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Suspension or limitation of contributions for the employee pension plans (PPE) in Poland

Zawieszenie lub ograniczenie składek do PPE

Abstract
Employee pension plans (PPE), covered under the third pillar of social security, are a voluntary form of group retirement savings. The subject of this paper are issues of institutions meant to encourage employers to establish employee pension plans. The analysis focuses on the opportunity for unilateral suspension of the payment of basic contributions, reduction of their amount and for the non-financing of obligatory contributions during a period of economic shutdown or reduced work time. With respect to the former, the paper addresses, in particular, the consequences of one-off suspension of basic contributions for a period longer than 90 days, or their reduction to an amount lower than 3.5% of salary of the PPE participant.

Keywords
employee pension plan, employee capital plan, basic contributions

Streszczenie
Pracownicze programy emerytalne (PPE), objęte trzecim filarem zabezpieczenia społecznego, stanowią dobrowolną formę grupowego oszczędzania na emeryturę. Przedmiotem rozważań autorki są kwestie dotyczące instytucji, które mają zachęcić pracodawców do tworzenia PPE. Analizie poddano możliwość jednostronnego zawieszenia odprowadzania składek podstawowych, obniżenia ich wysokości oraz niefinansowania składek o charakterze obligatoryjnym w okresie przestoju ekonomicznego lub skróconego czasu pracy. W odniesieniu do tych pierwszych w artykule zwrócono w szczególności uwagę na konsekwencje związane z zawieszeniem składek podstawowych jednorazowo na okres dłuższy niż 90 dni lub ich obniżeniem do kwoty niższej niż 3,5% wynagrodzenia uczestnika PPE.

Słowa kluczowe
pracowniczy program emerytalny, pracowniczy plan kapitałowy, składki podstawowe

JEL: J32

Introduction

Employee pension plans (PPE), covered under the third pillar of social security, are a voluntary form of group retirement savings. Pursuant to provisions of the Act of 20 April 2004 on employee pension plans[1], the funds collected in the plan come primarily from basic contributions, financed by the employer. They can be supplemented with optional contributions, paid voluntarily by the plan participant. As the setting up of an employee pension plans was left to discretionary decision of employers, so far not many of them have decided to establish one. By the end of 2018, there were 1230 plans active in Poland, with a total of 426 thousand employees participating (KNF, 2019, pp. 6–7).[2] One of the fundamental reasons that discourage employers from establishing pension plans is their fear that if the economic standing of a given company deteriorates, the plan's costs would contribute to deepening of the crisis. To eliminate this kind of threat, the legislators, in the regulations of 2004, have provided an opportunity for unilateral suspension or reduction of obligatory contributions, as well as an opportunity to cease their financing, especially during a period of economic crisis. The solutions adopted have become increasingly important during the time of economic crisis resulting from the spread of COVID-19.

Suspension of the payment of contributions into the PPE

Pursuant to Article 38(1.1) of the Act on the employee pension plans (further: the Act on the PPE), the employer is entitled to unilaterally suspend the payment of basic contributions. During a period covering 12 consecutive calendar months, the total time of such unilateral suspension cannot exceed 3 months, as a rule. Under the company pension agreement, this time may be extended, but not more than up to 6 months (Article 38(3) of the Act on PPE). The regulations referred to the above provide that the decision to suspend the payment of premiums is left to the sole discretion of the employer, who can exercise this right at any time. The Act does not specify any restrictions with respect to circumstances under which the application of this solution is allowed. Thus, the employer may suspend the payment of basic contributions not only in the case of a worsening economic situation, but also in the event of introducing organizational or technological changes that would result in improving his market competitiveness.

The Act, however, does specify time restrictions. During a period covering 12 consecutive calendar months, the total time of such suspension cannot exceed 3 months. Social partners may extend this time to 6 months.

The 12-month period commences on the day on which the employer first suspended the payment of basic contributions, and expires upon the lapse of 12 calendar months counted from that date. The requirement to base the calculation on calendar months indicates that the suspension should take place from the first day of a calendar month. The regulations refer to "joint period of suspension", which means that, in the course of 12 calendar months, the employer may exercise this entitlement once, suspending the payment of contributions for the period set in the Act or in the company pension agreement — or several times, if suspending for shorter periods. In the latter case, the total period of suspension may not exceed 90 or 180 days (Article 114 of the Civil Code). The entitlement of the employer expires upon the lapse of 12 calendar months from the date of the first day of suspension, or earlier if the whole permissible suspension period is used up. There are no normative obstacles for the employer to profit from this solution again in the next 12 calendar months.

It should be emphasised that Article 38(1.1) of the Act on the PPE refers to unilateral suspension of basic contributions. Then, pursuant to Article 26(1.1) of the Act on the PPE, as a rule, the employer is obliged to calculate and transfer the basic contributions correctly. "Calculate" in Polish means "arrive at a certain number by counting" (ed. Szymczak, 1983), and the term "transfer" is understood as "pass something somewhere, usually a certain amount of money, according to an earlier agreement" (ed. Szymczak, 1983). In the light of Article 26(1.1) of the Act on PPE, the employer is thus obliged to determine the amounts of the different individual contributions correctly and on time, and to transfer them to the participant's account. As Article 38(1.1) of the Act on PPE only mentions the "transfer" of contributions, a conclusion arises that during the term specified in the Act or in the company pension agreement, the employer is exempted only from the obligation to transfer the basic contributions to the financial institution that manages them. Throughout the entire suspension period, however, he is still obliged to calculate the obligatory contributions. As a result, the timely and correctly calculated contributions are not transferred into the account of plan participant, but remain at the employer's disposal. He can dispose of them at his discretion until the end of the defined suspension period. After the suspension period, the employer should transfer to the managing entity both the current contributions and the overdue basic contributions calculated during the suspension period. As a result, after the term for unilateral suspension of mandatory contributions has been used up, the financial burden on the employer related to running the pension plan increases considerably. The requirement of supplementing the missing amounts provides a guarantee of reasonable use of the solution in question by employers (Sierocka, 2010, p. 161).

The doctrine presents the view that, for a period of up to 3 months or up to 6 months (if the company agreement so provides), the employer does not bear any economic costs associated with the pension plan. Thus, he is not obliged to supplement the account of plan participant with the amounts calculated during the suspension period. If the legislator demanded such supplement, they would have used the term "postponement" of transfer of contributions (Kopeć, Maciejko & Wojewódka, 2008).

When trying to settle this issue, it is worth noting that Article 38(1) of the Act on the PPE, aside from the suspension of transfer of contributions, also refers to the non-financing of the basic contribution (item 3). In the vernacular, the term "to finance" means to provide funds for something (ed. Szymczak, 1983). Therefore, the phrase "the employer may unilaterally not finance the basic contribution" means that, under special circumstances, the employer may make a decision to cease transferring the due contributions into the account of participant of an employee pension plan. This refers both to the calculation and transfer of basic contributions. Considering that in item 1 the legislator referred only to the suspension of the payment of contributions, it should be assumed that until the end of the established period the employer is entitled only to freely dispose of the amounts calculated. After the end of the established period, the account of the plan participant should be credited not only with the current contributions, but with the amounts calculated and accrued during the suspension period as well.

Due to the need to transfer the contributions accrued during the suspension period, the question arises whether the limitation of the basic contribution to 7% of the participant's remuneration also applies in this case (Article 24(2) of the Act on PPE). The obligation on the employer to respect the upper limit of contributions would de facto deprive plan participants of the right to the amounts accrued during the suspension period. As a result, we would be dealing with a temporary exclusion of the right to basic contributions rather than just a temporary suspension of their payment. Therefore, it should be stated that after the suspension period the employer is obliged to transfer into the participants' accounts the full amount of contributions calculated during the suspension period, regardless of the value of current contributions (Kopeć & Wojewódka, 2005, p. 159). This means that after the suspension period the amount of basic contributions paid into the accounts of plan participants can even significantly exceed the limit provided for under Article 24(2) of the Act on PPE.

When making the decision on the suspension of transfer of basic contributions, the employer should also keep in mind the regulations contained in the Act of 4 October 2018 on employee capital plans.[3] Pursuant to Article 133(1) of the Act on employee capital plans (PPK), provisions of the Act must not be applied by an employer who, at the time when provisions on PPK come into force with respect to this particular entity, operates a PPE in which at least 25% of employees of his company participate, and who calculates and transfers basic contributions within the meaning of the Act on PPE, in the amount of at least 3.5% of the salary within the meaning of Article 2(1.15) of that Act. It follows directly, expressis verbis from the contents of the above-mentioned provision that employers who meet certain conditions are excluded from the PPK regulations. It applies to entities that: (1) operate employee pension plans, (2) have not less than 25% of all employees participating in these plans, (3) the basic contributions they make amount to at least 3.5% of remuneration to which the individual participants are eligible. At the same time, Article 133(2.1) of the Act on PPK stipulates that provisions of the Act apply to the employer referred to in section 1, starting from the day of suspension of the calculation and transfer of basic contributions to the PPE during a period exceeding 90 days. Therefore, suspension of transfer of contributions for a period longer than 90 days obligates the employer to set up an employee capital plan. It should be observed that the regulations of 2018 do not refer to the "total period exceeding 90 days". This means that the employer will be able to take advantage of the facility provided for in Article 38(1.1) of the Act on PPE several times, without the need to organize another institution devised for the collection of savings which are disbursed after the termination of professional activity, provided that the duration of one-time suspension of transfer of contributions does not exceed 90 days.

It is also worth noting that in Article 133(2.1) of the Act on the PPK the legislator refers to the "suspension of calculation and transfer of basic contributions". It is therefore a matter of stopping all operations related to the basic contributions. Meanwhile, the regulations on PPE speak only of one of them. In my belief, this is another argument to prove that during the suspension period provided for under Article 38(1.1) of the Act on PPE, the employer is obliged to calculate the contributions financed by him. At the same time, the question arises whether the employer who, for a period exceeding 90 days, calculated basic contributions but suspended their transfer, shall be obliged to open the PPK (employee capital plan). If Article 133(2.1) is interpreted strictly, the answer should be negative. Provisions regarding employee pension plans and employee capital plans are inconsistent in that respect.

Temporary limitation of basic contribution

Pursuant to Article 38(1.2) of the Act on PPE, the employer may unilaterally temporarily limit the amount of calculated basic contribution, by determining, for the period of limitation, a rule for calculation of contribution according to Article 24(3). When reducing the amount of basic contribution due, the employer is obliged to adopt one of the forms permitted under the Act. The contribution to be applied in the interim period may be determined as a percentage of salary, or a percentage of salary capped at a specific maximum contribution amount. In both cases it is mandatory to apply the same percentage value for all participants. The employer may also determine the amount of the contribution.

There are no regulations in the Act concerning the minimum amount of the contribution, the time limit during which the employer may exercise the right in this respect or the circumstances allowing this limitation. Pursuant to Article 13(1.15) of the Act on the PPE, these issues are regulated in the company pension agreement. Significant limitations regarding the amount of basic contribution result from the Act on PPK. Pursuant to Article 133(2.2) of the Act on PPK, an employer who operates an employee pension plan, excluded as a rule from the regulations enacted in 2018, is obliged to respect them starting from the day when he limits the amount of basic contributions transferred to the PPE below 3.5% of the participant's salary. The payment of basic contribution in an amount lower than defined in the Act, even for a short period, results in the obligation to establish the PPK (employee capital plan).

During the period of exercising the right to unilaterally limit the basic contribution, the employer calculates and pays contributions in an amount lower than that set in the pension agreement. As this entitlement is temporary, upon the lapse of the agreed period the employer is obliged to calculate and pay contributions at the amount initially specified.

It should be considered whether, after the period of limitation, the employer is obliged to supplement the contributions paid up to the level resulting from the pension agreement. Statutory provisions lead to a negative answer. The Act speaks only of limitation of the amount of contribution financed by the employer, but there are no regulations that would provide for the need to supplement the contributions transferred into the participants' accounts during the period of limitation.

The comparison of entitlements specified in Article 38(1) of the Act on PPE from the standpoint of the entity operating an employee pension plan leads to the conclusion that, on the one hand, the right to limit the amount of contributions is more favorable. It leads to temporary reduction of financial liabilities resulting from the pension plan. In the case of a temporary suspension of contributions, the employer is free to dispose of the contributions, but after the lapse of the specified period, his burden of liabilities towards the plan participants increases. On the other hand, however, the institution provided for under Article 38(1.1) of the Act on PPE shows more advantages. According to provisions of the Act, after the period of unilateral suspension of contributions, if justified by the financial situation, the employer may conclude an agreement with the representation of employees to suspend the calculation and transfer of contributions or an agreement to temporarily limit their amount.

It is also important whether the employer is allowed to limit the amount of due contributions for a certain period of time, and at the same time suspend their transfer into the participant's account with the management entity. The fact that the legislator used the conjunction "or" leads to the conclusion that, during a given time, the employer is only entitled to one of these rights. However, the unilateral suspension of contributions, for example, does not deprive the employer of the right to reduce contributions at a later date.

It should be emphasized that a temporary suspension of contributions or a temporary limitation of contributions applies only to contributions financed by the employer. Pursuant to Article 26(1.2) of the Act on PPE, throughout the functioning of the pension plan the employer is obliged to timely calculate, deduct and transfer additional contributions, financed by the persons who joined the plan.

Suspension of financing of the basic contribution during the period of economic shutdown and during the period of reduced work time

Among the facilities meant to encourage employers to establish employee pension plans, Article 38(1.3a) of the Act on PPE lists the right to unilaterally decide on the non-financing of the basic contribution. This opportunity may be used by the employer during the period of economic shutdown, referred to in Article 2(1) of the Act of 11 October 2013 on special solutions tied to protection of jobs[4] and during the period of reduced work time, referred to in Article (2.2) of that Act.

Pursuant to Article 2(1) of the Act on protection of jobs, economic shutdown is the period during which the employee does not perform work, for reasons not associated with the employee who remains ready to work. In order for a given situation to be acknowledged as economic shutdown, three conditions must be fulfilled: (1) periodic non-performance of work, (2) inability to perform work for reasons not associated with the employee, and (3) the employee remaining ready to work.

As regards the first condition, it refers to work specified in the employment contract. This conclusion stems from the provision of Article 4(1) of the Act on protection of jobs which stipulates that the collective labor agreement or another agreement determines the conditions and manner for performing work during the period of economic shutdown. Thus, the legislator does not require the employer to abstain from all kinds of activity. Cleaning or maintenance works can be performed during the time of economic shutdown.

Reasons not associated with the employee, which make it impossible for him/her to perform work, include circumstances associated with the employer, or independent of the parties of the employment relationship. Reasons associated with the employer should not be interpreted narrowly as reasons caused by or reasons for which the employer is at fault[5]. Events not associated with the employee include causes of economic, organizational or technological nature, or events caused by a force majeure (natural disasters). However, circumstances affecting the employee, regardless of whether the employee is at fault or not, cannot be considered as such (Pisarczyk, 2013, 626).

Moreover, an employee is required to continuously remain ready for work. This readiness is understood as: (1) having intention to perform work, (2) and an actual ability to perform work, (3) manifesting readiness to perform work and (4) being at the employer's disposal, on standby duty, at the workplace or at any other place designated by the employer (Kijowski, 1978, p. 47 and further). Accordingly, an employee must demonstrate a subjective intention to perform the agreed work, supported by an objective physical and mental capacity to perform it[6]. The employee should be prepared to immediately undertake work to which he/she shall be called. This criterion is not met by an employee who has been suspended from work as a preventive measure[7], or who encountered obstacles in the performance of his/her duties under the employment relationship due to cessation of the company's operations resulting from its actual liquidation[8].

The reduced work time is understood as work time reduced by the entrepreneur, for reasons not associated with the employee, but by no more than half the time (Article (2.2) of the Act protection of jobs). The idea is to temporarily reduce the employees' working hours. As the time of work cannot be less than 1/2 of full-time equivalent, the reduction may apply only to persons who work more hours than 1/2 of full-time equivalent. This also means that the reduction may affect employees to different degrees. Those working full-time will be affected the most. As in the case of economic shutdown, decisions in this area should be based on reasons affecting the employer or independent of the parties to the employment relationship.

Pursuant to Article 38(1.3) of the Act on PPE, during the period of economic shutdown and reduced work time, the employer may cease the financing of basic contributions. In both cases, the calculation and transfer of amounts due from the employer are suspended. In other words, in situations defined in Article (2) items

1 and 2 of the Act on protection of jobs, the employer bears no costs tied to the functioning of the employee pension plan.

Conclusion

In order to encourage employers to set up employee pension plans, the Act of 2004 provides for the possibility of unilateral suspension or temporary reduction of basic contributions. The employer's freedom tied to use of these solutions was significantly curbed when the Act on employee capital plans came into force. The suspension of obligatory contributions on one-off basis for a period longer than 90 days, or their reduction to an amount lower than 3.5% of salary of the PPE participant, obligates the employer to launch the employee capital plan (PPK). Actions undertaken to reduce costs tied to the operation of the employee pension plan may in consequence force the employer to establish another form for additional pension savings.

Under special circumstances, the employer may decide not to finance the basic contributions. As the financial savings made during the period of economic shutdown or reduced work time do not have to be supplemented at a later time, and there is no threat of being obliged to establish the employee capital plan, this solution appears to be the most favorable one among all solutions presented in Article 38(1) of the Act on PPE.

Przypisy/Notes

[1] Consolidated text: Journal of Laws of 2020, item 686.

[2] Employee Pension Plans, report by the Polish Financial Supervision Authority. Warsaw 2019, pp. 6–7.

[3] Consolidated text: Journal of Laws of 2020, item 1342, further "the Act on PPK".

[4] Consolidated text: Journal of Laws of 2019, item 669, further "the Act on protection of jobs".

[5] Judgment of the Supreme Court dated 7 January 2014, I PK 150/13, OSNP 2015, no. 3, item 35. Judgment of the Supreme Court dated 25 October 2016, I PK 255/15, LEX no. 2155205.

[6] Judgment of the Supreme Court dated 7 July 2016, I PK 185/15, LEX no. 2111405, Judgment of the Supreme Court dated 25 October 2016, I PK 255/15, LEX no. 2155205.

[7] Judgment of the Supreme Court dated 16 August 2005, I PK 32/05, OSNP 2006, no. 11–12, item 184.

[8] Judgment of the Supreme Court dated 24 October 1997, I PKN 280/97,OSNP 1998, no. 15, item 453.

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