

# New developments in pension schemes, including workplace schemes

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*The process of adapting internal legislation on pension schemes and funds to European regulation is moving forward. The focus is now on aspects such as information for members, potential members or beneficiaries of workplace schemes; publicity on investment criteria; greater legal certainty concerning the knowledge of vested rights and their transferability or, among other aspects, more precise rules on the minimum content of the joining form.*

A new piece of legislation, namely Royal Decree 738/2020, of 4 August (Official Journal of Spain - BOE - of 7 August), amending Royal Decree 304/2004, of 20 February (BOE of 25 February), approving the Pension Schemes and Funds Regulations (hereinafter referred to as the “Regulations”), and Royal Decree 1060/2015, of 20 November (BOE of 2 December), concerning the unified regulation, supervision and solvency of insurance and reinsurance companies, continues the process of adapting internal rules and regulations to European legislation.

On this occasion, certain matters are implemented in order to complete the transposition of Directive 2016/2341 of 14 December (Official Journal of the European Union - OJ - of 23 December) and Directive 2017/828 of 17 May (OJ of 20 May), respectively, as far as domestic legislation governing pension funds is concerned. In addition, Article 2.1 of Directive 2019/2177 of 18 December (OJ of 27 December), amending Directive 2009/138/EC on the taking-up and pursuit of the business of

Insurance and Reinsurance (Solvency II), Directive 2014/65/EU on markets in financial instruments and Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (whose deadline for transposition expired on 30 June 2020), is transposed into Spanish law.

Technically complex in content, some new developments stand out; this document summarises the most significant ones from an employment-related perspective.

## **1. Information for members and beneficiaries of workplace pension schemes**

Article 34 amends and completes its content to increase safeguards for members and beneficiaries. In this respect and in relation to workplace pension schemes, the manager or, where appropriate, the sponsor or the scrutiny committee of the scheme must provide members, potential members and beneficiaries with adequate information on the pension scheme. To this end, a general information document on the pension scheme must be drawn up and made available to all members, with the following minimum content:

- a) definition of the workplace pension scheme;
- b) name and type of the pension scheme and pension fund, registered office of the scheme's sponsor and of the fund's manager and depository, as well as the relevant identification numbers in the special register;
- c) contribution class and contingencies covered, with special reference to persons without the possibility of access to retirement; where applicable, the possibility of continuing to make contributions after the occurrence of retirement, disability and dependency contingencies must be indicated, without prejudice to the possibility of requesting payment of the benefit at a later date, together with a warning of the contribution limits;
- d) reference, where appropriate, to exceptional cases of liquidity or early withdrawal;
- e) non-refundable nature of the vested rights as long as the circumstances allowing for collection do not occur;
- f) benefit system, specifying the forms of collection, possible beneficiaries and procedure for the request of benefits by the beneficiary, with special reference to the date of valuation of the vested rights, as well as, in the case of partial collections, the criterion for selecting the contributions from which the vested or economic rights subject to collection derive, and, where appropriate, the degree of insurance or guarantee of the benefits with identification of the name and address of the insurer or guarantor;

- g) transferability of the vested rights, if applicable, and indications on the calculation of the vested right, conditions, procedures and deadlines for the transfer of vested rights, indicating the date of valuation of the rights for these purposes, as well as, in the case of partial transfers, the criterion for selecting the contributions from which the vested or economic rights subject to transfer derive; an indication of the conditions governing the treatment of the vested rights that remain in the scheme after the termination of employment shall also be included;
- h) description of the investment policy with information on how environmental, climatic, social and governance factors are taken into account in the investment strategy as set out in the statement of investment principles;
- i) nature of the financial risks assumed by the members and beneficiaries;
- j) information on past returns adjusted to the latest published quarterly report;
- k) fees and expenses;
- l) applicable law and tax scheme; or, inter alia, the following point *m*
- m*) reference to the means of access to information and documentation concerning the pension scheme and fund established here.

The general information document on the pension scheme, as well as the scheme's specifications, the fund's rules of operation, the pension fund's statement of investment principles and the internal rules of conduct must be kept up to date and available to members, potential members and beneficiaries, so that they can access these documents free of charge by electronic means, including a durable storage device or website (and, if expressly requested by the interested party, on paper). These documents must be made available by the scheme's manager, the scheme's sponsor or the latter's scrutiny committee. In any case, members shall be provided with the information referred to in Article 11 of the Personal Data Protection Act regarding transparency and information to the data subject and the guarantee derived from the digital rights and governed under Title X of the aforementioned law.

Furthermore, at least once a year, the manager of the pension fund in which the scheme is incorporated will provide each member of the workplace scheme with a certificate on the contributions, direct or assigned, made in each calendar year and the value, at the end of the calendar year, of their vested rights in the scheme. If the specifications of the workplace pension scheme provide for the possibility of early withdrawal of vested rights corresponding to contributions made at least ten years before, the certificate shall indicate the amount of the vested right at the end of the calendar year that can be converted into cash in the event of early withdrawal.

In this regard, the certificate must contain a summary of the determination of the covered contingencies, the use of the contributions and the rules of incompatibility of the same, as well as an indication of the conditions governing the treatment of the vested rights that are maintained in the scheme after the termination of employment and the possibilities of transfer. If applicable, the certificate will indicate the amount of the member's excess contributions over the established maximums and the duty to communicate the means of payment of the refund. Also, at least once a year, the manager must provide a document called the *Declaración de las prestaciones de pensión* (pension benefit statement), containing relevant, accurate and up-to-date information for each member and, at least, the member's personal data, including a clear indication of the retirement age; the name of the workplace pension fund and its contact address, as well as the identification of the member's pension scheme; where applicable, information regarding total or partial guarantees provided for in the pension scheme and, where appropriate, where additional information can be obtained; information on pension benefit forecasts based on the specified retirement age; information on employers' contributions and members' contributions during the 12 months preceding the date to which the information relates; information on vested rights; a breakdown of the costs deducted by the workplace pension fund for at least the last 12 months; information on the level of funding of the pension scheme as a whole; and finally, inter alia and prominently, the exact date to which the information relates.

In addition, and in this case on a half-yearly basis, the managers must provide members and beneficiaries of workplace pension schemes with information on the development and status of their economic rights in the scheme, as well as on matters which may affect them, in particular regulatory changes, changes to the specifications of the scheme, changes to the pension fund's operating rules or investment policy, and changes to the management and deposit fees. The half-yearly information will contain a status-summary of the evolution and situation of the fund's assets, the costs and the returns obtained and will inform, where appropriate, on management contracts with third parties. In addition, and at a member's request, information on the benefit payment options available to him when he receives his retirement benefits, as well as the assumptions used to generate the benefit forecasts, should be provided as additional information.

In any event, the Directorate-General for Insurance and Pension Funds may regulate the detailed content and format of the information provided for potential members, members and beneficiaries by means of a circular, as well as establish standard templates in order to allow comparisons between pension schemes.

## 2. General investment principles

Article 69 of Royal Decree 738/2020 introduces some interesting considerations. These include the fact that the pension fund's scrutiny committee must exercise, for the exclusive benefit of members and beneficiaries, all the rights attaching to the securities held in the fund.

These rights will be exercised by the fund's scrutiny committee either directly or through the manager, which will follow the instructions of the committee or the provisions of the fund's rules of operation. Along the same lines, a new Article 69 bis is introduced on publicity concerning the investment strategy and agreements with asset managers of workplace pension funds. To this end and among other issues, the scrutiny committee must indicate in the annual directors' report the policy of involvement it has developed, the key indicators and performance metrics considered and the results of its measurements of the environmental, social and corporate governance aspects that it considers.

In the case of workplace pension funds, the fund scrutiny committees or, where appropriate, the fund managers must prepare and make public a policy of involvement describing how the pension fund is involved as a shareholder in its strategy for investing in shares of companies that are admitted to trading on a regulated market situated or operating in a Member State of the European Union. This policy will indicate how they monitor the companies in which they invest with regard to at least strategy, financial and non-financial performance, risks, capital structure, social and environmental impact and corporate governance. In this respect, the scrutiny committees of the workplace pension funds and, where appropriate, the workplace pension fund managers and the asset managers, should take reasonable steps to detect, prevent, manage and control conflicts of interest that may arise in the context of the involvement activities. For these purposes, companies that fall under the cases provided for in Article 42 of the Code of Commerce shall be considered to belong to the same group.

### **3. Joining form**

Article 101 of Royal Decree 738/2020 contains new indications on the contracting of the pension scheme through the joining form "signed by the member together with the scheme's sponsor, the manager and the depositary". The expenses inherent to the contracting of the scheme and the remuneration or fees provided by the marketing or mediation services will not be paid by the member who joins the pension scheme. Under no circumstances may joining forms or acceptance documents of a pension scheme be issued that incorporate the contracting of operations, products or services other than those of the scheme.

The above-mentioned article also regulates the minimum content of the information that must be included in the joining form to provide the maximum guarantee in terms of holders, contributions, covered contingencies, vested rights, complaint instances in the event of conflict, electronic means of contact and information; it underlines, for example, that in the case of defined contribution pension schemes, their profitability is not guaranteed and warning must be given as to the possibility of incurring losses. However, in workplace pension schemes, the issue of individual joining forms will be optional, as agreed by the company with the worker representative, the worker being able to join the scheme through collective forms or directly by way of the sponsor or scrutiny committee, provided that the potential member has not requested his exclusion in writing.

#### 4. Pension scheme specifications

As a novelty, Article 18 of Royal Decree 738/2020 adds a paragraph *h* to specify that pension schemes must necessarily indicate, in addition to the aspects already provided for previously, the rules relating to the joining and leaving of members and, in particular, the transferability of vested rights. Likewise, “they must provide for the procedure for transferring the vested rights corresponding to the member and, where appropriate, the economic rights corresponding to the beneficiary who, due to a change in employment or other circumstances, alters his membership of a pension scheme. The specifications of workplace pension schemes and, where appropriate, their technical provisions must indicate the conditions governing the treatment of vested rights maintained in the scheme after termination of employment and the possibilities of transfer”.

#### 5. Determination of vested and economic rights

The new Article 22(6) of Royal Decree 738/2020 states that, on an annual basis, the manager of the pension fund in which the scheme is incorporated will provide each member with a certificate regarding the contributions, direct or assigned, made in each calendar year and the value, at the end of the calendar year, of his vested rights.

#### 6. Pension scheme review

The new Article 23(3) sets out the minimum content that the review of pension schemes should generally have. In this respect, the economic aspects and, more directly related to this analysis, the actuarial aspects, stand out. The latter include, among others: the description of the fundamental aspects of the scheme; data on the group being assessed; the actuarial methodology; the assumptions used; the analysis of the contributions, benefits and vested and economic rights; the results and analysis of the actuarial valuations; the analysis of the scheme’s position account; the analysis of the scheme’s solvency; the projections made until the next actuarial review; the assessment of the overall funding needs of the pension scheme; the assessment of risks to members and beneficiaries in relation to the payment of their retirement benefits and the effectiveness of any remedial action; the qualitative assessment of the mechanisms for safeguarding retirement pensions, including, where appropriate, commitments, guarantees and any other economic support by the sponsor to the pension scheme, to members and beneficiaries, and cover by way of a financing plan or insurance purchase or other guarantees; and finally, the conclusions and recommendations on these matters.

#### 7. Legislative adaptation period

Although it came into force in August 2020, the transitional provision of this Royal Decree 738/2020 includes an adaptation period. In view of this, it is provided that, within a maximum period of six months from the aforementioned entry into force, the pension fund

managers and, where appropriate, the sponsors and scrutiny committees of the workplace pension schemes must establish the electronic means of access of the members, potential members and beneficiaries to the above-mentioned information. Within this period members and beneficiaries shall be adequately informed of their right to choose the form in which the information is provided. Also within this period, the joining forms for new members of pension schemes in existence at the date of entry into force must be adapted to the provisions. For workplace pension schemes existing at the date of entry into force of this piece of legislation, the aforementioned deadline will be used to draw up and make available to members, potential members and beneficiaries the general information document on the workplace pension scheme. In addition, specific deadlines are set for some of the amendments made.

## 8. Other amendments

There are also some changes in other areas:

- a) membership and information of members and beneficiaries of individual schemes (Article 48);
- b) promotion of an associated system pension scheme (Article 54);
- c) creation and registration of pension funds (Art. 58) or subsequent amendments (Art. 60)
- d) pension fund managers with an exclusive corporate purpose (Article 78) and a new Article 78 bis is introduced on the suitability and good repute of those exercising effective management or performing key functions forming part of the undertaking's system of governance;
- e) functions of pension fund managers (Art. 81) and in relation to their internal scrutiny (Art. 81 bis);
- f) a new Article 81 ter is introduced on the scrutiny of the investment policy of managed pension funds and a new Article 81 quater on the internal risk assessment of workplace pension funds;
- g) related transactions (Article 85 ter) and expulsion of the depositary (Article 85 quater);
- h) investment and deposit institutions (Article 87);
- i) general conditions for related asset management and deposit contracts (Article 89);
- j) certain elements of the specific conditions of the asset management contract are amended (Article 90);

- k) some aspects of the time limit for deciding on applications for authorisation and administrative registration are amended (2nd Additional Provision);
- l) some changes are introduced concerning the professional activity of actuaries in relation to pension schemes (3rd Additional Provision);
- m) a new rule on the processing of personal data is added to the 9th Additional Provision;
- n) and, finally, among other amendments, Article 57 of Royal Decree 1060/201 is amended with regard to the volatility of risk-free interest rates that may be applied by insurance companies in their adjustments.