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移工自由轉換雇主之限制規範與檢討*

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摘　要

臺灣自 1992 年制定就業服務法以來，對於白領與移工（藍領外籍工作者）給予不同規範，為了確保國人之就業機會，政府對於移工採行聘僱許可制，嚴格控管移工名額，並對其來臺工作期間年限、跨業轉換進行限制，並僅能訂立定期契約，於期滿前轉換工作方面採取「原則禁止，例外許可」規定，僅允許移工於符合就業服務法第 59 條所訂 4 款情形或合意接續聘僱下申請期滿前轉換雇主或工作，在自由轉換雇主上，產生充滿階級主義色彩的「白領從寬、藍領從嚴」差異管制結果。在法規適用上，因移工常因難以取得不可歸責於自己之證據而無法適用轉換程序，或是受到轉換期間的限制而冒著逾期未被新雇主聘僱而遭遣返回國之風險，形同不具有轉換雇主之自由。準此，本文首先就移工轉換雇主或工作之法規範與政策變遷為介紹，說

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明其轉換路徑主要可分期滿前不可歸責於移工事由、合意轉換以及期滿轉換為三種，並分析此三種轉換路徑於實務上之適用與所生困境，以及就業服務法規範已與國際勞工組織於 1975 年通過「第 143 號移工濫用限制及平等機會與待遇促進公約」，以及聯合國大會於 1990 年通過的「保護所有移工及其家庭成員權利國際公約」對於移工職業自由之保障相悖，本文認為若欲維持補充性與暫時性之外籍勞工政策原則，而限制移工應訂立定期契約，惟為兼顧政策目的與移工人權，至少應在目前的定期契約框架下，放寬移工終止原契約、轉換新雇主之權利，而不應以就業服務法第 53 條與第 59 條為嚴苛之限制。長遠之改革應從現行之客工制度逐步朝向移工制度，走向移工得自由轉換雇主的修法方向前進。

關鍵詞：移工、客工、就業服務法第 59 條、轉換雇主、人力仲介

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A Study on Employment Transfer Regulations of Migrant Workers

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Abstract

The Employment Service Act was designed to regulate white-collar and migrant workers (blue-collar migrant workers) in different ways since it was enacted in 1992. In order to protect nationals' employment opportunities, the government adopts an employment permit system to controls the number of migrant workers strictly, restricting their working period and signing fixed term contracts, maintaining the same type of job in their original industry when job transferring. Also, the government prohibits blue-collar migrant workers from applying to transfer jobs before the expiry of employment, unless they meet four requirements of Article 59 of the Employment Service Act. However, blue-collar migrant workers often face difficulty to meet these four requirements. Besides, Employment Service Act also sets a period limit for employment transferring and the government controls the number of migrant workers, which makes it more difficult for migrant workers to transfer. Many migrant workers have to take risk of deportation to transferring job within the legal period. These phenomenon shows different level of regulation be-

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tween white-collar and blue-collar migrant workers in Taiwan, which means the latter have no freedom of employment transferring. In Summary, this article introduces regulations and policy changing of shifting to work for a new employer or to engage in new work at first and then explains three ways of employment transferring which includes circumstances not attributable to the employed foreign worker, transferring by consent and expiry transferring. The article then analyses the difficulty of applying to regulations of these three ways in practice. At last, considering the government has not yet follow ILO's Migrant Workers Convention No.143 and ICMW to grant migrant workers freedom of transferring in Employment Service Act, and taking account of supplementary and temporary foreign labor policy purpose and human rights of migrant workers, the article offers short-term and long term suggestion: loosen up restrictions on migrant workers' right to terminate contract and transferring in the short term. Long-term reforms should gradually move from current guest worker system to real migrant worker system, and amend the law to achieve freely transferring in practice.

Keywords: Migrant Worker, Guest Worker, Article 59 of Employment Service Act, Employment Transfer, Labor Broker Agency