Legal Problems and Assignments of Non-Standard Workers

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Abstract

Non-standard work constitutes one of the most controversial labor law issues. It is a form of employment developed by the personnel techniques founded on the employment flexibility. This form of employment create instability and inequality and dispense with the employer's obligations in the labor law and the social security law. The non-standard worker's legal status in Korea is very unstable, but the law rarely provides special protection for it. The Labor Standards Act and the Law for the Protection of Temporary Workers(1998) have provided some protection for non-standard workers under some of their articles. But the content and range of the protective articles are too simple and confined to solve in an efficient way the many legal problems arising from non-standard employment. The basic goal of the regulation of non-standard employment is to achieve both flexible business operation and employment stability. The real employment need of the enterprise and the choice of the workers must reasonably be accommodated. For this reason, in the first place, amendment must be made to the Labor Standards Act articles dealing with the employment contract period and clarifications must be made regarding the legal effects of illegal use of non-standard employment. Second, the employment instability of non-standard employment must be removed and the regulation promoting improvements in the work conditions must be strengthened. Employment stability is an absolute pre-condition for a worker to exercise his/her rights under the Labor Standards Act and the Trade Union and Labor Relations Adjustment Act. And the lure of non-standard employment must be weakened by strictly enforcing the rule of "equal work, equal wage." Third, the social balance of the burden of unemployment risk must be made more level between the worker and the employer. The current law only lessens the burden of the employer and demands the one-sided sacrifice of the worker. Furthermore, when coming up with a legislation to increase the stability of non-standard employment, the objective employment conditions, the tendency of the court's interpretation of the law and the employer-worker relationship must all be taken into consideration. Last of all, the principle should be established that the use of non-standard worker can not be permitted for the execution of the normal and permanent activity of the enterprise.

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I. Non-Standard Employment and Change in the Labor Market

Since the early 1990's, Korea's employment market has seen two diametrically-opposed phenomena of standard and non-standard employment. Non-standard workers, otherwise known as temporary workers, daily workers, time-based workers or short-term contract workers, have existed in the past, but after the IMF crisis, the use of such workers has become widely spread so as to become a general employment pattern in the present.[1] Apart from the fact that the number of non-standard workers is increasing, the fact that they are replacing standard workers makes the issue of non-standard workers important.

Just the use of the term "non-standard" as opposed to "standard" indicates how much non-standard workers are deprived of many of the rights of standard workers that are based on the Labor Law and Social Security Law and exposed to low income and unstable employment. Non-standard workers are also an alienated group of workers who are separated from the standard worker-oriented labor unions and are unable to protect their rights due to their unstable employment.

One of the main reasons for the rise in non-standard employment is that companies generally favor the use of non-standard workers because of the consequent reduction in personnel expenses and ease in the rearrangement of employees. In fact, compared to standard workers, the income rate of non-standard workers is very low. Further, after factoring in the absence of bonuses and social security charges, the personnel expenses companies incur, in cases of non-standard workers, dramatically decrease.[2]

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1) Differing opinions exist on the total scale or extent of non-standard employment. Some argue that non-standard employment constitutes 25% of the total labor market, while others argue that it constitutes up to 58%. The government's official surveying organization, the Statistics Department, announced that as of December 2001, among the total 13,635,000 employed workers, there were 6,535,000 permanent workers and the remaining workers were temporary and intermittent workers, making up more than half of the total number of workers (i.e. 52%). Considering the fact that when the employment period is more than 1 year, the worker is counted as a permanent worker, we can presume that non-standard workers such as long-term workers with employment periods of over 1 year (contractual or part-time), temporary employees and other special types of employees, will outnumber standard workers. Also, the employment of non-standard workers is increasing, and at a faster rate. Looking at the changes over the past few years, 41.9% in 1995, 43.4% in 1996, 46% in 1997, 49% in 1998, 53% in 1999, 52% in 2000, one can see that there has been a 2-3% increase every year in the ratio of temporary intermittent workers to permanent standard workers.

2) About the state of non-standard employment, Kim Yoo Sun, *The State and Scale of Non-Standard Employment,* Non-Standard Labor Volume 6, 2001, p. 72.

Nonetheless, the working hours of non-standard workers are longer or at least similar to those of standard workers. Companies are even replacing standard workers with non-standard workers in certain areas of work. Therefore, it can be said that in reality non-standard workers are used just like standard workers in those areas of work.

Consequently, the issues concerning non-standard employment are increasing in gravity, but the labor circle and economic circle seem to have different opinions on how legally to deal with these problems. The economic circle argues that the rigidly fixed current labor system has caused the increase of non-standard employment and that "flexible employment" must be allowed to alleviate the problem of non-standard workers.[3] In contrast, the labor circle argues that the present employment market in Korea is as flexible as that of any other country. It argues that rather the "flexible employment" strategy is causing pain to the workers and should be stopped and for the protection of non-standard workers, a legal, organized system must actively be installed.[4] In order to bridge these differences and reach a harmonious agreement, active discussion is currently taking place at Worker Employer Government Committee[5] but prospects appear dim due to the labor circle's basic distrust of the government.

II. The Concept and Type of Non-Standard Workers

A. The Criterion for Distinguishing between Standard Workers and Non-Standard Workers

The term "non-standard worker" or "atypical worker" is widely used today, but this is not a legally correct term. It is a term that has been established neither in a social nor

3) Typical requirements for the alleviation are: ① the extension of the maximum limit of contractual employment period to 3 years, ② to oppose the use of the term 'one similar to a worker' for a special type of non-standard worker, and ③ the full application of the 4 social insurances to temporary intermittent workers.

4) The labor circle advocates the abolition of temporary work altogether or at least the imposition of strict limitations on its use. They further argue that employment having fixed periods should be limited to cases where the reason for it is explicit and that the duration of the period should be limited to 1 year. When the contract is repeatedly renewed, it is presumed that the non-standard worker has become a standard worker. These issues are the foremost problems that need to be solved. (refer to www.workingvoice.net).

5) The Worker Employer Government Committee consists of three equal parties, the worker, employer and government, who make agreements about the employment stability and working conditions of workers, and related

in economic way, but refers to a worker whose status lacks certain factors that are present in the status of a traditional standard worker relative to his employer.[6] Therefore a non-standard worker can be categorized according to the factors he lacks, because the legal meaning and importance of the factor that is lacking is a leading criterion in deciding the type of non-standard worker. The problem lies in the fact that non-standard employment, whether it is reasonable from the market viewpoint, is not under the protection of labor law and can be used to avoid the law. Therefore in the eyes of labor law, it is important to determine what factor categorizes a particular non-standard employment situation and how that factor is used in avoiding any legal restrictions. At this point, the legal standard that differentiates non-standard employment from standard employment is whether the duration of the contract is set and whether the employment is made directly.[7] Apart from these legal standards, there can be many different types of non-standard employment situations. Among them are time-based employment, shift-based employment, transformation employment, and decision-based employment which are non-standard employment based on the many different types and flexibility of work hours. Home-based employment and office employment are non-standard employment based on the work place. The employee to whom labor law is applied can exist as a non-standard worker where the employment itself can be a problem. This paper will discuss three classes of non-standard employment: fixed-term employment, indirect employment and special types of non-standard employment.

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subjects of industry, economy and social issues. The committee was launched on January 15, 1998 in order to strengthen the state of competition and achieve social unification through the balanced development of the people's economy. Later, pursuant to the Presidential Decree of August 6, 1999 (Law 16519), article 17, clause 2, "the Law of the Formation and Operation of the Worker, Employer, Government Committee" was legislated and announced.

6) For example, researcher Kim Seung Hwan of the Korean Labor Research Institute defined the typical factors of standard employment as follows: ① subordinate relations to the employer ② unless there is a special reason, permanent employment without a fixed term ③ full-time labor ④ typical worker's number of working days ⑤ salary-based income ⑥ secure income based on the law and collective agreement, secure employment from dismissals ⑦ income level based on competence and seniority within the company ⑧ the protection of collective relations by representative organization. Researcher Kim defined non-standard employment as one that excludes some or all of these factors. (Study of Non-Standard Labor (1992) pp. 15-16).

7) Javillier, *フランスの非典型的勞動契約*, 日本勞動研究雜誌, 1993, p.4.

B. Fixed-Term Employment

First of all, non-standard employment is differentiated from standard employment by the period of the employment contract. Most non-standard employment such as daily employment, contractual employment, part-time employment and seasonal employment are all categorized under fixed-term employment. Such employments have their small differences but all have in common the fact that the period of the contract is either explicitly or implicitly set, placing them in a state of instability. The reason is that the Labor Standards Act protects only standard workers from lay-offs through limitation on dismissal causes and proceedings. Fixed-term employment results from an employment contract that has a fixed period, and since the period is fixed, the employment relationship ends when the period is over, and the employer does not have any restrictions on dismissal causes (Labor Standards Act articles 30 and 31) or any responsibility of informing the employee in advance of the dismissal (articles 32 and 35). As a result, the stability of the worker's employment is not protected apart from the period of the contract. Fixed-term employment usually exists in forms of daily workers (the contract period being less than a month), temporary workers (contract period being more than a month but less than a year) or seasonal workers (working during certain seasons) with usual contract periods of less than a year, even though occasionally periods of more than a year do exist. It is especially true in cases where for a period of time, companies employ new outside labor in the form of contractual workers or part-time workers or re-employ already existing labor where the period of the contract is fixed to be longer.

C. Indirect Employment

Non-standard employment is also set apart from standard employment by the employment relationship between the parties forming the employment contract. Non-standard employment can be categorized into direct non-standard employment and indirect non-standard employment. Direct non-standard employment refers to the type of employment in which the person who formed the contract with the worker also directs and orders the worker, while indirect non-standard employment refers to the employment in which the worker works for a third person who is not the person with whom the worker had formed the contract. Most of the non-standard employment

takes the form of direct non-standard employment

Major examples of indirect non-standard employment are temporary work and emergency service and subcontracts. In an indirect non-standard employment, since the employer is not the contracting party, instead of using the term dismissal, terms such as “cancellation of service” or “cancellation of contracts” are used in order to control employments easily and not have any dismissal restrictions. Also the person who employs these workers has easy access to employment control since he can employ workers only when needed. This is possible because under the current law, there is no requirement for registering dispatchment or requirement for dispatchment periods that correspond to employment periods. This type of non-standard employment worker has a double risk of unstable employment due to the fixations of his dispatchment period and his contractual period.

D. Special Types of Non-Standard Employment

Among non-standard employment, there exists special types in which issues are raised regarding the characteristics of the occupation Such special type includes study tutors, insurance agents, golf club assistants and construction truck drivers. For these workers, employers apply for personal business registrations and then make the workers self-employed, not forming separate contracts with the workers. The relationship between an employer and a worker, therefore, takes the form of consignment, without any direct contracts between them.

This type of employment is used by the employer intentionally to rule out the supervisor/subordinate relationship that has been the central notion of the traditional employment relationship. Instead of the usual salary, compensation takes the form of charges and commissions, and employer escapes the responsibility for maintaining a fixed business set-up in the office and can assign certain duties to certain workers. Such aspects differentiate the special types of non-standard employment from traditional work relationships. It is true that these special types of employees are providing labor in economically and personally subordinate positions to the employers not unlike the positions held by traditional standard employees. Nonetheless employers easily discount their status as workers because these special types of non-standard employees are registered as independent businessmen. Therefore these workers are denied protection under the Labor Standards Act and Social Security Law, and do not

have access to the benefits of payment under the law, holidays, employment security, protection of women, compensation for industrial calamities, retirement grants and unemployment allowance. Further, their right of establishing labor unions, collective negotiation and other collective action are all very much restricted.

III. Legal Rules of Employment and Work Conditions

A. Current Situation and Discussion to Improve the System

The non-standard worker's legal status is very unstable, but the law rarely provides special protection for it. Because of global economic recessions, along with large masses of unemployment, non-standard employment has risen; but since the economic recession of the 70's, developed countries have actively dealt with this situation and have come up with many legislations in order to stabilize the employment of non-standard workers. In Korea's case, the Labor Standards Act and the Law for the Protection of Temporary Workers (hereinafter referred to as "Temporary Workers Law"), which was legislated in 1998, have provided some protection for non-standard workers under some of their articles. But the content and range of the protective articles are too simple and confined to solve in an efficient way the many legal problems arising from non-standard employment.

B. Legal Rules of the Formation of Employment Relations

1. Freedom of Employment Rule

The formation of employment contracts has traditionally been based on the freedom of contract rule where it was up to the worker and the employer. Except for restrictions of the law and collective agreements, the employer normally does not have any hindrance concerning the content of the employment contract such as the purpose, period, the means and procedure by which the contract is formed. Further, the restrictions of the law and collective agreements mostly concern standard workers, and the employer enjoys much freedom when it comes to deciding the employment and work conditions of non-standard workers. On the other hand, this freedom of the employer's means restriction for the non-standard worker because of the subordination

of the laborer to the employer. The spread of non-standard employment is the result of the worker's subordination to the employer which, in turn, further encourages an even greater spread of non-standard employment. The need for legal restrictions of non-standard employment and work conditions comes about because this imbalance between freedom and subordination needs to be eliminated.

2. Regulation of the Purpose of the Contract

(a) Restriction of the Employment Purpose

The employer enjoys wide freedom in employing non-standard workers. Under the current law, there does not exist a comprehensive set of rules which regulates the use of non-standard workers. Only rarely is their use restricted. When a non-standard worker is used for a special purpose, there are three regulations that apply.

First, a worker cannot be employed or substituted for work which has been suspended due to a labor dispute (Labor Union Law, article 43, clause 1). This rule applies to both standard and non-standard workers, but it has more meaning in regulating the employment of non-standard workers because of the temporariness of a labor dispute. But since the purpose of the ban on substitute employment is the guarantee of collective action, the ban has no real relevance to the security of the non-standard worker's employment. In non-standard employment, however, there exists an explicit rule regulating temporary work.[8)]

Second, the employer cannot employ a temporary worker within two years of dismissal that occured based on special reasons (Temporary Worker Law, article 16-2, Regulation article 4). The purpose of this rule is to eliminate the possibility of illegally substituting standard workers with non-standard workers. However, the effectiveness of this rule is very limited, because even though the employer cannot employ temporary workers, he can still obtain the same result by employing other types of non-standard workers. Without any restrictions on substantial conditions such as the purpose of the use of temporary employment or the intention of the temporary worker,

8) Temporary Workers Protection Law states that "a temporary employer cannot dispatch a worker for the purpose of completing a job that was subdued because of a strike". When this rule is violated, the employer receives a sentence of less than 1 year or a fine of less than 10,000,000 won. (articles 16 and 44).

there exists a possibility of the misapplication of this rule because the contract period can be shortened to six months if a collective agreement exists that includes more than half of the workers. Therefore, a need exists to widen the application of this rule to include all non-standard workers and to be more strict in emphasizing the restrictive reasons and period. In the Labor Standards Act, there is a provision which performs a similar function. This provision states that when an employer wants to employ workers within two years of dismissals, he must employ the dismissed workers first (article 31-2). However, even this employment-first responsibility exists in the form of an effort clause, and the dismissed workers can be employed not as standard workers but as non-standard workers, weakening the enforcement of the rule.[9)]

Third, the Temporary Worker Law regulates the purposes of temporary employment. The two regulations mentioned above are based on a purpose other than protecting the security of the non-standard worker's employment; namely, the security of collective action and guarantee of the propriety of the dismissal purpose. The aim of regulating the purposes is to lessen the use of temporary employment and possibly encourage direct employment of workers, thereby securing the employment of non-standard workers.

The Temporary Workers Law permits the use of temporary workers in three categories of situations: when a business requires specialized knowledge, technology or experience; when a vacancy occurs due to temporary disability such as pregnancy, sickness, or accident; and when workers are needed for other temporary, intermittent purpose (article 5 clause 1 and 2). There can also be some acceptable reasons in using non-standard workers instead of standard workers because of economic fluctuation and a company's need to fill a temporary vacancy or to increase intermittently the number of workers. However, the possibility of exploitation by the owners of the temporary work agencies raises some doubt as to whether using temporary employment rather than other forms of non-standard employment contributes to employment stability. Also, businesses that require specialized knowledge, technology or experience are bound by regulation, but the reason for employing only non-standard workers in this

9) Temporary Worker's Protection Law sub-clause 4 states that 'according to article 16, clause 2, when a dismissal occurs due to administrative reasons stated in the Labor Standards Act article 31, a temporary worker cannot be hired in this work place for two years. But when a labor union consisting of more than half of the work force and this labor union consents, this period can be adjusted to 6 months.'

area of business is rather vague. Because of the serious nature of employment instability, there must be a truly reasonable cause in allowing this kind of employment. When a business has a daily, not temporary, requirement of a special skill or experiences, using standard workers seems to be more appropriate.

(b) The Legal Effect of Violation of the Law

When an employer uses a non-standard worker for an illegal purpose, each penalty set forth by the laws is applied. But then what is the legal effect of the forbidden employment? There is no law that regulates the effect, and so it is up to the judgment of the court to decide on the penalty. Recently, a temporary worker filed suit against an employer claiming an illegal dispatchment because the necessary permit had not been obtained. [10] The worker lost. In this case, the court did not explicitly state its position, but as a practical result, took the position of acknowledging the legal effect of illegal dispatchment.

3. Regulation of the Period of the Contract

(a) Non-Standard Employment other than Temporary Work

There is a special relationship between the period of an employment contract and the dismissal regulation system. An employment contract that has a fixed period ends when the period is up, and does not need another dismissal reason, nor does the rule of giving advance notice of a dismissal.[11] Generally the period of a non-standard employment contract is pre-fixed and short. Regarding the formation of the employment contract's period, the Labor Standards Act article 23 states: "Even if a certain period is set for the completion of certain tasks instead of the period of employment contract being fixed, the certain period cannot exceed one year". The purpose of this requirement was to avoid long term personal restraint on the worker, but today along with this purpose, there exists a second aim, i.e. securing stable

10) Seoul South District Court, 4th civil division, 2001.9.14, 2000 Gahap 9001 case.

11) Hyundai Construction case, Supreme Court 1992.9.1, 92 Da 26260 case; Kumsung Tours case, 1995.7.11, 95 Da 280 case etc.

employment. Therefore obtaining a worker's freedom to quit by not allowing employment contracts to have a fixed period has become a general international rule. But a few years ago, the Supreme Court, by changing opinions in its cases, has declared that along with short-term employment contracts of less than one year, even partly long-term employment contracts of more than one year are valid.[12] This change in decisional rule has tainted the meaning of the dismissal restriction rule and also has resulted in making non-standard workers vulnerable to the dangers of employment instability. Therefore it is important to declare explicitly by law that the formation of a contract without any fixed period is the basic rule, and that when forming an employment contract with a fixed period, it is essential to establish an appropriate maximum period in accordance with the purpose of the contract.

(b) Temporary Work

Under the current law, the only regulation that deals with the period of an employment contract exists under the Temporary Worker Law. Under this law, the dispatchment period is regulated in three categories according to the characteristics of the business or the reason for dispatchment: ① Business that needs specialized knowledge, technology or experience cannot have a contract period of more than one year (however, a period of less than one year can be prolonged, though only once, provided that both parties have reached an agreement) ② Clear and definite reasons such as pregnancy, sickness, or accident can support a contract period long enough to relieve the cause ③ When there is a need to obtain temporary, intermittent work force, a contract period of less than three months is allowed. (However, when the cause is not relieved and there is agreement among the parties, a period of less than three months can be prolonged, but only once, article 6, clauses 1 and 2)

The problem with the current law in relation to the regulation of the duration of temporary employment is the legal effect of the violation of the duration regulation. The only pertinent regulation dealing with any such legal effect in the Worker Temporary Worker Law states that unless the temporary worker explicitly opines

12) Korea KDK case, Supreme Court 1996.8.29, 95 Da 5783 case. The main contents and meaning of this case can be found in Cho Kyung Bae, *Study on the Labor Law Principles and Structure of Employment Protection*, Seoul National University Doctor's Degree Thesis, 1997, p. 202 footnote 237.

otherwise, the employer is presumed to have directly employed the worker starting the day after the 2 years are up (article 6, clause 3) when a temporary worker is continuously employed for over two years. Therefore, there is no regulation on what the legal consequences are for using a temporary worker for more than the two-year period. For situations ① and ③, such extensions beyond the two-year period occur when the contract period is prolonged without the worker's consent, when the contract was extended more than twice or when the employee was retained for over three months even with the worker's consent. For situation ②, an extension occurs when a temporary worker is used even after the cause is relieved. There needs to be a legislative reinforcement to resolve this problem.

4. Procedural Regulation

The spread of non-standard employment not only brings about the employment instability of non-standard employees, but also that of standard employees by bringing about non-standardization of standard employees. Therefore a democratic procedure of forming and reflecting workers' opinions is needed. This procedural regulation should provide a restraint on the freedom of the employers to make arbitrary decisions in non-standard employments, thereby allowing maintenance of the reasonableness and adequacy in the decisions relative to non-standard employment. However, the procedural regulation affecting the use of non-standard employment under the current law is inadequate in proper restraint of the use of non-standard employment. The reasons are as follows.

First, the procedural regulation of the current law relates only to the use of temporary work, and there are no regulations for other non-standard employment.[13] Even the Temporary Worker Law regulates only the minimum standard of responsibility and has no penalty provision, which is tantamount to there being almost no legal mandate.

Second, the procedural regulation of non-standard employment by collective

13) Temporary Worker Law states that when a user employer wants to hire a temporary worker, the employer must negotiate with the labor union in advance if there exists a labor union consisting of over half of the workers in the work place. If there isn't such a labor union, then the employer must negotiate with a worker who represents more than half of the workers.

agreement has its limits. In response to the rise of non-standard employment, there have been cases in which some labor unions formed with employers agreements not to employ non-standard workers after dismissals and desired retirement from companies. Of course these agreements are useful restraint methods provided that the employers abide by them, but when they do not, there is no adequate legal resolution. Keeping in mind the fact that the rate of organization of labor unions is very low (about 12% of total workers), and that in relation to a company's personnel and business matters, courts tend to interpret narrowly any opportunity to offer opinions in formulating collective agreements or agreement clauses, it can be said that at least legally, the regulating function of collective agreement is very weak.[14)]

Consequently, the procedural regulation under the current law is not very efficient in restraining non-standard employment. Therefore an adequate solution is needed and, rather than leaving it up to the employers and workers, a more active legislative resolution must be made.

C. The Legal Rules on the Termination of an Employment Relationship

One of the reasons why the employer favors the use of non-standard workers is its facility in reshaping employment according to the changes in economy. Considered in a legal sense, this is the same as widening the employer's freedom of dismissal, and reducing or eliminating the worker's right of labor. But, as the burden on the company is reduced, the social charge increases by a like amount. Therefore the maintenance of the employment relationship of the non-standard worker cannot be left entirely up to market 's free control. To do so would be to leave the non-standard worker to the employer's mercy because of the subordination of the former to the latter. Rather, the government must actively intervene and interfere.

The restriction on dismissals, being the only legal means under the current law to maintain an employment relationship, has been legislated with respect to standard workers, and as such cannot function as an adequate regulatory method to control the increase of non-standard workers quantitatively or qualitatively. If one is to look at the problems of the current regulation of dismissals as applied to non-standard workers,

14) Cho Kyung Bae, *supra* note 12, at 114.

one can divide them into two categories: the unfair burden of the risk of unemployment and the defect in law allowing the continued use of non-standard workers.

1. The Unfair Burden of Risk of Unemployment

In most cases, a non-standard employment either implicitly or explicitly takes the form of an employment contract with a fixed period. Therefore, in the first place the termination of the contract is not treated as a dismissal. This is why the burden of the risk of unemployment unfairly falls entirely on the employee. By not having the dismissal regulations applied, the employer can easily control employment and avoid the responsibility of having to pay the retirement fee, the pre-dismissal charge or the burden of social security fees.[15] On the other hand, the worker loses his job and wages, and does not have any security while being unemployed. This is the reason that the employer must take the responsibility of paying for the employment instability with the profits he makes using a non-standard worker. However there is no provision under the current law requiring the employer to make such payments.

2. The Continued Use of Non-standard Employment

The continued use of non-standard employment means that the employer repeatedly forms non-standard employment contracts with fixed periods. This type of non-standard employment can bring about the effect of having non-standard employment replace standard employment with respect to the daily business and operation of companies, and allowing the employer to avoid the application of the rules of dismissal restriction and to lower the wages and labor maintenance fees. But for the worker, the retention of discriminative work conditions and the maintenance of employment instability spell great losses.

The various forms of the continued use of non-standard employment are as follows; ① repeated renewals of the fixed term employment contract ② continued use

15) Temporary workers, intermittent workers of less than 3 months, seasonal workers or short-time workers can neither be members of work force labor unions nor beneficiaries of the National Pension Law or National Health Insurance Law. Time based workers and temporary workers do not have the right to receive the unemployment benefits under the Employment Insurance Law (articles 8 and 30).

of different non-standard workers for the same work and ③ continued use of the same worker for different jobs. Among the three forms, precedents and theories provide a solution for the repeated renewals of employment contracts to some extent, but the other two forms are left unaddressed. But, as stated above, for a temporary work, the contract can be renewed once with the agreement between the parties, and if the dispatchment period in total exceeds two years, then the employer is deemed to have directly employed the worker (article 6).[16)]

Among the forms of continued use of non-standard employment, there are still problems of legal interpretation regarding the regulation of repeated contract renewals. Almost all precedents and theories look upon denied renewals of previously repeatedly renewed contracts as dismissals, and consider them employment contracts without fixed periods. But it is unclear as to how many renewals must occur before the contract in question can be considered as not having a period fixed. Also, with implicit renewals, precedents refer to civil law article 622 and consider the implicitly renewed contracts as contracts with fixed periods, each fixed period being of the same duration as the preceding period [17)] However, there is no unified legal theory regarding this subject [18)] As a result, there is a legal deficiency and argument of interpretation about the continued use of non-standard employment. A need for stable legislation exists.

D. The Objectives of the Law Legislated for the Protection of Employment and Work Conditions

1. Basic Direction

The basic goal of the regulation of non-standard employment is achievement of both flexible business administration and employment stability. By restraining the spread of non-standard employment, the occurrence of unemployment can be curbed and the real employment demand of the company and the choice of the workers can

16) Temporary Worker Law article 6 has a lot of vague legal points. For example, the term 2 years is unclear as to whether it only means hiring the same temporary worker or whether it also means hiring temporary workers on a rotation basis. The Department of Labor's administrative interpretation and precedents see it as the former, but this is criticized as contradicting the employment protection of temporary workers.

17) Hyundai Construction case, Supreme Court 1986.2.25, 82 Daka 2096 case.

18) For example, professor Kim Hyung Bae sees it as an employment contract without a fixed period being

reasonably be accommodated. For this reason, first in order to resolve the vague laws and ambiguities present in the opinions of the Supreme Court, adjustment must be made to the Labor Standards Act articles dealing with the employment contract period and clarifications must be made regarding the legal effects of illegal use of non-standard employment. Second, the employment instability of non-standard employment must be removed and the regulation promoting improvements in the work conditions must be strengthened. Employment stability is an absolute pre-condition for a worker to exercise his/her rights under Labor Standards Act and Labor Group Law. Because non-standard employment can be used to avoid illegally the rules of dismissal restrictions, a suitable legislation must be provided and the lure of non-standard employment must be weakened by strictly enforcing the rule of "equal work, equal wage." Third, the social balance of the burden of unemployment risk must be made more level between the worker and the employer. The current law only lessens the burden of the employer and demands the one-sided sacrifice of the worker. Last of all, when coming up with a legislation to increase the stability of non-standard employment, the objective employment conditions, the tendency of the court's interpretation of the law and the employer-worker relationship must all be taken into consideration.

2. Direction of Definitive Improvement

(a) The purpose of the use of non-standard employment is regulated by law. The basic rule is not to set a fixed period of the employment contract. Further, for the company's daily continuing business, the law prohibits the use of non-standard employment and requires direct employment. However, the law excludes from the prohibition of the use of non-standard employment certain businesses which are stated in the Temporary Worker Law, for example, businesses requiring specialized technology, experience or knowledge. Also, for the temporary, intermittent

formed after the original period is up (Kim Hyung Bae, Labor Standards Act, p. 116), while professor Kang Seung Tae focuses his attention on whether an objective, reasonable case of the formation of the period exists, and when it does, a new period that is of the same length as that of the previous period is seen to have formed, but when it does not, a period is seen as not to have been formed at all. (Kang Seung Tae, *The Regulation of Employment Contract with a Fixed Period*, Labor Law Volume 7, pp. 189-190).

demand, a limited use of the non-standard employment is allowed.

(b) Even when non-standard employment is allowed, the maximum period is regulated in order to prevent the replacement of standard employment with non-standard employment. The maximum period is restricted.

(c) The rule of non-discrimination is stated. The rule of non-discrimination brings about the improvement in the treatment of the non-standard worker. This has the effect of indirectly restraining the spread of non-standard employment by reducing the allure, for the employer, of the discriminatory work conditions of non-standard employment.

(d) In order to be valid, a non-standard employment contract must be formed by a written document. A documented contract can clarify the purpose of the use of the non-standard employment and clarify the employment conditions and work conditions for the worker, thus preventing abusive use of non-standard employment and unreasonable discrimination of the worker. Also, the document allows the government to administer the employment efficiently and the court to make a judgment easily when a conflict occurs.

(e) As the procedure of the use of non-standard employment is regulated, the participation of the worker is secured. Although the participation level and range of the worker should be decided according to the circumstances of each situation, at the least a pre-agreement or consultation must be reached with the labor union or the leader of the workers.

(f) Employer's responsibility to contribute toward employment instability compensation is newly formed. This is a method used to bring about equal distribution of unemployment risk. When the employer uses non-standard employment, he is obliged to pay compensation for employment instability. To determine the level of compensation for employment instability, the period and wages must be considered, but the minimum amount can be based on the pre-dismissal expenses.

(g) A legal tool is available for the prevention of repeated, continuous use of non-standard employment. First, when a fixed-period contract is repeatedly renewed with the same worker or a dispatchment contract is repeatedly renewed for the same business, the renewal is allowed only once within the legal period. If the renewal occurs more than once, the result under the law is the formation of an employment contract without a fixed period. Next, the law prohibits a company

from continuously forming a temporary contract with a different worker or continuously forming dispatchment contracts for the same business. If this rule is violated, the law assumes an employment contract without a fixed period to have been formed. However, if the employment relationship with a previous temporary worker or a temporary worker has ended before the fixed period was over, the worker can still be used within the remaining period. But repeated formation of temporary employment or dispatchment contracts with the same worker for another business is not permitted and when this rule is violated, an employment contract without a fixed period is regarded as having been formed.

(h) A method must be sought after to secure the effectiveness of a legislation that regulates non-standard employment. When the law is violated, first criminal punishment is given. When basic conditions such as the purpose, contract period, documented contract of non-standard employment are violated, even though the contract itself is not nullified, the contract is deemed to have been changed to a contract without a fixed period, thus clarifying the legal relationship between the parties.

IV. The Legal Regulation of Collective Labor Relationship

A. Phenomenon of the Atrophy of the Right of Collective Labor Action

Because a non-standard worker is a worker under the purview of Labor Union Law, it goes without saying that he has rights of collective argument and action. Especially for a non-standard worker, what is needed is reforming discriminatory treatment by self-reformative efforts expressed through collective action. There are many technical difficulties in achieving security through legislation because the diversity of work rule which is a general rule is vague and ambiguous as a judging standard. As a consequence, many problems are predicted to occur that cannot be solved by legal theories .

The right of collective action of non-standard workers can be exceedingly difficult or impossible to exercise due to the imbalance of power between the employer and worker which is based on instability in the employment itself, restriction of time and place, and conflict with standard workers. Also, the article of the Labor Union Law banning multiple labor unions works as a restraint of the right to unionize, and causes

the workers' right to collective action to be ineffective.[19] This brings about a wider gap between reality and law. The disadvantage of non-standard employment relative to the exercise of collective action differs with the form of employment. We will take a look below.

B. The Right of Collective Action of Directly Employed Non-Standard Workers

The greatest hindrance to the exercise of the right of collective action of directly employed non-standard workers is the unstable contract relations called "temporary employment." With a temporary employment, the period of the contract is fixed. Therefore, the existence of a labor union formed based on such contracts is not guaranteed because the contract may not be renewed when the original period expires. Because of the daily employment instability, the formation or joining of a labor union is not taken on enthusiastically by the non-standard worker. Even if a labor union is formed with difficulty, a problem that arises is not solved by the labor union actively taking part, but rather by an individual quitting his job. Also, a temporary worker often changes his status to a contractual, temporary worker, thus making it very difficult for the stable activity of a labor union. Likewise, with temporary employment, the instability of the employment itself hinders the lasting activity of a labor union.The next hindering factor in the formation of a labor union for directly employed non-standard workers is the actual article that bans multiple labor unions in one business. This article, ever since it was legislated in 1963, has unfairly restricted the freedom of association, and not only has it earned domestic criticism, but it has also earned the criticism of international human rights organizations such as the Committee of Social Rights of the UN, Committee of the Freedom of Association of the ILO which have suggested the abolition of the article. In response, in February 2002, the article was due to be annulled, but perversely it was extended for another 5 years, blocking the possibility of the organization of directly employed non-standard workers. This resulted in several labor unions not obtaining their formation certificates and caused other labor unions to be formed only after going through a lot of difficulties. There is

19) Labor Union Law Act article 5, clause 1 states that "when a labor union is formed in a workplace, under article 5, until December 31, 2006, a new labor union that has the same structure as the existing one cannot be formed". This article bans the formation of multiple labor unions.

also a case being reported in which the administrating side had sent an order through a collective agreement to the companies, saying "To prevent non-standard workers from forming labor unions by themselves, include them in the harmonious whole of employees."

C. Right of Collective Action of Indirectly Employed Workers

For indirectly employed workers, the opposing parties to collective action are the employing business and the user employer. Especially the user employer who actually influences the employment and work conditions of the worker, and thus the security of the right of collective labor action is the most important in this regard. In other words, the person who is in a position to interfere with the exercise of the right of collective labor action of indirectly employed workers is the user employer. The user employer actually directs and administers workers working in his business. So, even though he directly influences the employment and work conditions, he can refuse to conduct collective negotiation with the labor union because he is not a formal party of the employment contract. Such refusal hinders the activity of the union. According to a research made by labor unions, there are often reports of unfair labor union-related and labor-related actions which include interference and control of association activities, such as annulment of contracts and dispatchments.[20)]

1. The Formation and Joining of a Labor Union

Relative to the right of association, the first legal problem that arises is the user employer's unfair labor action. Examples of such actions are; user business' nullification of the dispatchment or service contract or threatening to do so if the workers form or join a labor union, and user business' request for a change of labor union members and trying to make members withdraw from the union through persuasion and threats. In these cases, the user employer explicitly states in dispatchment or service contracts that when a labor union is formed, the contract will be annulled, or provides provisions in the contract that will make it possible for the

20) Dispatchment Abolition Legal Advice Team *The Legal Reality of Dispatchment Service Workers*, Democratic Law, Volume 19, 2001, p. 16.

user employer to nullify the contract arbitrarily. The nullification of dispatchment service contracts means dismissal for the worker. The reason is that most dispatchment service businesses' employment contracts take the form of recruitment or temporary employment contracts. Consequently, the user-employer's threat of contract annulment and exercise of the right of annulment directly brings about the collapse of the labor union. The most effective legal method for securing the formation and joining of a labor union is the Labor Union Law's unfair labor action system, but the question whether the user-employer can be encompassed under the term "employer" as the subject of unfair labor action provision of Labor Union Law article 81 must first be resolved.

The second legal problem that arises is related to the structure of the labor union itself. Three types of structures exist: (1) when workers belonging to the same dispatchment business form a labor union (2) when dispatchment service workers join an already-existing labor union of the user employer and (3) when there are many sub groups to one business, workers of all groups form a labor union.

Under the current law, the structure of single labor unions is not regulated, so the workers are free to choose. Therefore when indirectly employed workers join already-existing labor unions of the dispatchment business, or join both the dispatchment business union and the user business's union, it cannot be seen as an issue of the right of association. But in situation (1), because the places of labor are different for the workers and the size of the dispatchment business is small in most cases, this labor union structure does not have high visibility. Also, dispatchment, service businesses often appoint union members as assistants to police union activities or interfere with the union's activities by redispatchment (multiple dispatchment). In situation (2), the lack of legal basis for the administrative interpretation of the Ministry of Labor concerning amendments of rules and unfair enforcement of labor union structure poses a serious problem.[21] Last of all, concerning the most general type of structure, situation (3), there are a lot of cases in which the union's activities are interfered with by user employer's threats of contract annulments and refusal of contract renewals.

21) Labor Union 01254-131. 2001.12.17.

2. Right of Collective Negotiation

The question to ask is whether the user employer has the responsibility of collective negotiation. The party with whom the dispatchment service workers want to negotiate collectively is the user employer. The reason is that dispatchment service workers work under the order of user employers in their places of business and also that the person who really controls the work conditions is the user employer. But formally the direct party to the employment contract is the employing dispatchment business. So, a question arises as to whether when the user employer refuses to engage in collective negotiation, this can be seen as an unfair labor action. In such a case, along with the above mentioned hindering actions against the formation and joining of labor unions, the key to solving the question is whether the user employer can be encompassed in the term "employer" as it is used in the Labor Union Law.

3. Right of Collective Action

For the right of collective action of indirectly employed workers, the user employer's characterization as an employer is the standard for determining the reasonableness of collective action. In an exemplary case, a user employer nullified the service contract of a service worker because of the formation of a labor union, and thereafter employed only non-labor union workers. Workers of labor unions demanded the withdrawal of contract nullifications and total re-employment, but the user employer declared that he had nothing to do with the labor dispute and asked for a ban on disruption of work and provisional disposition of the eviction of the labor union's office which the court granted.[22] In relation to these facts, though Temporary Worker Law article 21 states, "user employers cannot nullify temporary worker contracts for reasonable labor union activities of temporary workers," I doubt the effectiveness of this article. Thus even if the annulment of dispatchment contracts is invalid because of the violation of the law, the user employer suffers no ill effect since the employing business does not actively argue the invalidity, though the dismissed worker sues the employer arguing the invalidity of the dismissal. It is clear that the protection of rights through general civil procedures is mostly ineffective. Therefore voluntary efforts such

22) Seoul West District Court, 2001.12.27, 2000 Kahap 1487 decision.

as collective negotiation or action are needed, and again the question of the user employer's characterization as an employer should be resolved promptly.

4. The Legal Assignment for the Protection of the Right of Labor Action

As previously mentioned, the road to protecting the exercise of the right of labor actions of indirectly employed workers involves identifying the true interferers without regard to the form of employment. Otherwise, the protection of the right of legal action and purpose will be damaged by illegal actions of the employer. On this point, the rulings of the court and decisions of the Committee of Labor cannot be seen as legal judgments based on balanced senses in relation to the reality of labor. According to the court's ruling relative to the responsibility of responding to collective negotiation, an employer subject to the Labor Union Law can be defined as "a person who has subordinate relations with the worker, orders, administers the worker, obtains work from him and in return pays wages, and implicitly or explicitly has employment relations with the worker." [23] Only some one who implicitly or explicitly has employment contract relations can be seen as an employer under the Labor Union Law. The Committee of Labor takes a similar position: when a user employer encourages or threatens a member to drop out of a labor union, the Committee did not see the user employer as an employer who is not allowed to engage in such unfair labor actions and dismissed the case.[24] However, legal scholars criticize the court's decision and take the position of not limiting a Labor Union Law's employer to a party to an employment contract. Since there exist differences between scholar's theories and the court's ruling, there is a need for clarifying legislation. Further, in interpreting the law, we should concentrate not only on the wordings of the law and form of the contract, but also on interpreting them in an adequate, reasonable and imminently fair way.

23) Supreme Court 1995.12.22, 95 Nu 3565 decision.

24) Central Labor Committee 2000.11.28, 2000 Buno 95 decision.