A Step against All or Nothing Policy: The Scope of Industrial Accident Compensation Insurance for Independent Contractors in Korea

Sukhwan CHOI
Myongji University

I. Introduction

In Korea, just like many other Asian countries, changes in economic market influence regulations for employment and labor. For recent 10 years, employers were consistently demanding flexibility concerning employment/labor relations. Two grand financial crises (1997 and 2007) gave rise to relatively deregulated labor market unavoidable, including flood of atypical workers. Legislation of fixed term employment contract, part-time employment contract, and temporary agency work were made during this period.

Along with rapid increase in atypical workers, we also had many changes in the area of independent contract. The places where originally classical employment contract dominated are now substituted with independent contract, by subcontract, outsourcing.

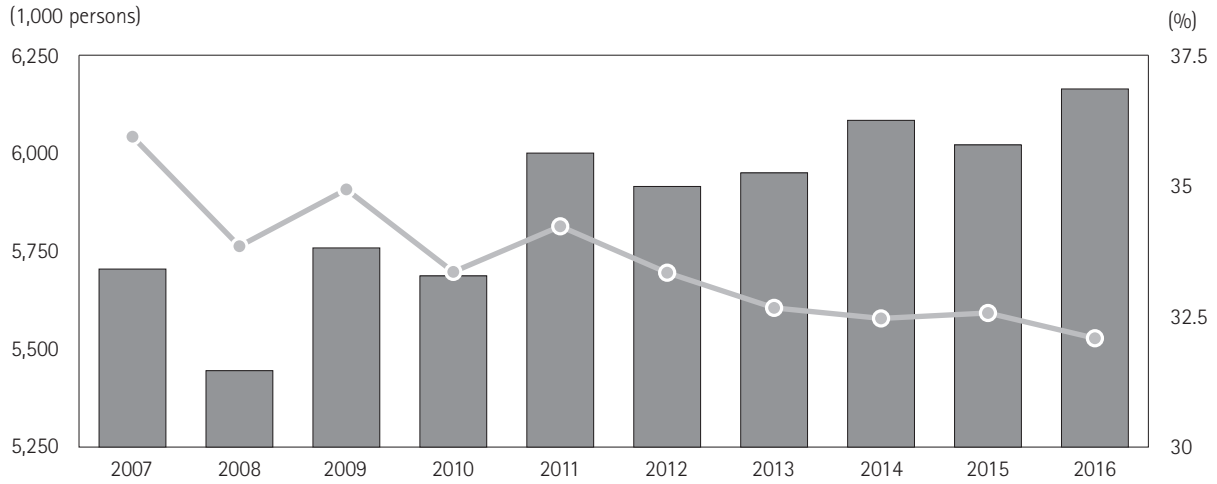
And because of Korean system of social security as a waged employee base, we are facing serious problem of social polarization. Informal workers (including statutory exempt, matter of practical exclusion, workers without social insurances) are increasing and making two extremes of society.

Today we will look over present situation about labor regulation, with requests for changes arising therefrom (II). Then I would like to pick up the issue of industrial accident insurance for independent contractors as a material for case study (III). New legislation for this area was accomplished for the last 10 years, but the legislation was very exceptional according to the classical way of regulations. I will introduce new system, pros and cons, too. With this, we can check what has been done, what is still there unsolved and (or) what is a new hurdle (IV). I expect to get an inspiration for other areas of employment/labor law, especially in the sense that special regulations are needed in employment relations from this lesson.

II. Present situation and request for change

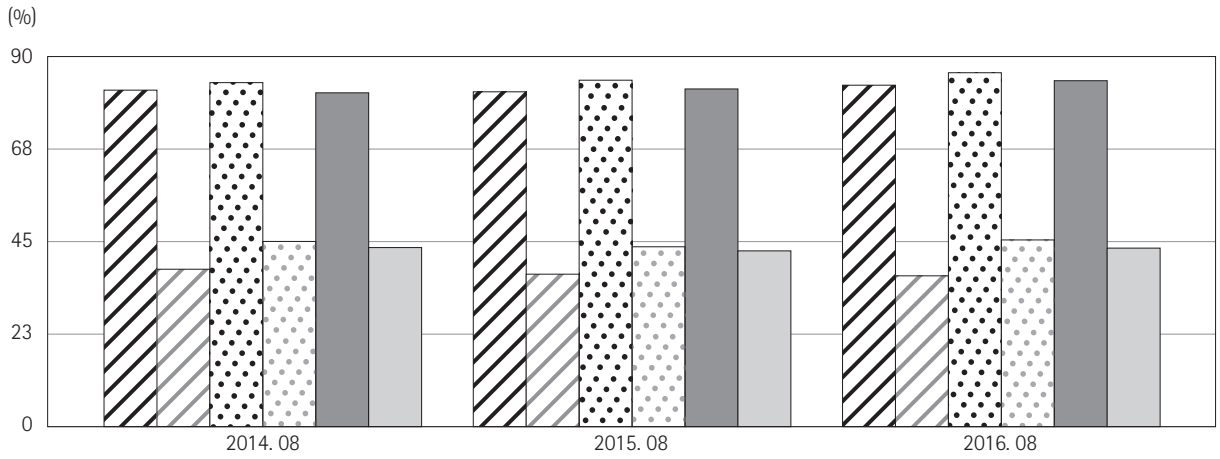
Increase of atypical workers including fixed term employees, temporary agency work, and part time workers is a common phenomenon in Korea during these days. Statistics shows 32.8% of paid workers are atypical workers, who are mostly paid with lower income and relatively lower protection by social insurance. For the National Pension Insurance (NPI), National Health Insurance (NHI), Unemployment Insurance, atypical workers are experiencing limited coverage by social insurance. This is partly because statutory exemption, for example excluding part-time workers with no more than 15 hours per week from NPI and NHI.

A more serious problem is here: working styles are transforming from employment contracts to different forms of contract, like outsourcing, subcontracting, and individual freelance contract. As a matter of fact, there are spectrums of working styles, and working conditions, as a result different needs for protection by labor law.



Source: Commissioner of Statistics Korea, Supplementary Results of the Economically Active Population Survey by Employment Type in August 2016.

Figure 1. Size and proportion of non standard employees



Source: Commissioner of Statistics Korea, Supplementary Results of the Economically Active Population Survey by Employment Type in August 2016.
Note: From left, National Pension Insurance (standard/nonstandard), National Health Insurance (standard/nonstandard), Unemployment Insurance (standard/nonstandard)

Figure 2. Coverage of social insurance

Traditionally, the term "worker" means a person, regardless of the kind of occupation, who offers labor to a business or workplace for the purpose of earning wages (Labor Standards Act (LSA) Art.2 para.1 (i)) in Korea. About the interpretation of this clause, the supreme court of Korea made firm criteria which include designated working place and working time, considerable control and directions by employer, fixed wages, character as an independent business owner, and status in the social security system, etc.

We also have "all or nothing policy," which means if you are an employee by this LSA, then you can enjoy whole protection by labor law. If you are not, you cannot have any at all. So for the employers, an easy way to succeed in management efficiency is making peripheral (sometimes core) posts subcontracted, outsourced, along with employing atypical workers. Another important background of Korean law is strict regulation about terminating employment relations. That is "just cause" clause (LSA Art.23, Art.24), which prohibits not only discriminative dismissal, but also requires reasons that could be admitted enough for not

continuing employment relations.

With the all or nothing policy, every area arising from employment relations needs entrance ticket of "worker by LSA," such as working time, severance allowances, industrial accident, lay off, health and safety, etc. As mentioned above, tendency to decrease employment contract inevitably broadened the range of persons working not as a "worker" by LSA. With these environmental changes, development in telecommunication techniques and the Internet, it becomes harder and harder to tell whether these persons are workers or not. One answer we can expect is changing the criteria of "worker," to set new appropriate ones. We are thinking of this way, too. Actually, there have been many cases especially concerning independent contractors, like caddies in golf clubs, debt collectors, insurance solicitors, outsourced broadcasting producers, deliverers, and drivers. The conflicts are not just about LSA, but contain problems about the concept of "worker" in labor union act, too. But we did make another answer for this situation. There were debates about protection for industrial accident in Korea, and special exceptions were made to overcome traditional way of all or nothing policy.

III. Legal responses

We can find one example of exemption from the all or nothing policy in the amendment of Industrial Accident Compensation Insurance Act (IACIA). Like many other countries, IACIA in Korea also chooses definitions used in LSA. If you are inside the range of "worker" according to LSA, then you can have whole package protections which are given by employment/labor laws. If you are outside the range, as a principle you get nothing. This rigid frame sometimes prevents the pin-pointed regulation of law for the places where there is a need for protection. We have this kind of problem in the area of Industrial Accident Compensation Insurance (IACI) for the increased independent contractors, so there came a legal response.

1. Backgrounds

There had been so many labor disputes about whether a person is a "worker" according to LSA or not. This was more common among some of the jobs mentioned above. This is partly because they were originally "workers" by LSA, changed into independent contractors, and partly because their working conditions are poor, excluded from protection of labor law, which brought exclusion from social security law (mainly social insurance).

This tendency was speeded up at the time of financial crisis, and there has been a social dialogue body called "Economic and social development commission" (formerly "Korea Tripartite Commission"), from 1998. This was a body that labor, management, government and public interest groups participated, making consultation for labor, industrial, economic and social policies. Labor and management participation in the formulation of government policies are its main goal. A group in this commission thought of an appropriate answer for these independent contractors to be totally excluded from labor law.

With the high hurdle that whether they are "workers" according to LSA or not still pending, they thought of a few answers: A) Widening the range of "worker" according to LSA, through legislation or interpretation of the court; B) Regarding them as independent contractors and give protections by monopoly regulation and fair trade; C) Giving some special protections which are given to workers.

2. Legislation

For the protection of IACI, we have two special regulations. We can call these exceptions "small and medium business operators" and "Special Types of Employment" respectively.

First, for small and medium business operators, they are allowed to join IACI on their own will, paying full insurance premium (Art.124). This includes business owners employing less than 50 with some other conditions. Also persons running his own business with no employee can join IACI, too. This category includes self-employed persons engaged in passenger transport services, in cargo transport services, in

construction machinery services, in door-to-door couriers (a quick service provider). Artist is defined in Art.2 of the Artists' Welfare Act in accordance with a contract concluded with an intent to receive a consideration in return for providing artistic activities.

This is a system which permits small and medium business operators, and self-employed persons. They can join the IACI if they wish. Insurance premium and insurance payment will be set by presidential decree. Insurance premium is 100% employee's burden, contrary to regular IACI. For the artists, public foundations for artists take the 50% burden for the artists.

Second, for special case concerning persons in special types of employment (Art.125), the business which receives labor service, from persons who engage in jobs prescribed by Presidential Decree, among the persons who are not subject to the LSA, etc., even though they offer labor service similar to that of workers regardless of the type of contract, and therefore need protection from occupational accidents, and who also meet all the following requirements, he/she shall be deemed a business subject to IACIA (para.1). These "persons in special types of employment" need to fulfill next two conditions:

(i) They mainly provide one line of business with labor service necessary for the operation thereof on a routine basis, and receive payment for such service and live on such pay;

(ii) They do not use other persons to provide such labor service.

With this, persons in special types of employment shall be deemed workers of the business concerned in applying IACIA.

An interesting part of this regulation is that it determines specific jobs covered by IACIA, shown in the Enforcement Decree of the IACIA. At first when this special regulation was introduced in 2008, there were four kinds of jobs, insurance solicitors, owner-drivers of concrete mixer trucks, learning-aid tutors, and golf caddies. After that, they added more jobs, including door-to-door couriers engaged in collection or delivery affairs in courier services (referring to services delivering parcels after collecting and transporting them), engaged in delivery affairs entrusted from mainly one quick service provider. Also, credit card solicitors, consumer financing dealers, substitute drivers mainly called by one company are newly added to this category.

But when the persons in special types of employment request exclusion from the application of IACIA according to para. 4, they shall not be deemed such workers (para.2). This is called "retreat by his own will," which is different from the compulsory feature of social insurance.

Where a person in special type of employment does not want to be subject to IACIA, he/she may file a request for exclusion from the application of IACIA, with the service as prescribed by the Insurance Premium Collection Act. Also, this shall not apply to persons in special types of employment whose insurance premiums are paid fully by their business owners (para.4).

The amount of average wages, used as the basis for calculating insurance benefits for persons in special types of employment, shall be the amount published by the Minister of Employment and Labor (para.8). The criteria for recognizing occupational accidents that give rise to the payment of insurance would be the same as "workers" by LSA (para.9).

3. Pros and cons

It is very interesting that statutory legislation designated several kinds of jobs as objects for protection, instead of concrete situations and actual features, which traditional labor law always had its eye on. As easily expected, there are various types of golf caddies, from extremely close to subordinate employees, to perfect independent contractors. Because of this spectrum, courts were ready to examine with microscope all the time. Legislators did not touch on the scope of "worker" traditionally confirmed by court with this Special Types of Employment. They just noticed the fact that there were some jobs that needed protection of industrial accident compensation regardless of their position in the labor law. And they chose a special protection clause according to what they do, not how they accomplish that job.

Of course they were not perfectly blind to the argument of fundamentalists. They paid attention to how it is fulfilled, so they agreed on the three conditions, "one line of business," "routine basis," "live on such pay," and "not using other person." Exclusive working, continuity, economical dependence and work on his own would be conditions for this special protection. Actually these are criteria originally used for "worker" by LSA. But the degree would not necessarily be the same.

Debates for renewing this clause are one of the pending issues in Korea. There are arguments for the widening of the range of "worker" as a whole, which will consequently lead to solutions to this problem as a package. This is mainly on the ground that, new protection system by IACIA is not working well enough. Research shows that persons who joined IACIA system using this new protection clause are no more than 10%. The reasons for these poor achievements are not that clear. Analysis suggested by researchers includes that employee side does not feel needs for this protection. They say that 50% burden of insurance premium could be not that light for some persons; as mentioned above, unlike regular IACI which employers pay 100% insurance premium, for the Special Types of Employment, both sides pay 50% each. Persons covered by private insurance also are not that positive to this system. Another analysis points out that employer side that came to pay extra 50% insurance premium make employee of Special Types retreat from the insurance by forcing them to request exclusion from the application of IACIA.

Critics to this new system insist that it cannot be a good answer to the needs for the protection of independent contractors. On the contrary, it helps stabilizing the third category of "special type of employment," and would influence the attempt to broaden the scope of "worker" through interpretation considering changed society and employment practice.

IV. Limitations and prospect

Where the boundary line should be drawn is not clear, so inevitably there arises demand by independent contractors from other areas. IACIA gradually has broadened its coverage that needs special regulation. Apparently it is up to date legal response, but to what extent? We feel like considering about the abstract concept of an entity covered by IACIA, consequently the concept of "worker" again.

Substitute drivers are one of the areas that are increasing rapidly, but not covered by employment/labor law at all. Amendment of IACIA suggests two solutions for this. Substitute drivers working mainly for one company (apps), can be covered by IACIA with 50% burden of insurance premium (Art.125). Substitute drivers working for multi users, can be covered by IACIA with 100% burden of insurance premium (Art.124). Of course substitute drivers can be covered by IACIA with 100% employer's burden when he is regarded as a "worker" by LSA. In this sense, new attempt to deal with special treatment by specified legal issues could be an answer to solve the delicate problem, but still it makes us contemplate on the orthodox homework.

With the rapid increase of independent contractors, we feel like depending on classical question but still not faded even today: Who is an employee? In a sense, this old question still dominates the whole employment/labor regulations. But, there are other ways to address this situation. We can detour the classical question and just outline for which a certain type of protection should be proposed, just like Korean IACIA made a new clause for special type of employment.

This is attractive in that we can cope with the issue of employees' protection on a case by case policy. It certainly can maximize optimal propriety and soundness. Where there is a need for protection, we can give it, whether he/she is a "worker" or not. For this, we introduced two ways of special regulation. Defaulted join and exceptional retreat is one way for special regulation. Joining by his own will would be another way to cover a protection. Various ways of regulation make it possible to choose protections according to his/her situation. Persons who don't feel needs for this type of protections or needs for social insurance (maybe independent contractors who are far from workers) can choose optimized regulation.

But at the same time, we need to be guaranteed legal stability. Changes surrounding labor relations are

fast and diverse. We cannot imagine all the changes in advance, and if we respond every time there occurs a more serious problem, losing our expectation about what should be done.

Moreover, needs for protection by social insurance, from industrial accident may be a possible, good choice for the present. But it also can conceive the problem of effectiveness, as we have seen in Korean case. Request for protection, prior response for needs could be a good symptomatic therapy, but from the entire system of law, it could be another hurdle that would prevent consistency and clarity of the regulation.

Finally, collective voices on this type of special regulations should not be overlooked. We introduced special regulation in the arena of social insurance which emphasizes and essentially wears compulsory characters. But our choice was rather on the basis of at-will basis, permitting request for exclusion or making room for joining by his own will. This inevitably raises problems of "real will," which could be hard to tell in the labor relations. At this point, we have to consult the ways of collective voices — unions, employee representative, or some other type of representing body. When we have this bodies, organizing and communicating (bargaining) is not interrupted, we can have better regulations regardless of what kind of new, special regulations we introduce.