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移工勞動契約終止法規適用與爭議之研究*

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摘　要

移工在臺灣已是不可或缺之重要勞動力，我國開放合法僱用外籍移工迄今亦已滿 30 年。但是，因為法院或行政機關對於就業服務法第 42 條，外國人來臺工作不得影響本國人就業權利之規定，即所謂移工係補充性勞動之「本國人優先原則」做出錯誤解釋，以致移工與雇主發生勞動契約終止爭議時常受到不公平之待遇。本文以為，在不修法之前提下，吾人應確認「本國人優先原則」只是行政機關擬定移工具體規定時之指導原則，不應用於個案處理之解釋。就業服務法等行政法令之規定不能影響移工與雇主間私法契約之效力，移工之契約終止爭議應適用與本國人勞工相同法令作為紛爭解決之依據，唯有依照此一原則始能公平合理的解決移工勞動契約終止時之爭議。

關鍵詞：移工、就業服務法、勞動契約終止、勞動基準法、本國人優先原則

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A Study on the Application and Disputes of the Termination Regulations of Migrant Labor Contracts

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Abstract

Migrant workers have become an indispensable and important labor force in Taiwan. It has also been 30 years since Taiwan opened up legal employment of foreign workers. However, because Article 42 of the Employment Service Law is used by courts or administrative agencies, migrant workers in Taiwan must not affect the employment rights of their own nationals, that is, the so-called "priority principle of nationals" of the so-called migrant workers must be supplementary labor, which led to the wrong interpretation. Migrant workers often receive unfair treatment when disputes over termination of labor contracts occur. This article believes that before mentioning the amendment, I should confirm that the "principle of nationals" is only a guiding principle for administrative agencies when drafting regulations on the transfer of tools, and should not be used for interpretation of individual cases. The provisions of the Employment Service Law and other administrative decrees cannot affect the effectiveness of the private law

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contract between migrant workers and employers. Disputes over termination of migrant workers should apply the same legal principles as domestic workers. Only in accordance with this principle can the fair and reasonable settlement of migrant workers be resolved.

Keywords: Migrant Workers, Employment Service Law, Termination of a Labor Contract, Labor Standard Law, Priority Principle of Nationals