longer maternity leave period of 120 days. Employers must allow its employees to use at least 45 of the 90 days of maternity leave after childbirth (60 days in the case of a pregnancy with two or more children). Employers must also grant leave to pregnant women who experience a miscarriage. The period of leave depends on the length of the pregnancy before the miscarriage.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Employees taking maternity leave are entitled to pay and benefits for 60 days of maternity leave (75 in the case of a pregnancy with two or more children) from the employer. The government may provide additional support under the Equal Employment Opportunity and Work-Life Balance Assistance Act. Employees taking leave for miscarriage are also entitled to pay and benefits during the leave period.

4.3 What rights does a woman have upon her return to work from maternity leave?

Employers must allow the employee to return to the same work at the same wage levels as before the maternity leave.

4.4 Do fathers have the right to take paternity leave?

Yes, fathers have the right to at least three days of paid paternity leave. Fathers can ask for up to two additional days of unpaid paternity leave. Paternity leave must be used within the first 30 days after childbirth.

4.5 Are there any other parental leave rights that employers have to observe?

Employees, both male and female, are entitled to one year of leave for childcare if the employee has a child that is younger than eight years old or has not yet entered the third grade. Employers cannot dismiss an employee for taking parental leave and must reinstate the employee to the same work at the same wage as before the childcare leave. The Labour Standards Act was also amended in May 2018 to specifically state that employers must include the period of childcare leave used by an employee when calculating annual paid leave.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

Any employee that is eligible for childcare leave, as described in question 4.5, has the right to apply for a reduction of work hours *in lieu* of taking the childcare leave. In such case, the total work hours can be reduced to 15–30 hours of work per week.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

In the case of a share sale, there is no legal change in the relationship between the employer and employee and thus, employees do not have any special rights related to the change in shareholder, unless the employees collectively have a specific agreement regarding a change of control with the employer. In the case of a merger, the surviving company must take over all legal obligations of the merged company including employment obligations.

For other business sales, the key question is whether the sale is an asset transfer or a business transfer. Employees do not have a right to employment with the buyer of an asset transfer, but for business transfers, employees of the business are transferred automatically to the buyer, although employees have the right to remain employed by the seller.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

If the business sale is a merger or a business transfer (as opposed to a share sale or asset transfer), the relevant employees have the right to continued employment with the surviving company (in the case of a merger) or buyer (in the case of a business transfer) at the same terms and conditions as those that were granted by the seller. The surviving company/buyer must also respect collective agreements and trade unions that existed with the seller.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

There are no information or consultation rights granted by statute for a business sale. Often, collective bargaining agreements will require information or consultation. Even if a collective bargaining agreement includes such a requirement, a breach by the employer will not give the employees a right to prevent or nullify the business sale. The employees will only be able to seek damages through a breach of contract claim.

5.4 Can employees be dismissed in connection with a business sale?

As discussed in Section 6, an employer can only dismiss employees if they have "just cause". A business sale does not itself constitute "just cause" and thus, does not grant the buyer or seller a right to dismiss an employee. An employer will be found to have just cause if there is an "urgent managerial necessity" for the dismissal. An "urgent managerial necessity" may be found if a business sale has been executed in order to prevent deterioration of management of the company.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Employers cannot unilaterally change the terms and conditions of employment unfavourably under any circumstances, including in the event of a business sale. Often the employment terms offered by the buyer are not the same as the seller, and the buyer will negotiate new terms with the employees in order to avoid having multiple sets of employment terms and conditions for its employees after the closing of the business sale.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

All employees must be given at least 30 days' written notice of termination by law, unless the employee has negotiated a longer notice period with the employer. The notice period cannot be shortened by agreement. However, the employer may be exempt from the notice requirement if the employee is causing a considerable hindrance to the business or intentionally inflicting damage to company property.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Yes, *in lieu* of providing 30 days' notice, employers can require employees to serve garden leave for 30 days.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Employers are not required to obtain third-party consent to dismiss an employee, unless there is a collective bargaining agreement which requires consent to dismissals. However, all employers with five or more employees, regardless of whether there is a collective bargaining agreement, must have "just cause" to dismiss an employee.

The Korean statutes do not define the term "just cause" or provide guidance on its meaning, and it is often difficult to determine with certainty whether there is just cause for dismissal. Generally, the courts impose a high threshold for the "just cause" requirement. It can be said with certainty that courts will not find just cause for mere poor performance, but will find just cause if there has been intentional misconduct such as self-dealing or embezzlement. Many of the cases in between this range are difficult to determine and for this reason, employers often offer a severance package in exchange for voluntary resignation.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

All employees (working for a company with five or more employees) enjoy protection from dismissal. Fixed-term workers, however, only enjoy protection from dismissal during the fixed term of employment. In order to prevent employers from hiring employees as fixed-term workers to avoid the just cause requirement, fixed-term employees have been granted the right to seek permanent employment with the employer after two years of fixed-term employment. Thus, if an employee has worked for a company as a fixed-term worker for over two years, the employee will have the right to permanent employment with the company. Once the employee obtains permanent employment, he/she will have protection under the "just cause" requirement for dismissal.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Employers with five or more employees must have just cause to dismiss employees, regardless of whether the reason is related to the individual employee or the business. As discussed in question 6.3, it will usually be difficult for an employer to show that there is a reason for dismissal that is related to the individual employee.

For business-related reasons, the employer will only be entitled to dismiss employees if there is an "urgent managerial necessity" for the dismissal. In order to meet this requirement, employers must make every effort to avoid dismissal, establish and follow reasonable and fair criteria for the selection of employees to be dismissed, provide 50 days' notice of the dismissal to employees, and engage in good-faith consultation with the labour union or representative of employees. The employer must also give the dismissed employees priority for hiring, if the employer hires new workers within three years of the dismissal.

As for compensation upon dismissal, all employees that have worked for an employer for one year or longer are entitled to a severance payment, regardless of whether the employee is dismissed or voluntarily resigns from the company. The amount of the severance payment is equal to approximately one months' salary for each year of service. There is no additional compensation required for dismissal, although as mentioned in question 6.3, employers often offer additional compensation in cases where it wishes to induce an employee to voluntarily resign.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

Employers must provide written notice to employees. If the employer has established internal procedures related to dismissals, the employer must also follow these procedures. Often, internal procedures require the employer to hold a disciplinary hearing with the employee before deciding on the dismissal.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

If an employee believes he/she has been wrongfully dismissed (dismissed without just cause), the employee can seek nullification of the dismissal with the LRC or with the civil courts. If successful, the employee is entitled to reinstatement and back pay.

6.8 Can employers settle claims before or after they are initiated?

Employers can settle claims before or after they are initiated. However, the courts will not enforce an agreement by employees to waive or settle claims before they have vested.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Yes, employers do have additional obligations when dismissing a number of employees at the same time. Please see question 6.5 regarding dismissal for business-related reasons.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employees that have been subject to a mass dismissal that violates Korean labour law can seek reinstatement and back pay in a wrongful dismissal claim filed with the LRC or a lawsuit with the civil courts.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Non-compete, non-solicitation and confidentiality covenants are recognised by the courts. In some cases, companies also impose a non-disparagement covenant, which is also enforceable.

7.2 When are restrictive covenants enforceable and for what period?

Non-compete, non-solicitation and confidentiality covenants are enforceable. The enforceable period will be determined by the courts on a case-by-case basis considering the relevant facts, and if the period is deemed excessive, the court may shorten the restriction period. The courts will consider various factors such as the interests of the employer, the employee's position at the company and his/her access to company assets, whether the employee was compensated adequately, the scope of the restriction (applicable territory and type of work) and other factors. Generally, the courts will recognise longer periods of restriction for non-solicitation and confidentiality covenants compared to a non-compete covenant.

7.3 Do employees have to be provided with financial compensation in return for covenants?

Employers are not required to provide separate financial compensation in exchange for covenants. However, compensation is one of the factors that will be considered by the courts in reviewing whether the period and scope of restriction is reasonable.

7.4 How are restrictive covenants enforced?

Employers can file for an injunction and also seek damages for a breach of the covenant.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

During the hiring process as well as during the employment relationship, the employer will have to comply with data protection laws, namely the Personal Information Protection Act ("**PIPA**") which imposes various obligations on anyone handling personal data. For example, employers are required under PIPA to obtain consent to collect, use and store an individual's personal information during the hiring process. Under PIPA, separate consent is required to disclose personal information to any third parties as well as to transfer data to another country. Thus, if an employer intends to transfer employee data to a third party or to an affiliate in another country, it must obtain the consent of its employees.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, employees have a right to obtain copies of personal information held by the employer under PIPA.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Employers are not permitted to conduct criminal record checks. However, employers can conduct reference checks and drug tests with the candidate's consent.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Employers are not prohibited from monitoring communications and activities conducted on the company's devices and systems. Employers will usually inform employees that such monitoring may occur so that the employees can avoid any unwanted disclosure of personal information.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Employers can control employees' use of social media by implementing rules regarding the use of the internet with company devices and at the workplace as well as through the application of technical measures on the company's network systems and devices. If the employee is subject to confidentiality and non-disparagement covenants, social media would not be exempt from such covenants. However, employers do not have any legal justification to prohibit an employee's personal use of social media outside of the workplace using personal devices.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The LRC has jurisdiction to hear employment-related complaints. The LRC is composed of regional commissions, and employees must file the complaint with the applicable regional commission. The regional commission's decision can be appealed to the central commission, and central commission decisions can be further appealed to an administrative court.

Employees can choose to file a civil lawsuit with the district courts *in lieu* of a complaint with the LRC.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

In order to file a grievance with the LRC, the employee must file the grievance within 90 days of the related event. The LRC will hold hearings and then issue a decision similar to a civil lawsuit. There is no mandatory conciliation or fees required before a complaint can proceed.

The statute of limitations for an employment-related civil lawsuit is three years. There is also no mandatory conciliation for a civil complaint to proceed. However, after each party has submitted its initial pleadings, the court may recommend non-binding mediation. For a civil lawsuit, the employee, as the plaintiff, will be required to pay filing fees and submit a cash deposit to file the complaint.

9.3 How long do employment-related complaints typically take to be decided?

It usually takes two to three months from the filing of the complaint before the LRC to the issuance of a decision by the LRC. District court cases usually take six months to one year for a judgment to be issued.

9.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

A first instance decision by a LRC regional commission may be appealed to the central commission, and such appeals typically take about two months to complete. District court decisions may be appealed to the appellate courts, and it usually takes about three to five months for a judgment to be rendered in the appeal.

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Steve is a U.S. attorney partner focusing his practice on representing foreign companies with operations in, or desiring to enter, the Korean market, as well as entrepreneurs. Steve's practice covers a broad range, including company formation, commercial/employment law, venture capital financing and M&A, and he provides advice to clients for market entry and day-to-day operations. Prior to SEUM, Steve served as TriBeluga's Chief Legal Officer and helped establish the Korea office of TriBeluga, a startup incubator, and served as the Head of Korea thereafter. Before TriBeluga, Steve worked at one of the leading Korean law firms representing multinational companies and private equity funds with respect to a wide range of matters including investments, acquisitions, joint ventures, commercial agreements and employment issues. Steve is also active in the startup community serving as a mentor and lecturer for government-sponsored incubation programmes, and frequently speaks on issues facing foreign businesses.

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