

## EAST ASIAN LABOR AND EMPLOYMENT LAW

This book discusses international labor and employment law in the East Asia Region (EA), particularly with regard to China, South Korea, and Japan. It explores and explains the effects of globalization and discusses the role played by international labor law as it affects lawyers, business, labor, labor unions, and human resource management and the labor issues that can arise in dealing in EA trade and investment.

The text and the readings (from area experts) are organized and written to provide the reader with a broad understanding and insight into first the global dimensions of the fast-emerging area of labor and employment issues (e.g., global legal standards and their interplay with domestic and foreign laws) and second how these laws and approaches play out in specific EA countries (comparing global approaches with the specific laws of each country on four common agenda items: regulatory administration, workers' rights, trade unions, and dispute resolution). The book should be of interest not only to lawyers, students, human resource personnel, and government officials, but also to business investors, managers, and members of the public interested in the growing phenomenon of changing labor laws and societies in China, South Korea, and Japan.

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# East Asian Labor and Employment Law

INTERNATIONAL AND COMPARATIVE CONTEXT

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## Preface

### EAST ASIAN LABOR AND EMPLOYMENT LAW: INTERNATIONAL AND COMPARATIVE CONTEXT

#### *Introduction*

*A mid-sized U.S. employer in Toledo, Ohio, contemplated investing somewhere in China, South Korea, or Japan. Its goal was to reduce its costs in manufacturing and supplying certain products. It currently has a collective-bargaining agreement with its employees and needs to decide whether to close its U.S. plant, subcontract with a foreign company, or set up operations overseas; but where and how can profits be maximized and competitive advantages enhanced? Must seniority be followed in selecting which key employees can be offered relocation to the foreign facility? Whose laws apply? Do those countries have labor and employment laws? Are they enforced? Certainly many business decisions will need to be made, but how significant are the labor issues that must be considered and how costly if mistakes are made?*

Within the developing world, the populous Asia and Pacific region dominates, accounting for more than fifty-seven percent of all employment. The two giants, China and India, have 26.0 percent and 14.8 percent of world employment, respectively.<sup>1</sup>

This book discusses international labor and employment law in the East Asia Region (EA), particularly with regard to Japan, South Korea, and China. Part I introduces globalization – economic integration, cross-border business involving capital, labor, and global production and assembly lines. Also discussed are the effects of globalization on labor, labor unions, business, human resource management, law, and lawyers. From this globalization and its effects come the need for international lawyers, business personnel, and human resource directors who are knowledgeable

<sup>1</sup> CHANGING PATTERNS IN THE WORLD OF WORK 19, *citing*, ILO: Global Employment Trends Model database (Geneva, 2006). See [www.ilo.org/public/english/employment/strat/wrest.htm](http://www.ilo.org/public/english/employment/strat/wrest.htm).

and culturally sensitive and who understand the issues that can arise in dealing in EA trade and investment. Not all issues are legal, but they still have clear implications for a company's wellness (e.g., cheap labor may be viewed by some as exploitive labor), as Sears, NIKE, and Liz Claiborne learned in earlier years. Practitioners soon discover that in today's global economy they need at least a basic awareness of not only U.S. or home-country labor and employment laws, but also of international and foreign legal issues that often are implicated.

Part II of the book deals with global legal standards and their interplay with domestic and foreign labor and employment laws. Understanding labor and employment law in its international context reveals that law itself is becoming globalized, as is an increasing percentage of the labor force. The book addresses how these changing demographics also change the dynamics of regulation; and, as the Eastern and Western cultures mix, new perspectives are raised concerning whether *labor rights* and practices may cross over into *human rights*. Some thoughtful analysis may be required to set aside one's own biases and understand another culture's approach to legal rights, as for example protecting the safety of a pregnant woman in the workplace involving issues of gender discrimination. The laws in EA derive from legal heritages and legal systems that embrace different pieces of Western traditions. Knowing how a civil law system or one blended with common law or socialist law characteristics operates facilitates successful lawyering involving foreign trade and investment. Whether there has been an "*Asianization*" of law in EA is debatable, but the impact in EA of globalization causing a convergence of global labor standards and local labor and employment laws is real.

Confronting the international labor and employment lawyer are three levels of law: domestic, international, and foreign. For example, a U.S. company needs to consider and coordinate gender issues in the workplace under Title VII of the Civil Rights Law, International Labor Organization (ILO) standards, and the particular EA country's laws. Also in play may be industry or company codes of conduct, extraterritorial application of U.S. laws, or the Alien Tort Claims Act. Wal-Mart has been embroiled in litigation in California touching on some of these issues.

Part III, for comparative purposes, examines global approaches to four "agenda items": a) regulatory sources, structures, and administration; b) workers' labor rights and benefits; c) labor unions, national and international; and d) dispute resolution of labor rights and interests.

Part IV examines the EA legal regimes of Japan, South Korea, and China (including reference to Hong Kong and Taiwan) as they regulate their labor and employment. Also considered are global institutions' measurements of these countries' compliance with international global standards.

Lastly, Part V provides a number of illustrative issues or themes common within the EA countries and raises questions about the various approaches that would be taken by the labor and employment laws of each. These approaches are then compared to each other through questions to see where the "best practice" or



comparative advantage might lie or identify an area needing reform. The issues examined include: a) hiring and discrimination; b) labor contracts, individual and collective; c) working conditions and benefits; and d) employer discipline, termination, and alternative dispute resolution (ADR).

Although this book is useful as a textbook or source book, it is also written for those interested in gaining *competitive* advantages in the Asian markets by better understanding the *comparative* advantages of the various labor law regimes in China, Japan, and South Korea. The readings and text are organized and written to provide the reader with a broad understanding and insight into first the global dimensions of the fast-emerging area of labor and employment issues and second how in specific Asian countries these laws and approaches play out. In this regard, the book should be of interest not only to lawyers, students, human resource personnel, and government officials, but also to business investors, managers, and members of the public interested in the growing phenomenon of changing labor laws and societies in Japan, South Korea, and China.

## International Labor and Employment Law: From Periphery to Core<sup>2</sup>

Marley S. Weiss

If we were to rank areas of labor and employment law by the level of change in the past twenty-five years, international labor and employment law would surely be near the top. It is no exaggeration to say that this field has been transformed during the past two and a half decades. As an area of specialty practice, international labor and employment law has fully emerged. This time period witnessed the information and telecommunication revolution, paralleled by quantum leaps forward in the global trade order and regional integration regimes. Internationalization of markets for and supply chains in goods and services has profoundly affected the practice of domestic labor and employment law, the balance of power between capital and labor, and the content of the employment relationship. The globalization of markets in goods, services, capital, and labor has led to the embedding of comparative labor and employment law within the practice of domestic labor and employment law. The globalization of labor markets also has resulted in the incorporation of elements of immigration law into the heart of employment law practice.

Changes in international trade law, as well as technology-driven changes in the economics of trade and investment, have stimulated new approaches to the substantive, procedural, and remedial aspects of international labor law. The content of law school curricula and continuing legal education programs increasingly responds to these new bodies of law and legal practice. Cumulatively, these dramatic changes in law, economics, and society have brought American labor and employment law practice to the

<sup>2</sup> Marley S. Weiss, *International Labor and Employment Law: From Periphery to Core*, 25 *ABAJ of Labor & Employment Law* 487–88 (2010). [Footnotes omitted.] The author, Professor of Law at the University of Maryland School of Law, has served as the academic/employee co-chair of the International Labor and Employment Law Committee of the ABA Section of Labor and Employment Law.

cus of an immense transformation in how employment and labor law is practiced in connection with transnational activities.

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#### **IV. The Next Step: Strategic Thinking in the Practice of Labor and Employment Law**

Finally, the coming of age of international labor law is increasingly reflected in practitioners' resort to the type of strategic and comparative thinking more familiar in U.S. domestic law. Strategic planning to minimize labor/employment obligations, economic burdens, and liability exposure, heretofore used by businesses in site selection and plant relocation decisions about moving from one U.S. state to another, now plays a role in decisions of multinationals about whether to outsource work from the United States to a Brazilian subcontractor. Even smaller businesses engage in comparative analysis of national law, industrial relations systems, and international obligations in making decisions about mergers, acquisitions, joint ventures, offshoring or outsourcing business activities, brand licensing, and other transnational transactions.

Transnational trade union confederations and global workers' rights networks are deploying countervailing corporate campaigns, consumer boycott appeals, and legal strategies on the international plane. As in a domestic labor dispute or corporate campaign, unions and workers' rights advocates strategically analyze potential sources of economic pressure, such as consumer boycotts, withholding of investment by sovereign wealth funds with corporate social responsibility mandates, and publicity campaigns. They utilize both domestic and international legal proceedings for the legal remedies they may supply and for the additional publicity and veracity a legal ruling can provide to fuel public political, economic, and social pressure campaigns. Legal submissions utilizing the frameworks available at the ILO, UN Global Compact, U.S. free trade agreement-based labor rights, international corporate codes of conduct, and other international arrangements provide an international framework within which labor organizations and multinational corporations strategize and navigate.

Although few of these international instruments afford relief to victimized workers and trade unions, or deterrent sanctions against employers or even nation-states, they do play an important role in mobilizing political pressure to change policy in noncompliant nation-states and induce corporate compliance with core international labor rights, even in the absence of strong national- or local-level enforcement. U.S. domestic statutes such as the Alien Tort Claims Act provide a stronger deterrent effect against both companies and governments by affording potentially massive tort remedial awards for the worst violations of workers' rights.

Management lawyers analyze choice of law, choice of forum, election or combination of procedures and remedies, comparative labor costs, industrial relations systems, and labor and employment law regimes as they advise regarding site selection decisions, capital redeployment decisions, and trade union development of countervailing transnational affiliations, mobilization, and economic and political pressure campaigns.

With an ever-shrinking globe, and an ever-intensifying international integration of markets and work, one must anticipate that these trends will continue and intensify in the coming years.

## Acknowledgments

The content of this book derives from working experiences in Asia and countless visits over the past decades to East Asia, including China, Japan, South Korea, Hong Kong, and Taiwan, and meetings, consulting, teaching, providing seminars and training, and working on joint projects on law and labor and employment-related projects with legal practitioners, academics, business personnel, and government officials. The format and organization of the book evolved from my law school course on Asian International and Comparative Labor and Employment Law, which I have taught at the University of Hawaii Law School and in Asian law schools for the past two decades and which appears to have been successful in introducing the legal environment of East Asia and educating law students during that time.

During this period of continually discovering and discussing with countless numbers of legal practitioners, academics, students, business personnel, and government officials the development and importance of international labor and employment law, I have come to understand that this area of the law is very significant as a discrete and concrete subject area that involves citizens, workers, businesses, unions, and governments. The economics and politics of labor and employment laws and labor relations can be volatile and affect economic development, social stability, labor unrest, and the success or failure of business operations, as well as the welfare and safety of the employees performing the work under varying workplace environments. I am grateful for the permissions granted by the authors for some of the materials used in this book, as they and their expertise have expressed it in the voice of firsthand knowledge and perspective.

The time for specialized emphasis and knowledge of the approaches and requirements of labor and employment laws and practices in this region of the world is now. The tide of trade and business investment, and even adventure for many, has moved from trans-Atlantic to trans-Pacific. This book seeks to address the legal background of the region, provide an introduction to the reader of the many sophisticated regional and global developments presently occurring in East Asia, and place

them in an international and comparative context; yet leave the many factors and variables raised, but not fully analyzed, for subsequent discussions and decisions by lawyers, students, business and human resource personnel, and those interested in the combined localization and globalization of the workplace environments now taking place in East Asia. The law in each country changes rapidly, and the EA country materials are not necessarily intended to be specific and current but rather to provide sufficient basis to understand the legal parameters and spur on further inquiry.

I also want to acknowledge the support of the University of Hawaii Law School and the significant technical assistance provided to me on this project by my research assistants at the Law School, Aeri Yum and Sara Lee. Aeri Yum, already a health specialist, transformed into a wonderfully capable foreign legal researcher, using her meticulous medical skills to collect and analyze the many laws and articles of possible relevance to my teaching a course on Asian labor law as well as for use in this book. She also successfully organized and obtained the required copyright permissions. Sara Lee, a second-year law student, more recently has assisted greatly in adding to Aeri's work and putting this book in proper form and formatting. Lastly, I wish to acknowledge my wife, Mangmang, who has assisted and supported me over the years in the many projects in Asia relevant to this book. Her keen mind, legal background, inherent understanding of "Chinese and Asian characteristics," and her time and support are always an asset to me as I move forward.