

Pensions & Retirement Plans 2019

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Pensions & Retirement Plans 2019

Contributing editor**Jan Van Gysegem**

Claeys & Engels

Lexology Getting The Deal Through is delighted to publish the seventh edition of *Pensions & Retirement Plans 2019*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil and Mexico.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, Jan Van Gysegem, of Claeys & Engels, for his continued assistance with this volume.

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Switzerland

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STATUTORY AND REGULATORY FRAMEWORK

Primary laws and regulations

1 | What are the main statutes and regulations relating to pensions and retirement plans?

The Swiss social security system is based on a 'three pillars' regime guaranteed by article 111 of the Swiss Constitution (Cst/BV), namely:

- the state pension system (the first pillar);
- the occupational pension system (the second pillar); and
- the individual pension system (the third pillar).

The first pillar includes the old-age and survivors' insurance (OASI) and the disability insurance (DI). It aims to adequately cover the 'vital needs' of the insured (article 112 Cst/BV), by partially compensating the loss of income due to old age, death or disability.

The first pillar is mainly governed by the Federal Act on Old-Age and Survivors' Insurance (LAVS/AHVG), the Federal Act on Disability Insurance (LAI/IVG), and their ordinances. In principle, each person domiciled in Switzerland or engaged in a gainful activity in Switzerland (including employees and self-employed persons) is subject to compulsory first pillar insurance contributions. Under specific conditions, employees working overseas may remain insured with the first pillar or may join voluntary insurance schemes.

The second pillar, combined either with OASI or DI, should allow the insured to adequately maintain their customary 'standard of living' (article 113 Cst/BV). Its objective is to cover around 60 per cent of the worker's income upon retirement.

The second pillar is mainly governed by:

- the Federal Act on Occupational Retirement;
- the Survivors' and Disability Pension Plans (LPP/BVG);
- the Federal Act on Vesting in Pension Plans (LFLP/FZG); and
- several ordinances, in particular:
 - the Ordinance on Occupational Retirement, Survivors' and Disability Pension Plans (OPP2/BVV2);
 - the Ordinance on the Tax Deductibility of Contributions to Recognised Forms of Benefits Schemes (OPP3/BVV3); and
 - the Ordinance on the Use of Pension Assets for the Encouragement of Home Ownership (OEPL/WEFV).

Employees over the age of 17 who receive an annual salary of more than 21,150 Swiss francs from the same employer are subject to compulsory second pillar contributions for disability and death risks. Regarding the old-age risk, the age limit is 24. Employees and self-employed persons who are not subject to compulsory insurance may contract voluntary insurance.

The third pillar should allow the insured to compensate any lack of coverage resulting from the first and second pillars in order to maintain their 'standard of living'. It is mainly governed by the Federal Act on

Insurance Contracts (LCA/VVG) and the OPP3/BVV3. The third pillar is optional for both employees and self-employed persons.

Regulatory authorities

2 | What are the primary regulatory authorities and how do they enforce the governing laws?

Two main (centralised) entities enforce the governing laws regarding the first pillar: the Central Compensation Office (CdC/ZAS) and the Federal Office of Social Insurances (OFAS/BSV). They monitor the (decentralised) compensation funds, which are in direct contact with the employers and the insured persons domiciled in Switzerland.

The CdC/ZAS is in charge of monitoring accounting. It may review the accounts of the compensation funds and the audit reports of external auditors, and require supporting documents.

The OFAS/BSV is responsible for the legal and managerial monitoring. It may suggest adaptations of the laws, issue guidelines and enforce uniform practices among compensation funds. It may, in this context, appeal against decisions of the cantonal social insurance courts and take actions against civil servants or managers in case of serious mismanagement or irregularities.

With regard to the second pillar, even though the OFAS/BSV also enforces uniform practices of the laws and may issue guidelines, the monitoring is mainly performed by regional supervisory authorities. They ensure that the occupational benefits institutions, which collect contributions and provide for benefits, comply with applicable laws. The regional supervisory authorities may take all appropriate measures, including examining all relevant documents and occasional monitoring of the management of occupational benefits institutions through inspections, accounting appraisals, surveys, etc. They may also impose decisions on the occupational benefits institutions' boards and dismiss a member or the entire board if necessary. The regional supervisory authorities are supervised by the Federal High Supervisory Commission.

Third pillar benefits are usually offered by banks or insurance providers. Both are supervised by the Swiss Financial Market Supervisory Authority (FINMA), which makes use of various supervision instruments (eg, audits, on-site supervisory reviews, annual reports, etc).

Pension taxation

3 | What is the framework for taxation of pensions?

Contributions to the first pillar are fully deductible from employees' taxable income. They are also not taxable for the employer. The first pillar retirement benefits are paid in the form of a pension, which is fully taxed as an income.

Contributions to the second pillar are fully deductible from the taxable income of the insured and are not taxable for the employer. During the term of the affiliation, the second pillar is exempt from

cantonal wealth taxes. Second pillar retirement benefits are usually paid in the form of a pension, even though it is also possible to withdraw (at least one-quarter of) the accrued benefits as a lump-sum capital payment. The pension is fully taxable as an income. The lump-sum capital is taxed separately at a reduced rate (one-fifth of the standard applicable rate).

Contributions to the third pillar are determined by the insured, who are solely responsible for financing it. Contributions may be tax-privileged. Contributions to the '3a pillar' (restricted third pillar) are deductible from the taxable income of the insured up to 6,826 Swiss francs for employees affiliated to a second pillar pension plan, and up to 20 per cent (but no more than 34,128 Swiss francs) for self-employed persons who are not affiliated to a second pillar pension plan. During the term of the contract, the 3a pillar is exempt from cantonal wealth taxes.

The third pillar retirement benefits are usually paid in the form of a lump-sum capital – payment as a pension is rare.

The payout of 3a pillar benefits in the form of a capital is taxed separately at a reduced rate (one-fifth of the standard applicable rate). The 3a pillar benefits, in the form of a pension, are taxed with the other incomes, entirely. Taxation of the contributions and benefits of the '3b pillar' (unrestricted third pillar) vary depending on the circumstances of the case.

STATE PENSION PROVISIONS

Framework

4 | What is the state pension system?

The state pension system is the first pillar. It mainly provides for retirement pensions as well as benefits for widowers, orphans and disabled persons. In employment relationships, employees and employer must each pay half of the contributions owed as a matter of law.

The ordinary retirement age is currently 64 for women and 65 for men (a potential reform is underway; see question 7). The payment of retirement pensions can be anticipated by one or two years (with an incremental reduction of the level of pensions of 6.8 per cent per year), or deferred by no less than one year but no more than five years (with an incremental increase of the level of pensions between 5.2 per cent and 31.5 per cent per year).

First-pillar retirement pensions are paid to Swiss nationals who have reached retirement age, provided that at least one complete year of contribution is recognised. Foreign nationals must, in addition, be domiciled in Switzerland, unless otherwise agreed in a social security agreement. Switzerland has entered into such agreements with the European Union (EU), the European Free Trade Association (EFTA), Canada and the United States.

Pension calculation

5 | How is the state pension calculated and what factors may cause the pension to be enhanced or reduced?

The amount of a first-pillar pension depends on several factors, in particular the years of contributions, level of income and bonuses for the raising or caring of children (if any). The insured are entitled to a complete pension when they have contributed for 43 years for women and 44 years for men. Retirement pensions are reduced by a small percentage for each year of unpaid contributions (at least 2.3 per cent per year).

The amount of the complete pension incrementally varies depending on the average income, from a minimum of 1,185 Swiss francs per month for a single person with an average annual income below or equal to 14,220 Swiss francs, to a maximum of 2,370 Swiss francs per month for a single person with an average income above

85,320 Swiss francs. The total amount of retirement pensions paid to a couple cannot exceed 150 per cent of the maximum pension (3,555 Swiss francs per month).

A child's pension may be paid in addition for each child who would be entitled to an orphans' pension upon the death of such persons.

Aims

6 | Is the state pension designed to provide a certain level of replacement income to workers who have worked continuously until retirement age?

The first pillar is designed to adequately cover the 'vital needs' of the insured (see question 1).

Current fiscal climate

7 | Is the state pension system under pressure to reduce benefits or otherwise change its current structure in any way on account of current fiscal realities?

The elevation of life expectancy as well as the retirement of the baby boomers is definitely a challenge for the first pillar. Projections from the Swiss Federal Council show a possible shortage of funds as of 2030 if no reform is undertaken.

Through a referendum in September 2017, 52.7 per cent of the voters refused a reform encompassing both the first and second pillars. In this context, the Swiss Federal Council decided on 20 December 2017 to prioritise a reform of the first pillar to maintain the level of pensions and to ensure its medium-term financing. On 2 March 2018, the Swiss Federal Council articulated the main terms of the contemplated reform (AVS 21), which should include, in particular, the following measures:

- ordinary retirement age at 65 for both women and men;
- possibility to retire between 62 and 70;
- introduction of incentives to work after 65; and
- compensation for raising the retirement age of women.

A project was proposed by the Swiss Federal Council on 28 June 2018. This project is currently under discussion with various political bodies.

OCCUPATIONAL PENSION SCHEMES

Types

8 | What are the main types of private pensions and retirement plans that are provided to a broad base of employees?

In the questions raised hereafter, we assume that 'private pensions and retirement plans' refer to the occupational pension system (the second pillar).

Two main types of occupational pension plans are available in Switzerland. Defined contributions plans offer benefits in connection with the amount of the contributions: the more the insured contribute, the higher the benefits are. In defined benefit plans, the benefits amount to a percentage of the insured's last annual salary at retirement age (or a percentage of the average of their last annual salaries). Nowadays, defined benefit plans have become rare in practice and mainly concern public entities.

The second pillar is based on capitalisation. The retirement pensions are financed by retirement credits corresponding to a percentage of the 'coordinated salary', the rates of which incrementally increase when employees grow older (7 per cent from ages 25 to 34; 10 per cent from ages 35 to 44; 15 per cent from ages 45 to 54; and 18 per cent from ages 55 to 64/65 (retirement age)), plus the accrued interest. At the time of retirement, the constituted capital is converted into an annual pension on the basis of a conversion rate (unless a lump-sum capital is paid).

Statutory minimum plans require covering the 'coordinated salary' that corresponds to the part of the salary between 24,885 Swiss francs and 85,320 Swiss francs. In 2019, the minimum annual interest is 1 per cent and the minimum conversion rate is 6.8 per cent.

In addition to statutory minimum plans, we may find supplementary plans covering an additional part of the salary, beyond the 'coordinated salary', and enveloping plans combining statutory plans with supplementary plans. In supplementary plans, the pension funds are not bound by the minimum retirement credits and conversion rates. In enveloping plans, pensions funds may apply different retirement credits and conversion rates to the full salary (including the 'coordinated salary'), as long as the total benefits provided to the insured are not less than what is provided under the statutory minimum plans.

Pension plans are mainly provided by foundations, which are legally separate from the employers. There are individual pension funds that run the plans for one employer's employees; 'shared' pension funds that run the plans of multiple employees, usually from the same group; and 'collective' pension funds set up by insurers, and joined by multiple independent employers (segregated funds are put in place for each employer within the 'collective' pension funds).

Restrictions

9 What restrictions or prohibitions limit an employer's ability to exclude certain employees from participation in broad-based retirement plans?

Employees meeting the minimum statutory criteria (see question 1) are subject to compulsory occupational pension payment. They are entitled at least to the coverage offered by statutory minimum plans and employers cannot exclude them from participating in such plans. However, participation in supplementary plans can be limited to certain categories of employees, provided that the limitation is based on transparent, objective and non-discriminatory criteria (seniority, level of salary, position, etc).

10 Can plans require employees to work for a specified period to participate in the plan or become vested in benefits they have accrued?

As a general rule, employees hired for more than three months, or who have actually worked for more than three months, are entitled to participate in statutory minimum plans (in case of successive contracts, employees are also entitled to participate in statutory minimum plans if the total duration of the contracts exceeds three months and the gaps between two contracts do not last more than three months). Supplementary plans can require employees to work for a certain period of time, even though this is not common in practice.

Statutory minimum and supplementary plans cannot require employees to work for a specified period of time before becoming vested in benefits they have accrued.

Overseas employees

11 What are the considerations regarding employees working permanently and temporarily overseas? Are they eligible to join or remain in a plan regulated in your jurisdiction?

In principle, employees working permanently outside Switzerland, in a single country, cannot be affiliated to a Swiss occupational benefits institution.

Employees working permanently outside Switzerland, in two or more countries, may be affiliated to a Swiss occupational benefits institution pursuant to EU/EFTA agreements or bilateral social security agreements, depending on all the circumstances of the case. The

nationality and domicile of the employees, their place of work and number of employers may have a significant impact on the state of affiliation.

EU/EFTA and Swiss employees temporarily seconded to EU/EFTA member states by companies based in Switzerland may remain affiliated to a Swiss occupational benefits institution for at least 24 months (a longer period of time, which cannot exceed six years, can be granted upon request), provided that they have been affiliated to the Swiss social security system for at least one month before the secondment.

Depending on all the circumstances of the case and the terms of the social security agreements entered into between Switzerland and the destination country (if any), employees seconded by companies based in Switzerland to non-EU/EFTA member states may, in principle, remain affiliated to a Swiss occupational benefits institution for a limited period of time, under specific conditions.

Funding

12 Do employer and employees share in the financing of the benefits and are the benefits funded in a trust or other secure vehicle?

Employers and employees share in the financing of the second pillar. The aggregate employer contributions must be at least equal to the aggregate contributions levied from employees (for both statutory and supplementary pension plans). The employers deduct the contributions of the employees from their salary and transfer both employer's and employees' contributions to the occupational benefits institutions.

Occupational benefits institutions are legal entities separate from the employers. Their board defines the investment strategy in a specific regulation. The investment strategy depends on the financial and structural risk capacity of the occupational benefits institutions and on applicable laws and regulation. Statutory requirements limit the type of investments available (eg, cash amounts, stocks, bonds, property, alternative investments, etc) and the respective part of each of those investments.

13 What rules apply to the level at which benefits are funded and what is the process for an employer to determine how much to fund a defined benefit pension plan annually?

Occupational benefits institutions have to ensure that their assets cover their liabilities (current and forecasted benefits – ie, pensions and vested retirement benefits). This is the case if the coverage ratio is at a level of at least 100 per cent. When the assets exceed the liabilities (coverage ratio of more than 100 per cent), occupational benefits institutions must create a reserve in accordance with their regulations. In the event of under-coverage (coverage ratio of less than 100 per cent), the occupational benefits institutions need to take consolidation measures.

The second pillar is mainly financed by the employees' and employers' contributions. In defined contributions plans, each occupational benefits institution sets the amount of the contributions in its regulations. Those contributions may therefore vary from one occupational benefits institution to another. In principle, they incrementally increase when employees grow older (see question 8).

With regard to defined benefit plans, occupational benefits institutions set a benefits target for the level of employees' retirement pensions based on a certain percentage (often around 60 per cent) of employees' last annual salary at the retirement age (or of the average of their last annual salaries). In this context, occupational benefits institutions must estimate in particular current and future investment returns as well as the future evolution of the affiliated employees' payroll in order to determine the retirement credits needed to reach the benefits target.

Occupational benefits institutions have to rely on Swiss generally accepted accounting principles (GAAP) RPC 26/Swiss GAAP FER 26 accounting standards (version date 1 January 2014), and not International Financial Reporting Standards or US GAAP, to establish financial statements.

Level of benefits

14 | What are customary levels of benefits provided to employees participating in private plans?

In practice, the level of retirement pensions varies depending on employees' situation throughout their working lives. In particular, the type of employer (public or private), branch of activity, position within the company and percentage of work have an impact on the level of benefits. Indeed, benefits notably depend on the accrued retirement savings capital, the accrued interests, the purchases of additional contribution years (if any) and the conversion rate (unless the insured person chooses a lump-sum capital).

Employees with high incomes that are not (fully) covered by supplementary plans cannot usually maintain their standard of living without a third pillar coverage.

Pension escalation

15 | Are there statutory provisions for the increase of pensions in payment and the revaluation of deferred pensions?

There are no statutory provisions providing for an automatic increase of pensions in the payment or revaluation of deferred pensions. However, occupational benefits institutions may allow in their regulations to defer the pension's payment for up to five years, as long as the insured continues their activity. Depending on the pension regulations, deferred pensions include an automatic increase or offer the possibility for the occupational benefits institution's board to decide on one-off increases.

Death benefits

16 | What pre-retirement death benefits are customarily provided to employees' beneficiaries and are there any mandatory rules with respect to death benefits?

In the event of pre-retirement death, widows or widowers of the insured persons who have reached the age of 45 and were married to the deceased for at least five years or who have one or several children, are entitled to at least 60 per cent of the full invalidity pension that the deceased would have received. If they meet none of these conditions, they are entitled to a lump-sum benefit equal to three annual pensions. Under specific conditions, divorced spouses may be treated as widows or widowers.

Children of the deceased (aged up to 18, or 25 if they are disabled or in training) are entitled to at least 20 per cent of their parent's potential full invalidity pension. Supplementary plans may increase those minimums.

The occupational benefits institutions' regulations may appoint other beneficiaries of survivors' benefits (eg, partners, parents, siblings, etc).

Retirement

17 | When can employees retire and receive their full plan benefits? How does early retirement affect benefit calculations?

The statutory retirement age for the second pillar is currently 64 for women and 65 for men. A reform is, however, being contemplated (see question 43).

There is no statutory right to early retirement in the second pillar. However, occupational benefits institutions may allow early retirement as of 58 years. Early retirement has an impact on the amount of the pensions, in particular since it reduces the retirement credits paid by the employer and the employees at a time where they are the highest (18 per cent from 55; see question 8) and the conversion rate by a small percentage for each 'non-worked' year.

Purchases for early retirement enable the insured to fill in (at least partially) a benefit gap resulting from early retirement. They are, however, not always possible and subject to specific conditions. As the case may be, purchases may be tax deductible, in a proportion set by the competent tax authorities.

Early distribution and loans

18 | Are plans permitted to allow distributions or loans of all or some of the plan benefits to members that are still employed?

Direct cash distributions and loans are not permitted. Nevertheless, in accordance with the applicable regulations, indirect distributions may be possible (eg, increase of the level of pensions, increase of the interest, exemption of the payment of retirement credits for a specified period of time).

An amount of up to the vested termination benefits may be withdrawn before retirement in order to finance ownership of a residential property for the insured's own use (on certain conditions a pledge is also possible). However, restrictions exist for the insured over 50 years of age and any withdrawal automatically reduces the pension benefits.

Notwithstanding the above, the insured may request a cash payment of their vested termination benefits if they permanently leave Switzerland for a non-EU/EFTA member state, if they become self-employed and are no longer subject to mandatory insurance, or the termination payment is less than their annual contributions. Employees leaving Switzerland for an EU/EFTA member state, who remain subject to mandatory retirement, death and disability insurance under the laws of the member state, can only ask for cash payments of the vested termination benefits of supplementary plans. Their vested termination benefits under statutory minimum plans must be transferred to a blocked vested benefits account.

Change of employer or pension scheme

19 | Is the sufficiency of retirement benefits affected greatly if employees change employer while they are accruing benefits?

In the event of a change of employer, the insured person is entitled to a termination payment (in principle, at least to the buy-in transferred at the time of joining with interest, plus contributions made during the contribution period, increased by 4 per cent per year over 20 years, up to a maximum of 100 per cent), which is transferred to the occupational benefits institution of the new employer. However, retirement benefits may dramatically change from one employer to another if the pension plan to which the new employer is affiliated provides for significantly lower benefits.

In the event of a change of employer in the context of a significant reduction of the number of employees or a restructuring, a partial liquidation could affect the vested termination benefits. If the coverage ratio is lower than 100 per cent, the occupational benefits institution may deduct underfunding proportionally from the vested termination benefits of leaving employees, provided that such a deduction does not reduce the retirement savings capital guaranteed under the statutory minimum regime. In case free assets are available, they could be distributed in addition to the vested termination benefits of the leaving employees.

20 | In what circumstances may members transfer their benefits to another pension scheme?

Employees cannot voluntarily transfer their vested termination benefits to another occupational benefits institution. However, a transfer to another pension plan will be automatic if the employees become eligible for another enveloping plan offered by the employer. When the employees change employer, their vested termination benefits are also automatically transferred to their new employer's occupational benefits institution (see question 19). If the vested termination benefits cannot be transferred to a new employer's occupational benefits institution (eg, end of paid employment, unemployment), they need to be transferred to a blocked personal vested benefits account.

Investment management

21 | Who is responsible for the investment of plan funds and the sufficiency of investment returns?

Occupational benefits institutions' board members are responsible for the investment strategy and the sufficiency of investment returns.

Statutory requirements limit the types of investments available (see question 12). If the investment returns are not sufficient, the occupational benefits institution's board needs to take consolidation measures. If necessary, the competent supervisory authority can also take action.

Reduction in force

22 | Can plan benefits be enhanced for certain groups of employees in connection with a voluntary or involuntary reduction in workforce programme?

Pension plans usually allow employers to make extra payments to employees in the event of a reduction of the workforce, either by making direct payment to their retirement savings capital or by paying a 'bridge pension' until retirement (early retirement age or statutory retirement age).

Executive-only plans

23 | Are non-broad based (eg, executive-only) plans permitted and what types of benefits do they typically provide?

Non-broad based plans are permitted, provided that they are based on transparent, objective and non-discriminatory criteria (seniority, level of salary, position, etc). In practice, non-broad based plans are very often supplementary plans that go in particular, beyond the 'coordinated salary' and facilitate withdrawal of a lump-sum capital.

24 | How do the legal requirements for non-broad based plans differ from the requirements that apply to broad-based plans?

As a general rule, there are no fundamental differences between the legal requirements applicable to broad-based plans and those applicable to non-broad based plans. However, non-broad based plans may differ from the legal requirements for statutory minimum plans, in particular in relation to saving contributions and conversion rates (see question 8).

Unionised employees

25 | How do retirement benefits provided to employees in a trade union differ from those provided to non-unionised employees?

Retirement benefits for unionised employees do not differ from benefits for non-unionised employees. Such a distinction would usually be considered as discriminatory.

26 | How do the legal requirements for trade-union-sponsored arrangements differ from the requirements that apply to other broad-based arrangements?

Employers are solely responsible for affiliating their employees to occupational benefits institutions. Therefore, it is not the practice of trade unions to create or sponsor occupational benefits institutions. Even if it were the case, such occupational benefits institution would be subject to the same legal requirements as those applicable to 'standard' occupational benefits institutions.

ENFORCEMENT

Examination for compliance

27 | What is the process for plan regulators to examine a plan for periodic legal compliance?

The plan regulators are the cantonal supervisory authorities. They ensure on an annual basis that the occupational benefits institutions comply with the applicable law and that they employ their wealth in accordance with their purpose. In this context, they must in particular be provided with the occupational benefits institution's annual report, the auditor's report as well as the accredited pension actuary's report. If necessary, they may conduct further investigations and take appropriate measures.

Penalties

28 | What sanctions will employers face if plans are not legally compliant?

The employers' main duties in the context of the second pillar are, in particular, the following:

- be affiliated to a registered occupational benefits institution;
- provide the occupational benefits institution with all the relevant information to determine the amount of the contributions and benefits for each employee;
- pay the contributions after having deducted the employee's contributions from their salary;
- pay specific contributions in case of underfunding for a limited period of time if:
 - the payment of such specific contributions is provided for in the pension fund regulations;
 - the other measures taken by the pension fund to resorb the deficit by its own means were not successful (ultima ratio); and
 - specific contributions are also paid by the employees.

In the absence of an affiliation after a request of the compensation fund, the employers are automatically and retroactively affiliated to the Substitute Occupational Benefits Institution. Employers that do not pay the requested contributions may in particular pay default interests and as the case may be, face debt and bankruptcy proceedings. Criminal sanctions are also possible.

Occupational benefits institutions – which are independent entities separate from the employers – and their board members are solely

responsible if the plans are not legally compliant. Employers should not face any sanction in such a case. In the event that plans are not legally compliant, cantonal supervisory authorities may, in particular, instruct the board to take specific actions and appoint an official administration to manage the occupational benefits institutions.

Rectification

29 | How can employers correct errors in plan documentation or administration in advance of a review by governing agencies?

Cantonal supervisory authorities review all plan documentation (statutes, pension plan regulations, investment regulations, etc) issued by occupational benefits institutions and confirm compliance of the documentation with statutory law prior to its implementation. Employers are usually not part of this process and are therefore not able to correct any errors in plan documentation.

Regarding the annual review of their activities, the occupational benefits institutions also have direct contact with the cantonal supervisory authorities. Employers have in principle no access to the plan documentation ahead of such a review by a cantonal supervisory authority.

Disclosure obligations

30 | What disclosures must be provided to the authorities in connection with plan administration?

Cantonal supervisory authorities have to be provided with all necessary information that allows them to ensure that the occupational benefits institutions comply with the applicable law and that they employ their wealth in accordance with their purpose.

This information includes, in particular:

- the occupational benefits institution's annual report;
- the auditor's report; and
- the accredited pension actuary's report.

Cantonal supervisory authorities may request further documents and information from the board, auditors and accredited pension actuary of occupational benefits institutions.

31 | What disclosures must be provided to plan participants?

The insured are entitled to receive an annual pension certificate that contains the key figures of their pension plan. These include:

- the 'coordinated salary';
- the savings contribution rates;
- the interest rates;
- the benefits paid in the event of disability and death;
- the projected benefits in the event of retirement;
- the conversion rate;
- the retirement capital;
- a projection in the case of early retirement;
- the savings and interest rates;
- the amount available for withdrawal in the context of encouragement of home ownership;
- purchases;
- contributions; and
- details on the administrative committee.

Employees may also in particular request information on the financial situation of their occupational benefits institution (eg, annual financial statements, annual reports, reserves, coverage ratio, etc), its investments, actuarial risks and administrative costs.

Enforcement mechanisms

32 | What means are available to plan participants to enforce their rights under pension and retirement plans?

In case of a breach of their information rights (see question 31), the insured may file an administrative complaint with the competent cantonal supervisory authority. Decisions from the cantonal supervisory authorities may further be appealed to the Swiss Federal Administrative Court and, as the case may be, to the Swiss Federal Supreme Court.

Other disputes involving occupational benefits institutions, employers and the insured are subject to the competence of cantonal social security courts. The decisions of these specialised cantonal courts may be appealed before the Swiss Federal Supreme Court.

PLAN CHANGES AND TERMINATION

Rules and restrictions

33 | What restrictions and requirements exist with respect to an employer's changing the terms of a plan?

Employers are not entitled to unilaterally change the terms of a pension plan. An occupational benefits institution's board, consisting of an equal number of employer and employees' representatives, may change the terms of the pension plan within the given legal framework and in accordance with the procedure set out in the pension plan regulations.

Any contemplated changes must be submitted to the cantonal supervisory authority for prior approval.

34 | What restrictions and requirements exist with respect to an employer terminating a plan?

Employers may terminate the affiliation contract in order to join another occupational benefits institution, in accordance with the notice period set out in the affiliation contract. The termination of the affiliation and re-affiliation with a new occupational benefits institution is subject to the employees' approval.

The termination of a plan may trigger a partial liquidation that could have an impact on the employee's vested termination benefits (see question 19).

Insolvency protection

35 | What protections are in place for plan benefits in the event of employer insolvency?

The insolvency of the employer should, in principle, not have any direct impact on the plan benefits, since occupational benefits institutions are legally independent from the employer. That being said, in the event of insolvency of an occupational benefits institution, the Guarantee Fund guarantees the statutory and regulatory benefits up to 126,900 Swiss francs.

Business transfer

36 | How are retirement benefits affected if the employer is acquired?

In case of share acquisitions, employees (and, as the case may be, retirees) remain, in principle, insured by the same occupational benefits institution, except if the acquisition leads to the termination of the affiliation contract.

In case of asset acquisitions and business acquisitions, employees are transferred to the acquiring party. The employees' vested termination benefits are in general transferred from the former employer's

occupational benefits institution to the acquiring party's occupational benefits institution.

The change of plan might have an impact on the employees' benefits, in particular, if the transfer triggers a partial liquidation (see question 19).

Surplus

37 | Upon plan termination, how can any surplus amounts be utilised?

Upon plan termination, any surplus might be distributed to the employees and retirees, in accordance with the applicable pension fund regulations and laws. The distribution has to be based on objective criteria and in accordance with the principle of equality.

FIDUCIARY RESPONSIBILITIES

Applicable fiduciaries

38 | Which persons and entities are 'fiduciaries'?

The board members of occupational benefits institutions may be considered as 'fiduciaries'. They must have a good reputation and be in a position to guarantee the proper conduct of business. The board members are subject to the duty of care of fiduciaries and in particular, have to protect the interests of the insured (including retirees). In this context, they must ensure not to have any conflict of interest due to their personal and professional relations.

Fiduciary duties

39 | What duties apply to fiduciaries?

The board members as fiduciaries of occupational benefits institutions are responsible for the overall management. They, in particular, ensure compliance with statutory duties, decide on the organisation of their occupational benefits institution and determine its strategic goals. They also decide how these goals should be reached (eg, amendment of the regulations, appointment or removal of managers, defining the investment strategies, etc), ensure the financial stability of the occupational benefits institution and to supervise the administrative board (if any).

Breach of duties

40 | What are the consequences of fiduciaries' failing to discharge their duties?

The board members may become personally liable towards occupational benefits institutions and the insured for all damages caused intentionally or negligently. Further, depending on the circumstances of the case, the cantonal supervisory authority has the power to admonish or dismiss them. Criminal sanctions are also possible.

LEGAL DEVELOPMENTS AND TRENDS

Legal challenges

41 | Have there been legal challenges when certain types of plans are converted to different ones?

Any conversion of a pension plan is decided by the board of the occupational benefits institution and has to be submitted to the cantonal supervisory authority for prior approval. There can be legal challenges, in particular if the conversion affects the contributions or benefits and worsens the financial or legal status of the insured. The conversion of a pension plan cannot infringe the acquired rights of the insured.

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42 | Have there been legal challenges to other aspects of plan design and administration?

With regard to plan design, the principle of 'collectivity' may lead to legal challenges. It should be observed in particular where the regulations of an occupational benefits institution provide for the creation of one or more insurance groups. According to this principle, inclusion in an insurance group should be based on objective criteria (such as seniority, responsibilities, position, age or salary level). In this context, pension plans that only apply to a few specific individuals are not allowed, unless the regulations stipulate that other persons may, in principle, also be insured in the future.

In relation to plan administration, it is the principle of 'equality' in particular that can create legal challenges. According to this principle, it is forbidden to favour or discriminate a certain category of insured persons based merely on subjective criteria. Occupational benefits institutions' decisions must, therefore, be based on transparent and objective criteria.

Future prospects

43 | How will funding shortfalls, changing worker demographics and future legislation likely affect private pensions in the future?

The Swiss pension system is facing great challenges. The life expectancy of the Swiss population is increasing continuously, a generation of baby boomers will reach the statutory retirement age in a few years and the capital gains are behind expectations. It is, therefore, necessary to stabilise the second pillar and ensure its financing.

Through a referendum in September 2017, 52.7 per cent of the voters refused a reform scheme encompassing both the first and second pillars. In this context, the Swiss Federal Council decided on 20 December 2017 to prioritise a reform of the first pillar in order to maintain the level of pensions and to ensure its medium-term financing (see question 7 and 'Update and trends').

On 2 March 2018, the Swiss Federal Council articulated the main terms of the contemplated reform (AVS 21), which should include, in particular, the following measures:

- ordinary retirement age at 65 for both women and men;
- the possibility to retire between 62 and 70;
- the introduction of incentives to work after 65; and
- compensation for raising the retirement age of women.

A bill was proposed by the Swiss Federal Council on 28 June 2018. This bill is currently under discussion with various political bodies.

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