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# The Legal 500 Country Comparative Guides

## South Korea

# EMPLOYMENT AND LABOUR LAW


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This country-specific Q&A provides an overview of employment and labour laws and regulations applicable in South Korea.

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# SOUTH KOREA
# EMPLOYMENT AND LABOUR LAW

## 1. Does an employer need a reason to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

Korea is not an at-will termination jurisdiction. Instead, employee terminations in Korea require just-cause. Just-cause is a very high standard to satisfy. Courts have defined just-cause abstractly as a "cause that is attributable to the employee that renders the continued employment impossible from a societal perspective."

Courts consider the totality of the circumstances when determining whether just-cause existed for an employee's termination. Examples of reasons that may constitute sufficient just-cause include, but are not limited to, (i) serious and repeated violation of an internal employment regulation, (ii) conviction of a serious crime; (iii) falsification of one's resume and detrimental reliance by the company, (iv) disclosure of trade secrets, and (vi) workplace sexual harassment. A complete business closure may also constitute just-cause under Korean law.

A key exception to the just-cause requirement: the just-cause requirement does not apply to workplaces with fewer than 5 employees.

## 2. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

Layoffs or terminations for redundancy may also be referred to as "terminations for managerial reasons." The Labor Standards Act ("LSA") sets forth the requirements for a lawful layoff (collectively, the "Layoff Requirements"). Please note that –as a general proposition – satisfying the Layoff Requirements is more difficult than the just-cause requirement for individual terminations. The Labor Relations Commission ("LRC") and the courts also tend to review layoff case with greater scrutiny than individual terminations, due to the larger number of employees involved in layoffs.

The Layoff Requirements are as follows:

1. An imminent managerial necessity for the layoff must exist (e.g., severe financial strain over a period of time without a reasonable prospect of improved financial conditions);
2. The employer must make best efforts to avoid the layoff;
3. The employer must establish reasonable and fair criteria regarding those to be laid off;
4. The employer must consult in good-faith with the employee representative or labor union (if majority union exists) on matters related to the layoff;
5. Advance notice must be provided at least 50 days before the scheduled layoff date to the employee representative or labor union (if majority union exists) and good faith consultation in connection thereto; and
6. The employer must submit a report to the Ministry of Employment and Labor ("MOEL") if, in principle, 10% or more of the workforce is being laid off.

Of the Layoff Requirements, the "imminent managerial necessity" requirement is considered the gateway requirement, the absence of which would render layoffs as a non-viable option.

There is no minimum number of employees required in order to trigger the requirements above. Thus, a layoff against just one (1) employee would still require that the layoff requirements above are met.

## 3. What, if any, additional considerations apply if a worker's employment is

 

### terminated in the context of a business sale?

A business sale may broadly fall into two deal structures: (1) business transfer and (2) asset purchase/transfer. The employment law implications differ depending on the deal structure of the business sale.

1. Business Transfer. In a business transfer, employees of the relevant business will – in principle – transfer automatically to the Buyer; provided that, the transferring employees will have the right to opt-out of the transfer and remaining with their current employer (i.e., the Seller). If an employee chooses to remain with his/her current employer, the employer must satisfy the termination standards as described in Questions 1 or 2 to terminate the employee. A business transfer or sale does not – in and of itself – constitute just-cause for employee termination.
2. Asset Transfer. In an asset transfer, employees of the relevant business do not transfer automatically. The employees of a particular business unit that was sold will remain as the company's employees, and the company must satisfy the termination standards as described in Questions 1 or 2 to terminate the employee. A redundancy due to an asset transfer or sale does not – in and of itself – constitute just-cause for employee termination.

### 4. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

Under the LSA, an employer must provide at least thirty (30) days' written notice of termination to the employee. Alternatively, an employer may provide thirty (30) days' compensation instead of advance notice. Please note that the latter will merely permit the employee to terminate an employee without the notice period. An employer must provide a written termination notice – indicating the effective termination date and the grounds for termination, irrespective of whether advance notice is provided, or compensation is made instead of the advance notice.

Under limited circumstances, employers may be exempt from the written termination notice requirement, for example, causing severe harm to the company, etc.

Employers are not required to provide the 30 days' notice in advance for employees who have been employed for less than three (3) consecutive months, unless stated otherwise in the applicable employment contract or employer rules.

There are no specific categories of employees who are typically provided with a longer contractual notice period as each case of notice entitlement would vary widely, depending on the prevalent practice of the employer.

### 5. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

Please refer to Question 4.

### 6. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

Yes, the employer may instruct an employee to remain at home during the notice period. This form of leave is also referred to as an "administrative leave" in Korea. It is common for administrative leaves to be fully paid to minimize legal challenges from the employee.

### 7. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

In principle, an employer must: (1) adhere to the disciplinary procedures (if any) outlined in its policies or regulations or work rules; and (2) provide a written notice of termination (either served in advance or with immediate effect pursuant to an appropriate payment in lieu thereof) – as described in Question 4 on written termination notices.

If the employer does not have any prescribed disciplinary procedures in its policies, regulations, or work rules, the employer is not required to have any particular procedure (except for statutory procedures such as the notice requirement in Question 4). However, most employers choose to provide a form of due process to the employee, which includes a reasonable notice period for a disciplinary hearing and a chance to present

 

arguments or submit evidence.

In some cases, immediate termination without prior procedure is permitted. This form of termination is called “general termination.” General terminations include situations where applying any procedures is impractical such as the death of an employee, an employee reaches retirement age, expiration of the employment term, or the incapacitation of an employee that no longer allows him to perform his job, and loss of a prerequisite license to continue doing the job. Please note that even in the case of general terminations, employers are highly recommended to provide a notice of termination.

## 8. If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?

If the employer does not follow the prescribed procedure, the termination would be held invalid for procedural error. If the employee had challenged the termination to the LRC or the courts, the available remedies are reinstatement and back-pay.

If an employer chooses not to comply with the LRC’s order, LRC will impose a compulsory fine of up to KRW 30 million (approx. USD 25,000). This compulsory fine can be levied up to twice per year and up to four times in total. The compulsory fine would be imposed even though the employer formally appeals the LRC’s order; provided that, if the decision is subsequently reversed, the compulsory fine would be returned.

Please note that these consequences of an invalid termination are the same for layoffs.

## 9. How, if at all, are collective agreements relevant to the termination of employment?

In the case where a collective agreement is entered into between an employer and a trade union that includes certain requirements (substantive or procedural) regarding terminations, the employer must follow the terms of such collective agreement. If an employer fails to adhere to its disciplinary procedures (including those stipulated in applicable collective agreements), the termination may be held invalid.

Please note that an employer must follow any certain requirements (substantive or procedural) regarding terminations in the collective agreement for all union and union-eligible employees in case the trade union is a majority union. If not a majority union, the requirements (substantive or procedural) regarding terminations (if any) in the collective agreement apply only to union members.

## 10. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

Employers are not required to obtain the permission of or inform a third-party (e.g., local labor authorities or the courts) before terminating individual employees.

However, in the case of a layoff, one of the Layoff Requirements includes filing a report to the MOEL if, in principle, 10% or more of the workforce is being laid off. However, if the first four (4) Layoff Requirements are satisfied (please see Question 2), the validity of a layoff would not be diluted simply because the employer fails to make this report. Please note that if a layoff is held invalid, the available remedies are reinstatement and backpay for the terminated employees.

Please refer to Question 8 regarding the consequences of an invalid termination.

## 11. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

Of the various protections from discrimination or harassment, the most pertinent protections may be as follows:

Under the LSA:

1. An employer shall neither discriminate against employees based on gender, nor take discriminatory treatment (including termination) in relation to terms and conditions of employment on the ground of nationality, religion, or social status.
2. An employer may not terminate an employee during a period of suspension of work for medical treatment of an occupational injury or disease and within thirty (30) days immediately thereafter.
3. An employer may not terminate a female employee during her maternity leave (as prescribed in the LSA) and for thirty (30) days

 

immediately thereafter.
4. An employer shall not terminate or treat an employee unfairly for reporting a violation of the employment and laws by the employer to the MOEL or a labor office inspector.
5. An employer shall investigate any claim or incident of workplace sexual harassment or general workplace harassment. The employer must also maintain confidentiality during the investigation, take appropriate measures during and after for the victim(s), and make efforts to prevent secondary harm to the victims and witnesses. Furthermore, the employer must take disciplinary action without delay as necessary, and no adverse measures shall be taken against victims or those assisting the victims.

Under the Equal Employment Opportunity and Work-Family Balance Assistance Act:

1. No employer shall discriminate on the grounds of gender in age limit, retirement, and termination of his/her employee.
2. No employer shall conclude an employment contract that stipulates marriage, pregnancy, or childbirth of female employees as grounds for retirement.
3. An employer shall not terminate, or take any other disadvantageous measures against, an employee who has suffered from sexual harassment on the job (in the workplace or from clients) or who has claimed that he/she has suffered from sexual harassment (in the workplace or from clients).
4. No employer shall terminate, or take any other disadvantageous measure against, an employee on account of childcare leave, or dismiss the relevant employee during the period of childcare leave; provided that, this shall not apply where the employer is unable to continue his/her business. Following the end of the childcare leave, the employer must also reinstate the employee back to the same work as before the leave or any other work paying the same level of wages.
5. No employer shall terminate, or take any disadvantageous measures against, an employee on the grounds of reduction of working hours for a period of childcare instead of the childcare leave. Following the end of the period of reduced working hours, the employer must also reinstate the employee back to the same work as before the leave or any other work paying the same level of wages.
6. No employer shall terminate an employee, deteriorate his/her working conditions, or take any other disadvantageous measures against him/her on the grounds of taking a family care leave.

## 12. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

If an employee is terminated in violation of the provisions outlined in Questions 1, 2, 4, 7, and 8, the termination will be held invalid. The available remedies for the employee are reinstatement and back-pay. Please refer to Question 8 for more information on the consequences of invalid terminations.

Please refer to the corresponding protection in Question 11 above.

Under the LSA:

1. Administrative fine not exceeding KRW 5 million (approx. USD 5,000);
2. Up to five (5) years' imprisonment or a criminal fine not exceeding KRW 50 million (approx. USD 50,000);
3. Up to five (5) years' imprisonment or a criminal fine not exceeding KRW 50 million (approx. USD 50,000);
4. Up to two (2) years' imprisonment or a criminal fine not exceeding KRW 20 million (approx. USD 20,000);
5. Administrative fine not exceeding KRW 5 million (approx. USD 5,000) for failure to investigate or take appropriate measures to protect the victim(s) or take disciplinary action or maintain confidentiality. However, employers can be subject to up to three (3) years' imprisonment or a criminal fine not exceeding KRW 30 million (approx. USD 30,000) for taking disadvantageous measures (e.g., termination, discrimination, exclusion, disciplinary actions) against victims or those who reported the workplace sexual or general harassment.

Under the Equal Employment Opportunity and Work-Family Balance Assistance Act:

1. Up to five (5) years' imprisonment or a criminal fine not exceeding KRW 30 million (approx. USD 30,000);
2. Up to five (5) years' imprisonment or a criminal fine not exceeding KRW 30 million

 

(approx. USD 30,000);
3. Regarding sexual harassment within the workplace, up to three (3) years' imprisonment or a criminal fine not exceeding KRW 20 million (approx. USD 20,000);
4. Regarding sexual harassment from clients, up to KRW 5 million (approx. USD 5,000) as an administrative fine;
5. Up to three (3) years' imprisonment or a criminal fine not exceeding KRW 20 million (approx. USD 20,000);
6. Up to three (3) years' imprisonment or a criminal fine not exceeding KRW 20 million (approx. USD 20,000);
7. Up to three (3) years' imprisonment or a criminal fine not exceeding KRW 20 million (approx. USD 20,000).

## 13. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

Fixed-term employees are treated the same as regular, indefinite-term employees under Korean employment laws. Also, please refer to Question 11 for information on specific protections for certain categories of employees against termination and/or discrimination.

## 14. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

Yes, as stated in Question 11, an employer shall not terminate or treat an employee unfairly for reporting a violation of the employment and laws by the employer to the MOEL or a labor office inspector. Applicable penalties are up to two (2) years' imprisonment or a criminal fine not exceeding KRW 20 million (approx. USD 20,000).

## 15. In the event of financial difficulties, can an employer lawfully terminate an employee's contract of employment and offer re-engagement on new less favourable terms?

Yes, an employer can terminate an employee for imminent managerial necessity. Termination for financial difficulties or imminent managerial necessity falls under the category of layoff terminations which requires stricter and additional requirements for lawful termination. Please refer to Question 2 for more information.

At any time during an employee's employment, an employer can approach an employee to amend the existing working terms and conditions. In most cases, employers would not terminate an employee only to offer reengagement under new or less favorable terms. Instead, employers would approach employees for possible amendments to their existing terms and conditions before considering employment termination.

## 16. What, if any, risks are associated with the use of artificial intelligence in an employer's recruitment or termination decisions? Have any court or tribunal claims been brought regarding an employer's use of AI or automated decision-making in the termination process?

The use of artificial intelligence has not been fully considered by the current legislations. The current laws do not restrict or prohibit the use of artificial intelligence in an employer's recruitment or termination decisions. However, even if the decision to recruit or terminate an employee maybe decided by artificial intelligence, the legality of the decision (result) will be reviewed with the same legal standard applicable to hiring or firing decisions done by a committee or a human being. For example, the courts will review whether a termination meets the procedural, substantive (just-cause), and the proportionality requirements, irrespective of whether the termination was decided by artificial intelligence.

While the advancement of AI is accelerating, there have not been any cases associated with the use of AI or automated decision-making in the termination process.

## 17. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

Under the LSA, an employer must provide at least thirty (30) days' written notice of termination to the employee. Alternatively, an employer may provide thirty (30) days' compensation instead of advance notice. Please refer to Question 4 for more details.

 

In the case of an early retirement package or mutual separation offers, there are no statutory formulas. Instead, the amounts offered are matters of contract; provided that, if an employer policy or regulation (including any collective agreements) stipulates a formula, the employer must follow its policy, regulation, or collective agreement. See Question 18 for more information.

Under Article 8 (1) of the Employee Retirement Benefit Guarantee Act, upon the termination of the employment relationship for any reason including mutual separation, an employee who has been employed for 1 or more years (and worked for 15 hours or more per week based on 4 week average) is entitled to a (statutory) minimum severance pay equal to not less than 30 days' average wage per each year of service (including partial years pro rata). The average wage is calculated by dividing the total wages paid to the employee during the last 3 months of service by the number of days in the three months.

## 18. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, in what form, should the agreement be documented? Describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

Yes, such an agreement is referred to as a "mutual separation agreement" (or if part of a larger reduction-in-force initiative, an "early retirement package"). In a mutual separation agreement, the employee agrees to resign in exchange for – most commonly – an ex-gratia payment from the employer. There are no statutory formulas. Instead, the amounts offered are matters of contract; provided that, if an employer policy or regulation (including any collective agreements) stipulate a formula, the employer must follow its policy, regulation, or collective agreement.

In a mutual separation agreement, an employee may waive his right to further claims against the employer and may agree to post-termination covenants (e.g., non-compete, non-solicitation), and non-disparagement clauses. Further, the parties may draft in a non-disclosure or confidentiality clause as they deem necessary, and such clauses would be generally binding upon the parties. See Questions 19 and 20.

Mutual separation agreements are most commonly documented in writing; it is highly rare and unadvised for the terms to be agreed upon verbally or in a less definitive written medium such as an email.

Further, while restrictive covenants such as non-competition and non-solicitation are, in principle, enforceable, the courts are requiring specific consideration in exchange for the restrictions as a de facto element. General renumeration such as the regular salary and other benefits are not readily recognized as the requisite consideration for enforceability.

## 19. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Yes, non-compete agreements are enforceable in Korea. When determining the enforceability of non-compete provisions, Korean courts will consider various factors including, but not limited to:

1. Whether there exists a legitimate and protectable business interest;
2. The circumstances of the employee's departure from the previous employer (e.g., termination, resignation);
3. The durational and geographical scope of the restrictions;
4. The employee's access to confidential information while with the previous employer;
5. The employee's position, rank, and responsibilities; and
6. Whether the employee received consideration in exchange for the non-compete provision.

Based on such factors, if the court finds that an employee's constitutional freedom of employment would be unreasonably infringed or violated, the court can invalidate the non-compete provision entirely or in part concerning the durational and geographical scopes.

Although there is no statutory limit on the recognized restrictive period for non-compete agreements, as a general proposition, restrictive periods that are longer than 12 months may be subject to a higher risk of challenge.

Of the factors above, Factor 6 (i.e., consideration received for the restrictions) has become a defacto requirement for enforceability. Courts are highly reluctant to enforce non-compete or non-solicitation agreements unless the employee received payment in exchange for his/her agreement to the restrictions or material risks of irreparable harm exist if an injunction is

 

not granted.

Enforcing non-compete provision and other post-termination restrictive covenants may require significant resources in terms of time and money. It is highly advised to consult with local counsel before commencing such procedures.

## 20. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Yes, a post-termination non-disclosure agreement is enforceable in Korea. Employers should carefully define what constitutes "confidential information" in any non-disclosure provision. Also, unlike non-compete or non-solicitation, non-disclosure agreements or provisions may be set for an indefinite period because non-disclosure obligations are – as a general proposition – not seen as infringing upon an individual's constitutional freedom of employment.

## 21. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

Yes, whenever an employer is requested by an "eligible" former employee to issue a certificate of employment, specifying the term of employment, kind of work performed, positions taken, wages received, and other necessary information, the employer shall immediately prepare and deliver such certificate based on facts, even after the retirement of the employee. The certificate shall contain only the information that was requested by the employee. Failure to provide the certificate may result in an administrative fine not exceeding KRW 5 million (approx. USD 5,000). Please note that a character reference is interpreted to be not included in this employer obligation.

A former employee is "eligible" if the employee had worked for thirty (30) days or longer and within three (3) years of retirement/separation from the employer.

## 22. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

We can identify two major difficulties when terminating employees in Korea:

1. The most common difficulty is satisfying the just-cause requirement for termination, especially if the employer seeks to terminate an employee for poor performance or redundancy (i.e., elimination of a single or few positions), which is not – in and of itself – considered sufficient just-cause for termination under Korean law.

When seeking to terminate an employee for poor performance, both evidence and time are required. As a general proposition, employers are required to demonstrate that efforts were duly undertaken to educate, train and guide an underperforming employee to provide opportunities (including adjustment of targets, reassignments, etc.) for improvement and that despite such efforts, the employee failed to improve. These efforts and the employee's failures should be evidenced from an objective standpoint (e.g., objective and regular evaluations and feedbacks). Therefore, termination for poor performance is highly difficult and may require up to 9 – 12 months of evidence and employer efforts. But even then, the satisfaction of the just-cause requirement is not guaranteed. Many employers opt to use the mutual separation method as an alternative to termination.

As redundancy (i.e., elimination of a single or few positions) is not – in and of itself – considered sufficient just-cause for termination under Korean law, employers also rely on the mutual separation method to separate from the employee; provided that, there are no other grounds for establishing just-cause.

Note: The just-cause requirement applies only for employers with 5 employees or more.

2. The second difficulty involves the protections around workplace harassment. Workplace harassment prevention laws were intended to protect employees and workers of third parties from hostile work environments and general harassment by supervisors and other employees. An employer is required to investigate any report of workplace harassment in addition to taking protective measures for the alleged victim and satisfying other statutory requirements. However, cases are becoming more frequent where employees weaponize the well-intended workplace harassment protection provisions. Specifically, when an employee believes that a company is threatening the employee's job security by initiating discussions about mutual separation, engaging in discussions about poor performance, initiating an investigation to review an employee's potential unlawful or acts of misconduct, or initiating disciplinary procedures, the impacted employee could file a workplace harassment claim to the employer, effectively

 

attempting to suspend any procedures or measures initiated against the employee until the investigation is complete.

Employers often react highly cautiously and conservatively when faced with a workplace harassment claim. However, employers may consider taking a “parallel approach” where the employer may choose to continue its initial, lawful procedure while satisfying its obligations under the workplace harassment prevention provisions to investigate the matter. Please be advised to seek legal counsel before proceeding.

### 23. Are any legal changes planned that are likely to impact the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

No, there is no major legal changes planned that would impact the way or standards that employers would approach termination of employment.

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