Employer workplace pension contribution as from one month of employee service: is it an obligation?

A discrepancy in statutory and regulatory workplace pension reforms generates confusion as to the obligation to enrol participants with no more than one month's seniority and the company's contributions.

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1. The possible discrepancy between the statutory and regulatory reform of workplace pension schemes and funds is generating quite a few controversies. One such controversy after the reduction of the two-year minimum length of service so that more than one month's seniority is not required to access the scheme or fund, concerns whether the company must make contributions for these workers, whether they must be the same as for the rest of the workers, or whether pension access is possible without contributions by the employer.

   Two years ago, the Pension Schemes and Funds Act (LPFP) was amended by the Workplace Pension Schemes (Promotion) Act 12/2022 of 30 June, the main aim of which was to promote workplace pension schemes, including government-sponsored pension funds, extending coverage to groups of workers without a workplace pension scheme or to self-employed workers and, finally, increasing the protection of workplace pension schemes agreed through collective (mainly multiemployer) bargaining. Subsequently, Royal Decree 885/2022 of 18 October was adopted to amend the Pension Schemes and Funds Regulations (RPFP), conceived as a partial and basic regulatory implementation at the start of the application of the aforementioned act; later, Royal Decree 668/2023 of 18 July was also adopted, amen-ding the Pension Schemes and Funds

Regulations to promote workplace pension schemes (BOE of 20 July).

Undoubtedly, the novelty of these regulations was the inclusion of simplified pension schemes and the integration of government-sponsored workplace pension funds into the system. Also, in the successive regulations, particularly Royal Decree 668/2023 - the focus of this text -, some aspects susceptible of critical appraisal were introduced, for example, in relation to Article 112 of the Pension Schemes and Funds Regulations on the characterisation of sponsors or participants in these schemes. In this regard, the legal regulation of reference is that contained in Article 67 of the Pension Schemes and Funds Act, with different modalities of simplified workplace pension schemes. As regards those sponsored by companies by virtue of multiemployer collective agreements that implement pension commitments in favour of their employees, the company included in one such collective agreement will be considered the sponsor, and the employee affected by the agreement will be a participant. It should be noted that the law adds that this type of scheme will pay "special attention to promoting its implementation in small and medium-sized companies", an aspect not included in the regulatory implementation contained in the aforementioned Article 112 of the regulation. The latter does, however, include the consideration as participants of the self-employed workers referred to in Article 68(2) of the Pension Schemes and Funds Act, which expressly includes the possibility for them to join a multiemployer scheme by reason of their activity and by virtue of the procedure set out in the specifications of the multiemployer simplified workplace pension scheme.

A workplace pension scheme can be accessed with one month of seniority in the company

Article 112(6) of the aforementioned regulations therefore stipulates the need for the administrator to verify, at the time the participant joins the scheme, that he/she is self-employed, which must be proven by means of the supporting documents provided by the pension scheme participant to the pension fund administrator. If the applicant is unable to provide the supporting documents, they may be replaced by a statement of compliance.

Another example would be the change introduced by Article 25 of the Pension Schemes and Funds Regulations to extend the status of employees, for the purposes of the application of pension schemes, to directors included in the Social Security's general class as likened to employees in the terms established in Article 136(2)(c) of the Social Security Act, as per Article 25(2) of the aforementioned regulations. Similarly, the status of participants may be extended to employee shareholders and members in workplace schemes sponsored by employee-owned companies and co-operatives, if this is provided for in the specifications of the scheme sponsored by the undertaking, as well as to co-owners in workplace schemes sponsored by joint property partnerships and to partners of business partnerships included in both cases, by virtue of their status, in the Social Security's special class for self-employed workers. The regulations clarify that references to employees, workers or the employment relationship contained therein shall be understood to refer, where appropriate, to the aforementioned employee shareholders or members, co-owners and partners, as well as to the employee shareholder or member, co-owner and partner relationship. Likewise, within the scope of the relationship between employee-owned

companies or co-operatives and their shareholders or members, the references in these regulations to the collective agreement or equivalent provision may be considered as being made to the shareholder or board meeting resolutions of these companies, all by virtue of the provisions of Article 25(3) of the Pension Schemes and Funds Regulations.

2. However, there is one aspect that is proving to be particularly contentious. This is the change introduced to the content of one of the basic principles of pension schemes: non-discrimination. In the statutory reform carried out in 2022, Article 5(1)(a)(1) of the Pension Schemes and Funds Act was amended to specify that "a workplace scheme will not be discriminatory when all the staff employed by the sponsor are covered or in a position to be covered by such scheme, and no more than one month's seniority may be required for access to the same. Any workplace scheme may provide for access with less than one month's seniority or as of joining the sponsor's staff". Before this amendment, however, it was possible to require a length of service in the company of up to two years to be able to access the pension scheme. Accordingly, Article 26(1) of the Pension Schemes and Funds Regulations was amended by Royal Decree 668/2023, although with some additions; thus, non-discrimination would be understood to refer to the worker's right to access the scheme and to company contributions as from enrolment in the scheme provided that the worker is in the employ of the sponsor.

   The regulations also stipulate that, in order to determine the length of service of one month referred to in both the new statute and the regulations, the time elapsed since joining the sponsor's workforce under any type of employment contract shall be taken into account. In the event of joining the sponsor's workforce by way of transfer of employment contract, the worker's length of service in the transferor company shall be taken into account for the purposes of access to the pension scheme. The right of access to the scheme is understood to be without prejudice, where applicable, to the system of contributions and benefits to be applied in the scheme to the staff affected by the transfer of employment contracts according to the provisions of the collective agreement or equivalent provision or in the specifications themselves, or as derived from the sponsor taking on the pension commitments assumed by the transferor company and their instrumentation. Within a maximum period of twelve months from the effective date of the transfer of employment contracts, the specifications of the scheme must be adapted to expressly regulate, where appropriate, the differentiated system of contributions and benefits that may apply to the staff affected by said transfer.

3 The obligation to enrol staff with one month's seniority in the workplace pension scheme, adapting, where appropriate, that existing to this requirement, is generally complied with by companies with workplace pension schemes. What happens with employer contributions for these workers is a different matter. In this respect, the question arises as to whether the fact that the statutory rule establishes the obligation to access the workplace pension scheme means that the company must also contribute into it for this worker with more than one month's seniority. In fact, the problem arises both for those who have recently joined the scheme - provided that one month has elapsed - and for those who, having more than one month's seniority, have not reached the two years required beforehand, which is why they would have been excluded from the scheme's coverage.

Because, both before and now, the statutory rule does not consider it discriminatory to differentiate the contributions of the sponsor corresponding to each participant according to the criteria derived from a collective agreement or equivalent provision or established in the specifications of the scheme. Hence, there were schemes with different contributions for different groups, and it was even feasible to have a scheme with some groups without contributions. However, in order to avoid discrimination, the new regulations not only recognise the worker's right to access the scheme, but also the right "to company contributions as from enrolment in the scheme provided that the worker is in the employ of the sponsor", as per Article 26(1) of the Pension Schemes and Funds Regulations.

The General Government, through the Directorate-General for Insurance and Pension Funds, interprets the regulations as clarifying the meaning of the statute and, since the latter requires the worker to be enrolled after one month's service, the company must make the appropriate contribution for said worker into the workplace pension scheme. Companies consider, however, that the regulations exceed their legislative capacity by including an obligation that is alien to the statutory text. If this is the case, it should be asked whether the contributions of these workers must be identical to those of workers in the same situation but with more than two years' seniority, whether they must pay these amounts retroactively and, if so, from when - from the entry into force of the statute in July 2022, from the entry into force of the regulations in July 2023? According to the General Government, from the entry into force of the statute (July 2022), although it is possible that the employer's contributions may be of a different amount depending on the length of service of the worker, provided that this is established in the scheme's specifications. Companies also add that, since the contribution requirement is contained in the regulations and the latter provide for a period of 12 months for the scheme's specifications to be brought into line with the regulatory reform, it should therefore be possible to bring the scheme into line by July 2024.

The company can contribute different amounts for different groups according to the scheme's specifications

4. It is true that the statutory reform modifies the basic principle of non-discrimination (Art. 5(1)(a) LPFP) in two of its paragraphs, the first and second, both in relation to workplace pension schemes: the first, to establish the possibility of access as of a length of service of one month; the second, to incorporate, when regulating the compatibility of non-discrimination with the differentiation of the sponsor's contributions corresponding to each participant, the obligation to guarantee, however, the implementation of corrective measures to avoid the gender gap. The remaining paragraphs refer to associated or individual schemes, respectively. Therefore, the possibility of differentiating contributions from the sponsor to each participant remains in force, provided that such differentiation occurs "in accordance with criteria derived from a collective agreement or equivalent provision or established in the specifications of the scheme" (Art. 5(1)(a)(2)). The scheme's specifications, as stated in Article 6(1)(e) of the Pension Schemes and Funds Act, shall specify, "where appropriate, the criteria and systems for differentiating contributions and benefits". Consequently, the specifications must include the possible differences in the

employer's contributions. Would it be possible to allow differences according to the worker's length of service in the company? In principle, nothing seems to prevent this.

Certainly, the regulations have added clarifications in relation to the first paragraph - the month's seniority - and has also specified the second of the paragraphs described - the sponsor's contributions: as regards the first (and leaving aside the above-mentioned issue of transfer of employment contracts and the clarification that the length of service of one month is calculated from the moment of joining the company, regardless of the type of employment contract used), to indicate that non-discrimination is understood to refer to the right to access the scheme and to company contributions as from enrolment in the scheme provided that the worker is in the employ of the sponsor. The regulations do not state, incidentally, that such contributions are compulsory, but rather that they will be those that correspond according to what has been "established". Consequently, neither the statute nor the regulations include an automatic principle of contribution, but rather a conditioning of the company's contribution to the collective agreement, equivalent provision, specifications, etc. in which it is included.

There is the possibility of accessing a scheme without contributions from the company

With regard to the second paragraph, the regulations stipulate, like the statute, that non-discrimination will be compatible with different sponsor contributions for each participant and adds that it will also be compatible with the application of differentiated contribution and benefit systems and with a structure of sub-schemes within the same scheme, all in accordance with criteria derived from a collective agreement or equivalent provision or established in the specifications of the scheme. Here too, therefore, the legislator seems to admit that the specifications can make such a difference in the participants' contributions.

It does not seem that the above-mentioned provisions are the subject of attention in the reform that the Ministry of Inclusion, Social Security and Migration envisages for the regulations, although it would be advisable that these aspects be clarified. However, clearly, there is a certain contradiction between the regulatory clarification of what is to be understood as non-discrimination - in terms of "the worker's right to access the scheme and to company contributions" - and the possibility of the employer not contributing in the end. However, there is nothing to prevent such a conclusion if, regardless of the divergences - or even discrepancies - between the statute and the regulations, it is noted that, in any case, the employer's contributions must have a specific legislative or mandatory justification, normally in the specifications of the scheme, the latter being sovereign to determine, where appropriate, the objective differences in the different protected groups.