

# Employment Discrimination in Taiwan

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## I. Introduction

The issue of employment discrimination is a relatively new development in Taiwan and has become more prominent following the lifting of martial law in 1987.<sup>1</sup> Especially in recent years, as concern for protecting socially disadvantaged groups—ethnic minorities, women, disabled workers and the elderly—has become more pronounced, the issue of employment rights and opportunities has steadily gained public attention. Following recent trends in globalization, freedom from employment discrimination is a fundamental right which should be enjoyed by all workers throughout the world, with the International Labor Organization (ILO) designating two conventions related to the prohibition of employment discrimination as “core” labor standards.<sup>2</sup> With Taiwan’s increasing assertiveness to rejoin the international community, the government has devoted substantial resources to incorporate these international conventions into its domestic labor laws.

Currently, Taiwan has two separate but closely related legal regimes governing the issue of employment discrimination. The backgrounds, developments and ultimate achievements of these two regimes are markedly different. The first regime was established under the Employment Service Act of 1992, which was originally intended to regulate foreign workers. It states in Article 5 that in order to ensure national workers’ employment opportunity and equality, employers cannot discriminate employees and job applicants on the basis of race, class, language, thought, religion, marital status, party affiliation, age, birthplace, one’s provincial/county origin, gender sexual orientation, facial features, appearance, disabilities, and former membership in labor unions. Article 5 of the implementation regulations of the Act also mandates that municipal cities, county and city governments, form commissions on employment discrimination to enforce the above Act. Currently, the above-mentioned commissions have been established throughout Taiwan, including the outer island counties of Kinmen and Matsu.<sup>3</sup>

The second regime concerns the Gender Equality in Employment Act of 2002. This law primarily addresses issues of gender discrimination in the workplace. Its enactment was instigated by an active and vocal women’s rights movement in response to the prevalence of gender discrimination in employment in Taiwan. According to this law, the Council of Labor

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<sup>1</sup> For a detailed account of the labor scene and labor law reforms before and after the lifting of martial law in 1987 in Taiwan, see Cing-Kae Chiao, *Democratization and the Development of Labor Law in Taiwan: 1987-1999*, 8 JAPAN INT’L LAB. L. FORUM SPECIAL SERIES 11-24 (March 1999).

<sup>2</sup> See Cing-Kae Chiao, *Globalization and the Protection of Fundamental Workers’ Rights*, 17 THEORY & POL’Y 77, 82-87 (January 2004).

<sup>3</sup> See Cing-Kae Chiao, *An Evaluation of Current Situations and Practices of the Prohibition of Employment Discrimination System in Taiwan*, 31 NAT’L TAIWAN U.L.J. 131, 146 (2002).

Affairs of the Executive Yuan (equivalent to the Ministry of Labor), municipal cities, county and city governments are required to form commissions on gender equality in employment to deal with issues of gender discrimination in the workplace. Five years after the implementation of these commissions, there has been marked success in combating gender-based employment discrimination. However, it should be taken into consideration that further reforms are still necessary.<sup>4</sup> The specificities of these issues will be discussed in later sections of this paper.

The two separate legal regimes to a certain extent address some issues regarding employment discrimination. However, in many ways they neglect other additional and important types of employment discrimination, such as age and sexual orientation. In addition, it has been acknowledged that there are complications involved in utilizing two separate legal regimes to adequately combat existing and additional types of employment discrimination. Thus, in response to these complexities, the government is currently in the process of combining, streamlining and reforming these two existing acts. The drafting of the new Equality in Employment Act also intends to garner insights of several developed countries. The enhanced combined version will likely be enacted and implemented in two years time.<sup>5</sup>

The purpose of this paper is to evaluate the effectiveness of the two anti-discrimination legal regimes, and to discuss their future direction and propose possible areas of reform. In addition to the introductory and concluding remarks, the contents of this paper are divided into five sections: Section One provides general background regarding the phenomenon of various types of employment discrimination in Taiwan in recent years by using statistical data and surveys provided by the government and related research projects. Section Two outlines and introduces the legal frameworks addressing this social problem. Section Three reviews how the legal framework established by the Employment Service Act copes with issues relating to employment discrimination. Section Four assesses the role played by the Gender Equality in Employment Act of 2002 in curtailing gender discrimination in the workplace. Section Five evaluates the merits, shortcomings and controversies of the current legal framework and discusses the prospect for future reforms.

## **II. General Background about Employment Discrimination Issues in Taiwan**

This section will first discuss the prevalence of gender discrimination in the workplace in Taiwan, followed by an outline of other forms of employment discrimination. Finally, it will present several emerging forms of employment discrimination that have become evident in Taiwan in recent years.

### **(1) Gender Discrimination in Employment**

Currently, among the differing forms of employment discrimination, gender discrimination is taken most seriously by the general public. This type of discrimination is also the most extensively researched and documented by researchers. In Taiwan, the most recent female labor participation rate is only 49.20%, compared to the male labor participation

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<sup>4</sup> See Cing-Kae Chiao, *The Enactment of the Gender Equality in Employment Law in Taiwan: Retrospect and Prospect*, 16 JAPAN INT'L LAB. L. FORUM SPECIAL SERIES 34-38 (March 2002).

<sup>5</sup> The task of drafting this new statute is assigned to the Department of Working Conditions, Council of Labor Affairs, Executive Yuan.

rate of 67.33%.<sup>6</sup> In further comparison, Taiwan's female labor participation rate also lags behind corresponding female labor participation rates in neighboring countries, such as Japan, South Korea, Singapore and Hong Kong. These statistics reveal that Taiwan's female potential labor resource has not been fully utilized and also shows that institutional barriers and traditional social and familial roles may disadvantage female workers.

In terms of wage equity, despite the norm of equal pay for equal work regardless of gender mandated by Article 25 of the Labor Standards Act, average female wages account for only 81% of wages earned by their male counterparts. The gender segregation phenomenon is also prevalent in both the public and private sectors, with female workers comprising a disproportionate number of workers holding lower end jobs.<sup>7</sup> These workers also experience difficulty in being promoted toward decision-making positions. These factors provide some indication that the so-called glass-ceiling effect is still a prevalent problem in the Taiwanese labor market. For example, according to the latest figures published by the Ministry of Personnel of the Examination Yuan, which is in charge of civil servant affairs, despite the fact that females represent 45% of total civil servants in Taiwan, only 13% occupy high-ranking positions within government institutions. They account for 35% and 36% respectively, of the mid to lower range positions.<sup>8</sup>

Sexual harassment in the workplace has recently been the subject of considerable public attention in Taiwan. Sensational medial coverage in the early 1990s as well as a battery of studies and surveys have revealed that 15-33% of women have experienced or noticed unwanted sexual conduct in the workplace. There are two major types of sexual harassment: *quip pro quo* and hostile working environment, and both are regarded as gender discrimination in the workplace.<sup>9</sup> Given that the majority of businesses in Taiwan are family owned small, or medium sized businesses, employers have considerable power in wielding managerial prerogatives. The concept of employment at will is an engrained attitude in Taiwan. In addition, after work social activities are usually mandatory and linked to an employee's performance evaluation. Under these circumstances, it is inevitable that sexual harassment has become a problem. Typically in cases regarding sexual harassment in the workplace, most of the victims are women while perpetrators are usually men in senior positions. Indeed, the government has come under intense pressure by women's advocacy groups to address this issue.<sup>10</sup>

Finally, the phenomenon of pregnancy discrimination is widespread. In addition to overt discriminatory practices, such as refusal to hire pregnant women or forced discharge of pregnant employees, "resourceful" employers also resort to subtle means of forcing pregnant workers out of the labor market. One common practice in the past was a labor contract containing a provision requiring a female employee to "voluntarily" resign from her job after assuming responsibilities of marriage, pregnancy and family. Even though such practices were eventually outlawed with the passage of the above-mentioned Gender Equality in Employment Act, there were still ways and incentives for employers to discriminate.<sup>11</sup> One

<sup>6</sup> For this most current statistics, see COUNCIL OF LABOR AFFAIRS, EXECUTIVE YUAN, MONTHLY BULLETIN OF LABOR STATISTICS 11 (April 2007).

<sup>7</sup> See CHIN-FENG CHANG AND TSAI RUEY-MING, LABOR FORCE AND LABOR MARKET 106-111 (2006).

<sup>8</sup> See MINISTRY OF PERSONNEL, EXAMINATION YUAN, CURRENT SITUATIONS OF PUBLIC EMPLOYMENT IN TAIWAN AREA 3-4 (2005).

<sup>9</sup> See Cing-Kae Chiao, *Sexual Harassment in the Workplace in Taiwan*, 1 NAT'L TAIWAN U.L. REV. 97, 111 (March 2006).

<sup>10</sup> *Id.* at 110-111.

<sup>11</sup> Chiao, *supra* note 4, at 22-23.

recent form of pregnancy discrimination goes by the euphemistic “fetal protection policies,” where a number of employers cite occupational safety and health provisions in the Labor Standards Act and Labor Safety and Health Act as a reason to not hire pregnant women.<sup>12</sup>

## **(2) Other Forms of Employment Discrimination**

The fact that Taiwan’s population is predominantly Han-Chinese in ethnic makeup does not preclude the existence of race-based employment discrimination. The existence of a small indigenous aboriginal population of Malay-Polynesian origin and the employment rights of this ethnic minority has been a subject of great debate. Because of social stereotyping and discrimination, aboriginal workers are mainly employed in manual labor occupations. In addition the settlement of aboriginals in predominantly rural mountainous regions has made it difficult for them to adapt to urban lifestyles; consequently, this has caused difficulties for these individuals when attempting to obtain long-term employment. Despite the fact that Taiwan has passed the Protection of Aboriginal Employment Rights Act of 2001 to guarantee work for regions with higher concentration of aboriginals, along with other related measures that have been put into practice by the Council of Labor Affairs to increase their employment opportunities, these efforts have largely failed to improve their plight. According to recent statistical data released by the Council of Aboriginal Affairs of the Executive Yuan, the unemployment rate of the aboriginal population is twice as high as the official national unemployment rate. In addition, the average wage of aboriginal workers makes up only 65% of wages earned by their Han-Chinese counterparts.<sup>13</sup>

Besides forms of racial discrimination, ethnic discrimination in the workplace is also a growing problem in Taiwan. Owing to the fact that Taiwan is an island of immigrants, the different waves of immigration over the last three centuries has shaped diverse “ethnic” identities, an issue which has gained prominence due to a government efforts in promoting policies of “localization.” Despite the fact that the Han-Chinese make up the vast majority on the island, they are often divided into three ethnic groups based upon their “provincial origin” and time in which their ancestors immigrated to Taiwan. These groups are the Hoklo (from Fujian, accounting for about 65% of the ethnic Han majority), Hakka (primarily from Guangdong, accounting for about 15% of the ethnic Han majority) and Mainlanders (wave of immigrants from various regions of China following the Nationalist government’s relocation after the Chinese Civil War, accounting for 14% of the ethnic Han majority). Because each ethnic subgroup uses a different dialect, Mandarin serves as Taiwan’s national language to facilitate linguistic communication. Recently, in an effort to promote “Taiwanese localization” and distinctiveness from China, the government has tried to place more emphasis on the use of local dialects, rather than continue the universal use of Mandarin. These policies have also caused an observable form of ethnic discrimination in the private sector where businesses are predominantly small to medium sized, family owned enterprises. In this sector where business owners often have indisputable power, the preference of using local dialect over Mandarin has created situations in which employees or job applicants who cannot adequately communicate in the dialect of choice are discriminated against.<sup>14</sup>

Another form of employment discrimination receiving increasing attention concerns that

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<sup>12</sup> *Id.* at 18.

<sup>13</sup> See COUNCIL OF ABORIGINAL AFFAIRS, EXECUTIVE YUAN, CURRENT EMPLOYMENT SITUATIONS OF ABORIGINES IN TAIWAN AREA 3-4 (2005).

<sup>14</sup> Actually, this discriminatory practice is in direct contravention of Article 5 of the above-mentioned Employment Service Act, which prohibits language discrimination in the workplace.

of disabled persons. According to figures provided by the Ministry of the Interior, 58.5% of disabled persons are unemployed. Not including heavily disabled and persons requiring long-term treatment, that figure drops to approximately 8%, or double the national average. Because of social stereotyping, and the fear that their employment would come at a liability to business, those with disabilities have often been the target of employment discrimination in Taiwan. According to regulations stipulated by the Protection of Disabled Persons Act, employees must provide forms of affirmative action for those with disabilities in the public and private sectors alike. Although these quotas have largely been met by the public sector, some private sector businesses still would rather bear the costs of administrative fines than choose to employ those with disabilities. The Council of Labor Affairs has also promulgated several similar measures to combat this problem, but their overall effectiveness has been limited.<sup>15</sup>

Finally, despite the fact that Taiwan is a religiously tolerant society and that discrimination on the basis of religious creed is rare, because of the prevalence of widespread for-profit institutions run by religious organizations (including schools and hospitals) there have been an increasing number of reported cases of employee discrimination. This has come about as these institutions place religious creed and faith as a requirement for employment, or when religious beliefs and practice become enmeshed within the workplace environment.<sup>16</sup> Furthermore, with the lifting of martial law and the increased political liberalization of Taiwanese society after democratization, the role of political ideology and party affiliation has also become a means in which employee discrimination takes place. Employers with traditionally pronounced party affiliations (example Pan-Blue or Pan-Green) will often either choose to limit their employees from debating politics that are contrary to their viewpoints or will choose to make political affiliation or political preferences a criteria in the hiring process.<sup>17</sup> In addition, due to the growth of Taiwan's service sector, person-to-person contacts and customer service have increased out of necessity. These industries often place considerable emphasis on the general physical appearance of their employees, such as the ideal characteristics of beauty, ideal height, weight and even facial features dictated by popular culture and Western influences become criteria for employment. This of course comes to a disadvantage to those with "appearance deficits" or those who do not meet these oftentimes arbitrary "ideal" standards.<sup>18</sup>

### **(3) Emerging New Forms of Employment Discrimination**

Despite the fact that Taiwanese traditional society is one that respects seniority and the elderly, it has in the past not seen the so-called "Grey Power" phenomenon as in some Western industrialized nations, nor has age discrimination in employment been a prevalently discussed social issue. This has changed in recent years however, as the proportion of Taiwan's middle aged and elderly population continues to increase along with a successively overall declining birthrate. In 1993, Taiwan became categorized as an "old age society" (with 8% of the population over the age of 65) according to standards established by the

<sup>15</sup> See Chin-Chin Chen, *A Study on Establishing Age Discrimination Legal System to Protect Employment Rights for Middle-and-Old Age Persons*, 12 BULLETIN OF LABOUR RESEARCH 395, 399-401 (2002).

<sup>16</sup> For instance, Tzu-Chi, a very powerful Buddhist sect in Taiwan has required lay employees in its colleges and universities to wear uniforms and attend certain religious ceremonies. These requirements, though voluntary in appearance, have put some pressure on these employees.

<sup>17</sup> For a similar situation in the United States, see Cing-Kae Chiao, *The Current Trend on Workplace Regulations—the American Experience (I)*, 129 FT L. REV. 83, 86 (2003).

<sup>18</sup> Chiao, *supra* note 3, at 171.

United Nations. Age and employment have henceforth become a hotly debated issue. Before the enactment of the 2006 Labor Pension Act, Taiwan lacked a solid worker's retirement program. Employers in the private sector have always found ostensible reasons to layoff their employees who are approaching the age of retirement, in order to avoid paying them enterprise retirement pensions which are required under the Labor Standards Act. Furthermore, when workers have reached their voluntary or mandatory retirement age and have received their old age pensions contained in the Labor Insurance Statute, they are not permitted to rejoin the labor insurance programs established by the Statute. This stipulation also discourages local employers to hire older workers. Finally, an increasing number of so-called "sunset" enterprises are moving abroad and to mainland China to avoid high labor costs in Taiwan. The livelihoods of middle and old-age workers are most adversely affected as a consequence of these relocations and plant closings.<sup>19</sup>

From 1989 onwards, due to labor shortages in the manufacturing and construction industries, Taiwan began to import large numbers of foreign blue-collar workers. In a parallel development, due to the rapidly aging Taiwanese society, many families who lack the economic means to hire domestic caretakers have resorted to hiring foreign caretakers, predominantly from Southeast Asia. According to the latest statistics released by the Council of Labor Affairs, Taiwan now has 357,000 foreign workers. Despite the fact that Taiwan's overall conduct toward foreign workers is favorable compared to other countries, foreign workers still face a number of problems, as differences in areas of race, language, culture, and economic standing create situations where employment discrimination has become increasingly common. Moreover, foreign caretakers who are not as visible to the public eye, often face multiple forms of discrimination (i.e. on the basis of gender, race, class, etc.). Furthermore, due to the unique nature of their work, the Labor Standards Act is not applicable to these types of foreign workers. Occasionally, the mistreatment of foreign workers has become the focus of the international media, which has consequently led to U.S. government criticism of Taiwan in its State Department Country Report on Human Rights Practices. This in turn has tarnished the island's image at home and abroad. Fortunately, after the passage of the Gender Equality Employment Law in 2002, the Council of Labor Affairs declared that this law would be applicable to migrant workers. Therefore, the principles of gender equality would also be applicable to foreign workers in Taiwan. Thus, in the event that they were to encounter sexual harassment in the workplace, they too, could use this law as recourse.<sup>20</sup>

Finally, in recent years, due to the rising educational attainment of Taiwanese women, it has become harder for males with lower social status to get married. As a result, a large number of these single men marry women who are colloquially referred to as "foreign brides" from Southeast Asia (predominantly Vietnam, Indonesia and Thailand) and "Mainland brides" from China. According to recent statistics released by the Ministry of the Interior, there are currently up to 300,000 "foreign and Mainland brides" residing in Taiwan. Since most of these women are married to local men from socially or economically disadvantaged groups, they typically need to work outside of the home in order to concurrently support their families in Taiwan and in their countries of origin. Nevertheless, without adequate linguistic abilities,

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<sup>19</sup> Chen, *supra* note 15, at 399.

<sup>20</sup> See Cing-Kae Chiao, *The Scope of Employer Liability in the Incident of Sexual Harassment in the Workplace as Provided in the Gender Equality in Employment Act: A Comment on a Related Decision Rendered by the Taipei High Administrative Court*, in ADMINISTRATIVE LAW: PRACTICE AND THEORY 159, 171-174 (Ming-Chan Lin and Mao-In Tsa eds. 2006).

they are inevitably becoming the most vulnerable workers in the local labor market and are consequently the most frequently discriminated against. However, in comparison, brides from mainland China face even more dire circumstances. They must reside in Taiwan for at least eight years to obtain their work permits while their counterparts from other countries need to wait only three years. The same rule also applies to foreign (or mainland) males who marry local Taiwanese women. Although this practice is an obvious violation of Article 5 of the Employment Service Act, which stipulates that employers cannot refuse to hire a worker based upon his or her marital status, to this day no known cases have been brought to the commissions on employment.<sup>21</sup>

### III. Legal Regime Governing Employment Discrimination in Taiwan

This section will discuss the legal regime governing employment discrimination issues prior to the passage of the above-mentioned Gender Equality in Employment Act of 2002 (as amended in 2007). It will also cover the major contents of the Act itself, and other related fair employment statutes will be briefly discussed.

#### (1) Legal Framework before the Passage of the Gender Equality in Employment Act of 2002

Prior to the passage of the Employment Service Act of 1992 and the Gender Equality in Employment Act of 2002, the legal regime addressing issues regarding discrimination in employment was a constellation of constitutional mandates and statutes. Due to several deficiencies, the regime was ineffective since it provided little legal recourse to those victimized by discriminatory practices. For instance, Article 7 of the ROC Constitution proclaims that persons are equal before the law regardless of their gender, religion, race, social class and political affiliations and Article 10 of the Amendments to the Constitution also declares that the state shall uphold personality and dignity of women, protect their personal safety, eliminate gender discrimination and promote gender equality. Furthermore, the same Article also mentions that the government shall actively promote employment opportunities for aboriginals and the physically and mentally disabled. However, these provisions have been interpreted by legal scholars as requiring state action, and therefore cannot be used by an individual aggrieved worker to challenge discriminatory employment practices by a private employer.<sup>22</sup>

The Civil Code can provide legal protection to victims of discrimination. Article 72 states that a juristic act that is contrary to public order or sound morals is null and void. A number of court decisions have relied on this broad provision and nullified the practice of mandatory retirement of female workers upon marriage and pregnancy. The shortcoming of this approach is that these decisions could only be applied towards overt acts of discrimination and not the subtler more common forms of discrimination.<sup>23</sup> Another important statute is Article 25 of the Labor Standards Act which stipulates that employers shall pay equal wage to its workers for equal work. However, this provides little legal protection for claimants of gender discrimination because it deals exclusively with

<sup>21</sup> See Cing-Kae Chiao, *Legal Controversies Arising from Interactions between the Two Sexes in the Workplace*, 3 TAIWAN LABOR 52, 57-58 (2007).

<sup>22</sup> Chiao, *supra* note 4, at 18.

<sup>23</sup> *Id.* at 18-19.

remuneration and not other employment practices.<sup>24</sup>

Perhaps the most effective legal avenue to combat discrimination in employment prior to the passage of the Gender Equality in Employment Act of 2002 was the Employment Service Act of 1992. Article 5 forbids an employer from discriminating against an employee or job applicant on the basis of race, religion, political affiliations, and sex.... etc. Furthermore, municipal and local governments are required to set up commissions on employment discrimination to handle this type of labor disputes. To date, all municipal and county governments have established these commissions and their organizations and functions will be discussed in Section (IV) of the paper.

Finally, Taiwan has ratified two important International Labor Organization conventions concerning employment discrimination, namely No. 100 Equal Remuneration Convention and No. 111 Discrimination in 1958 and 1961, respectively. Although Taiwan has no legal obligation to observe the two conventions due to its expulsion from the United Nations in 1971, they have nevertheless become “core” conventions and universally recognized as basic human rights in recent years. Thus, their influence on developments within Taiwan still merits attention.<sup>25</sup>

## **(2) Major Provisions of the Gender Equality in Employment Act of 2002**

The current regime utilizes the Gender Equality in Employment Act as the mainstay statute, which is in turn buttressed by several recently revised work discrimination-related laws. The Act’s major provisions can be summarized as follows.

### **(a) General Provisions**

The General Provisions of the Gender Equality in Employment Act contains six articles. This Act declares that it is applicable to both public and private sector employers and employees. It further stipulates that pre-existing arrangements between employers and employees that are superior to those provided by the law shall be respected. Moreover, it mandates that competent authorities establish commissions for the purpose of examining, consulting and promoting matters concerning gender equality in employment. Local government authorities must also provide various occupational training, employment services and re-employment training to enhance employment opportunities for women.<sup>26</sup>

### **(b) Prohibition of Gender Discrimination**

The five articles in the second chapter “Prohibition of Gender Discrimination” prohibits employers from making disparate treatment to their employees or job applicants in all aspects of employment practices (i.e. recruitment, examination, promotion, severance, retirement, termination, and so on). Employers may be exempt in certain circumstances, such as “the nature of work only suitable to a special sex,” a concept equivalent to the Bona Fide Occupational Qualifications (BFOQs). In addition, the law also eliminates the common practice of “voluntary” resignation upon marriage and pregnancy.<sup>27</sup>

### **(c) Prevention and Correction of Sexual Harassment**

One of the unique characteristics of the Gender Equality in Employment Act is that it closely follows the U.S. legal model in treating sexual harassment as a form of gender

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<sup>24</sup> *Id.* at 19.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 22.

<sup>27</sup> *Id.* at 22-23.



discrimination in employment. Firstly, it offers legislative definition for the two major types of sexual harassment, namely hostile working environment and quip pro quo sexual harassment. Hostile working environment sexual harassment refers to the conduct of “anyone” asking for sexual favors or uses verbal or physical conduct of a sexual nature in the workplace to cause an intimidating, hostile or offending work environment for employees. Quip pro quo refers to when an employer explicitly or implicitly asks for sexual favors from employees or applicants, or uses other verbal or physical conduct of a sexual nature as an exchange for the establishment, continuity or alteration of a labor contract. Secondly, the act imposes strict liabilities on employers in order to create incentives to prevent the occurrence of sexual harassment, and in the event of its occurrence, to implement immediate and effective remedial measures. The law also delegates the Council of Labor Affairs to formulate related preventive guidelines, correctional measures, compliance procedures and punitive measures.<sup>28</sup>

#### **(d) Measures for Promoting Equality in Employment**

This chapter mandates various leaves of absences for both male and female workers with the intent on harmonizing working and family lives. One is a provision for female workers to take one day off per month as part of their sick leave if they have difficulties performing their job duties as the result of the menstrual cycle. Secondly, in addition to reiterating the eight week maternity leave that was originally provided for in the Labor Standards Act, there is now a “refined” provision which legally mandates a maternity leave for miscarriages as well as a three-day paternity leave for fathers. Thirdly, an employee working for a firm is now entitled to a non-paid, two-year parental leave with possibility for full reinstatement. Fourthly, the Gender Equality in Employment Act requires employers to allow time for their employees to personally feed their children of less than one year twice a day, at thirty minutes each. This feeding time is deemed as working time and paid accordingly. Employers with over five workers must also reduce the total working day by one hour without pay or readjust working schedules for employees with children who are less than three years old. Fifthly, the Act grants any employee a non-paid leave, at a maximum of seven days per year, in order to allow the worker to take care of his or her family affairs. Finally, it mandates that firms employing over two hundred and fifty employees must provide childcare facilities or arrange for suitable childcare measures.<sup>29</sup>

#### **(e) Remedies and Appeals Procedures**

The Gender Equality in Employment Act incorporates a variety of complex remedial measures for an alleged victim. To settle related disputes, the Act attempts to establish internal and external channels for settlement. First, employers are deemed liable for any damage arising from gender-related discriminatory practices. For cases of sexual harassment, the Gender Equality in Employment Act stipulates that both the offender and the employer are jointly liable in making compensation. Employers are encouraged to adopt all preventive and correctional measures. In the event that an employer is aware of ongoing sexual harassment but failed to take immediate and effective actions, the employer is then liable for any damages arising from those incidents. Aggrieved employees or job applicants can also claim a reasonable amount of non-pecuniary damages, such as damage to their reputations. Secondly, to settle labor disputes arising from gender discrimination, the Gender Equality in

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<sup>28</sup> *Id.* at 23-24.

<sup>29</sup> *Id.* at 24-25.

Employment Act establishes internal and external complaint channels. Employers are encouraged to set up internal complaint systems to handle complaints filed by their employee. Employees are protected from termination or disciplinary action if they are personally involved or assisting another employee in filing complaints. For external procedures, there are two avenues. For appeals concerning various leaves of absences, the local competent authorities should be the first instance and shall investigate within seven days and act as mediators for the interested parties. For appeals that implicate matters concerning gender discrimination in employment, the local competent authorities are the first instance, but interested parties may appeal to the Council of Labor Affairs' Gender Equality in Employment Commission if they are dissatisfied with the decision rendered by the local authorities. If the parties are not satisfied with the decisions of the Committee, they may file administrative appeals or initiate administrative lawsuits. The Gender Equality in Employment Act, for the purpose of recognizing the expertise and prestige of the committees on gender equality in employment, instructs that courts or competent authorities determining the facts of discriminatory treatment. They shall also examine the investigative reports, rulings and decisions rendered by these committees. Thirdly, in order to relieve the burden of proof for claimants of gender discrimination, the Gender Equality in Employment Act stipulates that after the employees or applicants make a prima facie statement of the disparate treatment, the employers shall bear the burden of proof of the non-gender factor of the discriminatory treatment, or the specific sexual factors for the employees or applicants to perform the job. And finally, in order to not deter aggrieved employees or applicants from filing gender discrimination lawsuits in the courts, the Gender Equality in Employment Act also requires the competent authorities to provide necessary legal aid.<sup>30</sup>

### **(3) Other Related Fair Employment Statutes**

In addition to the foregoing enactment of the Gender Equality in Employment Act, the government is also currently in the progress of initiating other related reform measures in order to lay a solid groundwork for achieving the goal of substantive gender equality in the workplace. The 1996 amendments to the Labor Standards Act considerably expanded the statute's scope of coverage. This expansion extended protection to an additional 5.54 million workers, which will dramatically improve the job security for those previously uncovered, i.e. those working in the service sector (which are predominantly female).<sup>31</sup> Secondly, several provisions in the Labor Standards Act, deemed to be "overprotective" to female workers are due to be repealed. For instance, the long-standing ban on night-time work by female workers was lifted after suitable security arrangements were made. Mismatched maximum overtime hours per month for male and female workers were also eliminated thus allowing female workers an equal opportunity to earn premium payments.<sup>32</sup> Thirdly, a number of new statutes have been enacted to offer affirmative action to socially disadvantaged groups, such as aboriginals, the elderly and disabled persons. For instance, Article 98 of the Government Procurement Act requires that business entities that win the bids for government projects, and have projects that will require them to employ 100 or more workers, must also include a minimum of 2% of aboriginal or disabled persons in that group of workers. In addition, the Protection of Disabled Persons Act also imposes strict employment quotas on the employers

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<sup>30</sup> *Id.* at 25-27.

<sup>31</sup> *Id.* at 27.

<sup>32</sup> *Id.* at 27-28.

in both public and private sectors.<sup>33</sup> Furthermore, the Protection of Aboriginal Employment Act also stipulates that the Government, at all levels, public schools and nationalized industries shall employ at least one aboriginal person for every one hundred persons employed. For those counties with a substantial aboriginal population, the quotas have been increased to one-third.<sup>34</sup> Finally, in the Protection of Workers During Mass Lay-Offs Act, which was promulgated in 2003 to settle labor disputes during plant closure and mass lay-offs, Article 13 stipulates that when a business entity decides to discharge its workers during plant closings or mass lay-offs, it cannot discharge them based on the same categories indicated in Article 5 of the said Employment Service Act.<sup>35</sup>

#### **IV. Combating Employment Discrimination under the Employment Service Act**

In this section, the organizational structure of the commissions on employment discrimination formulated by the Employment Service Act will be briefly discussed. It then proceeds to outline their major functions as mandated by the Act. Their actual operations, i.e. the procedural aspects of the how they handle their cases will be addressed. Finally, this section addresses issues regarding the enforcement of the decisions rendered by these commissions.

##### **(1) Composition and Organizational Structure of the Commissions on Employment Discrimination**

According to the statistical data released by the Council of Labor Affairs upon completing its most recent evaluation and performance assessments of these commissions in December 2006, there are currently twenty-eight commissions on employment discrimination established throughout Taiwan. In addition to twenty-five municipal cities, counties and the two offshore islands of Kinmen and Matsu, one economic processing zone and two science parks have also established commissions of this type. According to the data collected by the author, there are a total of 322 members of these commissions. Among them, male members make up 227 of the membership, while females accounted for 95 members. As for their age groups, most of them belong to the 40-49 age bracket, accounting for 47% of total membership. The second largest age group is represented by the 50-59 age bracket, which accounts for 33% of the group. As for educational attainment of these members, around 75% of them have attained bachelor's degrees (23% percent have earned master's degrees). As for their professional backgrounds, thirty-eight percent of them are government officials and eighteen percent of them can be categorized as legal experts and scholars. Thirteen percent are from business communities and eleven percent represent labor unions.<sup>36</sup>

As for the organizational structure of these commissions, Article 2 of the enforcement

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<sup>33</sup> The Act is currently under revision, with the quotas having been raised under the pressure of civil society organizations, especially by those championing disabled persons' rights. For instance, it requires business entities which have over 67 employees in the private sector shall employ at least one disabled person instead of 100. For government departments and public schools, the threshold is reduced from 50 employees to 34.

<sup>34</sup> See Article 5 of the Protection of Aboriginal Employment Act.

<sup>35</sup> The only exception is that this Act has now instituted physical age as a new category.

<sup>36</sup> For a detailed account of this survey, see EMPLOYMENT AND VOCATIONAL TRAINING AGENCY, COUNCIL OF LABOR AFFAIRS, ANNUAL EVALUATION OF THE PERFORMANCE OF THE COMMISSIONS ON EMPLOYMENT DISCRIMINATION 4-5 (2006).

regulations of the Employment Service Act only stipulates that municipal and county governments may establish commissions on employment discrimination composing of members from the government, representatives from employees and employers' organizations, and scholars. Currently, each municipal and county government has promulgated its own set of organizational rules for these commissions. In general, these commissions are *ad-hoc* committees affiliated with the department of labor of each individual municipal and county government. For example, Taipei Municipal Commission on Employment Discrimination is affiliated with Section Two (which is in charge of employer-employee relations) of the Taipei City Department of Labor. The commission has neither a permanent staff nor its own budget. Instead, it must rely on the support of the department in almost all aspects of its operation. With such low legal standing, it is unsurprising that its achievements are also limited. These limitations will be discussed more specifically in Section VI.<sup>37</sup>

## **(2) Functions of the Commissions on Employment Discrimination**

According to Paragraph 4 to Article 6 of the Act and Article 2 of its Enforcement Regulations, which are the two articles directly concerned with the functions of these commissions, these bodies are authorized to "review and decide" employment discrimination complaints. Since there are almost no legislative and administrative guidelines whatsoever to provide any direction for these commissions to follow, they assume their functions from a very uncertain foundation. For example, when the Taipei Municipal City Commission on Employment Discrimination was created in September 1995, it had to spend considerable time debating its own functions even though seven other municipal cities and counties had already established their own respective commissions. Two months later, the Commission received its first complaint about sexual harassment in the workplace, and had to start from scratch in order to solve the problem, having no previous precedents or examples to follow through on. A considerably lengthy "trail and error" period of almost four months ensued, after which the Commission finally decided that its function was only to "review and decide" the complaint itself and let the Department of Labor to handle the subsequent administrative and judicial matters.<sup>38</sup>

After almost six years of passively receiving, reviewing and deciding the particular complaint case, the commissions have gradually assumed other additional functions. Following the leadership of the commissions in Taipei City and Taipei County, they began to launch a series of related educational and training programs. When the Legislative Yuan started to put the finishing touches on the enactment of the Gender Equality in Employment Act in 2000, the Council of Labor Affairs was required by the Executive Yuan to hold numerous training sessions, talks, conferences and seminars in order to lay a framework for this landmark legislation. During this time, the commissions in some municipal cities and counties played a active role in promoting the rudimentary concepts of employment discrimination (especially with regard to gender discrimination) to workers, employers, labor and business organizations, and even to the general public. Under the auspices of the Employment and Vocational Training Agency (EVTA) of the Council of Labor Affairs, the major competent authority in charge of overseeing employment discrimination issues, a number of booklets, pamphlets, videotapes and films have been published and issued on the topic of employment discrimination. Therefore, it is not an exaggeration to state that these awareness and empowerment functions are far more important than their official "review and

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<sup>37</sup> Chiao, *supra* note 3, at 183.

<sup>38</sup> *Id.*

decide” capacity.<sup>39</sup>

### **(3) The Commissions on Employment Discrimination in Actual Practice**

As mentioned earlier, each municipal city and county government has published its own administrative rules concerning the composition and operations of its commission on employment discrimination. Therefore, it is beyond the scope of this paper to make an overall account on how they actually process the complaint cases. However, since the author of this paper has been a founding member of Taipei City’s Commission on Employment Discrimination for thirteen years and has attended all fifty-nine sessions of reviewing and deciding cases, the actual operation of the Commission can be summarized as follows:

First, in terms of the number of complaints processed, from September 1995 to March 2002, when the Gender Equality in Employment Act became effective and all gender discrimination in employment complaint cases were referred to the newly-established Commission on Gender Equality in Employment, the Taipei City Commission on Employment had actually reviewed and decided 136 cases. Among them, almost 96 cases were related to pregnancy discrimination. Sixteen cases were concerned with sexual harassment in the workplace, and another eleven cases were related to other aspects of gender discrimination in employment, as discrimination in promotion (three cases), wage equality (two cases), disparate treatment (one case), recruitment discrimination (five cases), and dress code issues (one case). As for other types of employment discrimination complaints, four cases dealt with disability discrimination, two cases were about former labor membership, and finally one case each concerned race, class, political party affiliation and age. Forty-nine cases decided by the Commission had merit, eight-five cases were turned down while two cases were eventually withdrawn by the complainants. The success rate was only around 37%, with complainants raising grievances concerning pregnancy discrimination faring most poorly.<sup>40</sup>

Secondly, since the employment discrimination issue was a rather new phenomenon in Taiwan, the role played by first-line personnel became very important. Initially, since government officials in charge were quite inexperienced in handling these new types of labor disputes, they tended to treat these complaints as ordinary employee-employer disputes and tried to resolve them through the process stipulated in the Settlement of Labor Dispute Act. Fortunately, the first two executive secretaries of the Commission who were also Directors of the Department of Labor, were also veteran labor unionists and cognizant of the significance of these new types of labor disputes. Therefore, a taskforce on employment discrimination was formed in 1998 to screen and scrutinize the related cases. After the team decided that the particular case had merit, a thorough investigative process would be set in motion.<sup>41</sup>

Thirdly, during the investigation period, the staff members would conduct interviews (complainants, employers and witnesses), compile files and try to settle the disputes through various forms of alternative dispute resolutions (ADRs). For those employers who choose to be uncooperative, labor inspection processes might be utilized to gain their compliance. Upon deciding that the particular case was suitable for deliberation, the investigative team would refer the case to the Commission for the formal reviewing and deciding procedure.<sup>42</sup>

Finally, the formal sessions of the Commission was presided over by the Secretary

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<sup>39</sup> *Id.* at 156-158.

<sup>40</sup> *Id.* at 153.

<sup>41</sup> *Id.* at 175-176.

<sup>42</sup> *Id.*

General of Taipei City, who served as chairperson of the Commission. Two-thirds of all members are required to attend in order to establish a valid quorum. After executive secretary and staff members make their preliminary reports, members of the Commission then begin the deliberation process. Occasionally, complaining employees and employers would be interviewed personally, especially in cases involving sexual harassment in the workplace or when members of the Commission deemed the cases were of significance. Under normal circumstances, a simple and fairly straightforward case can be resolved by one plenary session, but complicated cases could take two to three sessions to settle. Since legal scholars and practicing lawyers have actively participated and played an important role in the process, all cases would be solved through consensus rather than by voting. After the tentative results have been reached, the staff members then prepare a draft report that will be subsequently reviewed by two members and then circulated to all members for approval. Regardless of the Commission's decision, whether the complaints had merits or not, an administrative appeals procedure would ensue.<sup>43</sup>

#### **(4) Enforcement of the Commissions' Decisions**

When the commission renders its decision on a formal complaint of employment discrimination, its contents are divided into three components: the ruling, reasons for the ruling and recommendations. The ruling itself is normally fairly straightforward: the complaint is either sustained or denied. The reasons for the ruling are the most crucial element of the decision-making process. This component is typically written by legal scholars and practicing lawyers. As mentioned earlier, since there are no local precedents that can be referred to, practices and experiences from the United States and the European Union are widely gathered and taken into consideration. For instance, because members of the Taipei City Commission on Employment Discrimination are strongly influenced by the prevailing concept that sexual harassment in the workplace is a form of gender discrimination in employment, the commission itself was deeply involved in the investigation of the complaints and made several important decisions. Whether this approach is valid or not is somewhat questionable, but it is undeniable that this practice has subsequently made a significant impact on the prevention of this kind of incident in the workplace in Taiwan.<sup>44</sup>

The reason for offering recommendations in the decision of the Commission has to do with its status as an *ad hoc* committee without any enforcement authority and functions. Therefore, it can only propose the following recommendations for the Department of Labor to adopt, including: administrative fines for a recalcitrant employer depending on the severity of the violation; no administrative fines imposed on the employer (especially those in the public sector) but reform and correction of his or her practices through some form of administrative guidance issued by the Department; and transfer of the case to other avenues or competent authorities for proper settlement.<sup>45</sup>

After the Department of Labor receives the decision from the Commission, a formal enforcement procedure will begin. If the commission decides against the complainant, the Department will issue a formal administrative decision and inform the claimant. The complainant can file an administrative appeal to the Council of Labor Affairs in accordance with the Administrative Appeals Act. If the appeal is denied by the Council, then the case can be appealed to the High Administrative Court as stipulated in the Administrative

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<sup>43</sup> *Id.* at 176-177.

<sup>44</sup> *See* Chiao, *supra* note 9, at 109-110.

<sup>45</sup> *See* Chiao, *supra* note 3, at 177-179.

Litigation Act. It should be noted that before the extensive amendments of the Employment Service Act in 2002, the administrative fine for the violation of Article 5 of the Act was only N.T. \$3,000 to N.T. \$30,000, which meant dispute resolution could only be handled in the High Administrative Court with a simplified litigation procedure without oral arguments and precluded any motion of appeal to the Supreme Administrative Court for a final judicial solution. If the Commission's decision is for the complainant, then the employer can appeal to the Committee of Administrative Appeals of the Council of Labor Affairs for redress. The subsequent procedures are identical to the ones described above.<sup>46</sup>

Generally, employers in the private sector seldom pursue their cases beyond the administrative appeals stage because the process is free of charge. However, since the Committee of Administrative Appeals of the Council of Labor Affairs is generally supportive of the decisions made by the Departments of Labor, only a few cases have reached the High Administrative Courts and most of them involved disputes concerning pregnancy discrimination and sexual harassment in the workplace. Initially, these administrative courts were uncomfortable hearing these kinds of cases, especially concerning the concept of sexual harassment in the workplace as a form of gender discrimination in employment.<sup>47</sup> Nevertheless, after a tenuous start and under the influence of the drafting of the Gender Equality in Employment Act, which had devoted a full chapter to the prevention of this kind of conduct at work, the Courts have come to accept and support this concept. As for the disputes over pregnancy discrimination, since they only involved shifting the burden of proof to employers, the Courts were also quite supportive of the decisions rendered by the commissions. Generally speaking, since the administrative fines imposed by the commission on employment discrimination were negligible, employers normally were not overly concerned about the enforcement of the Act. However, after the administrative fines section was extensively amended and increased ten to fifteen times in December 2001, employers have grown increasingly concerned about the outcome of their cases.<sup>48</sup>

## **V. Combating Gender Discrimination under the Gender Equality in Employment Act**

This section discusses the organizational structure, major functions, actual operations and the enforcement authorities of the commissions on gender equality in employment, which was established by the Gender Equality in Employment Act of 2002.

### **(1) Composition and Organizational Structure of the Commissions on Gender Equality in Employment**

Unlike the Commissions on Employment Discrimination, the Commissions on Gender Equality in Employment have a solid statutory foundation for their establishment. Article 5 of the Gender Equality in Employment Act stipulates that these commissions be comprised of five to eleven members, it also clearly mandates that the members be elected from persons with related expertise on labor affairs, gender issues or with legal backgrounds. Among these members, two shall be recommended by workers' and women's organizations

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<sup>46</sup> *Id.*

<sup>47</sup> See Cing-Kae Chiao, *Is Sexual Harassment in the Workplace a Form of Sex Discrimination in Employment? Comments on a Decision Rendered by the Taipei High Administrative Court and Experience from the United States*, 4 SELECTED COURT DECISIONS ON LABOR LAW 97, 113-116 (2006).

<sup>48</sup> See Article 65 of the Employment Service Act.

respectively. Most important of all, the Act also requires that the number of female members of the commission to be over one-half of the total membership. In order to avoid overlapping of functions between the commissions on employment discrimination and commissions on gender equality in employment, the Act also stipulates that in the case of local competent authorities which have already set up commissions employment discrimination, may handle the related matters referred to in the Act, provided that the composition of these commissions shall be in accordance with the Gender Equality in Employment Act.<sup>49</sup>

According to the statistical data released by the Council of Labor Affairs in December 2006 following the conclusion of its annual examination and review of the activities of these commissions, in addition to the Commission on Gender Equality in Employment set up by the Council itself at the central government level, there are currently only ten municipal and county governments plus three economic processing zones and science parks that have established these kinds of commissions to handle disputes arising from gender discrimination in employment. The remaining fifteen municipal and county governments still use commissions on employment discrimination to process complaints involving gender discrimination in the workplace. For instance, Taipei City has set up this type of commission in 2002, but several populous local governments such as Kaohsiung City, Taipei County and Taoyuan County still keep their commissions on employment discrimination established by the above-mentioned Employment Service Act. However, these local governments have adjusted their membership in accordance with the requirement of the Gender Equality in Employment Act.<sup>50</sup>

From an organizational perspective, these types of commissions operate on a two-tier system. At the central government level, the Commission on Gender Equality in Employment was established by the Council of Labor Affairs. It consists of eleven members, which is the maximum number allowed by the Gender Equality in Employment Act. Among them, one member serves as chairperson of the Commission and is appointed by the Chairperson of the Council itself. In most situations, the Deputy Chairperson of the Council (with political authority and obligations) presides over this Commission on a part-time basis. The remaining ten members are selected from workers' organizations (2), employers' organizations (2), women's organizations (2), scholars and experts (3), and representatives from the Council (1). Since the Department of Working Conditions of the Council is responsible for handling gender equality in employment affairs, its Director is appointed as executive secretary of the Commission and its (3 to 7) staff members are also supporting staff members of the Commission.<sup>51</sup>

As for the Commissions at the local government level, they generally follow the precedent of the Council of Labors in establishing their own commissions. Using Taipei City (which has the most functional system in Taiwan) as an example, its commission also consists of eleven members, but its composition is slightly different from the Commission established by the Council of Labor Affairs. For instance, it has only one representative from employers' organizations and has two members representing other civic groups.

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<sup>49</sup> See Paragraph 4 to Article 5 of the Gender Equality in Employment Act.

<sup>50</sup> See DEPARTMENT OF WORKING CONDITIONS, COUNCIL OF LABOR AFFAIRS, ANNUAL EVALUATION OF THE PREFERENCE OF THE COMMISSIONS ON GENDER EQUALITY IN MUNICIPAL CITIES AND COUNTIES 2-3 (2006).

<sup>51</sup> See related provisions of the Organizational Rules for the Establishment of the Commission on Gender Equality in Employment for the Council of Labor Affairs of the Executive Yuan which can be found on the Appendix (3) of this paper.



Additionally, the commission also includes one professor and one legal expert. The role of Chairperson of the Commission is taken on by the Secretary General of the City and the executive secretary's role is assumed by the city's Director of the Department of Labor. The Commission also has four to six supporting staff mainly drawn from the Department of Labor. Although the composition of the Commissions at other local governments may vary, they are generally in accordance with the minimum requirements of Article 5 of the Gender Equality and Employment Act, that is, at least one-half of the total membership be composed of female members.<sup>52</sup>

## (2) Functions of the Commissions on Gender Equality in Employment

Article 5 of the Gender Equality in Employment Act only slightly outlines that the functions of the commissions of gender equality in employment at each government level to review, consult and promote matters concerning gender equality in employment, therefore, it is up to related by-laws to delineate their major functions. At the central government level, according to Article 2 of the Organizational Rules for the Establishment of the Commission on Gender Equality for the Council of Labor Affairs, the main tasks of the Commission are as follows: (i) consult and research the Gender Equality in Employment Act and its related statutes and administrative regulations; (ii) investigate and make decisions regarding the complaints concerning gender equality in employment; (iii) review and examine annual working plans (proposed by the Council); (iv) investigate current situations of gender equality in employment; and (v) promote other matters concerning gender equality in employment. At the local government level, the municipal cities and other counties generally follow the Council of Labor Affairs' pattern to give functions to their respective commissions. For example, according to the bylaw of establishing the Commission for Taipei City, its functions as almost mirroring those of the Commission of the Council of Labor Affairs except those related to the review and examination of annual working plans.<sup>53</sup>

Although the official functions of the commissions on gender equality in employment under the Gender Equality in Employment Act are quite well-defined as compared with those functions assumed and discussed above by the commissions on employment discrimination under the Employment Service Act, their scope of authorities is actually severely limited due to their lack of independent budget and permanent supporting personnel. Utilizing the Commission set by the Council of Labor Affairs as an example, its functions of consulting and researching of the Act itself and the related administrative regulations have not performed adequately. Although five members of the Commission are practicing lawyers and law professors, the Commission itself cannot independently interpret the Act and related administrative regulations itself. Instead, it must rely on the Committee of the Statutes and Administrative Regulations of the Council to render the necessary interpretations which has considerably minimized the Commission's authority as an agency with specialized expertise in this regard.<sup>54</sup>

The Commission also cannot independently perform the duty of investigating current

<sup>52</sup> DEPARTMENT OF WORKING CONDITIONS, *supra* note 50, at 4.

<sup>53</sup> See Article 2 of the Organization Rules for Establishing the Commission on Gender Equality in Employment for Taipei City.

<sup>54</sup> For instance, the issue involved whether the Gender Equality in Employment Act is a so-called "special law" and shall take precedence of Article 5 of the Employment Service Act whiling dealing with sex discrimination in employment disputes was settled by the Statutes and Administrative Regulations of the Council and not by the Commission itself.

situations of gender equality in employment in Taiwan as required by Article 5 of the Act. It must rely on the Statistics Department of the Council for figures and data every year after the law's passage. Since the Commission has no input on the questionnaires designed by the Department while it conducts large-scale annual surveys, the results do not always accurately represent actual circumstances. In addition, the Commission also must rely on the Department of Working Conditions of the Council to conduct scholarly research programs because it has no other sources of funding for this specific purpose. In actuality, the Department itself normally delegates these projects to local scholars. Due to the strict regulations of the Government Procurement Act and the deep cuts in the government budget in recent years, it is nearly impossible to obtain quality research results. This in turn has almost rendered the Commission's function in this area irrelevant. As for the task of reviewing and examining annual working plans proposed by the Council, they are routinely approved by the Commission itself without any opposition. The members are fully aware and cognizant of the reality that there is little, or no point in questioning these plans since they are definitely required to properly perform the Commission's basic functions, despite receiving woefully inadequate funding.<sup>55</sup>

The remaining functions for the Commission to perform under the Gender Equality in Employment Act are to investigate and decide complaints concerning gender equality in employment, just like those performed by the commissions on employment discrimination under the Employment Service Act discussed above. In addition, the Commission also engages itself actively in the task of training and raising awareness. It is through these two functions that the Commission has gradually laid a solid foundation for the development of employment discrimination law in Taiwan in recent years (to be discussed in depth in a later section).<sup>56</sup>

### **(3) The Commissions on Gender Equality in Employment in Actual Practice**

In the five years since its inception, the Gender Equality in Employment Act has provided a very detailed procedural, while the commissions at all levels of government have gradually developed a consistent approach towards resolving various types of disputes. As mentioned earlier, there are two tiers of complaint procedures: The complainants shall at first instance file their complaints to the commissions on gender equality (or employment discrimination) of the local governments. If they are dissatisfied with the commission-rendered decisions, they can then appeal to the Commission on Gender Equality in Employment of the Council of Labor Affairs. Each commission has its own by-laws to receive, process, deliberate and decide on these complaints. While it is beyond the scope of this paper to present a full account of these procedures, the following subsections provides additional specifics regarding the ways in which the local government's commission on gender equality in employment (or commission on employment discrimination) and Commission on Gender Equality in Employment of the Council of Labor Affairs handle complaints and appeals respectively.

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<sup>55</sup> After the freezing of the budgets for the central government by the opposition KMT Party in the Legislative Yuan, the Commission could not even afford to pay modest honorarium to two members of the Commission, who are assigned to write the final report for the investigation team!

<sup>56</sup> The drawback and major disappointment of these training programs and seminars is that they are mostly attended by workers, especially by female workers, rather than by those who are most in need of such educational and awareness training.

**(a) Operations of the Commissions on Gender Equality in Employment (or Employment Discrimination) of Local Governments**

According to Articles 33 and 34 of the Gender Equality in Employment Act, there are two types of complaints that can be filed to the commissions established by local governments. The first type of case involves those related to so-called “non” gender discrimination in employment issues, such as controversies over menstruation leave, maternity leave and parental leave. This type of complaint is settled solely by local governments’ commissions independently. The second type of complaint involves gender discrimination issues for which administrative fines can be imposed; therefore, the complainants are allowed to appeal.<sup>57</sup>

When the staff members of local commissions receive the complaints, they normally will conduct a preliminary hearing. If the cases belong to the “non” discrimination category, they will attempt to settle the matters through mediation or other ADRs, and no administrative fines will be imposed. If the cases are determined to involve gender discrimination issues, they will be investigated and subsequently referred to the commissions for deliberation and decision. Under normal circumstances, the local commissions will follow the procedures adopted by the commissions on employment discrimination mentioned earlier. After the members of the commissions have reached their conclusions, the staff members will draft a tentative report that is then circulated among all members for their approval. The final decisions of the commissions will then be sent to the local governments to make formal administrative decisions. In the event that the complaints are sustained, an administrative fine ranging from N.T. \$10,000 to \$100,000 will be imposed.<sup>58</sup>

**(b) Operations of the Commission on Gender Equality in Employment of the Council of Labor Affairs, Executive Yuan**

If employees or job applicants are dissatisfied with the decisions made by the local commissions and local governments themselves, they are entitled to appeal to the Commission set up by the Council of Labor Affairs or directly file a formal administrative appeal to the Council’s Committee of Administrative Appeals within ten days upon receipt of the above-mentioned decisions. Because the Commission is generally regarded as more competent in handling disputes of this type, almost all appeals are filed with the Commission instead of the Appeals Committee.<sup>59</sup>

After the Commission receives the appeal, its staff members will gather all the necessary information and forward them to the plenary session of the Commission for consideration. The Commission will then appoint two members to conduct an investigation. Normally, the investigation is processed by examining the documents and written information supplied by the job application, employee, employer and formal responses offered by the local governments which made the administrative decisions. Hearings and interviews are extremely rare unless the investigation team deems them necessary or if the case involved is of extreme importance.<sup>60</sup>

<sup>57</sup> Chiao, *supra* note 4, at 25-26.

<sup>58</sup> See Article 38 of the Gender Equality in Employment Act.

<sup>59</sup> Actually, most of the appeals cases handled by the Appeals Committee of the Council are concerned with labor insurance disputes. The Committee is currently overloaded with pending cases and simply do not have any incentive to hear cases involving sex discrimination in employment.

<sup>60</sup> Originally, the Commission conducted in-depth interviews when investigating a pregnancy discrimination complaint but decided not to use this method because the Department Working of Conditions simply did not have enough the personnel to adequately carry out such tasks. Therefore, with the exception of cases involving decisions that were rejected by the Committee of Administrative Appeals of the Executive Yuan, normal

Since the majority of the appeal cases involve pregnancy discrimination and sexual harassment in the workplace, the investigations have normally adopted different investigation approaches toward these disputes. In the cases of pregnancy discrimination, the investigators always deem that if a pregnant employee or job applicant has made a *prima facie* statement of the discriminatory treatment (that is, filing a formal complaint to the Commission), then the employer shall shoulder the heavier burden of proof of non-sexual factors of the discriminatory treatment, that is, the employees' poor job performance is the reason for unfavorable treatment and not the pregnancy itself.<sup>61</sup> As for the case involving a claim of sexual harassment, the investigators will generally consider whether the employer has set up a preventative and corrective mechanism in its business entity, or whether it has adopted immediate and effective preventive measures as required by the Gender Equality in Employment Act.<sup>62</sup>

After two members of the Commission finish their investigation, they will prepare a draft investigative report to the Commission. In that preliminary report, the facts, claims, findings and reasons for them are carefully listed and forwarded to the plenary session of the Commission for deliberation and decision. Normally, members of the Commission are quite deferential to the results of the investigation, but sometimes several additions or corrections will be made. After the Commission has approved the investigation findings, the staff members will draft a final decision and circulate it to all members of the Commission for approval and then forward it to the Council of Labor Affairs. The Council will typically utilize the final decision of the Commission as a basis to render its administrative decision. After the decision has been made, then the enforcement process of the Gender Equality in Employment Act will be set in motion.<sup>63</sup>

#### **(4) Enforcement of the Commission's Decisions**

Since the Commission on Gender Equality in Employment of the Council of Labor Affairs is only an *ad-hoc* or task-force type of committee, it has no power and authority to enforce its decisions independently. After the Council has rendered its administrative decision based upon the findings of the Commission, the whole enforcement process then enters into the procedures detailed by the Administrative Appeals Act and the Administrative Lawsuits Act. According to Article 34 of the Gender Equality in Employment Act, if employers, employees or job applicants are not satisfied with the decisions made by the Commission and Council itself, they may file their appeals to the Committee of Administrative Appeals of the Executive Yuan and subsequently engage in administrative lawsuit procedures.<sup>64</sup>

As previously mentioned, the administrative fines imposed under the Gender Equality in Employment Act are much lighter than the ones imposed under the Employment Service Act. Therefore, most of the employers who have lost their cases before the Council's Commission normally voluntarily pay their fines and seldom appeal their cases. However, appeals are

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investigative procedure usually centered on the review of written documents and records.

<sup>61</sup> See Article 31 of the Gender Equality in Employment Act.

<sup>62</sup> According to Paragraph 1 to Article 27 of the Act, employers are entitled to raise "affirmative defenses" to exempt themselves from joint-liability.

<sup>63</sup> See Article 34 of the Gender Equality in Employment Act.

<sup>64</sup> Generally, since the Committee of Administrative Appeals of the Executive Yuan is very conservative in treating employment discrimination disputes while the High Administrative Courts are deferential to the decisions made by the Commission on Gender Equality of the Council, employers normally prefer to file their appeals with the former rather than the latter.

still filed because an appeal to the Committee of Administrative Appeals is free of charge and some of the Committee's conservative members are sometimes uncomfortable with the Commission's above-mentioned stance on the shifting of the burden of proof in the pregnancy discrimination cases,. In recent years, the Committee has remanded or even overturned and reverted several related cases back to the Commission. This trend has encouraged some determined employers to take their new challenges to the Committee and force the Commission to make further investigations or to abandon its former decision. However, this new development is not detrimental to the authority of the Commission because by reaching its decisions based on sounder legal foundations, the quality of the Commission's work is actually improved.<sup>65</sup>

Finally, Article 35 of the Gender Equality in Employment Act provides that when the courts and related competent authorities review—and decide on the facts of discriminatory treatment, they shall examine and take into account all of the investigatory reports, rulings and decisions made by the commissions on gender equality in employment. Although the wordings of “examine and take into account” is a toned-down version of “defer” as adopted by other Western countries with a similar anti-discrimination system, it did considerably enhance the authority of the commissions. Originally, the High Administrative Courts and the Supreme Administrative Court were quite reluctant to accept the decisions made by the commissions on employment discrimination under the Employment Service Act. However, since members with legal backgrounds have gradually played a much more important role in helping the commission at all levels of government to reach well-based decisions, more and more administrative law judges in the High and Supreme Administrative Courts are agreeable to the fact-finding functions of the Commissions. This trend is an extremely encouraging one which clearly indicates that the qualitative aspects of the decisions made by the commissions have indeed improved considerably in recent years, which, in turn will be instrumental to the development of anti-discrimination law in Taiwan.<sup>66</sup>

## **VI. A Critical Assessment**

In this section, the positive, negative and controversial aspects of the new legal regime and its implementation will be discussed, with an aim to outline and discuss these developments critically in order to provide a balanced view on the merits of current efforts and what work remains to be done. Finally, several policy reforms and recommendations are made to improve the existing framework in hopes of bringing Taiwan's system on par with those of leading industrial nations along with meeting local needs.

### **(1) Positive Aspects of Developments**

By far the most significant development is the emergence of a coherent legal framework for resolving gender-based employment discrimination disputes in Taiwan. Compared with

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<sup>65</sup> For instance, in a case involving pregnancy discrimination, a determined employer had appealed his case twice to the Committee of Administrative Appeals of the Executive Yuan. After the Committee remanded the case back to the Commission on Gender Equality in Employment of the Council for reconsideration twice, the Commission was obliged to reopen the case twice and rendered a decision which was finally approved by the Committee of the Executive Yuan. However, since the employer was still not satisfied with the decision, so the case went through the Higher Administrative Court and is now pending in the Supreme Administrative Court.

<sup>66</sup> Currently, almost all cases involving disputes over pregnancy discrimination and sexual harassment in the workplace decided by the Commission on Gender Equality in Employment of the Council have been sustained by the Administrative Courts.

other advanced countries, the law and practice in this field are still at a formative stage, but it is undeniable that this body of law has gradually expanded and several important principles governing equality in the workplace have emerged. For instance, although the anti-discrimination provisions in the Employment Service Act provides only basic guidance for the commission on employment discrimination, some of these specialized institutions have borrowed heavily from the experiences of other countries to deal with sex discrimination controversies over pregnancy discrimination and sexual harassment in the workplace. These practices provide a solid foundation for the implementation and enforcement of the Gender Equality in Employment Act which in turn, has provided a number of guidelines for the commissions on employment discrimination to settle other types of employment discrimination disputes. The decisions and rulings of these commissions are generally accepted by the administrative appeals committees and administrative courts. Furthermore, ordinary courts, both civil and criminal, are also increasingly reliant on the fact finding work of these commissions while they are adjudicating other disputes in related lawsuits. This has considerably enhanced the prestige of these commissions and made their enforcement and implementation even more feasible. Supplemented with the passage of a number of other statutes which provide various affirmative action programs for the most disadvantaged and vulnerable groups are other reform measures in the social security system which allows employees of both sexes to balance their work and family responsibilities. Through these developments, Taiwan is ready to set up a much more advanced anti-discrimination system in the workplace in the near future.<sup>67</sup>

A second positive aspect is that a robust framework for addressing gender discrimination in employment, and perhaps the most advanced in Asia, has been forged in Taiwan. After the passage of the Gender Equality in Employment Act, instances of overt gender discrimination have been on the decline. For instance, recruiting advertisements which openly deny employment for one sex or which offer preferential compensation for one sex (normally males) over another are restricted unless employers can provide justifiable reasons.<sup>68</sup> Several previously acceptable discriminatory practices, such as requiring job applicants to sign an employment contract promising to leave their job after marriage or pregnancy or child-birth are also strictly prohibited by the Act.<sup>69</sup> Furthermore, there are signs that the Act has already led to some improvements in Taiwan's labor market, as the labor participation rate for women has increased from 46% to 49%, while wage differentials between the two sexes have narrowed from 25% to 19% in the past five years.<sup>70</sup> The Act also mandates a variety of family and parental leave programs which allow employees to effectively balance their working and family responsibilities. Originally, these forms of leave were unpaid and qualified employees were normally not interested in utilizing them.

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<sup>67</sup> The Government is currently proceeding to reform the Labor Insurance Statute to provide pregnant workers with two months of payment as their salaries while they are taking maternity leave. This reform certainly will reduce local employers' hostility toward their pregnant employees because both the Labor Standards Act and the Gender Equality in Employment Act require that employers shall give their employees taking maternity leave two month of salary from their own pockets. Although this reform measure is not based on the concern of pregnancy discrimination but is mainly because the government is worried about the low birth rate, its "side-effect" is still very helpful in bringing a halt to this kind of most visible practice of sex discrimination in employment in Taiwan.

<sup>68</sup> See Article 7 of the Gender Equality in Employment Act, which requires employers to give an Bona Fide Employment Qualification (BFEQ) as a defense to this direct or "overt" discriminatory employment practice.

<sup>69</sup> See Article 11 of the Gender Equality in Employment Act.

<sup>70</sup> See CHANG & TSAI, *supra* note 7, at 70-72.

Now, the government has amended the Labor Insurance Statutes to provide social security payments and additional stipends for those who apply.<sup>71</sup> These reform measures not only encourage employees to take leave, but also reduce incentives on the part of employers to adopt discriminatory employment practices against pregnant women.<sup>72</sup>

Another closely related positive development is a growing body of law for combating sexual harassment at work and other places. Among its many priorities, the Gender Equality in Employment Act was supposed to focus on the prevention and correction of sexual harassment in the workplace. After five years of strict enforcement, the results are encouraging. According to the latest evaluation reports published by the Council of Labor Affairs in 2006, 99% of government offices and public corporations have set up internal dispute resolution mechanisms, while 55% of large-scale private enterprises have complied with the requirements of the Act.<sup>73</sup> Recently, this framework was extended further to cover sexual harassment in institutions of higher education after the passage of the Gender Equality in Education Act in 2004.<sup>74</sup> Two years later, the Prevention of Sexual Harassment Act became effective and the protections were extended to incidents occurring in the public, the military, and even in places where general and professional services were provided.<sup>75</sup> This development came about largely due to the advocacy efforts of local women's rights groups which have championed this cause for years. With effective implementation of these statutes, Taiwan now has the most comprehensive framework in Asia, or perhaps in the world, for dealing with these issues. Only the Philippines and Israel have enacted similar statutes, but their coverage has not been as extensive when compared with Taiwan's efforts.<sup>76</sup>

In the past fifteen years, as Taiwan developed its anti-discrimination in employment system, another positive development is the salient role played by local NGOs in supervising the enforcement and implementation of these fair employment statutes. Their importance is no less significant than the specialized institutions created by the government. In its initial formation, the Commissions on Employment Discrimination of the Employment Service Act, was restricted to government participation only, while NGOs played a passive role. However, during the actual operations of these commissions, representatives of these NGOs having legal background and professional expertise played a crucial role in enhancing the quality of decisions rendered. As with the enactment of the Gender Equality in Employment Act, Taiwan's women's rights organizations contributions were even more substantial, with the actions of the Awakening Foundation and the Modern Women Foundation being especially instrumental.<sup>77</sup> Both of these groups not only drafted the bills of the Act, they also devoted twelve years of continuous effort in bringing about its eventual

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<sup>71</sup> These amendments have passed the second-reading stage in the Legislative Yuan. However, due to the current political impasse in the legislature, it is doubtful that these long-awaited reform measures can be achieved in this legislative session, which will be recess in June 2008.

<sup>72</sup> However, the maximum period of taking parental leave with stipends lasts only six months and the amount paid per month is the same as minimum wage (N.T. \$ 15,840). Whether this reform program can attract employees to take this leave remains to be seen.

<sup>73</sup> See COUNCIL OF LABOR AFFAIRS, INVESTIGATION REPORT ON THE MANAGEMENT OF EMPLOYMENT OF WOMEN 27-29 (2005).

<sup>74</sup> For a detailed account of this Act, see Cing-Kae Chiao, *The Establishment of the Prevention of Sexual Harassment on Campus Mechanism in Taiwan—An Analysis of Related Provisions of the Gender Equality in Education Act of 2004*, 62 NAT'L TAIPEI U.L REV. 41, 54-65 (2007).

<sup>75</sup> For a fuller account of this new Act, see Cing-Kae Chiao, *The Establishment of an Anti-Sexual Harassment Legal System in Taiwan*, 57 LAW MONTHLY 460, 472-475 (May 2006).

<sup>76</sup> *Id.* at 483.

<sup>77</sup> Chiao, *supra* note 4, at 20-22.

enactment through hard lobbying. More importantly, the effect on the Act's actual implementation and operation was subject to much of their concern. They also provide legal assistance for victims of sex discrimination in employment and offer valuable comments on the annual review published by the Council of Labor Affairs, which evaluates the performance of these commissions. Since Taiwan's labor unions have always been heavily influenced by the practice of national corporatism, they are unable to protect various rights on the behalf of workers.<sup>78</sup> In turn, they do not know who to turn to when facing disputes over employment discrimination. Therefore, the participation of NGOs as social partners, in lieu of the unions, has allowed more effective mechanisms to be established in solving these types of disputes.<sup>79</sup>

Another positive development after Taiwan's implementation of anti-discrimination in employment statutes is that increasing numbers of business enterprise have established internal complaint systems to handle these types of labor disputes. Since Taiwan's collective industrial relations system is underdeveloped, labor unions do not have enough collective bargaining power to face up to management, resulting in limited coverage through collective bargaining agreements.<sup>80</sup> Under such circumstances, regular labor-management relations operate under a rather paternalistic system, especially in small to medium sized enterprises, which in turn provide inadequate protection for workers. Despite the stipulations of the Labor Standards Act which require enterprises with over thirty employees to promulgate work rules, these rules are usually unilaterally decided by the employers, without allowing any input and participation on the part of employees.<sup>81</sup> The Gender Equality in Employment Act has made substantial reforms by allowing employees to file complaints not only in the instance of sexual harassment at work, but also in other sex-discrimination related matters.<sup>82</sup> Because these internal complaint mechanisms always utilize ADRs in resolving disputes between parties, satisfactory resolutions for both sides are much easier to attain. Their results are even more effective than the external means provided by the commissions on gender equality in employment.<sup>83</sup>

Finally, through the establishment of a legal system governing anti-discrimination in employment, Taiwan not only can "import" related international labor standards to reform its related domestic labor statutes, it also has the ability through international investment and trade activities to influence or "export" its experience to other developing countries. In terms of importation, from 1980s onwards, the United States has used workers' rights provisions contained in its trade and investment legislation to force Taiwan to respect international labor standards in order to protect the human rights of its own workers.<sup>84</sup> The criteria adopted by the United States are based on the labor standards contained in various

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<sup>78</sup> For a general discussion on how state corporatism plays a role in shaping Taiwan's labor-management relations, see Chyi-Herng Chang and Trevor Bain, *Employment Relations Across the Taiwan Strait: Globalization and State Corporatism*, 44 J. IND. REL. 99, 106 (2005).

<sup>79</sup> Actually, the ILO has consistently encouraged various social partners to play an active role in dealing with employment discrimination, see ILO, *EQUALITY AT WORK: TACKLING THE CHALLENGES* 85-94 (2007).

<sup>80</sup> According to the latest statistical information issued by the Council of Labor Affairs, currently in Taiwan, among over 1.2 million business enterprises, only seventy-five have signed collective agreements and most of them are large-scale or enterprises in the public sector, see COUNCIL OF LABOR AFFAIRS, *supra* note 6, at 44-45.

<sup>81</sup> See Articles 70 to 74 of the Labor Standards Act.

<sup>82</sup> See Paragraph 1 to Article 13 and Article 32 of the Gender Equality in Employment Act.

<sup>83</sup> See generally CING-KAE CHIAO, *LEGAL CONTROVERSIES OVER SEXUAL HARASSMENT AT WORK IN TAIWAN* 248-249 (2002).

<sup>84</sup> See Chiao, *supra* note 2, at 89-91.



Conventions approved by the International Labor Organization, especially with regards to the so-called “core” international labor standards, with the prohibition of employment discrimination as one of its components. Therefore, although Taiwan was expelled from the United Nations in 1971 and is no longer a member of the International Labor Organization, under the pressure of the United States, it has incorporated the above mentioned “core” labor standards into its important labor statutes and put them into practice, linking Taiwan to international trends in this regard.<sup>85</sup> In terms of “exporting” its own experiences, under the pressure of globalization, Taiwan’s large scale enterprises, especially multi-national corporations (MNCs), have increasingly invested in Southeast Asia and China or sought suppliers in the region. In the past few years, through the efforts of the United Nations, International Labor Organization, Organisation for Economic Cooperation and Development (OECD), these corporations are required to fulfill their corporate social responsibility (CSR). Various corporate codes of conduct have also emerged as a result, which prohibit these companies from practicing discriminatory treatment toward hiring local employees.<sup>86</sup> Under the pressure of local and international human rights and religious organizations, Taiwanese companies are also responding positively by requiring their local suppliers to observe and adhere to these “core” international labor standards.<sup>87</sup> Since Taiwan plays a key role in the international division of labor and in the supply chain, these developments, combined with its efforts in reforming its domestic anti-employment discrimination legal system will inevitably enhance its international image and reputation.<sup>88</sup>

## (2) Negative Aspects of Developments

After fifteen years of trial and error, the current anti-discrimination in employment framework suffers from the following weaknesses and faults. For example, discrimination labels such as “class” and “thought” are considered too abstract and subjective, therefore making them hard to identify. Moreover, discrimination based on religious creed and political affiliations are inconsistent with the concept of unchangeable, immutable characteristics which represents the essence of defining employment discrimination. This is especially relevant since affiliation in Taiwanese religious and political institutions are not as rigid as those of other countries. Another issue involves the citing of former affiliation with labor unions are a form of discrimination. This actually constitutes a type of unfair labor practice and should be corrected under the purview of the Labor Union Law. With regards to the most recent amendments concerning discrimination based on age and sexual orientation, the lack of extensive deliberations and discussion with the greater public will make enforcement on these issues difficult at best. As for discrimination based on appearance, facial features and marital status, to some extent these listed forms of discrimination normally overlap with some types of gender discrimination in employment. This causes confusions in the legal terminology and will create difficulties in actual enforcement.<sup>89</sup>

Compositional and organizational weaknesses also exist within the commissions on employment discrimination and gender equality. For instance, the United States’ Equal Employment and Opportunity Commission has only five members, but in contrast, Taiwan as

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<sup>85</sup> *Id.* at 92.

<sup>86</sup> See Cing-Kae Chiao, *Promoting of Core International Labor Standards Through Corporate Codes of Conduct of the Multinational Corporations*, 125 FT L REV. 36 41-42 (October 2002).

<sup>87</sup> *Id.* at 47-48.

<sup>88</sup> *Id.* at 48.

<sup>89</sup> Chiao, *supra* note 3, at 170-171.

a small island nation has over three hundred members in 28 separate commissions. This represents a bloated organizational disadvantage which makes arriving quorums very difficult and also hampers the decision making process. In addition, the majority of members serving on the employment discrimination commissions are government and civil officials. The lack of specialists, scholars and other legal experts on these commissions makes the resolving of these issues on these new and emerging forms of labor disputes (such as employment discrimination) a difficult endeavor. At the same time, since the status of these commissions is quite low, their decisions serve only as a form of consultation to competent authorities and are therefore not legally binding. In addition, the commissions lack full-time supporting staff members and personnel, and must rely on government officials who serve in other capacities. Experience and expertise on these issues is therefore hard to accumulate. Also, despite the fact that the commissions on gender equality have made numerous improvements in its membership composition, the number of these commissions are still excessive. For instance, in thirteen of these commissions there are at least 141 members. Despite of the great number of members in these commissions, they ironically suffer from the same staffing shortages faced by employment discrimination commissions as mentioned above.<sup>90</sup>

The administrative fining system also fails to deter employers from committing employment discrimination. For instance, before the amendment of the Employment Service Act in 2002, employers in violation of the said Act could only be fined NT \$3,000 to NT\$30,000 (equivalent to approximately US \$100 to US \$1,000). This represented at most a slap on the wrist to employers, rendering enforcement ineffective. The fines were later sharply increased to NT \$300,000 to NT\$1,500,000, causing a potentially significant financial burden for small and medium sized businesses. As for the Gender Equality in Employment Act, violators are fined NT\$10,000 to NT\$100,000.<sup>91</sup> The gross disparities between the amounts of these two fines, clearly demonstrates a rather ironic “discrimination against sex discrimination” in employment. At the same time, these fines are only directed toward the employer and do not provide any substantial compensation to the victim unless they find other legal recourses. Furthermore, the lack of equitable relief in these two acts discourages victims to file claims unless they are prepared to leave their current occupation.<sup>92</sup>

Another noticeable shortcoming of this system is its “one-size fits all” application. Unlike the United States, in which Title VII of the Civil Rights Act of 1964 places enforcement on business entities with fifteen employees or above, in contrast, the anti-discrimination regime in Taiwan is enforceable upon business enterprises of any size, without setting a minimum number of employees in the company. Since 97% of Taiwanese businesses are small or medium-sized enterprise (SMEs), they face a grave dilemma: should they obey the law? And even if they choose to comply, how will they deal with the personnel shortage consequences brought about. Taking the example of age discrimination, in the United States according to the Age Discrimination in Employment Act of 1967, enforcement is placed on business entities with twenty employees or above. Since Taiwan recently added physical age as form of employment discrimination, the additional burdens and hardships placed on the great majority of Taiwanese businesses, and their subsequent resistance to the regime is imaginable. On the other hand, some provisions such as

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<sup>90</sup> *Id.* at 168.

<sup>91</sup> When the Gender Equality in Employment Act was amended in December 2007, the amount of this administrative fine was raised from N.T. \$100,000 to N.T. \$ 500,000. This amount is however still less than the fine imposed by the amended Employment Service Act.

<sup>92</sup> Chiao, *supra* note 3, at 173-174.

anti-sexual harassment policy and procedure and the establishment of child care facilities have higher thresholds that make them inapplicable to the employees of many SMEs, the very people who are in need of these protections.<sup>93</sup>

### (3) Controversial Aspects of Developments

Because gender discrimination in employment problems has long been neglected in Taiwan, the adoption of such sweeping reform measures will inevitably complicate relations between labor and management. In the past decade, the operation of the above mentioned committees have held hundreds of conferences, seminars and educational programs to promote the understanding and awareness for the different kinds of employment discrimination. However, since the changes made after the passage of the Gender Equality in Employment Act in 2002, several controversial aspects, especially concerning gender discrimination, remain unsettled.

First of all, the Gender Equality in Employment Act adopts a rather primitive approach toward various types of gender discrimination in employment. To this end, it only deals directly with disparate treatment discrimination and provides no remedies for other subtler forms of discriminatory practices. For instance, the Act never mentions disparate impact discrimination, i.e., employment practices that are superficially neutral and fair, but have negative impacts or effects that are particularly adverse towards female (or male) employees. In addition, it also does not provide any guidance in handling mix-motive discrimination, i.e., employment practices of employers that involve both legal and illegal motivations. As employment relationships have become increasingly complex in Taiwan, so too have the discriminatory employment practices adopted by employers. It is therefore imperative to gain insight from the experiences of other nations encountering the same phenomenon. For example, related decisions rendered by the United States Supreme Court and the stipulations of the Civil Rights Act of 1991 are all excellent examples for Taiwan to draw lessons from.<sup>94</sup>

Another controversy concerns the handling of the concept of equality of remuneration. The Act embraces a novel concept of equal pay for equal value as one of its guiding principles to pursue the goal of pay equity between the two sexes. The term was added in the final stages of its enactment at the urging of a member of the drafting group. This addition did not receive thorough and vigorous deliberation or debate and has caused an interpretation problem when disputes arose. It should be noted that the equality of remuneration system is primarily based upon the principle of equal pay for equal work. Its conception is closely modeled after American practices, especially the Equal Pay Act of 1963. Since the concept of comparable worth has fallen into general disfavor in the United States during the 1980s, it is quite incompatible to put these concepts together unless Taiwan is to adopt the European model of comparable worth to solve the problem of wage differentials between the two sexes.<sup>95</sup>

The extraterritorial application of the Gender Equality in Employment Act is also an important issue meriting attention. In recent years, increasing numbers of local business entities are moving abroad and many domestic employees are being hired to work in foreign countries where the branch offices of the mother corporations are located. Under such circumstances, can these expatriates claim protection under this law if they allege that their employment rights are being infringed upon by their home companies? The Act is

<sup>93</sup> *Id.* at 169.

<sup>94</sup> *See* Chiao, *supra* note 4, at 33.

<sup>95</sup> *Id.* at 33-34.

completely silent on this topic, but some foreign experiences, especially the above mentioned U.S. Civil Rights Act of 1991 affirmatively adopts this stance, which can provide guidance for Taiwan in resolving similar disputes.<sup>96</sup>

#### **(4) New Aspects of Developments**

Recently, several new developments and emerging forms of employment discrimination, especially with regards to forms of gender discrimination have started to become widespread in Taiwanese employment practices. One rather unexpected issue which emerged during the drafting and deliberation of the Gender Equality in Employment Act involved the issue of interpersonal relationships between the two sexes in the workplace. As these relationships become increasingly frequent and intimate as a result of the liberalization of society, a number of implications are bound to emerge after the passage of the new law. In addition to the issues of sexual harassment in the workplace discussed above, overzealous employers may also be inclined to impose a variety of codes of conduct to regulate other aspects of the relationships between their male and female employees. If these personnel policies are applied with different standards towards the two sexes or cause disparate impact, then allegations of sex discrimination in employment can be made. For instance, concerned with possible claims of sexual favoritism, some local business entities strictly forbid office romance and extramarital affairs, or even disallow married couples to work in the same unit. Because these anti-fraternization policies normally treat employees working at entry level jobs—mostly women—disadvantageously, issues of sex discrimination are implied. The courts have not yet rendered any rulings concerning these disputes, but a related case ruling by the Taipei District Court in January 2002 may serve as a prelude to this new type of labor dispute. In that case, a male employee of an insurance company was fired for being involved in a consensual extramarital affair with one of his subordinates. The court ruled against the employer on personal privacy grounds and ordered his reinstatement. Although this case was not directly related to sex discrimination in employment, the liberal stance adopted by the judge is indicative of present judicial interpretations in settling this new form of labor dispute.<sup>97</sup>

After the passage of the Gender Equality in Employment Act, several employment practices formally regarded as managerial prerogatives have been readily challenged. For instance, it is very common for local employers to set different hair grooming and dress codes for their male and female workers, or require female employees to be monitored for changes in weight. All of these work rules become the focal points in the near future as women's rights groups are posed to test their legality under the law. A related issue concerning dress codes was decided by the Commission on Employment Discrimination of the Taipei Municipal City when the law was waiting for passage in the Legislative Yuan. That case involved a personal order from the president of a renowned development bank which required female employees to wear skirts in offices, but made no similar requirements for male employees. The Commission unanimously found that practice constituted employment discrimination against female workers and the bank admonished to discontinue this policy. Several other "intrusive" practices, such as requiring female employees to change their names on personnel files after marriage when male employees are not subject to the same requirements.<sup>98</sup>

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<sup>96</sup> *Id.* at 34.

<sup>97</sup> *Id.* at 36-37.

<sup>98</sup> *Id.* at 36.

Another issue is the so-called “glass ceiling effect” experienced by female employees in trying to reach higher decision-making positions in their organizational hierarchies. As mentioned earlier, this type of horizontal segregation is extremely hard to overcome in both the public and private sectors in Taiwan. The most commonly cited reason for the barrier, which contributes to the under-representation of professional women in higher positions, is the so-called “mommy track.” Therefore, the ways of establishing suitable family support measures to assist aspiring career-oriented female employees will become an important task as Taiwan builds a foundation for promoting gender equality in employment. In the U.S., the Glass Ceiling Commission was organized under the Civil Rights Act of 1991 to study this phenomenon in American society. This Commission issued its reports and recommendations in 1995, and the results can provide Taiwan with insightful information if it decides to engage in reform programs to combat this difficult issue in the future.<sup>99</sup>

New issues regarding gender discrimination have also expanded to the military and defense sectors. When the Ministry of Defense started to actively recruit women into military service in the late 1990s, the issue of whether they could take part in combat missions was constantly debated. Currently, Taiwan has 7,000 female military personnel in the armed forces, which in total amounts to just under 300,000 soldiers in total. Most women serve in support and auxiliary units, under the capacity of nurses, staff members, aides-de-camp, logistics and maintenance personnel, counselors or instructors. Only a very tiny minority are engaged in active military activities in the strictest sense. As more and more women choose to join the military and treat military service as a professional career, the quest for equal treatment will inevitably bring up the sensitive issue of women in combat duties. Although the Ministry of Defense has yet to pay any serious attention on this issue, several empirical studies undertaken by the Department of Defense of the United States can provide Taiwan with some guidance in solving this dilemma. According to the findings, as modern warfare becomes increasingly sophisticated, the demands of physical capacities for combatants will diminish. Research has proven that in so-called “distanced” combat missions, the performance levels of women soldiers are generally equal to their male counterparts. This offers some hope that the goal of gender equality in the military might not seem so hard to achieve.<sup>100</sup>

In addition, employment discrimination issues in so-called “non-traditional” occupations have started to become noticeable. For example, when the two-year grace period for the legal “public prostitutes” in Taipei City expired several years ago, the issue of legalization of the sex industry came into public debate. Local women’s rights groups were torn by a difference in opinion on the issue. Except for those conservative feminists who adamantly oppose prostitution on moral grounds, a majority of these groups were ambivalent towards the issue. Only radical feminists support a total legalization of the sex industry. The debate on prostitution has raised the fundamental issue of sex discrimination in employment and the government has commissioned a series of research programs on this sensitive topic. Several European nations are on the forefront in dealing with the issue of legalizing sex industries and their employees have even organized trade unions to safeguard their rights and improve their working conditions. If Taiwan intends to face this issue pragmatically, such foreign experience will certainly be valuable.<sup>101</sup>

Another issue that has gained increasing societal interest is the debate over whether

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<sup>99</sup> *Id.* at 35.

<sup>100</sup> *Id.* at 38.

<sup>101</sup> *Id.* at 37.

homemakers should receive pay increases due to the increasing recruitment of female workers from Southeast Asian countries to do the same work. These domestic helpers normally can earn over N.T. \$17,280 per month, which is the current minimum wage set by the government pursuant to the Labor Standards Act. Local feminists began advocating that since foreign workers can receive minimum wage, local housework done by over three million housewives should also be given fair pay no lower than that of foreign domestic helpers. Originally, this debate was only of academic significance. However, after the Taiwan High Court ruled that a homemaker injured and hospitalized in a car accident was entitled to claim damages for being physically incapable of doing house chores, women's rights groups were inspired to use the ruling for their own interest. It must be noted that women's unpaid domestic labor does represent tremendous economic value. For instance, in the United States, it is estimated that the economic value of women's unpaid labor ranges from 24 to 60 percent of the nation's GDP.<sup>102</sup> The United Nations concluded in 1995 that women's unpaid work worldwide produces almost half the value of the total world economy.<sup>103</sup> However, currently, only Switzerland and one federal state within Germany acknowledge that women's unpaid housework has market value. While this issue is too sensitive to be put into actual practice, its underlying meaning is of tremendous importance to the understanding of the essence of female employment. Therefore, its future evolution merits greater attention.<sup>104</sup>

### **(5) Suggestions for Further Reforms**

In the short term, Taiwan should aim to combine the basic elements of the two aforementioned, separate but closely related legal regimes into one streamlined system. In the hypothetical new law, which may be called the Equality in Employment Act, the previous sixteen categories of employment discrimination types should be reformed to reflect changing international trends and social realities in Taiwan. Gender, race, religious creed, birthplace, age and disabilities should be included, while the other remaining redundant categories should be eliminated or incorporated into other statutes. For instance, discrimination based upon sexual orientation and whether it should be treated as a separate form should be discussed in further detail in the future. As for age and disability, being so-called "second generation" employment discrimination issues, and whether they in turn should be part of a separate legislation, are also matters that must be considered. As for the specialized institutions handling these types of disputes, their organizational structure and authority should be enhanced considerably, and the past practice of utilizing ad-hoc commissions on employment discrimination or gender equality in employment should be halted. An ideal example is an EEOC-type institutions, with commissioners nominated directly by the President and confirmed by the Legislative Yuan. If the above arrangements cannot be made, the commission can also be formed under the direct jurisdiction of the Executive Yuan, or even become a department or section of the Council of Labor Affairs. Any of these proposed arrangements could bring substantial improvements to the current situation. As for the number of commissioners at the central government level, only five to seven members with legal expertise, or are representatives of disadvantaged groups are required. Drastic cuts in membership at the municipal and county government levels should also be considered. The individual commissions at this level of government do not necessarily have to be eliminated; rather, they can be converted to field offices serving under the central government's

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<sup>102</sup> *Id.* at 38.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 38.

commission. The authority of the proposed commission in handling complaints relating to employment discrimination should be upgraded to possess a quasi judicial capacity, while not legally-binding, but nevertheless other government authorities must defer to their fact-finding and final decisions. Since the independence of these institutions are of great importance, their budget and personnel must be arranged accordingly.

In the past, Taiwan's efforts have mainly been the transplanting of the legal practices and experiences of the United States and other European countries. In the mid-term, it is suggested that efforts should be made to refine these imports to meet local needs. In practice, the United States and several European countries have also experienced new challenges with regards to anti-discrimination in employment in recent years, and if Taiwan does not begin an introspective analysis of its own, it might find itself one day, directly facing similar challenges with little or no prior warning. Using the example of Title I of the Americans with Disabilities Act of 1990: despite the fact that this legislation provides many protections to disabled workers and required employers to afford "reasonable accommodation" for this group, it also includes an "undue hardship" clause on the part of businesses in consideration of difficulties they may face in upholding these non-discrimination practices. Federal courts in the United States have in turn attempted to find a balance between meeting both the needs of disabled workers and the businesses that hire and employ them. During the 1999 and 2002 terms of the Supreme Court, six rulings pertaining to disability in employment undoubtedly show efforts on part of the Court to define disability with a strict and conservative review, which have largely been disadvantageous to employees seeking to address grievances under that term. Taiwan should be increasingly wary of what has occurred in the United States when approaching its own legislation regarding workers with disabilities. Furthermore, in closely related forms of discrimination concerning genetics and diseases such as AIDS/HIV, Taiwan should adopt a proactive policy of meeting these emerging forms of employment discrimination, rather than wait in passive reaction to these problems. Finally, with regards to age discrimination and other forms of affirmative action, the side-effects and consequently unforeseen practices that follow such as "reverse-discrimination" requires careful consideration when and if these foreign practices are considered suitable for importation for Taiwan's legal system.

Regarding long term recommendations, Taiwan should aim to support the United States and other European nations, echoing the call for a social agenda which supports the progressive development of fundamental labor rights in the face of a globalized economy. Despite the fact Taiwan's past economic growth and success came largely without the observation of the above mentioned ideals, recent large scale offshore movements of businesses away from Taiwan have caused a structural unemployment problem which has brought tremendous challenges to the country. Under such circumstances, if Taiwan is able to reform its legal system, allowing its workers to enjoy the protection and rights under international standards, not only does such practice benefit its international reputation, future advocacy on part of Taiwan to push for more progressive international standards on labor will be even more convincing. Despite international political realities that make Taiwan's comeback to international organizations such as the International Labor Organization virtually impossible, if it can demonstrate itself as a model state which in practice has adopted international standards, the unreasonableness of its further exclusion will become even more apparent and a loss to the international community. Taking Taiwan's past effort to join the World Health Organization as example, during the SARS pandemic, because Taiwan was not a part of the United Nations or the World Health Organization, it was excluded from the

quarantine zone during the spread of the disease. It clearly shows that despite the fact that Taiwan has an advanced public health system, international political realities created a situation where 23 million lives could not enjoy the same protections enjoyed by member states of the United Nations, which naturally lead to an outpouring of international sympathy. The prohibition of employment discrimination in the past decade has been one of Taiwan's most successful reforms to its labor law system. These efforts must be continually exercised not only to the betterment of local workers allowing them to work in fairer working environments, but also serve as encouragement and the resulting action on the part of the developing world in the improvement of working conditions in their respective countries in the future.

## VII. Conclusion

This paper set out to evaluate the effectiveness of Taiwan's current legal framework for addressing the problem of employment discrimination. In an environment where employment discrimination is prevalent and manifests in a variety of overt and subtle forms, there was a further need to curb discrimination given its adverse impact on female labor participation, which in turn lowers Taiwan's global competitiveness. Over the course of fifteen years of policy experimentation, adoption of foreign legal practices and grassroots activism by civil society organizations, Taiwan now boast one of the most comprehensive legal regimes in Asia for combating employment discrimination, with its special emphasis on protecting women, ethnic minorities, the disabled and the elderly. The Employment in Services Act of 1992 and the Gender Equality in Employment Act of 2002 introduced a key institutional innovation—local employment and gender commissions—which play an integral role in providing legal recourse for victims, mediating disputes, raising awareness and are becoming an indispensable for the courts in their provision of fact-finding services. However, there remains ample room for improvement. The paper identified several glaring deficiencies within the current legal framework that weakens its overall effectiveness, such as the overall organizational weaknesses of the commissions, low administrative fines that fail to deter employers that practice discrimination, and the arbitrary, one-size-fits-all approach to compliance that needlessly overburden small and medium-sized businesses essential to Taiwan's economic development. It recommends that in the short term to work towards a streamlined, and comprehensive legal regime, and in the medium term, to reevaluate the legal constructs and experiences imported from Western countries. In the long term, if Taiwan can put into practice while at the same time promote the social agenda of leading progressive nations, it will be able to play an important role in ensuring that its experience can one day become the model for other currently developing countries. The Equality in Employment Act is a promising start that would marry the strengths of the current twin legal regimes. A truly effective legal regime will be one that can anticipate the changing demographics of Taiwan's society, keep pace with new developments and changes in employment practices.

In May 2007, the International Labor Organization published its second global report on employment discrimination. In this report, the ILO emphasized that progress has been made in the elimination of employment discrimination on the part of both developed and developing countries, however, there are many areas that require improvements. Taking the example of gender discrimination in employment, despite the increase of women's labor participation rate, their remuneration is still unequal to their male counterparts. Just by looking at the wage differentials between genders in the progressive European Union, the



difference of remuneration between the sexes is as high as 15%. In other long recognized forms of discrimination such as race, ethnicity, migrant worker status, religious creed and social origin, their occurrence remain prevalent to this day. Moreover, emerging forms of discrimination related to age, disability and sexual orientation, and those infected with AIDS/HIV are harder to overcome. Added to this, “emerging manifestations of discrimination” such as genetics and lifestyle discrimination, show that there are still many new challenges left to face. The details of this report offer Taiwan a blueprint for future improvements in combating employment discrimination. Not only does it provide evidence that Taiwan’s past efforts are on the right track, it also offers a roadmap for further efforts to be made. It is believed that with continual effort and perseverance, Taiwan’s workers can enjoy protections no less extensive than their European and American counterparts.

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**Appendix (1)**  
**Related Provisions of the Employment Service Act of 1992**

**(a) Employment Service Act of 1992**

Promulgated by the President on May 8, 1992 and subsequently amended in 1997, 2000, 2002, 2003 and 2007.

**Chapter I General Provisions**

**Article 5**

To ensure equal employment opportunities for the nationals, an employer shall not discriminate against a job applicant or an employee he (or she) hires on the grounds of race, class, language, thought, religion, political affiliation, *birth place\**, one's provincial / county origin, sex, *marriage\** (or marital status), appearance, facial features, *disability, age\**, *sexual orientation\** and former membership of a labor union.

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:

**Article 6**

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Competent authorities at the municipal, county (city) level shall have authority to manage the following tasks:

(1) To review and decide employment discrimination

:  
:

**Chapter VI Penal Provisions**

**Article 65**

For those who violate Paragraph 1 to Article 5 of the Act, a fine of no less than N.T. \$ 300,000 and more than N.T. \$ 1,500,000 will be imposed.\*

\* marriage (or marital status) was added when the Act was amended in 2002.

\* disability replaced the formerly used physical and mental handicap when the Act was amended in 2002.

\* birth place, age and sexual orientation were added in May 2007, the latest amendments of the Act

\* the amount of the fine originally was set at N.T. \$ 3,000 to N.T. \$ 30,000, but it was increased to N.T. \$ 300,000 to N.T. \$ 1,500,000 when the Act was amended in 2002, the same day when the Gender Equality in Employment Act was passed.

**(b) Enforcement Regulations of the Employment Service Act of 1992**

Promulgated by the Council of Labor Affairs in 1992 and subsequently amended in 1994, 1996, 1997, 2001 and 2004.

:

**Article 2**

When competent authorities at the municipal, county (city) level are reviewing and deciding employment discrimination complaints, they may invite government entities, units, labor organizations, employer organizations, scholars and experts to organize commissions on employment discrimination.

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**Appendix (2)**  
**Gender Equality in Employment Act of 2002**

Passed by the Legislative Yuan on December 21, 2001.

Promulgated by the President on January 16, 2002 and came into effect on March 8, 2002.

Amended by the Legislative Yuan on December 19, 2007 and promulgated by the President on January 16, 2008.

**Chapter I General Provisions**

**Article 1**

To protect equality of right to work between the genders, implement thoroughly the constitutional mandate of eliminating gender discrimination, promote the spirit of substantial equality between the genders, this Act is hereby enacted.

**Article 2**

Arrangements made by employers and employees that are superior to those provided for by this Act shall be respected.

This Act is applicable to public officials, educational personnel and military personnel, provided that, Articles 33, 34 and 38 shall not be included.

Complaints, remedies and processing procedures for public officials, educational personnel and military personnel shall be handled in accordance with respective statutes and administrative regulations governing personnel matters.

**Article 3**

The terms used in this Act shall be defined as follows:

1. "employee" means a person who is hired by an employer to do a job for which wage is paid.
2. "applicant" means a person who is applying a job from an employer.
3. "employer" means a person, a public or private entity or authority that hires an employee. A person who represents an employer to exercise managerial authority or who represents an employer in dealing with employee matters is deemed to be an employer.
4. "wage" means compensation which an employee receives for his or her work, including wages, salaries, premiums, fringe benefits and other regular payments under whatever name which are payable in cash or in kind, or computed on an hourly, daily, monthly or on a piece-work basis.

**Article 4**

The term "competent authority" used in this Act is referred to the Council of Labor Affairs of the Executive Yuan at the central government level, the municipal governments at the municipal government level, and the county/city governments at the county/city level.

Matters prescribed in this Act which are concerned with the competence of other authorities with special purposes shall be handled by those authorities with special purposes.

**Article 5**

In order to examine, consult and promote matters concerning gender equality in employment, the competent authority at each government level shall set up commissions on gender equality in employment.

The commissions on gender equality in employment referred to in the preceding paragraph shall have five to eleven members with a term of two years. They shall be selected from persons with related expertise on labor affairs, gender issues or with legal backgrounds. Among them, two members shall be recommended by workers' and women's organizations respectively. The number of female members of the commissions shall be over one-half of the total membership.

Matters concerning the organization, meeting and other related issues of the commissions referred to in the preceding paragraph shall be drawn up by the competent authorities at each government level.

In the case of local competent authorities which have already set up commissions on employment discrimination, they may handle the related matters referred to in this law, provided that, the composition of these commissions shall be in accordance with the provisions of the preceding paragraph.

**Article 6**

For the purpose of promoting employment opportunities for women, competent authorities at the municipal, country (or city) government level shall prepare and earmark necessary budgets to provide various occupational training, employment service and re-employment training programs for them to promote the ideal of gender equality. During these training and service periods, child-care, elder-care and other related welfare facilities shall be set up or provided for.

The central competent authorities may provide financial assistance for those competent authorities at the municipal, country (or city) government level that have provided occupational training, employment service and re-employment training programs, and set up or provide child-care, elder-care and other related welfare facilities during those training and service periods mentioned in the preceding paragraph.

**Article 6-1**

Competent authorities at all level of governments shall incorporate the matters concerning the prohibition of gender and sexual orientation discrimination, the prevention of sexual harassment and the promotion of gender equality in employment into the items of labor inspection.

**Chapter II Prohibition of Sex Discrimination**

**Article 7**

An employer shall not treat an applicant or an employee discriminatorily because of gender or sexual orientation in the course of recruitment, examination, appointment, assignment, designation, evaluation and promotion. However, if the nature of work only suitable to a special sex, the above restriction shall not apply.

**Article 8**

An employer shall not treat an employee discriminatorily because of gender or sexual orientation in the case of holding or providing education, training or other related activities.

**Article 9**

An employer shall not treat an employee discriminatorily because of gender or sexual orientation in the case of holding or providing

various welfare benefit measures.

**Article 10**

An employer shall not treat an employee discriminatorily because of gender or sexual orientation in the case of paying remuneration. An employee shall receive equal pay for equal work or equal value. However, if such differentials are the result of a seniority system, a reward and punishment system, a merit system or other justifiable reasons of non-sexual factors, the above restriction shall not apply.

An employer may not adopt a method of reducing the remuneration of other employees in order to evade the provision of the preceding paragraph.

**Article 11**

An employer shall not treat an employee discriminatorily because of gender or sexual orientation in the case of retirement, severance, job leaving and termination.

Work rules, labor contracts and collective bargaining agreements shall not prescribe or arrange in advance that when an employee marries, becomes pregnant, engages in child-birth or child-raising activities, he or she has to leave his or her job or apply for leave without payment. An employer also shall not use the above-mentioned factors as reasons for termination.

Any prescription or arrangement that contravenes the provisions of the two preceding paragraphs shall be deemed as null and void. The termination of the labor contract shall also be deemed as null and void.

**Chapter III Prevention and Correction of Sexual Harassment**

**Article 12**

Sexual harassment referred to in this Act shall mean one of the following circumstances:

- (1) in the course of an employee executing his or her employment duties, any one makes a sexual request, uses verbal or physical conduct of a sexual nature or with an intent of sex discrimination, causes him or her a hostile, intimidating and offensive working environment and infringes on or interferes with his or her personal dignity, physical liberty or affects his or her job performance.
- (2) an employer explicitly or implicitly makes a sexual request toward an employee or an applicant, uses verbal or physical conduct of a sexual nature or with an intent of sex discrimination as an exchange for the establishment, continuance, modification or assignment of a labor contract or as a condition to his or her designation, remuneration, personal evaluation, promotion, demotion, reward and punishment.

**Article 13**

An employer shall prevent and correct sexual harassment from occurrence. For an employer hiring over thirty employees, measures for preventing and correcting sexual harassment, related complaint procedures and punishment measures shall be established. All these measures mentioned above shall be openly displayed in the workplace.

When an employer knows of the occurrence of sexual harassment mentioned in the preceding article, immediate and effective correctional and remedial measures shall be implemented.

Related guidelines concerning preventive and correctional measures, complaint procedures, and punishment measures mentioned in the preceding paragraph shall be drawn up by the central competent authority.

**Chapter IV Measures for Promoting Equality in Employment**

**Article 14**

When a female employee encounters job difficulty because of menstruation, she may request a menstruation leave for one day in one month. The number of this leave shall be incorporated into sickness leave.

The computation of wage of a menstruation leave shall be made pursuant to the related statutes and administrative regulations governing sickness leave.

**Article 15**

An employer shall stop a female employee from working and grant her a maternity leave before and after childbirth for a combined period of eight weeks. In the case of a miscarriage after being pregnant for more than three months, the female employee shall be permitted to discontinue work and shall be granted a maternity leave for four weeks. In the case of a miscarriage after being pregnant for over two months and less than three months, the female employee shall be permitted to discontinue work and shall be granted a maternity leave for one week. In the case of a miscarriage after being pregnant for less than two months, the female employee shall be permitted to discontinue work and shall be granted a maternity leave for five days.

The computation of wage during maternity period shall be made pursuant to the related statutes and administrative regulations.

While an employee's spouse is in labor, his employer shall grant him two days off as a fraternity leave.

During the preceding fraternity leave period, wage shall be paid.

**Article 16**

After being in service for one year, an employee may apply for parental leave without payment before any of his or her child reaches the age of three years old. The period of this leave is until his or her child reaches the age of three years old but cannot exceed two years. When an employee is raising over two children at the same time, the period of his or her parental leave shall be computed aggregately, provided that, the maximum period shall be limited to two years the youngest one has received raising.

During the period of parental leave without payment, an employee may participate in the original social insurance programs continuously. Premiums originally paid by the employer shall be exempted and premiums originally paid by the employee may be postponed consecutively for three years.

Payment of subsidies for parental leave shall be prescribed by other statutes.

The measures for implementing matters concerning parental leave shall be drawn up by the central competent authority.

**Article 17**

After the expiration of the parental leave referred to in the preceding article, an employee may apply for reinstatement. Unless one of the following conditions exists and after receiving permission from a competent authority, an employer may not reject such application:

- (1) Where the employer's business is suspended, or there is an operating loss, or a business contraction.
- (2) Where the employer changes the organization of his or her business, disbands or transfers his or her ownership to others

pursuant to other statutes.

- (3) Where *force majeure* necessitates the suspension of business for more than one month.
- (4) Where the change of the nature of business necessitates the reduction of workforce and the terminated employee cannot be reassigned to other suitable position.

In the case of an employer cannot reinstate an employee due to the causes referred to in the preceding paragraph, he or she shall give notice to the affected employee thirty days in advance and offer severance or retirement payment in accordance with legal standards.

**Article 18**

Where an employee is required to feed his or her baby of less than one year of age in person, in addition to the rest period prescribed, his or her employer shall permit him or her to do so twice a day, each for thirty minutes.

The feeding time referred to in the preceding paragraph shall be deemed as working time.

**Article 19**

For the purpose of raising child(ren) of less than three years of age, an employee hired by an employer with more than thirty employees may request one of the following from his or her employer:

- (1) to reduce working time one hour per day; and for the reduced working time, no remuneration shall be paid.
- (2) To adjust working time.

**Article 20**

For the purpose of taking personal care for a family member who needs inoculation, who suffers serious illness or who must handle other major events, an employee hired by an employer with more than five employees may request a family leave. The number of this leave shall be incorporated into normal leave and not exceed seven days in one year.

The computation of wage during family leave period shall be made pursuant to the related statutes and administrative regulations governing normal leave.

**Article 21**

When an employee makes a request pursuant to the provisions of the preceding seven articles, an employer may not reject.

When an employee makes a request pursuant to the preceding paragraph, an employer may not treat it as a non-attendance and affect adversely the employee's full-attendance bonus payments, personal evaluation or take any disciplinary action that is adverse to the employee.

**Article 22**

In the case of a spouse of an employee who is not engaged in any gainful employment, the provisions of Articles 16 to 20 of this Act shall not apply, provided that, the employee has a justifiable reason.

**Article 23**

An employer hiring more than two hundred and fifty employees shall set up child care facilities or provide suitable child care measures.

Competent authorities shall provide financial assistance for those employers who have set up child-care facilities or provide suitable child care measures for their employees.

The standards of setting up child care facilities, providing child care measures and matters related to financial assistance shall be drawn up by the central competent authority after consulting with other related public authorities.

**Article 24**

For the purpose of assisting those employees who have left their jobs due to the reasons of marriage, pregnancy, child-birth, child-care or taking personal care of their families, competent authorities at each government level shall adopt employment service, occupational training and other necessary measures for them.

**Article 25**

For those employers who hire the employees who have left their jobs due to the reasons of marriage, pregnancy, child-birth, child-care or taking personal care of their families and with outstanding results, competent authorities at each government level may provide suitable rewarding measures for them.

**Chapter V Remedies and Appeals Procedures**

**Article 26**

When an employee or an applicant is damaged by the employment practices referred to in Articles 7 to 11 or Article 21 of this Act, the employer shall be liable for any damage arising therefrom.

**Article 27**

When an employee or an applicant is damaged by the employment practices referred to in Article 12 of this Act, the employer and the harasser shall be jointly liable to make compensation. However, the employer is not liable for the damages if he or she can prove that he or she has complied with this Act and provide all preventive and correctional measures required, and he or she has exercised necessary care in preventing this damage from occurring but it still happens.

If compensation cannot be obtained by the injured party pursuant to the provisions of the preceding paragraph, the court may, on his or her application, taking into consideration the financial conditions of the employer and the injured party, order the employer to compensate for a part or the whole of the damages.

The employer who has made compensation has a right of recourse against the harasser.

**Article 28**

When an employee or an applicant is damaged because an employer contravenes the obligations referred to in Paragraph 2 to Article 13 of this Act, the employer shall be liable for any damage arising therefrom.

**Article 29**

In the case of circumstances referred to in the preceding three articles, an employee or an applicant may claim a reasonable amount of compensation even for such damage that is not a purely pecuniary loss. If his or her reputation has been damaged, the injured party may also claim the taking of proper measures for the rehabilitation of his or her reputation.

**Article 30**

The claim for damages arising from a wrongful act referred to in Articles 26 to 28 of this Act is extinguished by prescription, if not exercised in two years by the claimant becomes known of the damage or the obligee bound to make compensation. The same rule applies if ten years have elapsed from the date when the harassing conduct or other wrongful act was committed.

**Article 31**

After an employee or an applicant makes a *prima facie* statement of the discriminatory treatment, the employer shall shoulder the burden of proof of non-sexual and non-sexual orientation factor of the discriminatory treatment, or the specific sexual factor for the employee or the applicant to perform the job.

**Article 32**

An employer may establish a complaint system to coordinate and handle the complaint filed by an employee.

**Article 33**

When an employee finds out that an employer contravenes the provisions of Articles 14 to 20 of this Act, he or she may appeal to the local competent authority.

When he or she appeals to the central competent authority, the authority shall refer the appeal to the local competent authority after it receives the appeal or within seven days after the date it has found out the above-mentioned contraventions.

Within seven days after the local competent authority has received the appeal, it shall proceed to investigate and may mediate the matters for the related parties in accordance with its competence and authority.

The measures for handling the appeals referred to in the preceding paragraph shall be drawn up by the local competent authority.

**Article 34**

After an employee or an applicant finds out that an employer contravenes the provisions of Articles 7 to 11, Article 13, Paragraph 2 to Article 21, or Article 36 of this Act and appeals the matter to the local competent authority, if the employer, employee or applicant is not satisfied with the decision made by the local competent authority, he or she may apply to the Commissions on Gender Equality in Employment of the central competent authority for examination or file an administrative appeal directly within ten days. If the employer, employee or applicant is not satisfied with the decision made by the Commissions on Gender Equality in Employment of the central competent authority, he or she may file an administrative appeal and proceed an administrative lawsuit pursuant to the procedures of the Administrative Appeal Act and the Administrative Lawsuits Act.

The measures for handling the examination of the appeal referred to in the preceding paragraph shall be drawn up by the central competent authority.

**Article 35**

When a court or a competent authority determines the fact of a discriminatory treatment, they shall examine the investigation reports, rulings and decisions rendered by the committees on gender equality in employment.

**Article 36**

An employer may not terminate, transfer or take any disciplinary action that is adverse to an employee who personally files a complaint pursuant to this Act or assists other file a complaint.

**Article 37**

The competent authority shall provide necessary legal aid when an employee or an applicant who files a lawsuit in a court because of any violation of this Act by his or her employer.

The measures for providing legal aid referred to in the preceding paragraph shall be drawn up by the central competent authority.

When an employee or an applicant files a lawsuit referred to in the preceding paragraph and applies for precautionary proceedings, the court may reduce or exempt the amount for security.

**Chapter VI Penal Provision**

**Article 38**

An employer who violates the provisions of the final part of Paragraph 1 and Paragraph 2 to Article 13, Article 21, or Article 36 of this Act, shall be punished by an administrative fine not less than 10,000 yuan but not exceeding 100,000 yuan.

**Article 38-1**

An employer who violates the provisions of Articles 7 to 10, or Paragraph 1 and 2 to Article 11 of this Act, shall be punished by an administrative fine not less than 100,000 yuan but not exceeding 500,000 yuan.

**Chapter VII Supplementary Provisions**

**Article 39**

The enforcement regulations of this Act shall be drawn up by the central competent authority.

**Article 40**

This Act shall become effective on March 8, 2002.

The effective dated for Article 16 as amended on December 19, 2007 shall be decided by the Executive Yuan.

**Appendix (3)**  
**Organizational Rules for the Establishment of the Commission on Gender Equality in Employment for the Council of Labor Affairs, Executive Yuan**

Promulgated by the Council of Labor Affairs of the Executive Yuan on March 6, 2002.

**Article 1**

The Council of Labor Affairs of the Executive Yuan sets up the Commission on Gender Equality in Employment (hereinafter referred to as the Commission) pursuant to Paragraph 1 to Article 5 of the Gender Equality in Employment Act. The Council also enacts these rules pursuant to Paragraph 3 of the same Article.

**Article 2**

The Commission is in charge of the following matters:

- (1) The consultation and research of the Gender Equality in Employment Act and its related statutes and administrative regulations.
- (2) The investigation and examination of the complaints concerning gender equality in employment.
- (3) The examination of annual working plans.
- (4) The investigation of current situations of gender equality in employment.
- (5) The promotion of other matters concerning gender equality in employment.

**Article 3**

The Commission shall have eleven members. The chairperson of the Commission shall be the Deputy Chairperson of the Council of Labor Affairs of the Executive Yuan designated by the Chairperson of the Council of Labor Affairs of the Executive Yuan and shall serve on a part-time basis. Other members of the Commission shall be designated or appointed by the Council of Labor Affairs of the Executive Yuan from the following persons:

- (1) One representative from the Council of Labor Affairs of the Executive Yuan.
- (2) Two representatives recommended by labor organizations.
- (3) Two representatives recommended by employers' organizations.
- (4) Two representatives recommended by women's organizations.
- (5) Three representatives from scholars and who are regarded as experts in their fields.

**Article 4**

The term of the members of the Commission is two years. When a membership is vacant for cause, the term of successor member shall last to the expiration of the term of former member.

**Article 5**

The Commission shall designate an executive secretary and in charge of ordinary day-to-day matters of the Commission under the supervision of the chairperson. The Committee shall also have three to seven staff members handling general affairs and under the direction and supervision of the executive secretary. The executive secretary and staff members shall be appointed by the Council of Labor Affairs of the Executive Yuan from its current personnel and serve on a part-time basis.

**Article 6**

The Commission shall hold its regular meeting every three months. Temporary meetings shall be held, if necessary. In case of the filing of complaints, the examination meeting shall be held immediately.

**Article 7**

When the Commission is in session, it shall be chaired by the chairperson. When the chairperson is in absent, he (or she) shall designate a member in attendance as a substitute chairperson.

The members shall attend the meetings in person and cannot be substituted. When the Commission is in session, it may invited other related persons to attend with no voting right.

**Article 8**

The Commission shall be in session when over one-half of the members attend. The decisions of the Commission shall be rendered by the approval of over one-half of the members attended.

**Article 9**

The Commission may commission academic institutions, scholars, or experts to provide assistance in collecting related materials concerning gender equality in employment or to do researches on related topics.

**Article 10**

The members of the Commission shall receive no salary for their work. However, for the members who are not the personnel of the Council of Labor Affairs of the Executive Yuan, they may receive transportation fees under the existing regulations.

**Appendix (4)**  
**Measures for Processing Complaints Concerning Gender Equality in Employment**

Promulgated by the Council of Labor Affairs of the Executive Yuan on March 6, 2002.

**Article 1**

These measures are enacted pursuant to Paragraph 2 to Article 34 of the Gender Equality in Employment Act (hereinafter referred to as the Act).

**Article 2**

When an employee or an applicant file a complaint pursuant to Article 34 of the Act to a local competent authority for examination, the commissions on gender equality in employment of the local competent authority shall examine the complaint in accordance with these measures. When an employer, an employee or an applicant is not satisfied with the decision made by the local competent authority, he (or she) may file an administrative appeal directly, or file a complaint to the Commission on Gender Equality in Employment of the Council of Labor Affairs of the Executive Yuan in written form within ten days after the decision is rendered. If the said period has expired, his (or her) complaint will not be accepted.

The written form referred to in the preceding paragraph shall contain the following items and signed or sealed by the applicant or his (or her) agent:

- (1) Name of the applicant, his (or her) address or residence, contact telephone number and I.D. number. If the applicant is a juristic person or other group with an administrator or a representative, its name, office or business office, name, address or residence, contact telephone number and I.D. number of the administrator and representative.
- (2) Name, address or residence, I.D. number of the legal representative and agent of the applicant.
- (3) Subject-matters, facts and reasons of the complaint.
- (4) Authority which makes the decision and the name of its head.
- (5) Year/month/day.

**Article 3**

When an applicant files a complaint to the commission on gender equality in employment of a competent authority for examination, he (or she) may withdraw the application for examination before the delivery of the decision. When an application for examination is withdrawn, the applicant may not file another complaint on the same case.

**Article 4**

If an application for examination is not in standard form or pattern, the competent authority shall inform the applicant to supply and correct within fifteen days after the receipt of the notice. If the supplement and correction cannot be completed within the prescribed period, the application shall not be processed.

**Article 5**

The commission on gender equality in employment of the central competent authority shall deliver the photocopied or duplicated copy of the application for examination to the local competent authority. The local competent authority shall respond and explain within seven days after the receipt of the official documents and forward related documents and materials to the central competent authority.

**Article 6**

When the commissions on general equality in employment of the central and local competent authorities are in the process of examining complaints, they may notify the applicants or other related persons to present and make statements.

When the commission on gender equality in employment of the central competent authority is in the process of examining complaints, it may invite local competent authorities to attend without voting rights.

**Article 7**

The central or local competent authorities shall render decisions within three months after the receipt of the application for examination. They may have one extension, if necessary. The extension may not exceed three months and the applicant shall be informed ahead of time.

**Article 8**

When the commission on gender equality in employment of the central and local competent authorities are in the process of examining the applications, they may designate over two members of the commission to organize special sub-committees to investigate the cases, if necessary.

When the special sub-committees are in the process of investigation, they shall protect the privacy rights of the applicants, respondents of the complaints and the related third-parties. After the process of investigation, the special sub-committees shall make investigation reports and forward them to the committees on gender equality in employment of the competent authorities for examination.

**Article 9**

When the result of an examination is pending on the settlement of other legal relationship, if that legal relationship is not yet certain, the commissions on gender equality in employment of the competent authorities may, under their own authorities or after the application of the related parties, suspend the proceedings of the examination and inform the applicants.

**Article 10**

In principle, the proceedings of examination of the application cases shall be held in private.

**Article 11**

The commissions on gender equality in employment shall render decisions in accordance with the findings of the examination. The decisions shall be informed to the applicants and respondents to the complaints in writing by the competent authorities.

**Article 12**

These measures shall be effective on the date of promulgation.