

# PENSIONS & RETIREMENT PLANS 2023

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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?

Retirement plans in France are legally organised around three pillars.

First pillar: Mandatory social security plan – ‘pay as you go’ – governed by the Social Security Code and annual bills on social security funding.

Second pillar: Mandatory inter-professional complementary retirement plan (AGIRC – ARRCO) – pay as you go.

The AGIRC-ARRCO Plan was renegotiated in 2017. The new plan came into effect on 1 January 2019. Contributions are paid on salaries up to eight social security ceilings (€351,936 in 2023), with two brackets of contributions (Bracket 1 and Bracket 2 for the fraction of the salary comprising between €43,992 and €351,936).

Participants acquire retirement points (based on the acquisition value determined by the executive board of AGIRC ARRCO). A supplemental contribution of 27 per cent of the base contribution is paid to maintain the plan’s financial balance.

At retirement date, points are converted to a pension annuity (using the service value of the AGIRC ARCCO point).

The 2019 AGIRC-ARRCO plan postpones the payment of a full pension to one year after the date when the employee has become eligible for a full-rate social security pension. In practice, for most employees, the AGIRC-ARRCO pension represents two-thirds of their pension income. As a result, senior employees find themselves tempted to defer retirement by another year.

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## Occupational pensions – third pillar

### General overview

Pension arrangements are implemented through a Pension Promise that is undertaken by the employer according to Employment Law rules. The law (codified in the Social Security Code) provides for different ways to implement a pension plan to the benefit of employees:

- collective bargaining agreement signed at branch level or at company level by trade unions and employers;
- ratification by a majority of employees, of a draft pension agreement proposed by the employer; and
- unilateral decision of the employer that must be then notified to the employees concerned.

New plans or modification of existing plans must be submitted to the Workers' Economic and Social Council before implementation.

Most pension promises (whether defined benefit (DB) or defined contribution (DC)) are funded through contracts subscribed by the employer with external providers (insurance contracts or company long-term savings plans) governed either by insurance laws or by commercial and financial regulations.

### Legal provisions

French occupational pensions are not regulated by a specific piece of legislation.

Relevant provisions are scattered through the Labour Code, the Social Security Code, the Tax Code, the Insurance Code, the Financial and Monetary Code, and various specific bills, namely the Pension Bills of 21 August 2003, 9 November 2010, 21 December 2011, 22 May 2019 (with two Ordinances of 3 July and 24 July 2019), and the very recent Pension Reform of 17 March 2023.

This legal framework implements the main EU pension directives (on IORPs, preservation of pension rights in the case of mobility of workers in the EU, and protection against insolvency).

Directive 2000/78/EC and Labour Code provisions establish a general framework for equal treatment in employment and occupational pensions. The French Labour Code also includes specific anti-discrimination provisions of great importance.

For occupational Plans, the most prevalent type of plans are group insurance contracts subscribed by the employer to the benefit of its employees. These plans are funded through the regular payment of contributions that are capitalised by the insurance company until the beneficiaries reach retirement age.

### Insurance coverage for pension plans

Insurance providers in France are subject to three different sets of rules depending on their legal form (insurance companies are governed by the Insurance Code, mutual companies

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are governed by the Mutuality Code, and providence institutions are ruled by the Social Security Code). Although most provisions regarding supplementary pensions have been harmonised through the three codes, there are still differences, which can make the matter quite complex.

In 2017, the government adopted the regulation transposing the EU directive of 23 December 2016 on IORPs. This regulation creates a new category of operators on the French market, entitled an Additional Occupational Pension Fund (FRPS), which are fully dedicated to retirement operations. FRPS is governed by French insurance laws but are subject to prudential rules set by the Solvency I directive (as opposed to general insurance providers that are governed by Solvency II regulations). French insurance providers are allowed to transfer their portfolio of existing retirement contracts to a FRPS under certain conditions. The transfer is subject to approval by the French insurance Regulatory Authority (ACPR) <https://acpr.banque-france.fr/>, and must be implemented by 31 December 2022, at the latest. As of March 2023, a significant number of major insurance providers operating in the retirement market in France have completed the process of transferring their retirement operations to a newly created FRPS.

In 2019, the Parliament adopted the Loi Pacte of 22 May 2019, which brought very significant changes to DB plans, DC plans and to company long-term savings plans (PERCO Plans).

## Regulatory authorities

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

The French Regulatory Authorities include the ACPR, which has competence over the insurance, banking and credit institutions, as well as the Financial Markets Authority <http://www.amf-france.org>.

Both are independent administrative authorities, but have different jurisdictions and powers. For operators in the retirement and pension plans area, the ACPR is the main authority.

## Pension taxation

### 3 | What is the framework for taxation of pensions?

Pensions annuities are subject to income tax under the ordinary progressive tax schedule (income tax brackets range from 0 to 45 per cent, with intermediary rates of 11 per cent, 30 per cent, 41 per cent), after the deduction of a 10 per cent rebate. They also are subject to social charges at a rate of a 3.80 per cent, 6.60 per cent or 8.30 per cent depending on the amount, to Social Debt Repayment Contribution at a rate of 0.50 per cent and to potential solidarity surtax (Casa) at 0.30 per cent.

In addition, AGIRC ARRCO pensions are also subject to a 1 per cent contribution to finance the healthcare social security plan.

Certain plans may allow the payment of a lump sum. Taxation will vary depending on the plan design.

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## STATE PENSION PROVISIONS

### Framework

#### 4 | What is the state pension system?

France has implemented a mandatory State Pension Plan based on 'pay as you go' principles.

This national legal plan is mandatory for all private employers and covers pensions for the bracket of salary up to the social security ceiling (€43,992 in 2023 – 'bracket 1'). It is funded through mandatory contributions and can be liquidated at a minimum legal age determined by law, which is currently 62. According to a new pension Bill voted on 17 March 2023, amid major parliamentary and social turmoil, this minimum legal age is gradually postponed for generations born from 1 September 1961 onward, until age 64. A minimum legal age of 64 will fully apply to generations born on 1968 and onwards. This new Bill also increases the total number of insurance quarters contributed to the State Pension Plan, which are required to liquidate a full rate pension.

### Pension calculation

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

The State Pension Plan provides an annual pension calculated as follows:

Pension Annuity =  $SM * T * d/D$ , in which:

- 'SM' is the average salary calculated on the basis of the 25 highest salaries (up to the social security ceiling);
- "T" = liquidation rate. T is determined according to the total number of insurance quarters contributed to a social security plan (on whatever professional ground). The full rate is 50 per cent and is accrued at the latest at age 67;
- 'd' = the number of insurance quarters contributed to the State Pension Plan (CNAV), for salaried employees; and
- 'D' = the total number of insurance quarters required for liquidation at the full rate (which varies based on the year of birth).

### Enhancements

Additional quarters of insurance exceeding the duration required for a given generation will procure a lifetime increase of the state pension by 1.25 per cent.

Parents of three children or more are entitled to receive a 10 per cent lifetime increase of the state pension annuity.

### Reduction

Any beneficiary can liquidate the state pension as soon as the minimum legal age has been reached. If, at this date, the beneficiary does not fulfil the number of insured quarters

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required for his or her generation, he or she will be subject to a reduction of his or her liquidation rate by 1.25 per cent for each missing quarter of insurance.

## Aims

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

Yes, it is designed to deliver a replacement income equal to 50 per cent of the average salary over 25 years for workers who have contributed for the required number of insurance quarters. For instance, an employee born in July 1960 will be eligible to liquidate a pension annuity equal to 50 per cent of his or her average salary when the employee reaches 167 quarters of insurance and the minimum legal age of 62.

## 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 State Pension system is under financial pressure to increase the minimum requirements to liquidate a full-rate pension annuity. The new Pension Reform voted on 17 March 2023 increases requirements for generations born between 1 September 1961 and 1968 onwards.

## Minimum legal age requirement

The Pension Bill increases the minimum legal retirement age from 62 to 64 and increases the duration of insurance (number of quarters of contributions) required for full-rate liquidation.

## 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?

The most common plans are defined contribution plans (DC and PER-OB) and long-term savings plans (PERCO and PERECOL).

## Defined contribution plans

### Eligibility and plan design

Under those plans, the employer's promise is limited to the payment of a certain level of contributions.

Income tax and social security charges exemptions are granted on contributions paid for the funding of the plan, provided both the plan and the insurance contract meet certain requirements:

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- The plan must be collective and mandatory for an objective category of beneficiaries, defined according to criteria that are set by provisions of the French Social Security Code.
- The plan must provide for an employer's contribution at a similar rate for all the beneficiaries.
- The employer's contribution must not substitute a benefit or element of salary that was previously subject to social charges or income tax.

The benefits provided by the insurance contract can only be liquidated at retirement and served as a pension annuity; lump sums and early withdrawals are not available except in limited cases.

### Tax and social treatment

Social charges exemptions are granted on employers' contributions up to 5 per cent of the gross remuneration capped at five social security ceilings (€219,960 in 2023). These exemptions only apply to plans that are mandatory for an objective category of employees.

The employer's contribution remains subject to a social surtax for the employee and the employer.

Income tax exemptions are granted on mandatory employees and employers' contributions up to 8 per cent of the gross remuneration capped at eight social security ceilings (€351,936 in 2023). If the plan also allows employees' voluntary contributions, those contributions can also be deductible for income tax under certain conditions and within certain limits.

### Long-Term Savings Plan – PERCO

#### Plan design

##### *Eligibility rules*

- all employee plan – If the employer decides to implement a PERCO, the plan must be offered to all employees in the company, as an adjunction to the company savings plan (PEE);
- seniority requirement cannot exceed three months; and
- the employee is free to contribute or not to the plan.

### Funding and contributions

Employee contributions to PEEs and PERCOs are limited to 25 per cent of the gross annual salary.

At minimum, the employer must pay for administration fees. In addition, the employer can provide for a matching contribution, which is at maximum equal to 300 per cent of the employee's contribution.

### Benefits

The PERCO provides benefits that can be liquidated only at retirement age. The PERCO plan must offer a benefit expressed as pension retirement annuity, but plan rules can also provide for an option to choose a lump sum payment at retirement. Early withdrawals are

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allowed in the case of death, disability, unemployment, insolvency or acquisition of the employee's main home.

If the employee leaves the company, assets are held in his or her name until retirement age (except for the early withdrawals rule).

### Other main features

PERCO plans can be managed and administered only by registered entities dedicated to this sole purpose. The plan is based on the accumulation of individual savings.

### Tax and social charges

The employee's contribution is not tax deductible. The employer's contribution is exempt from social charges and income tax up to 16 per cent of the social security ceiling (€7,039 for 2023) but is subject to a social surtax of 20 per cent at the employer's expense and at 8 per cent at the employee's expense.

Last of all, the employer's matching contribution is taken into account in the global social and income tax exemptions granted for company-sponsored DC pension plans.

When the plan is set, the employer's contribution must not substitute a benefit or element of salary, which was previously subject to social charges and/or income tax.

### Warning

Collective retirement insurance contracts (for DC contributions) and long-term savings plans (PERCO) set before 1 October 2020 can remain active and open to new entrants and new contributions.

However, from 1 October 2020 onwards:

- If a company wants to set a pension plan for part or all of its employees, it must fund it only under the new PER legislation.
- Entitlements and assets accrued through an individual pension plan (such as PERP), a PERCO or a DC insurance contract, continue to be transferable, but the employee can only transfer them to a new retirement savings plan (PER) contract.

### Loi Pacte – new PER plan

In 2019, a new vehicle was created, the PER, governed by a new set of rules (articles L.224-1 and subs of the Financial and Monetary Code).

All PERs have to:

- set three contributions compartments (one for employees' voluntary contributions, one for employer's contributions coming from company profit sharing plans, and one for employer's and employees' mandatory contributions);

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- provide that contributions are invested in *gestion pilotée* (pre-defined allocation monitored by the asset manager), unless otherwise decided by the employee;
- offer early withdrawals in case of death, disability, unemployment, insolvency and acquisition of the main residence by the beneficiary;
- provide that pension rights can be liquidated at retirement age either as an annuity or a lump-sum payment, except for the rights funded through mandatory contributions in the third compartment of the PER; and
- implement full transferability.

From a practical point of view, the PER works as an aggregation, in one same insurance contract, of the rules governing previous retirement products, which were set separately under the former legislation.

As a result, the employer can implement either a PER-OB (mandatory plan) or a PERECOL (long-term saving plan).

The tax and social treatment of contributions remain changed, except on one point: the voluntary contribution, which an employee pays into the PERECOL, is tax deductible, unless he or she decides otherwise.

Each PER contract, whether subscribed individually or through a PERECOL or a PER-OB set by the employer, must include each of the three compartments, and open each of them, at minimum to receive the transfers of long-term and retirement savings coming from other individual or group retirement plans.

## Restrictions

- 9** | Are employers required to arrange or contribute to supplementary pension schemes for employees? What restrictions or prohibitions limit an employer's ability to exclude certain employees from participation in broad-based retirement plans?

There is no general legal requirement that an employer provide workers with a supplementary pension plan.

Since 2010, companies, which provide DB benefits to a category of employees, must provide all employees with access to at least one type of company pension plan. Companies that operate DB plans, which were closed to new entrants before 10 November 2010, are exempted from this obligation. Companies that operated existing DB plans at this date and or that created new DB plans after this date must comply with this obligation.

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

In DC and PER-OB plans, a minimum seniority can be required but it cannot exceed 12 months. In PERECOL, it cannot exceed three months.

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## 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?

Different rules apply on first, second and third pillar arrangements.

On first pillar, affiliation to the State Pension Plan is determined according to the EU Social Security Regulations and to the applicable international Social Security Agreement [https://www.cleiss.fr/index\\_en.html](https://www.cleiss.fr/index_en.html).

On third pillar plans, employees assigned abroad under a secondment pursuant to EU Social Security Regulations must be maintained for the pension plan. Employees transferred to France under a secondment agreement should be exempted from affiliation.

## Funding

- 12** | Do employers and employees share in the financing of the benefits and are the benefits funded in a trust or other secure vehicle?

Yes, this is common practice in France, partly dictated by plan design rules for eligibility to social charges and income tax exemptions.

- 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?

The insurance contract must guarantee at least 50 per cent of the pension entitlement of each beneficiary during active service in the case of insolvency of the company, and must guarantee 100 per cent coverage for pension annuities in service.

## Level of benefits

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

Legal pensions still represent a high replacement ratio. As a result, most companies' pension plans are not designed to target a replacement ratio, but rather to optimise compensation from a social charges and income tax point of view.

## Pension escalation

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

By law, State Pensions are increased every year on 1 January, to compensate for inflation. The annual Social Security Bill may adopt a different rule (this was the case in 2019, 2020 and 2021).

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AGIRC-ARRCO pensions are increased on 1 November of every year, upon the decision of the board of directors.

Private pensions are governed by contractual provisions of the Plan. As a minimum, the Insurance Code provides for mandatory sharing of financial returns on a regular basis.

## 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?

State pensions include a survivor's benefit that is payable upon the death of the employee when the surviving spouse reaches age 55, and has income under a certain threshold.

Mandatory inter-professional complementary retirement plan (AGIRC-ARRCO) provides a pension equal to 60 per cent of the main pension to the surviving spouse upon age 55, without income conditions.

In DC plans and in the new PER-OB, options can be offered for a survivor's benefit.

## Retirement

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

Full plan benefits in the State Pension plan and AGIRC-ARRCO can be received, provided the employee reaches minimum legal age (62 to 64 years, depending on birth date) and has contributed the required number of quarters.

## 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?

State pensions and AGIRC-ARRCO pensions are pay as you go schemes and do not offer any of these possibilities.

For private pensions, such distributions or loans will be governed by the insurance code, but during the period of accrual and active service, any withdrawal or distribution, which does not qualify as 'a regulated early withdrawal', will jeopardise the tax and social treatment.

DC and PER-OB plans, PERCO and PERECOL plans regulations provide a list of permitted early withdrawals.

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## Change of employer or pension scheme

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

No, it should not. When an employee leaves the company, the savings accrued remain invested under the company sponsorship and should continue to yield financial return.

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

DC and PER-OB plans must include a transfer clause, for those employees who leave the company for whatever reason.

PERCO and PERECOL plans must also contain such provisions.

Transfers can only be implemented to another PER contract that can be a private PER plan subscribed individually either by the employee or the PERECOL or PER-OB in place at the new employer.

Pension entitlement accrued in DB plans is not transferrable for historical reasons.

## Investment management

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

For insured plans (DB, DC and PER-OB), investment rules are set by the Insurance Code general provisions on life insurance.

As a result:

- liabilities and assets related to pension operations are mutualised in the insurance provider general accounts. Investments are regulated and can be in euros or units of accounts; and
- specific rules apply to pension contracts subscribed under the FRPS legislation.

For PERCO and PERECOL, the French Labour Code sets investment rules; the money must be placed in collective investment funds subject to certain diversification and liquidity rules (corporate mutual funds (FCPE) and collective investment schemes).

Employees must be offered a choice of at least three different investment funds with diversified investment profiles, and one of them must be a fund invested in 'solidarity entities'.

There is no general legal rule giving responsibility to the employer as plan sponsor for the investment of plans funds and the sufficiency of investment returns. In practice, when the employer implements a plan by unilateral decision, the employer will choose the insurance company and investment funds. If the plan is implemented through an agreement with the

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trade unions, a clause may provide that the providers and investments are selected through a procedure, which involves employees' representatives.

### 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?

Such a provision would be difficult to implement in France due to tax and social security rules.

### Executive-only plans

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

PER-OB can be implemented for executives only (exempt employees) but the criteria must meet the requirements of 'objective category' in the meaning of Social Security and Employment Law rules.

There is more flexibility on DB plans.

### Defined benefit plans

Since 2010, companies that provide DB benefits to a category of employees must provide all employees with access to at least one type of company pension plan only (with some exceptions).

DB plans that are newly created must be funded through an insurance contract. DB plans created before that date can remain funded on book reserves. However, at least 50 per cent of pensions in service must be guaranteed through an insurance contract, a fiducial arrangement or any other type of security or personal guarantees.

In most of DB Plans implemented before July 2019, the vesting of pension rights is conditional upon the fact that the employee will finish his or her career in the company. Early termination clauses are accepted at age 55 or more (such as termination at company's initiative).

### New regulations since 2019

Existing non-vested DB plans are mandatorily closed to new entrants from 4 July 2019 onwards.

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

The rules of the Social Security Code to define an 'objective category' do not apply. As a result, provided the company respects 'Equal Treatment' requirements, the group of beneficiaries can be defined narrowly. For the premiums paid to fund the plan to be deductible

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from taxable results, the plan must be designed as a 'general and impersonal engagement'. In other words, it cannot provide directly or indirectly for individual benefits.

All new DB plans created on 4 July 2019 or afterwards must provide vested benefits.

New DB plans are regulated by an Ordinance of 2019, which sets rules that must be complied with, so that the plan can qualify for favourable social and tax treatment.

The plan must provide for benefits payable as a lifetime pension annuity.

The plan can stipulate a minimum age requirement up to 21 years maximum; it can set minimum seniority requirements or minimum period of contributions requirements. The addition of those cannot exceed three years.

Pension rights must be accrued every year and fully vested. They must be calculated as a percentage of the beneficiary's annual remuneration of the year capped at 3 per cent of the remuneration. The cumulated pension entitlement accrued by one beneficiary, *all employers included*, is capped at 30 per cent of his or her annual latest remuneration.

There can be no acquisition of rights retroactively.

For corporate officers, and for executives earning salaries exceeding eight social security ceilings (€351,936 for 2023), the acquisition of pension entitlement for any given year is subject to performance conditions.

Every year, the company must notify the list of beneficiaries and the additional pension rights accrued for this given year, to the social authorities.

The company must provide all employees with access to at least one type of company pension plan.

The DB Plan must be funded through an insurance contract subscribed with a regulated insurance provider or IORP.

## **Funding**

The insurance contract must guarantee at least 50 per cent of the pension entitlement of each Beneficiary in case of insolvency of the company, and must guarantee 100 per cent coverage for pension annuities in service.

## **Social and income tax treatment**

Employers' contributions to DB Plans that meet the design and funding requirements listed above are eligible to a complete exemption from all social charges (both for the employer and for the employee) and from income tax. They are subject to a special social charge of 29.7 per cent at the employer's charge.

For the retiree, pension annuities are subject to social surtax (generalised social contribution and social debt repayment contribution), and to a social security health care tax.

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In addition, pension annuities, which exceed certain amounts, are subject to a specific tax according to a progressive schedule with three income brackets (progressive taxation at 0, 7 and 14 per cent of the gross annuity).

### Unionised employees

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

This is not applicable in France. Trade unions cannot sponsor a mandatory plan of their own. They can however negotiate and sign collective retirement agreements implementing mandatory pension plans with an employer or at branch level.

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

Not applicable in France.

## ENFORCEMENT

### Examination for compliance

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

*At employer's level*, the most common review occurs when the company is controlled by the social security administration (URSSAF). The URSSAF controller verifies the company practice in implementing exemptions rules on employers' contributions to a mandatory company-sponsored pension plan. The URSSAF Controller will verify that the plan meets all the criteria set by applicable regulations to obtain the exemptions.

*At the level of the insurance company*: all insurance providers are subject to the supervision of the French Prudential Supervision and Resolution Authority (ACPR). The ACPR also monitors compliance with anti-money laundering and anti-terrorist financing measures, and the protection of customers, policyholders, members and beneficiaries. ACPR can organise on-site inspections of any insurance provider to verify that such entity complies with all applicable regulations.

### Penalties

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

*URSSAF supervision*: Failure to comply with social security rules will result in the loss of exemptions of social charges on employers' contributions to the pension plan. The company can go to the Judicial Court to challenge an URSSAF decision.

*ACPR supervision*: If violations of the law are reported, the ACPR can launch a disciplinary procedure and decide to apply graduated sanctions. The ACPR can inflict a financial penalty

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of up to €100 million (€1 million for bureaux de change). Decisions are published and can be appealed directly to the French administrative courts.

## Rectification

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

Employers can modify plan documentation but must follow the rules of employment laws, which are stringent. A minimum period of three months applies.

## Disclosure obligations

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

For all plans (Labour Law Code), the employer must comply with the rules of information and consultation of the Workers' Social and Economic Council.

The employer must also comply with a number of obligations relating to the information of members of the plan on insurance conditions.

Insurance providers must notify employees every year of the accrued rights of the previous years. They must also send an information notice when an employee leaves the company with details of rules for liquidation at retirement and transfer conditions to another retirement plan.

### 31 | What disclosures must be provided to plan participants?

For all plans (Labour Law Code), the employer must comply with the rules of information and consultation of the Workers' Social and Economic Council.

The employer must also comply with a number of obligations relating to the information of members of the plan on insurance conditions.

Insurance providers must notify employees every year of the accrued rights of the previous years. They must also send an information notice when an employee leaves the company with details of rules for liquidation at retirement and transfer conditions to another retirement plan.

## Enforcement mechanisms

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

Plan participants can bring their claims against the employer in the labour courts and/or against the insurance company in civil courts. Mediation is available.

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## PLAN CHANGES AND TERMINATION

### Rules and restrictions

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

An employer can notify the modification or denunciation of a pension plan but must respect formalities, and a minimum period of notice.

The employer must inform and consult the workers council prior to making such a decision.

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

An employer can notify the modification or denunciation of a pension plan but must respect formalities, and a minimum period of notice.

The employer must inform and consult the workers council prior to making such a decision.

When a plan is implemented through a collective agreement signed with trade unions, the employer can notify the denunciation, but if no substitution agreement is signed, employees are entitled to a 'remuneration guarantee' equal to the contributions paid over the preceding year.

### Insolvency protection

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

Plan Rules cannot include any provision that would result in the loss of pension entitlement for employees and former employees in the case of insolvency of the employer.

A company insolvency should have no adverse effect on long-term savings plans (PERCO and PERECOL) plans, PER-OB and DC plans for rights already accrued as the contributions are invested in individual accounts open in the name of the employees and managed by an outside provider, which has its own solvency rules.

For DB plans, protection against sponsor insolvency is gradually implemented through the obligation made to employers to guarantee at least 50 per cent of pensions in service through an insurance contract, a fiducial arrangement or security guarantees.

### Business transfer

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

Plan Rules cannot include any provision that would result in the loss of pension entitlement for employees and former employees in the case of transfer of the business or sale of the company.

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In broad based plans, retirement savings already accrued should not be impacted. Depending on a number of factors, the plan may be challenged and even waived, or may continue to apply mandatorily.

## Surplus

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

Not applicable in France, except for old DB plans with no vested rights.

## FIDUCIARY RESPONSIBILITIES

### Applicable fiduciaries

### 38| Which persons and entities are 'fiduciaries'?

Not applicable in France except in very limited cases.

### Fiduciary duties

### 39| What duties apply to fiduciaries?

Not applicable in France, except in very limited cases.

### Breach of duties

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

Not applicable in France, except in very limited cases.

## LEGAL DEVELOPMENTS AND TRENDS

### Legal challenges

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

In 2019, the closing of old non-vested DB plans to new entrants with no more accrual from 1 January 2020 onwards, has raised many issues, particularly on the calculation of pension entitlement at the closing date.

Alternatively, the law allows transformation and transfer into a new DB plan with vested rights but implementation instructions from the Social Security administration are still expected.

DC plans are growingly transformed into a new PER-OB, and long-term savings plans (PERCO) into a new long-term savings plan (PERECOL). Transfer of assets and liabilities must be monitored carefully as legal rules are not very explicit.

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

Low interest rates have put the pension industry under stress over recent years.

The administration issued very substantial instructions on the many rules that a pension plan must respect to qualify for social charges exemptions.

The insurance market has been targeted for many years by the authorities for not delivering pension payments to retirees who do not spontaneously claim their benefits. Since a law was passed in Parliament, the situation is slowly improving due to the determination of the French Prudential Supervision and Resolution Authority.

### Future prospects

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

The French state pension plan and mandatory inter-professional complementary retirement plan are under strong demographic pressure as the population is aging. There is a growing need for more private pension funding.

## UPDATE AND TRENDS

### Hot topics

## 44 | Are there any current developments or trends that should be noted?

The new Pension Bill passed on 17 March 2023, which modifies the minimum legal age to retire, applies to senior staff born in the last quarter of 1961, who had planned to retire at the end of 2023. As a result, the Pension Bill has an immediate effect and it forces employees and employers to reassess all their HR policies and strategies in a very short time frame.

The Pension Bill also includes a number of provisions to encourage flexible retirement and sets new obligations for employers (Senior Index, special surtax on termination of senior employees).

The French Constitutional Court has received a claim from some members of parliament that some provisions are unconstitutional. Its decision is expected soon. If some provisions are held unconstitutional, they will not get into force.

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# Germany

[Andreas Hofelich](#), [Mario Brungs](#) and [Michael Rein](#)

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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?

Pension in Germany is based on a three-pillar system. The first pillar, which is essentially regulated in the [Sixth Book of the German Social Code \(SGB VI\)](#), is the statutory old age pension financed by employer and employee social security contributions that generally have to be paid to the [Statutory German Pension Insurance](#). Exceptions exist for civil servants and self-employed persons, who do not have to pay social security contributions but must finance private pension insurance. The second pillar consists of company pension schemes that are financed either by the employer, by the employee (deferred compensation) or by both and are mainly regulated in the [Company Pensions Act \(BetrAVG\)](#) and the [Insurance Supervision Act \(VAG\)](#). The important thing here is that an employer is not obliged to operate an employer-financed company pension scheme and may decide voluntarily whether to offer such company pension scheme. The third pillar is personal pension provision, usually in the form of private life insurances. Here, the [Insurance Contract Act \(VVG\)](#) as well as the Insurance Supervision Act are essentially relevant.

Company pensions have increasingly become the subject of EU legislation in recent years. In this context, various EU regulations have an impact on German company pension schemes. For example, there are regulations that affect company pension commitments, such as the regulations on the portability of pension entitlements in the event of a job change, for the vesting periods (eg, Directive 2014/50/EU), but also regulations that affect pension providers such as insurance companies or retirement funds (eg, Directive 2016/2341/EU). In the meantime, numerous German rules implement EU directives.

### Regulatory authorities

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

As far as the statutory pension system (first pillar) is concerned, there is the Statutory German Pension Insurance. This institution administers the contributions paid by employers and employees and pays out the benefits to pensioners after the insured event occurred.

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For company pension schemes (second pillar) there is no central state authority. This applies in particular to direct pension commitments of the employer. However, insofar as external insurance-type pension providers are involved, they are subject to the [Federal Financial Supervisory Authority \(BaFin\)](#). Furthermore, in order to protect employees' pension entitlements against employer insolvency, employers are generally required to pay contributions to the German [Pension Protection Association \(PSVaG\)](#).

Private life insurances (third pillar) are in turn subject to supervision by the Federal Financial Supervisory Authority.

## Pension taxation

### 3 | What is the framework for taxation of pensions?

Regarding taxation, a distinction must be made between the statutory pension system and company pension schemes.

Employers' contributions to the statutory pension scheme (first pillar) are tax-free. At the present time employee contributions are not tax-free. However, deferred taxation for the pensions of the statutory pension scheme has been introduced in stages since 1 January 2005. This means that from 2040 onwards pension income will be fully taxable, and employee contributions will be tax-free.

For company pension schemes (second pillar) income tax due on pension contributions/benefits is dependent on the specific type of pension scheme. In the case of direct pension commitments and support fund schemes, contributions within the vesting period are not taxed. However, there is a downstream taxation of ongoing pension benefits within the pension phase. In the case of direct insurances, retirement funds and pension funds, contributions within the vesting period are only tax-exempt up to a certain threshold (which in 2023 is €7,008 per calendar year). Contributions above this threshold are generally taxable regardless of whether the contributions are financed by the employer or by the employee by way of deferred compensation.

Contributions to private life insurances (third pillar) are always paid from the employee's net salary and are therefore not subject to renewed taxation.

## STATE PENSION PROVISIONS

### Framework

### 4 | What is the state pension system?

Employers and employees pay mandatory contributions to the statutory pension scheme. For 2023 these contributions were set at 18.6 per cent of gross remuneration (up to the social security ceiling of the statutory pension insurance, which is €87,600 in West Germany and €85,200 in East Germany in 2023). The employer and the employee each owe half of this amount (9.3 per cent each). However, the employer pays the entire amount to the collecting agency of the German social security institutions (employer's and employee's share) and

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then deducts the employee's share from the employee's remuneration. If the employee's remuneration is above the social security ceiling of the statutory pension insurance, the portion of the gross remuneration above this threshold is not considered when calculating the contributions.

The current standard retirement age of 67 applies to all insured persons in the statutory pension insurance born after 1963. The retirement age of 65 still applies to insured persons born prior to 1 January 1947. For those born between 1 January 1947 and 31 December 1963 the regular retirement age is incrementally increased from age 65 to 67. Some groups, such as persons insured for a particularly long period (45 years) or the severely disabled, are entitled to receive their full pension prior to reaching the standard retirement age.

In principle, all employees are included in the statutory pension insurance which provides retirement pensions, pensions for reduced earning capacity and rehabilitation benefits. Civil servants and self-employed persons do generally not pay into the statutory pension scheme.

The statutory pension scheme is financed on the pay-as-you-go principle. This means that the individuals paying the contribution pay for the pensions of current pensioners and acquire entitlements regarding their own pension later, which will then be financed by future employees.

## Pension calculation

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

The amount of the state retirement pension depends on the amount of the contributions paid throughout the duration of employment. However, other factors are considered, such as time spent raising children and for school education.

## Aims

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

No. The statutory pension insurance is not structured to guarantee a certain level of replacement income. The amount of the individual pension benefit depends primarily on the sum of pension contributions made.

However, the general pension level has been falling in recent years because it is a pay-as-you-go system. As a result of the falling birth rate in Germany, pension benefits have to be borne by fewer employees, which will lead to a lower pension level in the future.

## 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?

No, since the state pension system is a pay-as-you-go system, the capital market (such as the ongoing low-interest phase) does not have a direct impact. Rather, the demographic development in Germany is problematic for the future pension level (as a result of the falling birth rate in Germany, pension benefits have to be borne by fewer employees, which will lead to a lower pension level in the future).

## 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?

Company pension schemes are generally defined benefit schemes. Until 31 December 2017, defined contribution schemes were only possible if the employer promised to pay a minimum amount of company pension. As of 1 January 2018, it is also generally possible to structure a company pension as a pure defined contribution scheme if an applicable collective bargaining agreement allows it. If there is no such collective bargaining agreement in place, then it remains that defined contribution schemes are only possible if the employer promises to pay a minimum amount of company pension.

### Restrictions

- 9** | Are employers required to arrange or contribute to supplementary pension schemes for employees? What restrictions or prohibitions limit an employer's ability to exclude certain employees from participation in broad-based retirement plans?

Under German law, the employer is not required to offer employer-financed company pension schemes. Nevertheless, if it decides to voluntarily set up and finance such a company pension scheme, the employer is in principle free to decide what financial resources it provides and which group of people should be entitled. However, if some employees are to be excluded, this cannot be done arbitrarily, but must be based on objective reasons in accordance with the principle of equal treatment under labour law. Additionally, there are further restrictions due to extensive case law prohibiting discrimination on grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.

Even without the employer itself financing a company pension, the employee can claim a company pension by deferred compensation. In this case, the employer must use a future salary of up to 4 per cent of the income threshold for assessing contributions to the statutory pension insurance (€3,504 in 2023) to provide an employee-financed company pension. If the remuneration is converted via a direct insurance, a retirement fund or a pension fund, the employer must also pay an employer's subsidy of up to 15 per cent of the deferred

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compensation amount if, and to the extent, the employer saves social security contributions because of the remuneration conversion. However, in the case of deferred compensation agreements already concluded before 1 January 2019, this obligation applies only since 1 January 2022.

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

If the employee leaves the company prior to the occurrence of the insured event, the pension expectancy for the company pension remains legally vested if (1) the employee is at least 21 years old upon termination of employment; and (2) the pension commitment existed for at least three years at the time. An exception is made for pension commitments financed by the employee by way of deferred compensation. Such pension entitlements are immediately vested irrespective of the employee's age or the duration of the pension commitment.

If an employment relationship does not end prematurely, but upon the occurrence of or after a covered event indicated in the pension commitment, the law stipulates no minimum term of service that must be completed in order to receive pension benefits. However, company pension schemes can stipulate such so-called waiting periods and often do so. This means that a certain period must pass between granting the pension commitment and the occurrence of the covered event. The waiting period can also be completed after the employment relationship ended. Such waiting periods usually range from five to 15 years.

## 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?

German company pensions law is applicable wherever German law applies to the pension commitment. In particular, if someone who is employed in Germany changes from a German company to a foreign group company (for example on a temporary secondment) and a new (foreign) employment contract is not entered into, German company pensions law continues to apply if the habitual place of work is still Germany. The situation differs if the employee enters a new employment relationship with the foreign group company. Whether, and to what extent, it is possible to continue a pension commitment under German law abroad needs be examined on a case-by-case basis.

## Funding

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

There is no legal obligation for the employer to finance a company pension scheme. If an employer decides to grant a company pension, it can determine the requirements in principle. This may also include an obligation for the employee to contribute financially (also known as matching contribution plans).

There are still a great number of pension schemes that are unfunded. Especially unfunded direct pension commitments are still common. If the employer does not refinance these by (1) concluding reinsurances; or (2) transferring assets to a trustee within a contractual trust arrangement (CTA), pension provisions have to be formed within the company's balance sheet. However, there has been an increase in funded company pension schemes recently. In particular, pension commitments that are implemented by way of direct insurances, retirement funds or pension funds are subject to funding requirements.

**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?**

It is not mandatory for a pension commitment to be funded. Therefore, it is also not possible to say in general terms how much to fund a defined benefit pension plan annually.

Company pension schemes that are structured as insurance (direct insurance) or like an insurance (retirement fund, pension fund) are subject to funding requirements as a result of regulatory provisions which apply to the insurance sector.

### Level of benefits

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

Since employer-funded occupational pension plans in Germany are voluntary benefits provided by the employer, the employer decides in which benefits are granted. In practice, it is not possible to identify a customary benefit level.

### Pension escalation

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

Yes. In general, company pension payments must be adjusted every three years in accordance with the increase in the cost of living insofar as the employer's economic situation does not make such an adjustment impossible (see section 16 of the Company Pensions Act (BetrAVG)). If during the relevant three-year period the cost of living has increased at a rate which is higher than the increase in the net salaries of comparable employees at the company, the obligation to adjust the pension is limited to the increase of the net salaries of comparable active employees. As an alternative the employer can promise to increase ongoing company pensions by 1 per cent each year. This must be agreed in the pension commitment. No adjustment of company pensions is necessary if the company pension scheme is implemented by a direct insurance or a retirement fund and, from the start of the pension, all surplus shares attributable to the pension portfolio are used to increase current benefits, or a defined contribution plan with a minimum benefit has been issued.

## 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?

There are no mandatory rules. The benefits depend on the individual rules of the pension schemes. It is customary that surviving dependants receive a certain percentage part (eg, 60 per cent) of the pension benefits that the employee would have been entitled to.

## Retirement

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

There are no mandatory legal provisions that determine the earliest date employees can retire and receive their full plan benefits. However, occupational pension schemes are often aligned with the age provision of the state pension and thus refer to the standard retirement age, which is currently 67 (for employees born after 31 December 1963). Nevertheless, an earlier date, such as reaching the age of 65, can also be determined. If an employee receives an earlier statutory full pension (eg, a pension for severe disability at the age of 63), the employee is – in general – entitled to claim the benefits from the occupational pension scheme also at the same date he or she receives the statutory pension.

According to section 2 paragraph 1 BetrAVG, there is a pro rata reduction of the employee's full pension benefits if the employee leaves the company before reaching the agreed standard retirement age. In general, the pro rata reduction is calculated based on the duration of the actual service compared to the length of service if the employee would have been employed until reaching the standard retirement age. A deviation from this calculation to the disadvantage of the employee is only possible by collective bargaining agreements. Deviations in favour of the employee are possible, but not very common, by other agreements (eg, works council agreements). In addition, section 2 paragraph 1 BetrAVG does not apply to (1) pension commitments financed by way of deferred compensation; (2) commitments structured as contribution-oriented defined benefit plans; (3) defined contribution plans with minimum benefits; or (4) pure defined contribution plans.

## 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?

If the employee receives benefits even though he or she is still employed by the employer, these payments can generally not be classified as occupational pension benefits within the meaning of the BetrAVG. However, as the classification as a benefit under the BetrAVG is, especially due to tax reasons, important for the employer, such a payment would be possible in principle, but not advisable.

## Change of employer or pension scheme

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

This depends on the type of financing and the implementation method of the occupational pension scheme. If the benefits are financed by the employer, under section 1b BetrAVG they are only vested if the employee has reached the age of 21 and the pension commitment has existed for at least three years at the time the employee leaves the company. If this is not the case, the employee loses all entitlements unless more favourable individual provisions apply. In contrast, if the benefits are financed by way of deferred compensation, the entitlements are immediately vested.

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

In particular, due to accounting reasons, employers may intend to transfer their direct pension obligations to external pension providers so that accruals no longer have to be made for those direct pension commitments in the company's annual financial statements. If this transfer is accompanied with a degrading effect on the benefit level of the beneficiaries, it will be only legally effective if the strict conditions of the Federal Labour Court are met. In addition, as such an outsourcing also causes a change in the implementation method, the consent of the employees or, if the pension scheme is based on a works council agreement, the consent of the works council is necessary.

Employees who left their former employer with a vested pension entitlement will often intend to transfer their pension commitment to their new employer and continue it unchanged. However, there is no statutory legal obligation for the new employer to continue – unchanged – a pension commitment of a previous employer. The employee is only entitled to claim – under further conditions – that the new employer grants a new pension commitment, whereby the value of the old vested pension commitment is taken into account (see section 4 paragraph 3 BetrAVG).

## Investment management

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

In the case of direct pension commitments, there is no such obligation at all. If indirect implementation methods (ie, support funds, direct insurances, retirement funds or pension funds) are used, the employer itself is, in principle, only obliged to ensure the proper payments of the pension contributions to the external pension provider. The latter is then responsible for the investment of the plan assets and sufficient investment returns. However, due to section 1 paragraph 1 BetrAVG, there is a risk of a default liability for the employer if the external pension provider is not able to fulfil the pension promise. This contingent liability applies in principle to all kinds of indirect pension commitments and is also completely independent of whether the employer is at fault for the fact that the external pension provider is unable or unwilling to fulfil the pension promise. Only in the case of a pure defined contribution scheme within the meaning of section 1 paragraph 2 No.

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2a BetrAVG is there no such risk of a contingent liability. However, such pension schemes are not yet widespread in practice because the conclusion of a corresponding collective bargaining agreement is mandatory here.

### 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?

In principle, this is possible. However, restrictions may result from the general principle of equal treatment. In addition, if the pension commitment is processed as an indirect pension promise via an external pension provider, it must be ensured that additional contributions to finance such enhancements are allowed under the provisions of the external pension provider.

### Executive-only plans

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

Yes. As the employer is in principle free to decide whether, to what extent and to which employees occupational pensions are granted, executive-only pension schemes are in general, also with regard to the principle of equal treatment, permissible.

In practice, however, employers often grant occupational pension schemes for executive and non-executive employees. The plans also often cover similar pension events (ie, old age, disability and death). Nevertheless, executive employees are often entitled to higher benefits in a pension event.

In the case of executive employees, individual pension commitments are also common. For executive employees, within the meaning of section 14 BetrVG, the works council is not in charge. Thus, a pension plan for these executive employees, which is based on a collective agreement, can only be concluded with the spokesman committee.

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

Not at all, as the statutory regulations of the BetrAVG apply equally to all forms of pension commitments, regardless of whether they were issued as broad-based or non-broad based plans. Incidentally, this also applies to managing directors and executives. Only for managing directors, who control at least 50 per cent of the shares of the company (by themselves or together with another managing director), are the legal restrictions of the BetrAVG not applicable.



## Unionised employees

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

Non-unionised employees are only entitled to occupational pension benefits based on a collective bargaining agreement if the employment contract stipulates that the provision of the collective bargaining agreement also applies to them. However, these reference clauses are common.

In addition, a pure defined contribution scheme (section 1 paragraph 2 No. 2a BetrAVG) is only permissible if it is based on a collective bargaining agreement. However, such pension schemes, whereby the principle of pay and forget applies, are not widespread in practice at this point in time. However, by the end of 2022, the first collective bargaining agreements have been concluded stipulating a pure defined contribution scheme.

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

The main difference is, according to the case law of the Federal Labour Court, that the parties of a collective bargaining agreement are subjected to less strict conditions when cutting benefits of an occupational pension scheme. In addition, deviations from certain statutory provisions (listed in section 19 BetrAVG) are only allowed based on a collective bargaining agreement. The same applies to pure defined contribution schemes, which are only permissible on the basis of a collective bargaining agreement.

## ENFORCEMENT

### Examination for compliance

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

There is no general process for plan regulators to examine legal compliance under German law. However, depending on the implementation method, different state authorities may review the compliance with the law of the pension plan. For example, within the implementation method of direct insurance, the Federal Financial Supervisory Authority will supervise compliance with the law.

### Penalties

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

If a provision of an occupational pension scheme is not legally compliant and has a degrading effect on the benefit level, the employer will face financial disadvantages as the invalid provision leads to higher claims of the beneficiary. However, within the exceptions listed in section 12 Company Pensions Act (BetrAVG), a violation of the provisions of the BetrAVG will not lead to a fine being imposed by a state authority.

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## Rectification

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

As there is no general process for a review of a pension scheme by governing agencies, there is no specific procedure for correcting errors in advance of such a review. In general, the employer's options to change the pension scheme are determined by the basis on which the occupational pension scheme was concluded and how extensively the changes shall be implemented.

For example, if the pension scheme is based on a works council agreement and it is planned to close the occupational pension scheme for new entrants, this change can be implemented unilaterally by a termination of the employer. If the pension scheme is based on other agreements (eg, collective bargaining agreements or individual agreements) any changes – in general – require the consent of the other party (eg, trade union or employee).

## Disclosure obligations

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

Pursuant to section 11 BetrAVG the employer is subjected to reporting, information and notification obligations towards the state insolvency insurance, the [Pension Protection Association \(PSVaG\)](#). Apart from this, specific disclosure obligations may result from other legal areas, such as insurance, banking or corporate law, in particular for external pension providers within the indirect implementation methods.

### 31 | What disclosures must be provided to plan participants?

Pursuant to section 4a BetrAVG the employer is obliged to provide detailed information to active and former plan participants about their pension expectancies. This includes in particular information on whether a pension expectancy has been acquired at all, the benefit amount, the estimated benefit amount upon reaching the age limit and how a termination of the employment relationship affects the entitlement. However, this obligation only occurs upon an express request by the beneficiary.

If the occupational pension scheme is implemented by an indirect implementation method (eg, a direct insurance), the pension provider has to inform the plan participants annually about their pension expectancies.

Within a transfer of business according to section 613a of the German Civil Code the employer is obliged to provide information about any implication of the transfer of the business to the occupational pension benefits.

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## Enforcement mechanisms

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

In order to enforce their pension entitlements, plan participants must initiate legal proceedings. Although an out-of-court settlement is always possible, the conduct of a prior (out-of-court) arbitration is not stipulated by law.

## PLAN CHANGES AND TERMINATION

### Rules and restrictions

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

The employer's options to change a pension plan are determined (1) by the basis on which the pension plan was concluded ('formal requirements'); and (2) whether and to what extent the planned changes will have a degrading effect on the benefit level of the beneficiaries ('material requirements').

Within (1), only if – in general – the pension scheme is based on a works council agreement and if the planned change is limited to a closure of the occupational pension scheme for new entrants can the change be implemented unilaterally by a termination of the employer. In contrast, if the pension scheme is based on other agreements (eg, collective bargaining agreements or individual agreements) or if other changes are planned, the consent of the other party is required (eg, trade union or employee).

Further to (2), if the planned change will have a degrading effect on the benefit level of the beneficiary's entitlements the restrictions of the case law of the Federal Labour Court must be observed. Within these material requirements, the impact on the benefit level of the beneficiaries and the employer's justification (eg, its economic situation) are weighed against each other. Generally speaking, the already acquired (vested) entitlements of the pension beneficiaries (past service) are more strongly protected than the increases in pension entitlements still to be acquired in the future (future service). Overall, the legal requirements for a valid reduction of the benefit level are strict.

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

A termination of a pension plan that has a degrading effect on the benefit level of the beneficiaries is subjected to strict 'formal' and 'material' requirements. Only if the pension plan is based on a works council agreement and the termination is limited to a closure for new entrants, can the employer unilaterally impose this change.

## Insolvency protection

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

In the case of direct pension commitments or indirect pension commitments processed via a support fund, a retirement or a pension fund, all vested pension entitlements of the employees earned until the opening of the insolvency proceedings are generally protected against the risk of the employer's insolvency by a governmental insolvency protection ([Pension Protection Association \(PSVaG\)](#), see section 7 BetrAVG). Pension promises via the indirect implementation method of a direct insurance are only protected in specific cases.

The amount of insolvency protection via the German Pension Protection Association is limited to monthly benefits of a maximum of €10,185 (West Germany) and €9,870 (East Germany). The aforementioned values refer to 2023. The threshold is increased every year. The PSVaG's insolvency protection is financed by compulsory contributions that must be paid by all employers who made pension commitments covered by the PSVaG.

For pension commitments processed as direct insurances, there is a separate insolvency protection via a special security fund of the insurance industry ([Protector Lebensversicherungs-AG](#)), which covers the insurer's default risk. This fund is financed by the insurance companies, which are – in general – obliged to contribute to the fund, if they provide direct insurances in Germany. In contrast to the German Pension Protection Association, this fund will only intervene in the event of the insolvency of an insurance company. In general, there is no maximum threshold for the monthly benefits the fund is liable for.

## Business transfer

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

In the case of a share deal, the occupational pension schemes remain unchanged. The buyer takes over all pension obligations (past and future service) towards all beneficiaries, that is, towards (1) active employees; (2) former employees with vested entitlements; (3) company pensioners; and (4) their surviving dependents. However, changes may be necessary if the acquired company leaves the corporate group due to the share deal. In this case, the unchanged continuation of the pension scheme could be no longer possible, as, for example, a retirement fund only allows a continuation if the employer is a member of the group.

Pursuant to section 613a of the German Civil Code, also within an asset deal (transfer of an undertaking), the occupational pension schemes remain unchanged. However, in contrast to a share deal, within an asset deal, the purchaser only takes over the pension obligations towards the active employees. The remaining pension obligations (towards former employees with vested entitlements and company pensioners) remain with the seller. However, also within an asset deal, changes of the occupational pension scheme may become necessary, in particular, due to the integration of the acquired business (eg, with regard to conflicting existing pension schemes of the purchaser).

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## Surplus

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

There are no mandatory provisions. Thus, provision of the occupational pension scheme will stipulate how any surplus will be utilised.

## FIDUCIARY RESPONSIBILITIES

### Applicable fiduciaries

### 38| Which persons and entities are 'fiduciaries'?

In Germany fiduciary structures only occur in connection with a contractual trust arrangement (CTA). A CTA particularly aims to avoid (or to remove existing) accruals for direct pension obligations in the company's annual financial statements. In addition, a CTA also grants an additional security for the beneficiary in the event of the employer's insolvency, as there is in general, in contrast to the governmental insolvency protection, no threshold for the monthly pension entitlements that are guaranteed by the CTA provider.

### Fiduciary duties

### 39| What duties apply to fiduciaries?

The duties depend on the provisions of the CTA and the applicable law. In most cases a CTA for a German pension scheme will be governed by German civil law. Since the CTA is merely a type of reinsurance for direct pension obligations, CTA providers are subjected to less strict regulations than insurance companies or other providers of indirect pension commitments (pension fund, retirement fund and support fund). This applies in particular to investment restrictions.

### Breach of duties

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

The consequences of a breach of duties are subject to the individual rules of the CTA and the applicable law. Most CTAs will be governed by German civil law.

## LEGAL DEVELOPMENTS AND TRENDS

### Legal challenges

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

Some employers are seeking to change the implementation method of their direct pension commitments to one of the indirect implementation methods. This change aims in particular

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to be no longer obliged to set aside accruals in the company's annual financial statements for these pension obligations. For tax reasons, within such a restructure the past service is often outsourced to a pension fund and the future service to a (reinsured) support fund. Usually, however, this restructure cannot be implemented unilaterally by the employer. Rather, depending on the basis of the pension scheme, the consent of the works council or each beneficiary is required.

Apart from this change of the implementation method, most of the occupational pension schemes no longer provide for defined benefits. Instead, the majority of the newer pension schemes are to be qualified as contribution-oriented benefit plans, whereby the amount of the pension benefits is calculated on the basis of the contributions that have been paid until the pension event occurs.

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

As many external pension providers, especially retirement funds, are experiencing economic problems due to the long-term low-interest rate phase, reductions in pension entitlements are likely to continue to increase. Due to their financial situation approximately one-quarter of retirement funds are under strict observation by the Federal Financial Supervisory Authority. However, as the requirements for a valid reduction of pension benefits are very strict, the employer is often exposed to the risk of a contingent liability if the pension provider cuts the benefits.

In addition, major insurance companies have announced that they will no longer guarantee 100 per cent of the paid contributions within newly concluded direct insurances. To avoid a possible contingent liability in this regard, employers should not conclude such direct insurance but switch to other types of pension commitments.

### **Future prospects**

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

There is a risk that the financial situation of pension providers will continue to worsen and thus the described risks for employers of a contingent liability will further increase. Legislative initiatives have so far not provided any relief for employers. Against this background, there is not only the risk that a contingent liability will actually occur in existing pension schemes, but also that it will become (even) more difficult for employers to offer an attractive and, at the same time, low-risk occupational pension scheme.

## UPDATE AND TRENDS

### Hot topics

#### 44 | Are there any current developments or trends that should be noted?

Due to the recent significant increase in inflation, (legal) disputes about the obligation of an employer to examine an adjustment to the inflation trend (see section 16 BetrAVG) could increase significantly. Based on the adjustment date of 1 January 2023, inflation in the – generally – relevant three-year period (1 January 2020 to 31 December 2022) amounts to 14 per cent.

Recently, some insurance companies have been advertising a new type of pension promise on the market, in which benefits for disability and death are promised for a limited period of one year. At the end of this year, the employer is supposed to be free to decide whether or not to issue the time-limited pension again for another year. However, it is unclear whether the time limitation of the pension promise is legally effective. Thus, such a pension promise can result in considerable financial risks for the employer.



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# Netherlands

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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 main pieces of legislation are the [Pensions Act](#), the [Act on Mandatory Participation in an Industry-wide Pension Fund](#) and the [Wage Tax Act](#). The European pension directives are implemented in the Pensions Act.

### Regulatory authorities

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

The most important regulatory authority is the Dutch Central Bank, which supervises pension providers and verifies whether such providers act in accordance with the Pensions Act. In the case of a violation of the Pensions Act, the Dutch Central Bank can levy substantial fines. In addition, the Authority of the Financial Markets supervises communication between pension providers and their members.

### Pension taxation

- 3 | What is the framework for taxation of pensions?

The framework is provided in the Wage Tax Act. According to this act, pension contributions are tax favourable only if a pension scheme meets various conditions. If pension contributions are tax favourable, the accumulated pension capital is exempt from the national wealth tax and retirement benefits are taxable. If a pension scheme no longer meets these conditions, the accumulated pension capital is added to the taxable income of the members.

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## STATE PENSION PROVISIONS

### Framework

#### 4 | What is the state pension system?

Every individual who has worked or lived in the Netherlands is entitled to a state pension. The state pension provides lifelong retirement benefits as of a certain retirement age. The retirement age for the state pension is 66 years and 10 months in 2023, and will be increased gradually to 67 years by 2024. In addition to retirement benefits, the state provides for a spousal bereavement pension when various conditions are met.

### Pension calculation

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

The annual retirement benefits equal an amount of approximately €11,500 gross (2023 figure) if a beneficiary is in a civil partnership and has lived or worked in the Netherlands between the ages of 16 and 66. The annual retirement benefits of single beneficiaries are approximately 40 per cent higher than the aforementioned amount. If and insofar as an individual has lived or worked abroad, the aforementioned amount is decreased on a pro rata basis. Annual retirement benefits are not related to the income or wealth of a beneficiary.

### 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 amount of the annual retirement benefits is not related to the employment-derived income of individual employees. However, the annual retirement benefits are, in principle, equal to 70 per cent of the legal minimum wage if the beneficiary is in a civil partnership and to 50 per cent of the legal minimum wage if the beneficiary is single.

### 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?

No. In 2022, the government abolished its plans to eliminate the link between the legal minimum wage and retirement benefits, which will effectively decrease the amount of the retirement benefits.

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## 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?

The main types are defined benefit plans and defined contribution plans. Both types provide for annual benefits only, which implies that lump-sum payments are, in principle, not possible. Defined benefit plans generally provide for indexation upon the condition that the pension provider is funded sufficiently. In defined contribution plans, the accumulated pension capital is generally converted into fixed annual retirement benefits upon reaching retirement age.

Defined benefit plans have flat-rate pension contributions, whereas defined contribution plans have age-related pension contributions. As at January 2023, approximately 80 per cent of all employees participate in a defined benefit plan and approximately 20 per cent of all employees participate in a defined contribution plan. However, almost all employers, when setting up a new pension plan, opt for a defined contribution plan.

The Dutch House of Representatives approved the Act Future of Pensions (in Dutch: Wet toekomst pensioenen) in December 2022. If this legislation enters into force, accumulation of pension rights through a defined benefit plan is no longer allowed as per 1 January 2027. This legislation implies that defined contribution plans will become the standard pension type in the Netherlands.

### Restrictions

#### 9 | Are employers required to arrange or contribute to supplementary pension schemes for employees? What restrictions or prohibitions limit an employer's ability to exclude certain employees from participation in broad-based retirement plans?

Approximately 80 per cent of all employees participate in a mandatory industry-wide pension plan. The Act Mandatory Participation in an Industry-wide Pension Fund provides for such mandatory participation. If an employer is active in a certain industry (eg, the construction industry or the education sector), this employer is obliged to ensure the participation of all its employees in the pension plan of the applicable industry-wide pension fund. If an industry-wide pension fund is not applicable and an employer opts to set up a supplementary pension plan for its employees, these plans generally apply to all employees. This is not related to any legislation, but to the fact that pension providers negotiate that all employees must be covered by the applicable pension plan.

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

The Pensions Act provides for a vesting period of two months only.

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## 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?

Employees who are seconded overseas can continue to participate in a Dutch pension plan. This is more difficult for employees who start to work in an overseas legal entity. However, despite applicable European pension directives, overseas tax legislation generally does not provide for tax-favourable continued participation in a Dutch pension plan. To tackle this, the Wage Tax Act provides for participation in a Dutch pension plan with retroactive effect once an employee returns to the Netherlands.

## Funding

- 12** | Do employers and employees share in the financing of the benefits and are the benefits funded in a trust or other secure vehicle?

There are virtually no legal restrictions on the employer part of the pension contributions or on the employee part of the pension contributions. However, the average employer part of the pension contributions is two-thirds of the total pension contributions and the average employee part of the pension contributions is one-third of the total pension contributions. The total pension contributions are, on average, equal to 25 per cent of the pensionable base. According to the Pensions Act, benefits must be funded and administered by a pension provider who is independent of the employer. There are three types of pension providers: pension funds, insurance companies and premium pension institutions, which are all legal entities.

- 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?

Employers must pay pension contributions to a pension provider to fund the benefits. The amount of pension contributions payable is calculated by the pension provider on an annual basis. According to the Pensions Act, the minimum funding ratio is 105 per cent of the accumulated pension capital. In the case of underfunding, in principle, the pension provider is obliged to increase the pension contributions, but the involvement of labour unions generally prevents significant fluctuations in pension contributions on a year-to-year basis.

## Level of benefits

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

In the case of a retirement age of 68 and 40 years of service, the Wage Tax Act provides for a maximum amount of annual retirement benefits that equals 75 per cent of the average pensionable base. The average pensionable base equals the average pensionable salary minus a state pension component of approximately €16,000 (2023 figure). The pensionable

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salary is capped at approximately €128,000 per year (2023 figure). In practice, annual retirement benefits are within the range of 50 to 75 per cent of the average pensionable base.

### Pension escalation

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

In the Netherlands, pension escalation is generally referred to as indexation of pensions. According to the Pensions Act, all pension plans must include a clause regarding indexation. Pension providers are furthermore obliged to mention whether accumulated pension capital is adjusted to inflation and whether this indexation is conditional or unconditional.

### 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?

Almost all pension plans contain a spousal bereavement pension in cases of pre-retirement death and death after retirement. Some pre-retirement spousal bereavement pensions are limited to current employees and therefore do not apply to former employees. This will become standard once the Act Future of Pensions enters into force. The standard level of annual benefits of the spousal bereavement pension equals 70 per cent of the retirement benefits.

### Retirement

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

According to the Wage Tax Act, an individual is entitled to retirement benefits equal to 75 per cent of the pensionable base only when the standard retirement age of a pension plan is 68 years. This does not mean that employees cannot retire at an earlier age and receive benefits, but annual retirement benefits will be reduced. The rule of thumb is that, for each year an individual retires before the age of 68, the annual retirement benefits will be reduced by 7 per cent.

### 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?

The Pensions Act does not allow such distributions or loans. If distributions or loans occur despite this restriction, substantial fines and fiscal consequences will be triggered.

## Change of employer or pension scheme

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

No. Pensions are always vested and employees are entitled to transfer their accumulated pension capital to the pension provider of their new employer.

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

According to the Pensions Act, employees are entitled to transfer their accumulated pension capital to the pension provider of their new employer upon their change of employment. In addition, employees generally have the right to transfer the accumulated pension capital of a defined contribution scheme to another pension provider upon reaching retirement age.

## Investment management

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

The pension provider who administers the pension plans and the corresponding assets is responsible for the investment of plan funds and the sufficiency of investment returns. Pension providers are legal entities that can employ asset managers or make use of the services of third parties to manage their assets.

## 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?

Not directly. Employees can decrease their retirement age, but they cannot be forced to do so and a decrease in the retirement age decreases the annual retirement benefits. However, the Wage Tax Act supports tax-favourable early retirement plans – which are not the same as pensions or administered by pension providers – to a certain extent.

## Executive-only plans

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

Executive-only plans are allowed but rare in the Netherlands. This is mainly related to legislation on equal rights, which makes it very difficult to only offer a pension plan to a certain group of employees within a legal entity. However, various employers offer pension plans if and insofar as employees earn more than the maximum pensionable salary of €128,000 (2023 figure) per year.

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

The pension plans that are offered if and insofar as employees earn more than the maximum pensionable salary of €128,000 (2023 figure) per year are defined contribution plans, which are not tax favourable.

### Unionised employees

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

Approximately 80 per cent of all employees participate in a mandatory industry-wide pension plan. The Act on Mandatory Participation in an Industry-wide Pension Fund provides for mandatory participation if representatives of employers and representatives of employees ask the government to approve such mandatory participation. This means that, in practice, unionised employees participate in a pension plan of an industry-wide pension fund and non-unionised employees do not. Pension plans of industry-wide pension funds are almost always defined benefit plans, whereas employers who set up a pension plan themselves (because there is no such applicable mandatory participation) opt for a defined contribution plan.

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

There is no separate legislation for unionised arrangements.

## ENFORCEMENT

### Examination for compliance

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

According to the Pensions Act, the Dutch Central Bank and the Authority for the Financial Markets supervise pension providers. The Dutch Central Bank is the financial supervisor of pension providers and the Authority for the Financial Markets supervises the communication between pension providers and their members. This means that the Dutch Central Bank and the Authority for the Financial Markets, in principle, do not supervise the content of pension plans. However, the Dutch tax authorities can verify whether a pension plan is in accordance with the Wage Tax Act.

### Penalties

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

If a pension plan is not or no longer in accordance with the Wage Tax Act, the accumulated pension capital will be added to the taxable income of employees at once. This is subject

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to the regular income and wage tax rate, which means the maximum rate of 49.5 per cent will apply in most cases. In addition, there is additional taxation of 20 per cent, which means that the total tax burden is 69.5 per cent of the accumulated pension capital. As these fiscal consequences are significant, employees, employers and pension providers try to make sure that a pension plan is in accordance with the Wage Tax Act at all times.

## Rectification

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

In the event that an employer or a pension provider finds an error in the pension plan that implies that the pension plan is not in accordance with the Wage Tax Act, such an entity can reach out to the tax authorities and suggest correcting the pension plan with immediate retroactive effect. This approach generally avoids the harsh fiscal consequences that apply if the Dutch tax authorities discover that a pension plan is not in accordance with the Wage Tax Act.

## Disclosure obligations

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

According to the Pensions Act, pension providers must send extensive information to the Dutch Central Bank. The most important documents that must be provided to the Dutch Central Bank are the annual report and the recovery plan. A recovery plan must be drafted to be used in the case of underfunding of a pension provider and includes measures to be taken by the pension provider to solve such underfunding.

In addition to the annual report and the recovery plan, the pension provider must send, among others, to the Dutch Central Bank:

- the pension scheme regulations;
- the administration agreement between the employer and the pension provider;
- the deed of incorporation; and
- financial forecasts.

Furthermore, the members of the board of management of pension providers must be approved by the Dutch Central Bank. It should be noted that employers do not have to send any pension-related documentation to the Dutch Central Bank.

### 31 | What disclosures must be provided to plan participants?

The Pensions Act states that pension providers must send a pension overview to their members. This overview must be provided to employees, former employees and retirees on an annual basis. The annual pension overview is an extensive document that states, among others:

- the accumulated pension capital;

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- information on indexation;
- the applicable retirement age; and
- the amount of the pension contributions payable.

Pension providers must also provide a pension overview in cases of certain life events such as changing jobs, divorce and death. Some information is not included in the annual pension overview but must be provided by the pension provider upon the request of their members. An example of information that must be provided upon request is information on the investment strategy of the pension provider.

### Enforcement mechanisms

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

If an employer or a pension provider is unwilling to fulfil its obligations related to a pension plan, members can go to court and claim a breach of contract.

## PLAN CHANGES AND TERMINATION

### Rules and restrictions

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

Pension plans are based on an agreement between employers and employees. This means that, according to Dutch employment law, employers cannot change a pension plan without the approval of their employees. Obtaining approval from employees often means that employees must be compensated. If applicable, changes in a pension plan are also subject to the approval of a works council or a labour union. If a change in a pension plan affects retirees – for example, in the case of indexation – an employer must also seek the approval of those retirees.

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

The same restrictions that apply to changing a pension plan apply to an employer terminating a plan. This means that an employer must have the approval of its employees. If applicable, changes in a pension plan are also subject to the approval of a works council or a labour union.

### Insolvency protection

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

The Pensions Act states that pension plans must be administered by a pension provider that is independent of the employer at all times. As a result, employer insolvency generally

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does not impact accumulated pensions. After insolvency, an employee no longer has an employer and, as a result, no longer accumulates a pension, but already-accumulated pensions remain intact. In cases of employer insolvency, the social security service will pay pension contributions due (if any) within a maximum of 13 weeks.

## Business transfer

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

Accumulated retirement benefits are not affected by a business transfer. If the employer is acquired and the employees remain employed at the same legal entity, the applicable pension scheme remains in place and the employees concerned continue to participate in the plan. If the employees are transferred to another legal entity, the question arises of whether there is a transfer of undertaking. If there is no transfer of undertaking, employees remain entitled to the same employment conditions, including pensions. If there is a transfer of undertaking, the Dutch Civil Code states that the receiving legal entity is allowed to demand that the employees start participating in the pension plan of this legal entity, even if this pension plan is less favourable. A transfer of undertaking can be executed by way of asset acquisition, business acquisition or merger.

## Surplus

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

In the Dutch pension system, a pension plan itself cannot have a surplus. However, a pension provider could have a surplus if it no longer administers a pension scheme. For example, this can happen if an employer has decided to select another pension provider for its pension scheme administration and the pension provider is dissolved. In that case, the Pensions Act states that the surplus may be used for the benefits of its members only. This generally means an increase in the accumulated pensions just before the pension provider is dissolved.

## FIDUCIARY RESPONSIBILITIES

### Applicable fiduciaries

### 38 | Which persons and entities are 'fiduciaries'?

Pension providers can hire employees who manage the assets that are administered by the pension provider. Pension providers can also make use of the fiduciary services of third parties. The Pensions Act states that, among others, a pension provider must select its fiduciary carefully, and that a pension provider and a fiduciary must make use of a proper service agreement. Such a service agreement must be in accordance with the Pensions Act. The Pensions Act does not prohibit selecting certain financial institutions as fiduciaries. There are also no geographic restrictions provided that the pension provider is able to conduct sufficient due diligence over the fiduciary.

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## Fiduciary duties

### 39 | What duties apply to fiduciaries?

Strictly speaking, the Pensions Act and the Decree on the Execution of the Pensions Act do not apply to fiduciaries. However, the pension provider must ensure that the service agreement between the pension provider and the fiduciary is in line with the Decree on the Execution of the Pensions Act. In practice, this means that (foreign) fiduciaries should be willing to provide certain information on investments on behalf of the pension provider to the pension provider, if the Dutch Central Bank requests this information.

## Breach of duties

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

Failure to discharge duties constitutes a breach of contract between the fiduciary and the pension provider. The Pensions Act does not provide for legal or financial consequences directly applicable to the fiduciary.

## LEGAL DEVELOPMENTS AND TRENDS

### Legal challenges

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

In the past couple of years, most employers that have their own pension plan have tried to replace their defined benefit plans with defined contribution plans. This is a very costly and time-consuming project in the Netherlands because of the required works council (if any) approval and the approval of all employees. In many cases, employers have been forced to pay their employees' compensation by way of a one-off payment or an increase in their regular salaries.

Some employers have tried to change their pension plan unilaterally. This is possible in exceptional cases only and has resulted in a lot of case law. A well-known case on this matter is the verdict of the Supreme Court dated 15 July 2022, case No. ECLI:PHR:2022:705.

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

Yes. The most prominent legal challenge is the adjustment of pension plans' clauses related to indexation. Many employers have tried to decrease the costs of indexation by trying to adjust the pension plan in such a way that indexation of accumulated pension capital no longer applies. However, this is also an adjustment of the pension plan. There is currently a lot of case law on this matter. This case law, among others, focuses on the question of whether it is possible to adjust unconditional indexation and whether an employer also needs the approval of retired employees if such employees' retirement benefits are no longer adjusted to inflation by the employer. One of the most important cases regarding

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this matter is from the High Court in Amsterdam (No. ECLI:NL:GHAMS:2020:2929, dated 3 November 2020).

## Future prospects

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

Over the past 12 years, most pension providers have not been able to grant any indexation of pensions at all. Furthermore, pension contributions continue to rise due to low interest rates and an increased life expectancy. The general consensus in the Netherlands is that, unless the Dutch pension system is revised, the trends of not providing any indexation of pensions and increasing pension contributions will continue.

## UPDATE AND TRENDS

### Hot topics

### 44 | Are there any current developments or trends that should be noted?

The Dutch House of Representatives has approved the Act Future of Pensions in December 2022. This legislation will significantly revise the Dutch pension system. It is currently expected that the Act Future of Pensions enters into force as per 1 July 2023. According to this legislation, accumulation of pension rights through a defined benefit plan is no longer allowed as per 1 January 2027. This implies that defined contribution plans will become the standard. Three new types of defined contribution plans will be introduced. Defined contribution plans set up after the introduction of the new pension system will have flat-rate pension contributions. Already existing defined contribution plans with age-related pension contributions can be continued. Accumulated pension capital of defined benefit plans will be converted to pension capital of a defined contribution plan by default. Employers need to obtain works council approval and employee approval for switching to another pension plan as a result of the Act Future of Pensions. Obtaining such approval generally required employee compensation.

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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?

In order to respond to this first question, some context regarding the Swiss social security system, and the place of occupational pension schemes in it, should be given.

The Swiss social security system is founded on a three-pillar model.

The first pillar is the state pension (similar to social security in the United States) and includes old-age and survivors' insurance (OASI), disability insurance and loss of earnings insurance.

The primary legal bases covering OASI are the:

- [Swiss federal act on old-age and survivors' insurance of 20 December 1946, RS 831.10](#); and
- [Old-age and survivors' insurance regulation of 31 October 1947, RS 831.101](#) .

The second pillar is the occupational pension scheme. The primary legal bases covering the second pillar are the:

- [Swiss federal act on old-age, survivors' and disability occupational pension schemes of 25 June 1982, RS 831.40](#)
- [Swiss federal act on vesting in old-age, survivors' and disability occupational pension schemes of 17 December 1993, RS 831.42](#) ;
- [Vesting in old-age, survivors' and disability occupational pension schemes regulation of 3 October 1994, RS 831.425](#) ;
- [Supervision of old-age, survivors' and disability occupational pension schemes regulation of 22 June 2011, RS 831.435.1](#);
- [Old-age, survivors' and disability occupational pension schemes regulation of 18 April 1984, RS 831.441.1](#); and
- [Tax deductibility of contributions to recognised forms of old-age, survivors' and disability occupational pension schemes regulation of 13 November 1985, RS 831.461.3](#).

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The third pillar is the private pension plan. Its purpose is to cover additional, personal needs. The third pillar is outside of the scope of this article and, therefore, will not be discussed further.

Additionally, the following legal bases are important across all three pillars:

- [Swiss federal act on the general part of social security law of 6 October 2000, RS 830.1](#); and
- [General part of social security law regulation of 11 September 2002, RS 830.11](#).

Moreover, the following European Union (EU) legal bases are important with regard to Switzerland's cooperation with the EU, as they also apply to European Free Trade Association (EFTA) States, including Switzerland:

- [Regulation \(EC\) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems Regulation \(EC\) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems](#) ; and
- [Regulation \(EC\) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation \(EC\) No. 883/2004 on the coordination of social security systems](#).

Switzerland also concluded a number of multilateral and bilateral [social security conventions](#).

## Regulatory authorities

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

It should be noted that Switzerland is a federal state with three levels of government – communal (municipal), cantonal and federal.

Concerning the first pillar, the primary regulatory authorities are the cantonal authorities at the competent Cantonal Compensation Fund Office. These authorities are responsible for issuing decisions with regard to most aspects of state pension laws and regulations, including who is subject to making state pension contributions, the contribution amounts and the payment of state pension benefits. The subject of a decision may object and request that the authority review its decision. This decision then can be appealed to the competent courts.

That said, in some cases, other compensation fund offices may be competent for making such decisions. In particular, professional associations may have their own compensation fund office. In that case, in principle, members of the professional association would be affiliated with that compensation fund office, rather than with the Cantonal Compensation Fund Office.

Moreover, there is a federal compensation fund, which mainly is responsible for federal employees.

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The federal authority is the Federal Social Insurance Office (FSIO). The FSIO's primary role with regard to the regulation of state pensions is to act as the supervisory authority. In particular, the FSIO can step in to issue a decision when the cantons do not agree whose Cantonal Compensation Fund Office is competent.

Concerning the second pillar, the primary regulatory authorities are the occupational pension funds themselves. These funds must be listed in a register of occupational pension funds. Each canton designates a supervisory authority tasked with monitoring the occupational pension funds in that canton.

There is also a federal Substitute Occupational Benefit Institution. This fund is primarily responsible for individuals whose employer did not meet their statutory obligations concerning occupational benefits, as well as individuals wishing to be affiliated on a voluntary basis.

These authorities are responsible for issuing decisions with regard to most aspects of occupational benefit scheme laws and regulations, including who is subject to making occupational pension contributions, the contribution amounts and the payment of occupational pension benefits. The subject of a decision may object and request that the authority review its decision. This decision then can be appealed to the competent courts.

The FSIO also acts as the federal supervisory authority regarding occupational pension funds.

## Pension taxation

### 3 | What is the framework for taxation of pensions?

Contributions made to compensation funds and occupational pension funds, in principle, are deducted from an individual's taxable income.

Employers also may deduct contributions they make from their taxable revenue.

As a general rule, both state pension and occupational benefit pension payments are considered income subject to Swiss income tax.

In addition, cantonal tax laws often exonerate pension capital from wealth tax (a cantonal and communal tax).

## STATE PENSION PROVISIONS

### Framework

### 4 | What is the state pension system?

The state pension system (first pillar) includes old-age and survivors' insurance, disability insurance and loss of earnings insurance.

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## Pension calculation

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

State pensions are calculated based on an individual's average annual income and the number of years of contributions. Bonuses also are included for time spent raising children and caring for family members. As there are 43 years in which women could have contributed to their state pension and 44 years in which men could have contributed to their state pension, a reduction of 1/43, or respectively 1/44, is applied for each missing year.

## 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 purpose of the state pension system is to cover vital subsistence needs.

## 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?

Yes. One example of this is the recent decision to raise the retirement age for women. The current retirement age in Switzerland is 64 for women and 65 for men. The Swiss population recently voted to raise the retirement age for women to 65. The new dispositions will enter into force on 1 January 2024, with the age being increased incrementally as from 1 January 2025.

Moreover, the Swiss population also voted to increase the VAT rate in order to better fund the state pension system. This change is expected to enter into force on 1 January 2024.

## 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?

The specificities of the occupational pension plan will depend on the specific occupational pension fund's regulations. For instance, some offer a lump-sum payment at retirement, while others pay a monthly pension and others still combine a smaller lump-sum payment with a monthly pension. Moreover, both defined benefit plans and defined contribution plans exist, although defined contribution plans are more common.

Further, there are two main categories of occupational pension schemes: (1) mandatory, and (2) voluntary (extra-mandatory):

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- 1 employees over the age of 17, whose salaries exceed a certain minimum (22,050 francs for 2023) must be affiliated with an occupational pension fund; under a mandatory occupational pension scheme, salaries between 25,725 francs and 88,200 francs are insured (for 2023); and
- 2 employers may decide for their employees to also be affiliated with a voluntary occupational pension scheme to insure salary above this threshold; the maximum salary that can be insured with a voluntary occupational pension scheme is 882,000 francs (for 2023).

Self-employed individuals also may choose to be affiliated with a voluntary occupational pension scheme.

## Restrictions

- 9 Are employers required to arrange or contribute to supplementary pension schemes for employees? What restrictions or prohibitions limit an employer's ability to exclude certain employees from participation in broad-based retirement plans?

Employers only are required to make contributions with regard to the mandatory occupational pension scheme. They must support at least half of the contributions.

Moreover, employers also offering voluntary occupational pension schemes may choose to limit participation in these plans to employees meeting certain conditions, provided these conditions are objective (eg, salary or position). However, employers still must cover at least half of the contributions for any voluntary occupational pension scheme with which their employees are affiliated.

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

With regard to mandatory occupational pension schemes, employees whose employment contracts are for a duration of three months or more (or who, in reality, will work for three months or more) must be affiliated with a mandatory occupational pension scheme. This often is the case for voluntary occupational pension schemes as well, but a fund's regulations may specify otherwise. However, beyond these limits, there is no requirement for employees to work for a certain period of time to participate in the plan or become vested in benefits.

## 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?

A distinction should be made between (1) employees coming under the scope of Regulation (EC) No. 883/2004, (2) employees coming under the scope of another social security convention and (3) all other employees.

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The following rules apply with regard to employees coming under the scope of Regulation (EC) No. 883/2004 (ie, EU citizens, European Free Trade Association (EFTA) citizens, refugees residing in an EU or EFTA State and stateless persons residing in an EU or EFTA State), as well as British citizens (including refugees and stateless persons residing in the United Kingdom), as similar rules exist under the [UK/Switzerland convention on social security coordination](#).

Posted workers' (temporarily overseas) affiliation with the Swiss social security system, including occupational pension schemes, may be maintained if the following conditions are fulfilled:

- the employee was affiliated with the Swiss social security system for at least one month prior to being posted;
- it is not anticipated that the posting will last more than 24 months (it may be possible to request a longer period of time of up to six years); and
- the individual has not been posted to replace another person.

For other overseas workers (long-term), assuming no other provisions of an international convention apply, affiliation with the Swiss social security system (including occupational pension schemes) may be maintained if:

- the employee is working overseas for a Swiss employer (who supports the employee's salary);
- that employer agrees to maintain the employee's affiliation; and
- the employee was affiliated with the Swiss social security system for at least five years immediately prior to going abroad.

Special rules also apply under Regulation (EC) No. 883/2004 with regard to cross-border workers (ie, individuals working in Switzerland, but resident in another EU or EFTA State). In this case, those individuals are affiliated with the Swiss social security system, provided they do not carry out 25 per cent or more of their employment activity from their country of residence (eg, remote working).

That said, during the covid-19 pandemic, the EU Administrative Commission for the Coordination of Social Security Systems adopted a 'no-impact position' (with effect in Switzerland) with regard to how the applicable social security affiliation should be determined. This no-impact position has been extended through 30 June 2023, meaning that for the moment, remote working should not have an effect when determining the social security scheme applicable under EU Regulation (EC) No. 883/2004.

With regard to employees coming under the scope of another social security convention, the possibility of remaining affiliated with the Swiss social security system, including occupational pension schemes, may depend on the content of the specific convention. Assuming no other provisions of an international convention apply, affiliation with the Swiss social security system (including mandatory occupational pension schemes) may be maintained if: the employee is working overseas for a Swiss employer (who supports the employee's salary); that employer agrees to maintain the employee's affiliation; and the employee was affiliated with the Swiss social security system for at least five years immediately prior to going abroad.

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For other employees, affiliation with the Swiss social security system, including occupational pension schemes, may be maintained if: the employee is working overseas for a Swiss employer (who supports the employee's salary); that employer agrees to maintain the employee's affiliation; and the employee was affiliated with the Swiss social security system for at least five years immediately prior to going abroad.

That said, in some cases, the possibility of remaining affiliated with an occupational pension scheme may also vary according to the occupational pension fund's regulations.

## Funding

### 12 | Do employers 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 occupational pension scheme benefits. The total employer contributions (for all employees) must equal at least the total employee contributions (made by all employees).

Occupational pension funds are legal entities, separate from the employer. They may take the form of either a foundation or an institution established by public law (and having legal personality). The funds must be structured in accordance with the Occupational Pension Scheme Act and its regulations.

### 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?

It should be noted that in Switzerland, the question of benefits funding relates to the occupational pension fund itself, rather than the employer.

The Occupational Pension Scheme Act stipulates that occupational pension funds must ensure that their liabilities are covered fully. Several exceptions exist:

- a short-term overdraft is permitted if the occupational pension fund:
  - still will be able to provide all benefits as soon as they become due;
  - takes measures to eliminate the shortfall; and
  - informs the supervisory authority, employer, insured individuals and pension beneficiaries of the shortfall; and
- moreover, an exception exists for certain occupational pension funds that are organised as public corporations and are guaranteed by the state.

With regard to the evaluation of assets and liabilities, the Occupational Pension Scheme Regulation stipulates, in particular, that they must be evaluated in accordance with Swiss GAAP RPC 26 rules.

It also should be noted that the occupational pension fund's debts are not considered to be the employer's debts. Therefore, the employer's liability would be limited to contributions

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due under the occupational pension plan, which may include a special recapitalisation contribution.

### Level of benefits

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

The purpose of the occupational pension scheme is to provide benefits that allow individuals to maintain their standard of living after retirement (ie, approximately 60 per cent of their pre-retirement income).

The precise benefits received will depend on a number of factors, including the individual's salary, the number of years during which they made contributions and whether contributions also were made to a voluntary occupational pension scheme.

### Pension escalation

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

The occupational pension fund regulations may allow for an up to five-year deferral of pension benefits after reaching the statutory retirement age, if the insured individual still is carrying out their gainful activity. In this case, pension payments will be increased.

### 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?

Under the Occupational Pension Scheme Act, provided certain conditions are met (eg, the deceased being insured at the time of their death or onset of their incapacity to work leading to their death), the following death benefits are mandatory:

- death benefits to the surviving spouse; and
- death benefits to any children.

With regard to mandatory occupational pension schemes, death benefits are due to the surviving spouse if that individual (1) is at least 45 and the marriage lasted at least five years, or (2) they are responsible for at least one child. In this case the surviving spouse has a right to 60 per cent of the disability pension that the deceased would have received until their own death or until they remarry. If the aforementioned conditions are not fulfilled, the surviving spouse receives a lump-sum payment equalling three annual pensions.

With regard to mandatory occupational pension schemes, the deceased's children have a right to 20 per cent of the disability pension that the deceased would have received until they turn 18 (or 25 if still a student or if they have a disability).

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The occupational pension fund regulations may provide for the following individuals to receive death benefits:

- dependants of the deceased or the deceased's partner with whom they lived with continuously during the five years prior to their death or who was jointly responsible for a child with the deceased;
- in absence of the above, children of the deceased not fulfilling the conditions mentioned above, the parents of the deceased and the deceased's siblings;
- in absence of the above, other statutory heirs of the deceased (besides public officials), to a limit of contributions paid by the deceased or 50 per cent of the deceased's pension capital.

## Retirement

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

Currently, the retirement age in Switzerland is 64 for women and 65 for men. However, this is in the process of changing, as the Swiss population recently voted for a staggered increase in the retirement age for women to 65 from 1 January 2025 on.

The occupational pension fund's regulations may provide for early retirement as from the age of 58. In this case, the pension amount will be reduced.

## 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?

As a general rule, distributions and loans are not permitted in this case. There are three exceptions to this rule:

- Up to three years prior to retirement age, withdrawals may be made to finance the purchase of residential real estate. This amount is equal to up to the entirety of the vested benefits; however, this amount is reduced after the age of 50. In some cases, the vested benefits also may be used as collateral in the context of purchasing residential real estate.
- Under certain conditions, and within certain deadlines, an early withdrawal is possible in the event of self-employment.
- Moreover, vested benefits may be withdrawn in the form of a cash payment if the covered individual leaves Switzerland for a non-EU or EFTA State, or otherwise ceases to come under the scope of mandatory occupational pension schemes.

Also, it should be noted that when an individual reaches retirement age, retirement benefits ordinarily start to be paid out, even if that individual still is employed. That said, the occupational pension fund's regulations may allow benefits to be postponed until the age of 70.

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## Change of employer or pension scheme

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

When changing employers, the covered individual receives a payment of their vested benefits that must be transferred to the occupational pension fund with which their new employer is affiliated.

That said, as occupational pensions plans can differ from one employer to another (based on the plan with which the employer is affiliated), retirement benefits can be affected by a change in employers.

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

Employees may not choose their occupational pension scheme; they automatically are affiliated with the occupational pension fund with which their employer is affiliated.

In that context, an employee's occupational pension scheme affiliation will change (1) if they change employers, or (2) if their employer changes the occupational pension scheme with which it is affiliated (however, the latter is subject to the agreement of the employees or employee representatives).

Also, if an employee ceases to be affiliated with an occupational pension scheme (eg, due to unemployment or a sabbatical), their vested benefits can be transferred to a vested benefits foundation or account. That individual may choose the vested benefits foundation or account to which their vested benefits will be transferred.

## Investment management

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

The supreme body of the occupational pension fund is responsible for the occupational pension fund's investment strategy. The employer and employees are represented equally in the supreme body.

In the case of insufficient funds, the supreme body, as well as the pension expert and auditor, may bear legal responsibility.

Further, investment foundations may be created in order to serve the investment needs of occupational pension funds.

The Occupational Pension Scheme Act and its regulations set out a certain number of conditions regarding the asset classes in which occupational pension funds may invest, and the percentage of funds that may be invested in the respective asset classes.

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## 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?

Such possibilities may be provided for in Switzerland.

Common enhancements include giving employees bridging pensions to cover them until they reach retirement age (early retirement age or normal retirement age) and making direct contributions to their pension capital. The exact specificities of measures taken may depend on what is allowed under the occupational pension fund's regulations.

Such measures are often provided for in a company social plan. Social plans may be enacted unilaterally by the employer, although in some instances they must be negotiated with, and agreed to by, the employees or employee representatives (ie, if certain thresholds are met in the event of mass redundancies). In this context, it is common to have special measures in place for older employees (ie, employees over the age of 55 or 58).

Moreover, the Occupational Pension Scheme Act contains special measures allowing employees over 58 (or 55, if allowed by the occupational pension fund's regulations) to keep their occupational pension affiliation if they are laid off.

## 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 membership is based on objective criteria and that they are offered to everyone meeting these objective criteria (eg executive level). Typically, these are voluntary occupational pension schemes that insure salaries above the threshold covered under a mandatory occupational pension scheme.

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

In general, voluntary occupational pension schemes may differ somewhat from mandatory occupational pension schemes, in particular regarding contribution amounts and the amount of salary insured. The precise conditions will depend on the occupational pension fund's regulations.

## Unionised employees

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

There are no special occupational pension or retirement benefits provided to employees in trade unions.

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

In Switzerland, it is the employers, rather than the trade unions, who affiliate employees with occupational pension funds and there are not specific trade-union sponsored arrangements.

## ENFORCEMENT

### Examination for compliance

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

Occupational pension funds and comparable institutions are subject to supervision by the cantonal supervisory authorities.

The cantonal supervisory authorities are in charge of examining whether occupational pension funds' regulations comply with the law. The implementation and amendment of regulations need prior approval from the competent cantonal supervisory authority. Moreover, the supervisory authorities can request annual reports regarding the occupational pension fund's business activities, review reports and audits prepared by other supervisory bodies (such as the control body and the pension expert, who is responsible for providing actuarial reports) and impose measures to remedy deficiencies.

### Penalties

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

Such sanctions are not issued against the employer, but rather against the occupational pension fund or the responsible individuals.

If the cantonal supervisory authority finds deficiencies, it can take appropriate measures. Such measures include:

- requests for information;
- the issuance of instructions to the occupational pension fund, auditors or pension expert;
- requests for expert opinions;
- the overruling of the occupational pension fund's decisions;
- the imposing of substitute measures;
- warnings or dismissal of the occupational pension fund's supreme body (or individual members of that body);
- an order regarding the official administration of the occupational pension fund;
- the appointment or dismissal of the auditor or pension expert; and
- prosecution of administrative offences.

Failure to comply with an order of the cantonal supervisory authority may constitute an administrative offence, punishable by fines of up to 4,000 francs.

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## Rectification

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

The occupational pension fund is represented by its supreme body, which is responsible for the overall management of the occupational pension fund: ensuring the accomplishment of statutory tasks and determining the strategic objectives and principles of the occupational pension fund, as well as the accomplishment of those objectives and principles. It also determines the organisation of the occupational pension fund, ensures its financial stability and supervises its management. Both the employer and the employees are entitled to delegate representatives to the supreme body. In this way, the employer may supervise the activities of the occupational pension fund and its management.

It should be noted that many employers, especially small and medium-sized enterprises, decide to affiliate their employees with a collective occupational pension fund. Such collective occupational pension funds are open to multiple employers with a separate account for each employer. However, there only is one supreme body that is competent for the entire collective occupational pension fund. Consequently, each employer may not delegate a representative to the supreme body and some employers only will be indirectly represented by other employers' representatives.

## Disclosure obligations

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

Occupational pension funds are obliged to submit an annual report regarding their business activities. In addition, the cantonal supervisory authorities are entitled to inspect the reports prepared by the auditors and pension expert. Moreover, the occupational pension fund, its auditors and the pension expert are required to report certain deficiencies coming under their respective purviews.

### 31 | What disclosures must be provided to plan participants?

Occupational pension funds are obliged to inform beneficiaries annually of their vested benefits, the coordinated salary, the contribution rate and the asset balance. Normally, employees are provided with statements containing this information at the beginning of each calendar year. Moreover, the occupational pension fund is obliged to provide information regarding the organisation and the financing of the occupational pension fund, as well as information on the members of the supreme body.

Upon request from a beneficiary, the occupational pension fund is obliged to provide further information regarding its finances (ie, annual financial statements, the annual report, information on investment income, coverage of liabilities, etc).

## Enforcement mechanisms

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

If an occupational pension fund does not fulfil its information duties, beneficiaries may contact the supervisory authority. The supervisory authority then can issue an order. A person adversely affected by the decision may challenge such an order and ultimately, bring the matter before a court.

However, were an occupational pension fund to refuse to pay out retirement benefits, the individuals affected by this decision would need to take legal action and bring the matter before the courts directly. The supervisory authority is not competent in such cases.

Therefore, depending on the dispute, either the supervisory authority or the courts (civil courts or administrative courts) are competent.

## PLAN CHANGES AND TERMINATION

### Rules and restrictions

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

As occupational pensions are administered via a separate legal entity with its own management and supervisory body, changes to a pension plan require a decision of the occupational pension fund. Therefore, the employer itself has no way to change the pension plan unilaterally.

Changes to the terms of a plan by the occupational pension fund generally are subject to such a reservation in the plan documents. Also, the changes must not adversely affect beneficiaries' vested benefits.

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

An employer may decide to terminate its affiliation with a specific occupational pension fund and affiliate itself with a different occupational pension fund or establish its own occupational pension fund. However, this requires consultation with the employees or employee representatives, as well as their consent, in order to be valid. If no mutual decision can be reached, the decision is taken by an arbitrator.

In any case, employers are legally required to affiliate employees with an occupational pension scheme at all times. If an employer fails to do so, its employees automatically will be affiliated with the Substitute Occupational Benefit Institution.

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## Insolvency protection

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

Since the occupational pension fund is a separate legal entity, employer insolvency does not affect the occupational pension fund directly. In addition, the occupational pension fund is subject to strict accounting and reporting regulations.

If an employer becomes insolvent and ceases to pay the required contributions to the occupational pension fund, the occupational pension fund is privileged over most other creditors with regard to those contributions.

Moreover, occupational pension funds themselves are affiliated with a security fund to which they pay contributions. If an occupational pension fund becomes insolvent, the security fund assumes responsibility for providing the statutory benefits to the beneficiaries.

## Business transfer

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

If the employer is acquired by way of a share deal, only the shareholder structure changes. In the same way that the former shareholders had no obligations towards the occupational pension fund, the new shareholders also do not. Therefore, a share deal generally should not affect employees' retirement benefits or the target company's affiliation with an occupational pension fund. However, especially in group structures, there frequently are occupational pension funds exclusively for the group. If a company is no longer part of the group following the share deal, the continuation of the occupational pension scheme most likely would not be possible. In such cases, the target company must terminate the previous affiliation agreement within a reasonable period of time and conclude a new affiliation agreement with a different occupational pension fund.

If the transfer takes the form of a transfer of an undertaking, or a part thereof, such that the employment relationships are transferred statutorily, the acquiror assumes the undertaking's employment relationships and all incumbent rights and obligations. The Federal Supreme Court of Switzerland has yet to rule as to whether the transfer of an undertaking includes the transfer of the affiliation contract with the occupational pension fund with regard to the transferred employees. In this context, it is advisable to address this matter contractually, with the involvement of the occupational pension fund, in order to find a mutually agreed solution (ie, the continuation or discontinuation of the affiliation with the occupational pension fund).

Transfers of undertakings (or parts thereof) also may result in the (partial) liquidation of the occupational pension fund. The events and conditions that trigger a partial liquidation are specified in the occupational pension fund's regulations concerning partial liquidation.

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## Surplus

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

Were an occupational pension fund to be liquidated, any surplus amounts must be distributed to the beneficiaries in accordance with objective criteria laid out in the distribution plan. If there are accrued liabilities, these amounts are not transferred to the beneficiaries, but rather to a new pension fund if the beneficiaries change occupational pension funds and that occupational pension fund assumes the associated risks.

## FIDUCIARY RESPONSIBILITIES

### Applicable fiduciaries

### 38| Which persons and entities are 'fiduciaries'?

Supervision of the occupational pension fund and its management is carried out by:

- the supreme body, which is made up of employee and employer representatives;
- the pension expert;
- the auditor; and
- the cantonal supervisory authorities.

Therefore, all of these entities can be considered fiduciaries, as their goal is to protect beneficiaries' rights.

### Fiduciary duties

### 39| What duties apply to fiduciaries?

Their duties include supervision and reporting obligations, as outlined above.

### Breach of duties

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

If the failure of the fiduciaries to discharge their duties results in a loss, the occupational pension fund is entitled to claim that loss as damages. Also, if the beneficiaries suffer losses, they too may claim damages.

Moreover, failure to comply with specific duties may be penalised under public law (ie, administrative or criminal law) and could result in fines.

## LEGAL DEVELOPMENTS AND TRENDS

### Legal challenges

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

Not applicable.

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

Not applicable.

### Future prospects

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

High inflation rates in 2022 had an impact on private pensions, as individuals had less liquidity and therefore, were less likely to contribute to their private pensions.

## UPDATE AND TRENDS

### Hot topics

- 44** | Are there any current developments or trends that should be noted?

Due to increased part-time work, in order to increase pension coverage and improve retirement benefits for part-time employees, the Swiss parliament are currently discussing whether the basis for calculating the amount subject to mandatory contributions to occupational pension funds should be changed.

Also, to address changing worker demographics and low interest rates, the conversion rate could be reduced in the future. The conversion rate is the percentage of the accrued capital that can be drawn as a pension. The conversion rate at the time of writing is 6.8 per cent.

Both of these proposals currently are being discussed in Swiss parliament, but it remains to be seen what the outcome will be, especially since even if parliament were to approve these reforms, ultimately, they still could be voted down in a referendum.

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# United Kingdom

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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?

UK pensions are highly regulated through UK statutes and regulations, overlaid with common law duties and requirements arising from case law. In the past, the legal framework had to be consistent with European pension directives. The approach of the government is to move away from European Union based legislation.

The main statutes are:

- [the Pension Schemes Act 1993](#);
- [the Pensions Act 1995](#);
- [the Pensions Act 2004](#);
- [the Finance Act 2004](#);
- [the Pensions Act 2008](#);
- [the Equality Act 2010](#);
- [the Pensions Act 2011](#);
- [the Marriage \(Same Sex Couples\) Act 2013](#);
- [the Pensions Act 2014](#);
- [the Pension Schemes Act 2015](#);
- [the Pension Schemes Act 2017](#); and
- [the Pension Schemes Act 2021](#).

The main regulations are:

- [the Employment Equality Age Regulations 2006](#);
- [the Occupational and Personal Pension Schemes \(Consultation by Employers and Miscellaneous Amendment\) Regulations 2006](#);
- [the Occupational Pension Schemes \(Cross-border Activities\) Regulations 2005](#);
- [the Occupational and Personal Pension Schemes \(Disclosure of Information\) Regulations 2013](#);
- [the Occupational Pension Schemes \(Employer Debt\) Regulations 2005](#);
- [the Occupational Pension Schemes \(Investment\) Regulations 2005](#);

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- [the Occupational Pension Schemes \(Member-nominated Trustees and Directors\) Regulations 2006](#);
- [the Occupational Pension Schemes \(Payment to Employers\) Regulations 2006](#);
- [the Occupational Pension Schemes \(Revaluation\) Regulations 1991](#);
- [the Occupational Pension Schemes \(Transfer Values\) Regulations 1991](#);
- [the Occupational Pension Schemes \(Scheme Administration\) Regulations 1996](#);
- [the Pension Protection Fund \(Entry Rules\) Regulations 2005](#);
- [the Pensions Regulator \(Notifiable Events\) Regulations 2005](#);
- [the Transfer of Undertakings \(Protection of Employment\) Regulations 2006](#);
- [the Occupational and Personal Pension Schemes \(Automatic Enrolment\) Regulations 2010](#); and
- [the Occupational Pension Schemes \(Charges and Governance\) Regulations 2015](#);
- [the Occupational Pension Schemes \(Master Trusts\) Regulations 2018](#);
- [the Civil Partnership \(Opposite-sex Couples\) Regulations 2019](#); and
- [the Pension Protection Fund \(Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty\) Regulations 2020](#).

The Pension Schemes Act 2021 paves the way for some significant changes including to the funding of defined benefit plans, ESG, collective defined contribution plans and the pensions dashboard. It also increases the powers of the Pensions Regulator to help safeguard defined benefit plans.

## Regulatory authorities

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

The Pensions Regulator is the primary regulatory body for work-based pension plans. Its statutory objectives are to:

- protect the benefits of members of work-based pension plans;
- reduce the risk of situations arising that may lead to claims for compensation from the Pension Protection Fund;
- maximise employer compliance with automatic enrolment;
- promote, and improve understanding of, the good administration of work-based pension plans; and
- minimise any adverse impact on the sustainable growth of an employer when exercising its scheme funding functions.

The Pensions Regulator aims to intervene where defined benefit plans are significantly underfunded or avoidance is suspected. In doing so, it helps to ensure defined benefit plans are properly funded, administrated and supported by a solvent employer or group. It also supervises auto-enrolment and protects consumers by regulating master trusts (a type of collective defined contribution plan used by different employers) and defined benefit super-funds (a type of collective defined benefit plan used employers). It also drives up standards for professional trusteeship and for the maintenance of pensions data. Its powers will be extended once the Pension Schemes Act 2021 is fully in force.

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It achieves its objectives through a series of codes and guidance notes for employers, trustees and plan advisers, and explains what people need to do.

## Pension taxation

### 3 | What is the framework for taxation of pensions?

As the government wants to encourage saving for retirement, fiscal relief is available for contributions to registered pension plans – those satisfying strict statutory requirements.

An employee can gain income tax relief (annual allowance) on contributions of up to £40,000 for the tax year 2022 to 2023 and onwards, unless they have taken money from their pension savings in a flexi-access way or their total income is essentially more than £240,000. For these, the annual allowance reduces or tapers respectively to £4,000. Employees have a lifetime allowance on their total pension savings of £1,073,100, unless they have put in place special protection of a higher pension limit. This figure is frozen until April 2026. Penal tax charges apply on potentially both the plan and the individual if these limits are exceeded. An employee can carry forward unused annual tax allowances from the previous three years.

An employer can claim tax relief on its contributions to a plan against corporation tax, and all the plan's capital gains are free of tax.

Individuals pay income tax on receipt of their benefits, which is payable at their marginal rate of income tax, but they can receive limited amounts of tax-free cash. Small pensions can be commuted for triviality, but payment is subject to income tax, once the tax-free element has been taken.

Lump sum death benefits payable on the death of an individual are generally free of inheritance tax if they are paid out under a discretionary trust basis and these can be valuable benefits. Income tax is payable at a marginal rate of tax if a partner's pension is payable from the plan on the participant's death.

An employer can reclaim value added tax on some of its pension costs in certain circumstances.

## STATE PENSION PROVISIONS

### Framework

### 4 | What is the state pension system?

The current state pension system is very complex, and a flat-rate state pension, which runs alongside the earlier system, was introduced in April 2016. Pensions start to be paid when the individual reaches his or her state pension age, which is now 66 for women and men. It is a freestanding pension right.

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## Pension calculation

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

The amount of the state pension depends on how long the employee has worked and how much national insurance has been paid on their behalf, and for how long.

The state pension can be topped up for the following reasons.

- The individual may separately receive the state second pension (formerly the additional or graduated pension, or state earnings-related pension scheme (SERPS), an earnings-related additional pension). This can come from the employer's pension arrangement if it contracted out of SERPS and meets certain criteria. In defined benefit plans, these replacement benefits are guaranteed minimum pensions.
- A couple can partly share their national insurance contribution record to increase a state pension.
- Individuals aged 80 or over who have little or no state pension also receive a small additional age-related pension.
- It can also be supplemented by the individual's own private pension provision or, for poorer pensioners, by the state pension credit system, which is means-tested.

Also, an individual with an incomplete national insurance record can sometimes voluntarily pay extra national insurance contributions to increase the state pension.

## Aims

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

Even with the changes made to the state pension in 2016, it is still basically designed to provide a set level of replacement income to workers who have worked continuously until their state retirement age. This is currently age 66 but it is increasing to age 67 in 2028. The 2016 changes are designed to be fairer to women and self-employed workers but the system still does not reflect many people's actual working lives. This is because individuals still need to have paid a minimum amount of national insurance to qualify for the flat-rate state pension.

## 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 flat-rate 2016 state pension is overall higher than the previous basic state pension but the primary aim of introducing the flat-rate state pension was to simplify and improve the state pension, as well as to reduce its cost. However, both the flat-rate and the earlier state pension systems remain in force which adds to the cost of administration as well as to the overall complexity of the current arrangements.

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While the state pension age has now been equalised for men and women at 66, it does increase to age 67 by 2028. It then increases to age 68 for men and women but only between 2044 and 2046, although the government is considering whether to accelerate this change. This because over time the cost of providing the state pension increases, as does the elderly population who receive it, while the state pension is still paid for by the younger, working population.

This highlights further questions over the basis of the UK's state pension system. It is currently operated on a 'pay as you go' rather than a funded system. This means it has the effect of penalising younger workers, and it is criticised for its intergenerational unfairness. This is particularly so given the younger workers have their student loans to repay, higher housing costs, lower wages, less job security and families to bring up, as well as paying their taxes.

Overall, the system remains controversial.

## 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?

Plan types available in the UK are defined benefit, defined contribution, and hybrid plans (in which the 'pension risk' is more fairly shared between a plan's employer and employees on a career average or cash balance basis). The same plan can have both defined benefit and defined contribution sections. They can be for one employer or for a group of employers.

Owing to increasing governance requirements, many employers are replacing their defined contribution plan with a defined contribution master trust. These are also often used by non-associated employers to comply with their auto-enrolment obligations – the employer's obligation to auto-enrol all eligible workers into a qualifying pension arrangement (a workplace pension plan), to which both the employer and the employees have to pay a minimum level of contributions. Master trusts are now authorised by the Pensions Regulator to ensure they are well run and operate in accordance with minimum statutory requirements.

Additionally, some defined benefit master trusts have been set up to act as consolidators of defined benefit plans (superfunds). They are regulated by the Pensions Regulator through its guidance issued in June 2020 but the legislation is not yet fully in place. Collective defined contribution plans are also being developed but in a limited way. Employees employed by the state join public sector plans, which are effectively run by the state.

## Restrictions

- 9** | Are employers required to arrange or contribute to supplementary pension schemes for employees? What restrictions or prohibitions limit an employer's ability to exclude certain employees from participation in broad-based retirement plans?

An employer can exclude certain employees from its broad-based retirement plans, despite this leading to a two-tier workforce in pension terms. Often this happens for historical reasons leading to different groups of employees earning different pension benefits with the same employer. Different pension provision can arise for legal reasons owing to the transfer in of a business from another employer. Alternatively, an employer's defined benefit plan may be closed to new joiners, who can join the employer's defined contribution plan, while current employees still earn defined benefits.

With defined contribution plans, different employees can be entitled to different rates of employer contributions, and an employer may also have, for historical reasons, different defined contribution plans for various groups of employees. There have been a series of cases challenging these types of distinctions. An employer should not discriminate against an individual owing to, for example, sex, gender, age, sexual orientation or because the employee works part-time. Care should be taken with plans that have different pension provisions for different ages of employee, with older employees being entitled to a higher level of employer's contributions. Because of employers' statutory auto-enrolment obligations, nearly all workers (subject to some minimal requirements) have to be given access to a minimum level of pension provision.

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

Using postponement, employers have slightly more than three months to pay a newly auto-enrolled worker's initial contributions over to the provider of its workplace pension plan to comply with statutory minimum pension requirements. Benefits in these plans vest for new joiners after 30 days' membership. However, employers and plans can require employees to work for a specified period before the employee can join any other plan.

## 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?

Employees who work permanently outside the UK should be excluded from membership of the employer's plan. Employees who are only working overseas on a temporary basis can continue to be members of an employer's plan, as long as there is a reasonable expectation the employee will, in the next five years, return to work in the UK or retire. There are serious consequences for defined benefit plans if these requirements are breached and the employee is working in another EU country as the plan has, for example, to be fully funded immediately. Employer auto-enrolment duties apply to workers who are based in the UK but work abroad.

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## Funding

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

Occupational pension plans are set up as trusts, with trustees who hold the plan's assets separately from the employer for the benefit of its members. With defined benefit plans, employees usually have to contribute to the plan, and the employers pay the balance of the costs of funding the plan, depending on the value of the plan's assets and what assumptions are used to determine the plan's liabilities. Many defined benefit plans are closed to the future accrual of benefits, so members no longer pay contributions and cease to earn additional pension benefits, although the employer must still fund the plan. Sometimes in these cases, the terms of the plan require a final salary link to be maintained for calculating benefits while the member remains employed with the plan's employer, but no contributions are required from the member.

With defined contribution plans, the employer can match, in either a simple or more complicated form, the employee's contributions to the plan, and the plan is set up with a third-party pension provider, usually an insurance company. With auto-enrolment, the minimum employer contribution from April 2019 is 3 per cent of the worker's qualifying earnings, with the worker paying 5 per cent. Salary exchange is often used as a tax-efficient way for these contributions to be paid.

### 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?

Many defined benefit plans have deficits (on at least one funding basis), which the employer usually has to make good over a period of years. Deficits arise because of adjustments over the years to funding assumptions, for example, over what investment returns the plan's assets will earn, the future level of inflation and mortality rates. However, some plans now have a surplus on all funding bases and their employer may be looking to wind up the plan, secure all benefits with an insurance company and extract the surplus.

The funding of defined benefit plans is controlled by the results of the plan's triennial valuation, which values its liabilities on the following bases:

- scheme-specific funding: the plan's own ongoing funding basis determined primarily by the trustees after taking advice from the plan's actuary. Depending on the plan's rules, the employer may also agree the funding rate;
- pension protection funding: the statutory basis that determines whether, if an insolvency event occurs in respect of the plan's employer, the plan would enter and stay in the Pension Protection Fund; and
- full buyout, statutory section 75 basis: the most expensive funding basis. It is the cost of winding up the plan and securing all benefits with an insurance company, together with the trustees' costs of doing this.

The Pension Schemes Act 2021 introduces the new funding basis of self sufficiency but it is not yet in force. It is likely to result in employer contributions increasing.

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The UK accounting standard FRS 102, which brings the UK's accounting standards in line with the equivalent international financial reporting standards (IAS 19 revised), is used to value a plan's assets and liabilities for the employer's accounts. If the valuation shows the plan has a scheme-specific funding deficit, the plan needs a recovery plan, setting out what employer contributions will be paid over a set number of years to eliminate the deficit. The valuation is used to compile a statement of funding principles showing how the trustees intend to ensure the plan is appropriately funded. Contributions are paid in accordance with a schedule of contributions. This valuation is then reviewed by The Pensions Regulator. The plan's funding position must be reconsidered annually in the light of plan and employer experiences. The plan's actuary prepares an annual funding report comparing the plan's actual funding position to the funding position anticipated by the plan's valuation and its statement of funding principles. If the discrepancies are too wide, the trustees can bring forward the plan's next valuation or formally alter the plan's schedule of contributions to change the contribution rate. No valuations are needed for defined contribution plans, but they must have a payment schedule that sets out what contributions are due and when.

### Level of benefits

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

In a defined benefit plan, the pension is based on the salary the employee was receiving at the end of his or her working life with that employer (or when the plan closed to future accrual, if earlier), and the number of years of the employee's employment with the employer, with a proportion of benefits earned in the plan for each year of such work. Typically, an employed member earns one-sixtieth of his or her final salary from that employer for each year of employment, and the plan provides a maximum pension of two-thirds of the member's final salary after 40 years' employment with that employer.

With defined contribution plans, employees have their own notional pension account in the plan into which employer and employee contributions are paid. The pension savings on retirement depend on how much has been contributed to the plan for the employee, the investment returns achieved for that account and the charges paid. Once the employee reaches the age of 55, he or she can access his or her pension savings and decide how to use them, including buying a pension, an annuity, from an insurance company, once tax-free cash has been taken (with, potentially, pension increases and dependants' pensions paid from the annuity) or taking cash or flexible drawdown (minus, in both cases, tax), or a combination of all these to the extent these options are permitted by the plan.

### Pension escalation

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

For defined benefit plans, benefits earned from 6 April 1997 must be increased when in payment by 5 per cent or price indexation, if less. This is reduced for pensions in payment to increases of 2.5 per cent or price indexation, if less, for pensions earned from 6 April 2005 onwards. From 1 January 2011, the index used for statutory increases changed from the retail prices index (RPI) to the consumer prices index (CPI). Whether plans are affected by this

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change depends on the plan's rules. The composition of RPI will change from February 2030 and will be calculated in the same way as the Consumer Price Index but including housing costs (CPIH). There is no statutory requirement to increase pensions in payment earned before 6 April 1997, apart from guaranteed minimum pensions where special rules apply; however, many defined benefit plans do increase them. What increases are granted for these benefits depend on each plan's rules. Legislation requires most deferred pensions to be revalued. The precise revaluation requirements depend on each plan's rules and when the member joined the plan.

Defined contribution benefits for employment from 6 April 1997 that came into payment before 6 April 2005 also have to increase by 5 per cent or by price indexation, if less. Apart from this, there are no statutory requirements for pension escalation or the revaluation of deferred pensions with defined contribution plans. However, the defined contribution benefit must be purely defined contribution, otherwise there may be overriding statutory requirements to provide, for example, pension 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 defined benefit plans, an employee's spouse (including a same-sex spouse or civil partner) is usually provided with a pension if the employee dies before retirement. That benefit can, but does not have to, be extended to cover a member's dependant children up to a certain age and other dependants, such as a non-married partner.

For both defined benefit and defined contribution plans, the death of the employee usually triggers a lump-sum death benefit paid by the trustees to the employee's nominee. These payments can be funded through separate life assurance, with the pension plans then providing a smaller benefit.

## Retirement

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

When employees can retire and receive their full benefits depends on each plan's rules – normal retirement age usually ranges between 60 and 65. For historical reasons, benefits in some defined benefit plans are determined on the basis of a split normal retirement age of 60 and 65. For these, members are entitled to retire as of right when they reach 60, but benefits determined by reference to a normal retirement age of 65 tend to be reduced for early payment. Employees can usually retire at any time after 55 (increasing to age 57 from 6 April 2028) on a reduced pension. Often a plan's rules require the employer's or the trustees' consent, or the consent of both, to early retirement. Whether consent is given in respect of a defined benefit plan usually depends on whether early retirement will result in additional costs to the plan, which depends on how the plan's early retirement actuarial adjustment factors apply.

Early retirement is not usually an issue for defined contribution plans. An employer may have to auto-enrol employees into its statutory auto-enrolment plan if it continues to employ them after they have accessed their pension savings, and their annual allowance will reduce.

### 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?

No, this is not generally permitted. However, employees can receive their pension from a plan while still employed by the plan's employer, as long as the plan's rules permit this. Additionally pension benefits may be increased if a plan has surplus.

### Change of employer or pension scheme

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

A defined benefit plan's funding is not immediately affected if an employee changes employment – it is picked up on the plan's next actuarial valuation.

For a defined contribution plan, an employer ceases to pay contributions for an employee once the employee has left employment.

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

There is currently no requirement for an employee to transfer his or her pension benefits from one plan to another if he or she changes employer. Often employees do not transfer their pension benefits when they change jobs.

Although many members have a statutory right to transfer their benefits out of a plan, as long as they are not in receipt of their pension from that plan, they do not have the same statutory right to require a new plan to accept that transfer. The trustees of many defined benefit plans do not accept any transfers in from any other plans; so, the transfer of these individual benefits from one plan to another is uncommon. Auto-enrolment and the April 2015 pension flexibilities are gradually resulting in more employees transferring their pension benefits (defined benefit or defined contribution) to plans that allow them access to the new flexibilities.

A member of a defined benefit plan must take specialist advice before transferring their benefits out of a defined benefit plan to a defined contribution plan or to an overseas plan.

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## Investment management

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

With defined benefit plans, the plan's trustees have overall responsibility for the investment of its assets. They decide its investment strategy, after taking written advice from an investment adviser authorised by the Financial Services and Markets Act 2000 on how to implement that strategy. The investment adviser advises the trustees on which investment or fund manager to use and how to invest the plan's assets in the various asset classes, how to measure performance, what the performance has been and what costs have been charged. The trustees delegate the detailed implementation of their investment strategy to the investment or fund managers and sometimes appoint a fiduciary fund manager. As long as they do so in a way that satisfies the statutory requirements, the trustees are not then responsible for the actions of their managers.

The trustees' key investment decisions are set out in the plan's statement of investment principles, which is used by the plan's investment managers when they manage the plan's investments. It includes the plan's investment objectives, its asset allocation strategy, governance, target funding levels, implementation and responsible investment. The Pensions Regulator also provides guidance for trustees. Trustees of trust-based defined contribution plans are required to produce an annual governance statement signed by their chair, called the 'Chair's Statement', showing among other things, investment charges and core transaction costs. These statements are reviewed by the Pensions Regulator. The Pension Schemes Act 2021 requires trustees of defined benefit plans to produce a Statement of Strategy (called a DB Chair's Statement), which the Pensions Regulator will also review.

With a defined contribution plan, the investment and mortality risk rests with the member. The trustees decide the range of investment options the plan provides, but the members decide which options they want to use. If they make no decision, then the default investment option or options, chosen by the trustees, is used. The default investment option of a plan used for auto-enrolment is subject to statutory charging restrictions.

All trustees now have to take account of financial and non-financial matters, including environmental, social and governance matters, and climate change when taking investment decisions.

## 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?

Whether a defined benefit plan's benefits can be enhanced for groups of employees because of a voluntary or involuntary reduction in the workforce varies from plan to plan. There is no general statutory right to such enhancements – they form part of a plan's rules.

Under a plan's early retirement rules, members may be entitled to draw their pensions without reduction for early retirement if they have reached a certain age, or the trustees

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or employer may agree to a member's early retirement request in these circumstances on favourable, rather than cost-neutral, early retirement terms.

Defined contribution plans are not structured in a way that enhances benefits on a voluntary or involuntary reduction in the workforce. However, an employer can make an extra contribution to the employee's pension account.

### 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 (executive-only) plans are permitted. They can be agreed on a common basis, so all executives of a particular type obtain the same benefits, or they can be agreed on an individual basis. With the tax regime less favourable for executive pension arrangements, it is becoming increasingly common for employers to agree terms on an individual basis to reflect the person's own tax position and for employers to put in place generous tax-favourable life assurance arrangements. Executive pension plans can be defined benefit, defined contribution or hybrid. Tax changes to the annual allowance and the lifetime allowance make it less tax-efficient for some executives to add to their pension savings, so these look for pension alternatives such as enhanced pay.

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

Some relaxations in general pension law apply to some forms of executive plans. They vary depending on the type of plan, but small self-administered schemes have the most relaxations.

The key legal concern for setting up executive plans is that they do not breach HM Revenue & Customs tax-avoidance rules.

Executive plans for public limited companies are subject to disclosure rules.

### Unionised employees

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

There is no difference in the retirement benefits provided to employees in a trade union from those provided to non-unionised employees. However, trade union involvement often results in better pension terms being negotiated for all employees of that employer.

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

There are no special legal requirements for trade-union-sponsored pension arrangements.

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## ENFORCEMENT

### Examination for compliance

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

Each plan has to complete an online annual return for the Pensions Regulator, so it can monitor changes in the plan's arrangements. Additionally, His Majesty's Revenue & Customs (HMRC) also checks plans periodically for legal compliance.

### Penalties

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

The Pensions Regulator aims to educate the pensions industry about what it requires for compliance. If this is insufficient, it can issue, for example, improvement notices or require that a professional trustee is put on the plan's trustee board. Ultimately, it can issue civil penalties, and some breaches of pension law can result in imprisonment.

There are certain key requirements every plan employer has to satisfy or be directly answerable to the Pensions Regulator. This includes ensuring that employee contributions are deducted and paid over to the plan within 19 days of the end of the month in which the contributions are deducted. Additionally, employers risk a daily fine if they breach their auto-enrolment obligations and risk criminal prosecution if they fail to provide requested information to the Pensions Regulator.

The Pension Schemes Act 2021 gives the Pensions Regulator increased powers to regulate define benefit plans. It has new information gathering powers and can impose new penalties if these powers are not complied with. It can issue fines up to £1 million for failing to comply with the new notifiable event requirements, providing misleading information, avoiding an employer debt, risking accrued benefits and failing to pay a contribution notice.

### Rectification

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

If an employer identifies errors in its plan documentation or administration, it needs to liaise with the plan's trustees and their advisers to correct those errors. If the error relates to breaches of the auto enrolment requirements, then the plan's pension provider may be able to assist with resolving the issue but in complex cases, legal advice may be needed. Depending on the type of error, it may be necessary to 'blow the whistle' regarding the error to the Pensions Regulator.

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## Disclosure obligations

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

A defined benefit plan's funding documentation must be submitted to the Pensions Regulator for review. A plan's actuary and auditors, as well as its trustees, have whistle-blowing obligations. Also, employers and trustees have to notify the Pensions Regulator if key events occur. The Pension Schemes Act 2021 requires trustees of defined benefit plans to produce a Statement of Strategy (called a defined benefit Chair's Statement), which the Pensions Regulator will review.

The Pensions Regulator also requires defined contribution governance statements (including the chair's statement), or the administrator or trustees will be fined and the Pensions Regulator can request certain information from them. Both defined benefit and defined contribution plans need to be registered with HMRC, which also monitors them.

### 31 | What disclosures must be provided to plan participants?

Members must be given information about their own individual benefits in the plan, general information about the plan including the trustees' investment approach to financial and non-financial matters (including their approach to the environmental, social and governance issues), and what changes have been made to the plan. This is provided through a membership letter, the plan booklet, its annual report and accounts, the member's benefit statement and, for defined benefit plans, an annual funding update.

Members can also request further information about the plan from its trustees. All plans must provide information about their compliance with the Data Protection Act 2018, including issuing a fair-processing notice to members.

## Enforcement mechanisms

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

If a member is in dispute with the trustees or the employer over pension benefits, he or she can use the plan's internal dispute resolution process, which is free for members. The Early Resolution Team at the Pensions Ombudsman helps members resolve their pension difficulties. If the problem remains unresolved, the member can, without cost, complain to the Pensions Ombudsman, which issues a determination after representations from the parties.

Some pension disputes can also be resolved through the employment tribunals, and a member can usually go to court, although this is expensive.

Depending on the dispute, the Pensions Regulator may take an interest.

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## PLAN CHANGES AND TERMINATION

### Rules and restrictions

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

An effective change to a plan's terms must be made in accordance with the plan's alteration power. Restrictions in a defined benefit plan's alteration power can prohibit certain changes being made to a member's benefits and the employer will need specialist legal advice to work round this problem.

If the member's benefits are to be changed, depending on the nature of the change and the number of employees, a formal statutory consultation exercise may be required. However, a consultation may not be needed if the employer is increasing the level of auto-enrolment contributions in accordance with the statutory requirements. If pension contributions are paid through salary exchange, then formal consultation will be required to change them.

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

Specialist legal advice should be taken before an employer terminates a defined benefit plan because to do so may trigger the plan's winding up, and depending on its funding position, its statutory section 75 debt – the employer's obligation to fund the plan's buyout deficit. So, most employers close their plans to future accrual and continue to fund the plan on its scheme's specific funding basis. Closing the plan to future accrual usually has to be done in accordance with its alteration power and specialist legal advice is needed. It is easier for an employer to terminate its defined contribution plan.

An employer of a plan must consider whether it needs to go through a formal statutory consultation exercise with its employees if it wants to terminate the plan, and review what legally binding representations it might have given its employees over the years about keeping the plan open. In any event, all employers have a duty to auto-enrol their qualifying workers into a qualifying pension plan for auto-enrolment purposes.

### Insolvency protection

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

Occupational pension plans are established as irrevocable trusts: their assets cannot revert back to the employer, except in very limited circumstances, and this is key to the security of the members' benefits. The Pension Protection Fund acts as a lifeboat for defined benefit plans whose employer has suffered an insolvency event where the plan is below 100 per cent funded on the Pension Protection Fund funding level. It ensures a minimum level of plan benefits are paid to members. Solvent employers pay for the Pension Protection Fund through a levy. Some employer and employee or worker contributions that are outstanding when the employer goes insolvent are also safeguarded. An employer insolvency should not adversely affect pension savings in a defined contribution plan.

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## Business transfer

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

With any share sale or business/asset sale relating to a company or a group, where a defined benefit plan is involved, the seller and purchaser must take specialist legal advice about the requirements of the Pension Schemes Act 2021. They will need to ensure they are advised on the new notifiable event requirements and all the other requirements of the Pensions Regulator are considered and met.

A share acquisition with the sale of a company is not likely to affect an employer's plan as such, if the employer is the only employer in that plan as the plan stays with the employer. The plan's trustees should be informed of the sale before it occurs. If it is a defined benefit plan, the trustees will need to consider the impact of the sale on the plan's funding position and the ability of the employer to continue to support the plan both immediately and on any potential insolvency (ie the strength of the employer covenant). If the transaction relates to the employer's wider group, then, for defined benefit and defined contribution plans, the decision needs to be taken as to whether the plan will go with the employer or whether it will stay with the group and alternative pension arrangements will be put in place for the employer's employees. Depending on the circumstances, formal employee consultation about the pension changes may be necessary. Care needs to be taken with defined benefit plans. If the employer ceases to participate in the group's plan, this can trigger the employer's statutory section 75 debt – buyout debt – which the employer must discharge. There are various statutory mechanisms for dealing with this. They ensure the employer is sold free of its defined benefit pension liabilities, but they require the cooperation and agreement of the plan's trustees and 'clearance' from the Pensions Regulator if there is an event that is likely to have a materially detrimental impact on the employers' ability to fund the plan, and insufficient mitigation has been provided to the plan in compensation for this. Clearance is how the Pensions Regulator regulates the consequences of corporate transactions on pension funds. In any event, the Pensions Regulator may have to be notified about the sale.

The same types of problems do not arise for defined contribution plans. Slightly different considerations apply on the sale of a business or part of a business. Employees are likely to be transferred over to a new employer under the Transfer of Undertakings (Protection of Employment) Regulations. As these exclude the transfer of an employee's pension benefits, special statutory rules apply. There is usually consultation about the change in the pension (and other) arrangements, then the new arrangements apply after the acquisition. Care needs to be taken with a defined benefit plan that the sale of a business (or part of it) does not, under the plan's rules, trigger a termination or part-termination of the plan. If it does, then there are mechanisms for dealing with this. For any corporate change such as these, the trustees, the buyer and the seller must assess what effect the change might have on the strength of the employer covenant for the defined benefits plan and agree what mitigation the plan might require and whether the Pensions Regulator needs to be notified. If there is an asset sale, then consideration needs to be given as to whether that sale is material in pension terms if there is a defined benefit plan involved. The law in this area will tighten considerably once the Pension Schemes Act 2021 fully comes into force.

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## Surplus

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

The plan's rules specify what happens if the plan terminates with a surplus. With a defined contribution plan, usually the surplus can be refunded to the employers, less tax.

With defined benefit plans, sometimes the trustees have to use the surplus to augment members' benefits – sometimes by a specific amount, sometimes by as much as the trustees or the employer decide, or sometimes both – before any remaining surplus can be refunded to the employer, minus tax. As the rules of some defined benefit plans prohibit the payment of a surplus to the employer, even on plan termination, the surplus has to be used to augment members' benefits.

## FIDUCIARY RESPONSIBILITIES

### Applicable fiduciaries

### 38| Which persons and entities are 'fiduciaries'?

The trustees are a plan's primary fiduciaries. They act independently of the employer. Their specific powers arise from the plan's trust deed and rules, legislation, the Pension Regulator's Codes and Guidance and common law.

### Fiduciary duties

### 39| What duties apply to fiduciaries?

The trustees' duty is to administer the plan in accordance with its trust deed and rules, relevant legislation and case law, and regulatory requirements. In doing this, they are required to act in the best interests of the plan's members. This is usually taken to mean their financial interests. Trustees must maintain sufficient trustee knowledge and understanding to be a trustee.

### Breach of duties

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

Trustees of plans can ultimately face personal liability if they have committed, for example, a breach of trust or an act of dishonesty, but other than this, a plan's rules often contain an exoneration clause making the trustees not liable for their acts under the plan's rules. There may also be an indemnity for the trustees from the employer or from the plan out of the plan's assets.

Trustees have to manage their conflicts of interest properly or risk potentially having a decision challenged and set aside. As trustees are there to safeguard members' interests, they are directly answerable to the members if they fail to do so.

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The Pensions Regulator can impose the same types of sanctions on trustees as it can on employers, including prohibiting someone from acting as a trustee. It can also appoint a professional trustee to the plan. They can also be fined for a data breach.

## LEGAL DEVELOPMENTS AND TRENDS

### Legal challenges

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

There have been challenges about how defined benefit plans have converted to defined contribution plans and about how defined benefit plans closed to future accrual. These concern whether members properly understood and agreed to the proposed change, whether there had been proper consultation, whether members have any reasonable expectations that are legally binding, and whether the change could legally be made in accordance with the plan's alteration power. Ultimately, the question is whether all the proper formalities have been undertaken when changing members' pension benefits and that members understand the change. Additionally, changes of benefit design have been successfully challenged on the basis that the changes amount to a breach of the age discrimination legislation.

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

As a result of legal challenges, plans that provide guaranteed minimum pensions, must equalise these benefits so that male and female members receive equal benefits from the plan for their guaranteed minimum pensions.

There are often challenges about changes to pension benefits not being correctly documented, particularly in relation to a plan's pension increase and retirement age provisions, and particularly for special category members such as directors. As trustees have to administer the plan in accordance with a plan's rules, rather than custom and practice, this often leads to disparities that have to be resolved. Recent challenges have shown that trustees can properly forfeit someone's pension if they are allowed to do so by the plan's rules.

### Future prospects

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

For private pensions, defined contribution rather than defined benefit plans are the norm, and this makes many defined benefit plans, a legacy issue, not relevant to current employees but very significant to the companies that still have them. Gradually, these plans are moving to being in surplus with the emphasis on risk management and ultimately securing all benefits with an insurance company as well as winding up the plan. Alternatively, the Pension Schemes Act 2021 allows for the consolidation of defined benefit plans through superfund master trusts, and these will become increasingly more important as they develop.

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Auto-enrolment and the April 2015 pension flexibilities have done much to reinvigorate interest in defined contribution pension savings. They work with an older workforce, although the fiscal advantages of saving into a pension plan are limited if the individual's defined contribution pension savings have been flexi-accessed at age 55 or over. Good governance of defined contribution plans and master trusts is important, as is reducing the risk of people losing their pension savings through pension scams.

## UPDATE AND TRENDS

### Hot topics

#### 44 | Are there any current developments or trends that should be noted?

The Pension Schemes Act 2021 sets out the largest pension change for defined benefit plans in recent years. Its new funding regime is likely to result in employers paying more to their plans. The Pension Regulator's new criminal and civil powers, the enhanced notifiable event regime and the Pension Regulator's extended powers to issue contribution notices are expected to ensure these plans are treated properly by employers and so aims to safeguard members' benefits.

Although most of the Act is not yet in force, many employers and trustees are reviewing and updating how they run these plans to ensure they will be ready to comply once the changes become law. The Act builds on the existing framework of pensions law, making these pensions even more highly regulated and so even more risky for employers and trustees to manage. Because of this, and because many such plans are now moving towards having surplus, employers are looking to terminate their plans, secure all benefits with an insurance company and wind up the plan, extracting any surplus that might be left, subject to the laws on this.

For members of all types of plans, the emphasis of the Act is in looking after plan members. The Act introduces the concept of the pensions dashboard. This aims to ensure an individual can see all their pension information digitally in one place and plans will be legally obliged to provide this information to the pensions dashboard. This should make it easier for individuals to make holistic decisions about their pension savings. The Act also introduces some further safeguards to try to reduce the risk of members losing their pension benefits through pension scams.

The Act requires trustees of smaller defined contribution plans to assess their plans for value for money for plan members. If this is not clearly shown, then trustees should look at moving members and assets over to a defined contribution master trust.

The Act also looks to safeguard the environment. The largest pension plans are required to increase their governance and reporting on climate change and these requirements will gradually trickle down to the smaller plans.

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# United States

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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?

Pension and retirement plans are generally governed by the [Internal Revenue Code of 1986, Title 26 of the United States Code](#), and the [Employee Retirement Income Security Act of 1974, Title 29, Chapter 18 of the United States Code](#) (ERISA). Associated regulations appear in [Title 26](#) and [29 \(Subtitle B\)](#) of the Code of Federal Regulations, respectively. ERISA generally pre-empts the laws of the 50 states on matters that relate to benefits, but ERISA does not pre-empt other potentially applicable US and state laws.

### Regulatory authorities

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

The Department of Treasury and its bureau, the [Internal Revenue Service](#), are responsible for administering the [Internal Revenue Code](#) through regulations, generally applicable guidance (such as revenue rulings and procedures, notices and announcements), taxpayer specific guidance (such as private letter rulings), informal guidance and audits. The Department of Labor and its bureau, the [Employee Benefits Security Administration](#), are responsible for administering [ERISA](#) through regulations and interpretive bulletins, generally applicable guidance (such as prohibited transaction class exemptions), situation-specific guidance (such as advisory opinions and field assistance bulletins), guidance applicable to a particular plan or transaction (such as individual prohibited transaction exemptions), informal guidance and audits. The [Pension Benefit Guaranty Corporation](#), another bureau within the Department of Labor, is a quasi-governmental entity created under ERISA that provides insurance and oversight with respect to defined benefit qualified plans.

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## Pension taxation

### 3 | What is the framework for taxation of pensions?

Pensions and retirement plans are either 'qualified' or 'non-qualified'. Qualified plans are broad-based arrangements, established by employers and subject to favourable tax rules that provide an employer with an immediate deduction for contributions, permit assets to grow on a tax-deferred basis and defer recipient taxation of benefits until distributed. Non-qualified deferred compensation plans (non-qualified plans) are available for more highly compensated employees but without most of the tax advantages.

## STATE PENSION PROVISIONS

### Framework

### 4 | What is the state pension system?

With limited exceptions, employers, employees and the self-employed are required to contribute to a broad-based [social security](#) system. Employers and employees each pay tax of 6.2 per cent of compensation up to an annual taxable wage base (US\$160,200 in 2023; indexed for inflation). The self-employed (including sole proprietors and partners) pay both the employer and employee share of the tax – 12.4 per cent on earned income up to the annual taxable wage base – although the self-employed, like employers generally, are entitled to an income tax deduction for a portion of the tax.

### Pension calculation

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

Social security benefits are based on a worker's lifetime compensation and work history. To qualify for full benefits, a worker must accumulate 40 quarters of covered employment with minimum compensation of US\$1,640 (for 2023; indexed for inflation) per quarter. Benefits generally begin between ages 65 and 67, depending on the worker's birth date, but a reduced amount can be paid beginning at age 62 or an increased amount can be paid by deferring to as late as age 70.

### Aims

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

Generally yes, although the maximum available benefit may be limited, and the more compensation a worker earns, the more likely it is that the worker will need private retirement arrangements and personal savings to supplement social security benefits.

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## 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?

Social security is currently expected to be insolvent in the next 10 to 15 years. Postponing insolvency will likely include one or more of the following strategies: increasing social security taxes (either by increasing the rate, raising the annual taxable wage base or expanding compensation subject to the tax); reducing benefits; or increasing the retirement age.

## 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?

Broad-based qualified plans are either defined benefit plans, including traditional arrangements and cash balance plans, or defined contribution plans, including profit-sharing, stock bonus and money-purchase pension plans. Other forms of broad-based, employer-sponsored, tax-favoured retirement arrangements include 403(b) plans and 457(b) arrangements for non-profit employers and, for smaller employers, simplified employee pensions (SEPs) and savings incentive match plan for employees (SIMPLE) 401(k) plans or individual retirement accounts or annuities (IRAs). Individuals may also maintain their own IRAs, but it is uncommon for an employer to have any involvement with an IRA that is not part of a SEP or SIMPLE IRA.

### Restrictions

- 9** | Are employers required to arrange or contribute to supplementary pension schemes for employees? What restrictions or prohibitions limit an employer's ability to exclude certain employees from participation in broad-based retirement plans?

Employers are not required to adopt a private pension or retirement arrangement, although doing so is a useful recruiting tool and in some industries is expected. Qualified plans are subject to a myriad of eligibility, vesting, non-discrimination and other requirements that are generally designed to ensure that they are broad-based and do not disproportionately favour highly paid workers. Applicable law can treat related entities with sufficient common ownership to create a parent-subsidiary, brother-sister or affiliated service group (a controlled group) as a single employer to ensure that these requirements are not avoided.

Employers have substantially more flexibility with respect to non-qualified plans, but these may only be offered to a select group of management or highly compensated employees (generally representing no more than 10 per cent to 15 per cent of the workforce) and lack some of the tax benefits available with qualified plans.

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

Once employees have reached the age of 21 and have completed one year of service, they must generally be offered the opportunity to participate in a qualified plan within six months. If a qualified plan provides that an employee is 100 per cent vested upon entry, a two-year-of-service requirement can replace the one-year-of-service requirement.

Qualified plans that offer a tax-favoured employee deferral feature (known as a 401(k) deferral) must, beginning in 2024 for calendar year plans, offer employees who have attained age 21 and completed at least 500 hours of service in three consecutive years the opportunity to make employee deferrals. Beginning in 2025 (for calendar year plans), the service requirement is reduced to two consecutive years.

The rate at which an employee must fully vest in a qualified plan has been accelerating over the last several decades. Currently, the minimum vesting requirements are:

	Defined benefit		Defined contribution	
Years of service	Cliff vesting	Graded vesting	Cliff vesting	Graded vesting
Less than 1	0%	0%	0%	0%
1	0%	0%	0%	0%
2	0%	0%	0%	20%
3	0%	20%	100%	40%
4	0%	40%	100%	60%
5	100%	60%	100%	80%
6	100%	80%	100%	100%
7 or more	100%	100%	100%	100%

Unvested benefits must immediately vest with respect to affected employees if the plan undergoes a 'partial termination', which can result from certain employer actions (such as a layoff) and certain types of amendments, or in the event of a complete discontinuance of contributions or a plan termination.

### 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?

It is possible for US taxpayers to continue to participate in a qualified plan while working abroad if the plan document so permits and if various non-discrimination and operational requirements are satisfied. For example, a qualified plan's definition of compensation will need to explicitly include certain foreign income. If the US taxpayer is employed by a foreign affiliate, a US tax deduction may not be available for contributions made by the foreign affiliate. If the benefits are taxed locally (immediately or later), any advantages may be undermined.

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## Funding

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

Defined benefit qualified plans are typically funded solely by the employer. Defined contribution qualified plans often have a tax-favoured employee deferral feature. Employee deferrals can be made on a pre-tax (traditional) or after-tax (Roth) basis, with different income tax rules applying to each type at distribution. Qualified plan assets are required to be held in trust, the assets of the trust are protected from the employer's creditors and grow on a tax-deferred basis.

Non-qualified plans are funded by employers, although they may also permit an employee to defer the receipt of otherwise taxable compensation. Assets need not be held in trust, but if a trust is used, the assets must remain available to the employer's creditors and any earnings are taxable to the employer. As a result, participants are considered general, unsecured creditors of the employer. If assets are held in a trust that protects the assets from an employer's creditors, the benefit of deferred tax for the employee is lost.

### 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?

The maximum permitted participant benefit under a defined benefit qualified plan is an annual life annuity, beginning at normal retirement age, of 100 per cent of average compensation for the highest three years of service or, if less, US\$265,000 (for 2023; indexed for inflation). The employer bears the actuarial risk of ensuring that assets sufficient to pay benefits are contributed to the plan's related trust, and it typically funds within a minimum and maximum deductible contribution corridor, as determined with the assistance of an actuary and in compliance with tax rules. Mortality and interest rates are prescribed by applicable tax law and asset shortfalls are amortised over seven years.

The maximum contributions, by employers and employees, and allocations under a defined contribution qualified plan for a year is the lesser of 100 per cent of the employee's compensation or US\$66,000 (for 2023; indexed for inflation). Tax-favoured employee deferrals are capped at US\$22,500 (for 2023; indexed for inflation). Employees who have attained or will attain age 50 by the end of a year may make additional employee deferrals of up to US\$7,500 (for 2023; indexed for inflation).

Minimum employer contributions may be required for plans with benefits that are skewed too much in favour of owners and officers. Moreover, any of the limits described above may be reduced as necessary to satisfy non-discrimination testing requirements and may be limited by other provisions of the [Internal Revenue Code](#).

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## Level of benefits

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

Plan types and levels of benefits vary widely, largely by industry. Historically, defined benefit qualified plans were the most common form of private plan in the US, generally basing benefits on a percentage of average compensation or a dollar amount for each year of service. While this is still somewhat true for industrial employers, particularly with unionised workforces, service businesses and employers in the technology and life sciences spaces tend to offer only defined contribution qualified plans. The latter will typically permit employees to make employee deferrals and may also include matching or other forms of employer contributions (such as a profit-sharing allocation).

## Pension escalation

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

Except for increases in accrued benefits in the case of late retirement, there are generally no statutory requirements for pension escalation or revaluation. Employers may, by design, provide such features if in compliance with applicable tax rules.

## 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?

Defined benefit and money-purchase pension defined contribution qualified plans must provide benefits in the form of a qualified joint and survivor annuity (QJSA) or a qualified preretirement survivor annuity (QPSA). A QJSA is an annuity for the life of the participant, and if the participant is married, a survivor annuity for the life of the spouse of not less than 50 per cent of the amount payable while the participant was alive. These plans may also be required to offer a qualified optional survivor annuity (QOSA) of either 50 per cent (if the survivor portion of the QJSA is at least 75 per cent) or 75 per cent (if the survivor portion of the QJSA is less than 75 per cent). A QPSA is an annuity for the life of a deceased participant's surviving spouse where the participant dies before retirement but after reaching the plan's earliest retirement age. In that situation, the QPSA cannot be less than the survivor portion of the QJSA. For a participant who dies on or before the plan's earliest retirement age, payments to the surviving spouse may not be less than the survivor portion of the QJSA, determined as if the participant terminated at death, survived until the earliest retirement age, commenced a QJSA and then died the following day.

Those plans, and other types of defined contribution qualified plans, can offer other distribution forms, including other forms of annuities, instalment distributions and lump sums, but a properly witnessed spousal consent to waive the QJSA or QOSA form will be required.

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The QJSA, QOSA and QPSA requirements do not apply to other types of defined contribution qualified plans as long as the default beneficiary of the participant's entire vested benefit is the surviving spouse and the participant does not elect a life annuity form. The participant can designate an alternative beneficiary, but the spouse must provide a properly witnessed spousal consent.

It is common but not required to accelerate vesting if an employee dies while employed.

## Retirement

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

A qualified plan must allow participants to take distributions by the sixtieth day following the close of the plan year in which occurs the later of: (1) the participant attaining age 65 or, if earlier, the plan's normal retirement age; (2) the tenth anniversary of the participant's commencement of participation; or (3) the participant's termination of service. A plan's normal retirement age is typically either age 62 or 65. Participants are required to begin taking distributions shortly after attaining age 72 (age 73 effective 1 January 2023) except with respect to active employees who own not more than 5 per cent of the employer.

Defined contribution qualified plans generally allow a terminated employee to receive a distribution immediately following termination. With a defined benefit qualified plan, distributions are typically deferred until normal retirement age, although a plan may permit commencement of benefits at early retirement, often age 55. Such a benefit may be actuarially adjusted to take a longer distribution period into account.

Distributions received prior to age 59 and one-half may be subject to a 10 per cent excise tax in addition to ordinary income tax, unless 'rolled' over into another tax-favoured vehicle (another employer plan or individual retirement account, for example) or unless a special exception applies.

## 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?

Yes, depending on how the plan is designed. Defined benefit and money-purchase pension defined contribution qualified plans can, but are not required to, permit in-service distributions as early as age 59 and one-half. Other types of defined contribution qualified plans can permit in-service distributions after a fixed number of years, on the attainment of a stated age (generally age 59 and one-half) or upon the occurrence of a stated event (such as termination of employment, disability or hardship). In-service distributions received prior to age 59 and one-half are generally subject to a 10 per cent excise tax, in addition to ordinary income tax, unless another exception applies.

Qualified plans may also, but again are not required to, allow participants to borrow up to the lesser of US\$50,000 (reduced by the highest outstanding principal balance in the past 12 months) or the larger of one-half of the present value of the participant's vested benefit or

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US\$10,000. Requirements under the [Internal Revenue Code](#) and the Employee Retirement Income Security Act (ERISA) are designed to ensure that a loan is neither a taxable distribution nor a prohibited transaction. A defaulted loan may result in ordinary income tax and, possibly, a 10 per cent excise tax.

## Change of employer or pension scheme

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

The impact of changing employers generally depends on the type of qualified plan. Traditional defined benefit qualified plans generally base benefits on a combination of compensation and years of service. As a result, the maximum benefit is generally earned over an employee's career with the employer maintaining the plan, and termination prior to normal retirement age can significantly reduce the available benefit (even when the employee is fully vested). Defined contribution and certain other defined benefit qualified plans provide a benefit equal to an actual or hypothetical account balance that, once partially or fully vested, can generally be received in the form of a lump-sum distribution without any reduction.

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

Most, but not all, distributions from a qualified plan may be deposited or 'rolled over' into another tax-favoured employer plan or individual retirement account, thus allowing the employee to continue to defer taxes. Exceptions include annuities, instalments over at least 10 years and hardship distributions. The Internal Revenue Service has a helpful chart on its [website](#).

## Investment management

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

[ERISA](#) requires every qualified plan to have a 'plan administrator' and both ERISA and the [Internal Revenue Code](#) require that qualified plan assets be held in trust. Those responsible for managing the trust's assets may be the plan administrator, the trustee, an investment manager appointed under ERISA or another fiduciary (such as an investment committee).

In the case of a defined benefit qualified plan, the employer will be responsible for any shortfall in investment returns through minimum required contributions. In a defined contribution qualified plan, participants may manage their own investments. This transfers responsibility for investment risk (but not fund selection) to the participant. The plan administrator, trustee, investment manager or other fiduciary remains responsible for adding, monitoring the performance of and removing the funds offered to participants.

## 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?

Yes. Defined benefit qualified plans will sometimes offer early retirement window incentives, treating participants as older (closer to normal retirement age), crediting additional years of service for vesting or benefit accrual purposes or adjusting compensation. Special allocations or additional years of service for vesting purposes may also be provided under a defined contribution qualified plan, within certain limits.

In modifying any qualified plan for this purpose, care must be taken to ensure that non-discrimination requirements are met and that any changes are compliant with other applicable laws, such as age discrimination laws.

## 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 but such arrangements do not have the same tax-favoured status as qualified plans. These non-qualified plans can be structured as defined benefit or defined contribution arrangements and with or without employee contributions. No immediate deduction is available to employers, and benefits are generally subject to social security tax at vesting and ordinary income tax at distribution. For non-profit employers, benefits are generally subject to tax at vesting rather than at distribution.

Non-qualified plans are generally exempt from most provisions of [ERISA](#) as long as they are maintained primarily for a select group of management or highly compensated employees.

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

To avoid current income tax on the benefits, non-qualified plans must be unfunded and unsecured, meaning that the promised benefit is paid from the employer's general assets, which are subject to claims of the employer's creditors. No immediate deduction is available for the employer with respect to non-qualified plans and they must be designed to be exempt from or compliant with [section 409A](#) of the [Internal Revenue Code](#). This means that payments must generally be made on certain pre-specified dates and any employee deferral elections generally must be made prior to the year amounts are earned. Amounts paid pursuant to a non-qualified plan are not eligible to be rolled over to a broad-based plan or other tax-favoured account.

To avoid most of the requirements of [ERISA](#), the non-qualified plan must also be limited to a select group of management or highly compensated employees.

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## Unionised employees

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

Employers with union employees may be required to collectively bargain with respect to retirement benefits. This may result in participation in a multi-employer plan in which several unrelated employers (but typically in the same industry) make contributions on behalf of their union employees. This allows the employees to more easily change jobs within the same industry (trucking or airlines, for example) without losing benefits. Multi-employer plans are more often than not defined benefit qualified plans, and they are jointly administered by a board of employer and union representatives.

There has been a trend more recently to limit the potential liability of contributing employers to liabilities attributable to their own workforce, as well as to allow employers to participate in a multi-employer defined contribution arrangement, typically with an employee deferral feature.

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

A multi-employer plan must satisfy the qualified plan requirements of [ERISA](#) and the [Internal Revenue Code](#) and are subject to the Multiemployer Pension Plan Amendments Act (MPPAA), a part of ERISA. MPPAA provides that if a multi-employer plan is underfunded, all contributing employers can be required to make additional contributions, even if the liability did not arise with respect to the employer's own union employees. As a result, employers can face significant liability to a multi-employer plan if the plan is not sufficiently funded by all employers. Minimum required contributions are determined by an actuary based on best estimate assumptions, and asset shortfalls are amortized over 15 years. Severely underfunded plans are required to implement formal procedures to avoid insolvency.

## ENFORCEMENT

### Examination for compliance

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

The [Internal Revenue Service](#), the [Department of Labor](#) and the [Pension Benefit Guaranty Corporation](#) (PBGC) have authority to audit qualified plans. Broadly speaking, the Department of Labor focuses on fiduciary compliance under the [Employee Retirement Income Security Act](#) (ERISA), the Internal Revenue Service focuses on tax compliance under the [Internal Revenue Code](#) and the PBGC focuses on benefits and sufficiency of assets solely with respect to defined benefit qualified plans.

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## Penalties

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

The [Internal Revenue Service](#) can revoke a qualified plan's tax-favoured status if the arrangement fails to satisfy the requirements of the [Internal Revenue Code](#) in form or operation. Revocation of tax-favoured status means that employer deductions are lost, earnings on trust assets are subject to income tax and benefits are taxed as they vest. Employers may also be subject to various excise taxes if certain requirements are not satisfied (for example, failure to timely file annual reports, making non-deductible contributions, failing to satisfy minimum contribution requirements or failing to timely correct certain non-discrimination testing failures).

The [Department of Labor](#) has the authority to remove fiduciaries and impose sanctions in the form of monetary penalties for which fiduciaries can be personally liable. Various other penalties can be imposed on plan administrators who fail to timely provide certain information or fail to timely file annual reports. Plan administrators and fiduciaries can also be sued in civil court, and the Internal Revenue Code and [ERISA](#) both include criminal penalties.

For non-qualified plans, failures largely adversely affect participants, although an employer can be penalised for failing to withhold income or social security taxes or for failing to satisfy certain reporting requirements.

## Rectification

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

The Internal Revenue Service maintains a robust programme, known as the [Employee Plans Compliance Resolution System](#) (EPCRS), that allows employers to correct a range of qualified plan issues. EPCRS allows for self-correction, correction with Internal Revenue Service approval and a closing agreement program for issues discovered by the Internal Revenue Service on audit. The latter two arrangements involve a sanction payment to the Internal Revenue Service. In general, EPCRS requires restoration of the plan to the position it would have been in had the error not occurred. Correction programmes are far more limited for non-qualified plans.

The Department of Labor permits fiduciaries to correct certain fiduciary violations and prohibited transactions. This programme is known as the [Voluntary Fiduciary Correction Program](#) (VFCP).

For plans that fail to timely file annual reports, an employer and plan administrator can voluntarily file through the Department of Labor's [Delinquent Filer Voluntary Correction Program](#) (DFVC). Penalties for filing under DFVC can be substantially smaller than the penalties the Department of Labor could impose under [ERISA](#) and filings under DFVC can also result in a waiver of Internal Revenue Service penalties.

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## Disclosure obligations

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

Employers and plan administrators jointly file an annual report using a [Form 5500 series](#) filing. The annual report is generally due by the end of the seventh month following the end of the plan year, absent an extension.

The annual report includes information used by the [Internal Revenue Service](#) and [Department of Labor](#) and, in the case of defined benefit qualified plans, the [Pension Benefit Guaranty Corporation](#) (PBGC). Depending on the number of participants in a qualified plan at the beginning of the plan year, and, in certain other situations, audited financial statements must also accompany the annual filing. Since 2009, previously filed Forms 5500 are available on the Department of Labor [website](#). Additional Internal Revenue Service filings may be required, such as a request for a determination letter as to the tax-favoured status of the form of qualified plan or a notification when plans are merged or assets are transferred.

Defined benefit qualified plans are required to pay annual premiums to the PBGC and certain plans must file annual PBGC forms. Filings are also required if there has been a 'reportable event', which includes reductions in active participants, failures to make a required minimum funding and certain ownership changes, among others.

Non-qualified plans must make a one-time filing with the Department of Labor.

### 31 | What disclosures must be provided to plan participants?

All qualified plan participants must receive a plain English summary in the form of a summary plan description (SPD), as updated from time to time. Plans are also required to provide summary annual reports and provide participants with benefit statements. At the time of distribution, participants must receive notices explaining various tax issues, rights and elections.

A notice may be required (depending on the change and type of plan) when a qualified plan is amended to reduce future benefit accruals, certain changes are made to the vesting schedule or, for certain plans, if there is a failure to satisfy minimum funding requirements. Defined benefit qualified plan participants may also receive funding notices, notices if there are benefit restrictions and beneficiary designation forms. Defined contribution qualified plan participants may also receive employee deferral election forms, beneficiary designation forms, safe harbour notices, information concerning plan investments and other specialised notices.

Qualified plan participants also have a legal right to request and receive plan documents and other materials from the plan administrator.

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## Enforcement mechanisms

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

[ERISA](#) provides several tools for participants to use in enforcing their rights. Each plan must establish and publish claims procedures that are used in making, and appealing adverse, benefits decisions. Dissatisfied participants may, usually after satisfying the requirements of the claims procedures, bring a civil action in federal or state court to challenge a claim decision.

Participants may also bring complaints directly to the [Department of Labor](#), which may follow-up informally, launch an audit or bring a civil or criminal action with respect to plan violations, fiduciary breaches and prohibited transactions.

## PLAN CHANGES AND TERMINATION

### Rules and restrictions

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

Plan amendments may be required as a result of changes in the [Internal Revenue Code](#), the [Employee Retirement Income Security Act](#) (ERISA) or [Internal Revenue Service](#) or [Department of Labor](#) guidance. In these situations, the law or agency will specify a date by which an amendment must be adopted and become effective. In the case of tax-related changes, it is not uncommon for a change to become effective in operation earlier than the required date by which an amendment must be adopted.

With respect to discretionary changes, the required timing of an amendment and any participant notice may depend on the type of plan and the significance of the amendment. For reductions in future benefit accruals under defined benefit or money-purchase pension defined contribution qualified plans, advance notice to participants under [Internal Revenue Code](#) section 4980F and ERISA section 204(h) may be required, and the amendment generally must be adopted before it becomes effective. For many other changes, amendments can often be effective as of the beginning of the plan year in which the amendment is adopted. Generally, however, an employer cannot take away benefits that have already accrued. As an example, if a plan provides for matching contributions with respect to employee deferrals on a pay period basis, the plan can be amended to eliminate matching contributions, but the employer cannot take away any matching contributions that are already funded.

Special rules, including advanced notice requirements, may apply to amendments that slow down the rate at which benefits vest.

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

Although a qualified plan may be terminated, it must initially be established as a permanent benefit arrangement. Termination within a few years of creation may cause the [Internal Revenue Service](#) to challenge the tax-favoured status of the arrangement.

On termination, all unvested benefits become immediately vested. Employees in terminated defined contribution qualified plans are eligible to receive distributions that can be rolled over on a tax-deferred basis to other employer qualified plans or individual retirement accounts.

Terminating a defined benefit qualified plan involves compliance with additional [Pension Benefit Guaranty Corporation](#) (PBGC) procedures, including filings with that agency, notices to participants and participant elections to annuitise benefits. Additional funding may be required to fully fund the benefits earned. Plans may be terminated in distress situations if the cost of maintaining the plan would result in the employer's failure to continue to operate. The PBGC has the authority to terminate a defined benefit qualified plan involuntarily, and the employer's controlled group (including foreign entities) may be jointly and severally liable for unfunded benefits.

A terminated qualified plan's trust assets generally must be distributed as soon as administratively feasible (typically within one year of the date of termination) or the Internal Revenue Service will require ongoing amendments to comply with law changes. Annual reports must continue to be filed until all assets have been distributed, at which point a final annual report must be filed by the end of the seventh month following the month in which all assets have been distributed.

## Insolvency protection

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

Qualified plan assets are held in trust and are protected from the claims of an employer's creditors in the event of insolvency. In contrast, non-qualified plan assets, even if set aside in a trust, must remain subject to the claims of the employer's creditors.

While the [PBGC](#) provides insurance with respect to a portion of the benefit under a defined benefit qualified plan, in the event of employer insolvency the PBGC's guaranty will freeze as of the date the employer enters bankruptcy, and employers are required to provide notice of this limitation to participants. While an employer is in bankruptcy, a defined benefit qualified plan generally may not be amended to increase benefit accruals, and distributions other than in the form of a life annuity generally may not be paid unless certain requirements are met.

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## Business transfer

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

In the case of a stock acquisition, a qualified plan will transfer to the buyer's controlled group, which post-closing includes the target employer. If the qualified plan remains separate, that plan, and any other qualified plans maintained by the buyer's controlled group, must satisfy eligibility requirements known as minimum coverage and, in the case of a defined benefit qualified plan, minimum participation. These requirements are designed to ensure that benefits under each qualified plan remain broad-based. Transition relief may be available through the end of the plan year following the plan year in which the target joins the buyer's controlled group, provided no significant change in the qualified plan or to coverage are made. Alternatively, the target's qualified plan can be terminated, which results in all unvested benefits becoming fully vested, and the assets distributed. If employee deferrals are part of the plan, the timing of the termination (generally at least one day prior to closing) becomes critical for distribution purposes. Finally, the buyer can merge the target's plan into a qualified plan of the buyer at or following closing, although careful attention must be paid to ensure that accrued benefits are not diminished for target employees.

In the case of an asset sale, the target's qualified plan will remain with the target and the target's controlled group, unless the buyer agrees to assume the arrangement. Employees of the target's qualified plan will generally be eligible to take distributions since they will have ceased employment with the target.

Where larger employers with multiple business lines are involved and a particular business and its associated employees are moved to the buyer, the parties may agree to a 'spin-off' in which a portion of the assets and liabilities of the target's qualified plan are transferred directly into a qualified plan of the buyer. In a defined contribution qualified plan, the spin-off is generally accomplished by transferring the vested and unvested account balances of affected employees. In the case of a defined benefit qualified plan, the accrued benefits of the transferred employees are assumed by the buyer's plan and the value of assets (determined as if the target's plan had been terminated) must be proportionately allocated among the two plans. Prior to a spin-off or merger of qualified plans, a filing with the [Internal Revenue Service](#) may be required.

## Surplus

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

Defined contribution qualified plans generally have no surplus amounts at termination. For defined benefit qualified plans, an employer may, if permitted under the plan document, recover any surplus assets remaining after all benefits have been properly calculated and distributed. If the document does not include this provision, an amendment to add it cannot take effect until the end of the fifth calendar year following the adoption of the amendment. Otherwise, any surplus assets must be used to increase benefits. Even if a surplus could be paid to the employer, the employer may opt to increase benefits since an employer (other than a non-profit) receiving a surplus (a reversion) is subject to income tax plus a 50 per cent excise tax on the amount received. The excise tax can be reduced to 20 per cent if at least

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25 per cent of the reversion is transferred to a qualified replacement plan, which can be an existing or a new defined contribution qualified plan.

## FIDUCIARY RESPONSIBILITIES

### Applicable fiduciaries

#### 38| Which persons and entities are ‘fiduciaries’?

The [Employee Retirement Income Security Act](#) (ERISA) provides that a fiduciary is any person or entity: (1) exercising any discretionary authority or control respecting the management of the plan or its assets; (2) rendering investment advice with respect to plan assets for a fee or other compensation, or who has the authority or responsibility to do so; or (3) having any discretionary authority or responsibility in the administration of the plan. ERISA fiduciaries include the plan administrator (the employer by default). By virtue of the preceding definition, those responsible for adding, monitoring and removing investments are fiduciaries.

Fiduciary responsibility can be delegated, but relieving oneself of fiduciary responsibility is not always simple. The employer that maintains the plan (or its board of directors or trustees) is considered a fiduciary at least with respect to its authority to appoint and remove other fiduciaries. The trustee of a qualified plan’s related trust will also be a fiduciary, although its liability may be limited if it is a ‘directed’ trustee.

### Fiduciary duties

#### 39| What duties apply to fiduciaries?

[ERISA](#) provides that a fiduciary must: (1) act for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying the reasonable expenses of administering the plan (the exclusive benefit rule); (2) discharge duties with respect to a plan with the care, skill, prudence and diligence that a prudent man acting in like capacity and familiar with such matters would use (the prudent expert rule); (3) unless clearly prudent not to do so, diversify the plan’s investments as to minimise the risk of large losses; and (4) discharge its duties in accordance with the plan documents.

Fiduciaries must also avoid engaging in prohibited transactions, a category of transactions that lawmakers determined are so rife with conflict that they should not be allowed to occur, unless strict exemption requirements are satisfied. The prohibited transaction rules exist under both the [Internal Revenue Code](#) and ERISA, and the [Department of Labor](#) is responsible for promulgating guidance and issuing class and individual exemptions. (ERISA and the Internal Revenue Code also set forth statutory exemptions.)

### Breach of duties

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

A fiduciary can be held personally liable for any losses resulting from a breach of fiduciary duty, and for restoring any profits made through improper use of plan assets resulting

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from the fiduciary's breach. A fiduciary may also be liable for a breach by another fiduciary by knowingly participating in, or knowingly undertaking to conceal, an act or omission of the other fiduciary, knowing that the act or omission is a fiduciary breach, or by failing to comply with specific fiduciary duties, thereby enabling another fiduciary to commit a breach. A breaching fiduciary is also subject to removal, civil actions to recover benefits and appropriate relief sought by the [Department of Labor](#). A fiduciary who causes or allows a prohibited transaction to occur is liable for reversing the transaction and restoring any loss a plan may have experienced in the transaction, and for a 20 per cent civil penalty, on top of the amount actually involved in the transaction.

## LEGAL DEVELOPMENTS AND TRENDS

### Legal challenges

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

Generally, legal challenges on conversions are rare, in part because conversions themselves are rare. A significant exception involved cash balance plans, a type of defined benefit qualified plan in which a participant's benefit at any time is defined by reference to the value of a hypothetical account that can be translated into a life annuity at normal retirement age. The benefit is derived from employer contributions and interest credits, the latter of which may generally be more valuable to younger participants. When traditional defined benefit qualified plans began to be converted to cash balance arrangements, challenges asserted that the conversions violated [Internal Revenue Code](#) and [Employee Retirement Income Security Act](#) (ERISA) rules against reductions in benefits, as well as US age discrimination laws. Ultimately, these issues were resolved when laws changed to permit such arrangements if a participant's benefit would be at least that of any similarly situated (in every way except age) younger employee who is or could be a participant. The changes also addressed the reduction in benefits issues.

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

The most significant litigation trend involving private plans involves class action lawsuits with fiduciary breach claims relating to oversight and management of defined contribution qualified plan investments and the investment and other fees borne by participants. The litigation, as well as newer fee disclosure regulations issued by the [Department of Labor](#), have resulted in plans utilising or including lower-cost investment alternatives (in particular, passively managed funds), paying lower recordkeeping fees and having greater overall fee transparency.

A more recent trend has involved challenges to the use of outdated mortality and interest assumptions used in calculating benefits under defined benefit qualified plans.

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## Future prospects

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

Because of the voluntary nature of the US system, this is difficult to predict. Defined benefit qualified plans, particularly multi-employer plans, face significant funding shortfalls that have yet to be fully addressed. Changing worker demographics have already moved qualified plans generally from defined benefit to defined contribution type arrangements. Tax increases generally result in greater interest in qualified plans, but if there are related changes (such as lower benefits limits or changes to the existing social security exemption with respect to qualified plan benefits) that interest may be limited and interest in non-qualified plans may increase.

## UPDATE AND TRENDS

### Hot topics

### 44 | Are there any current developments or trends that should be noted?

Increases in US tax rates (some of which will occur automatically in 2026) will likely trigger renewed interest in both qualified plans and non-qualified plans. Under current law, virtually all contributions and benefits under a qualified plan escape social security tax. Congress could reduce or eliminate that exemption.

Recent legislation (known as the SECURE 2.0 Act) makes a variety of changes to qualified plans, although the effective dates of these changes are spread out over many years.

We anticipate that privacy and data security concerns will continue to garner increased attention, as will the appropriateness of environmental, social and governance factors in selecting investment alternatives under qualified plans. We have also seen renewed efforts to broaden the scope of persons considered fiduciaries to qualified plans and individual retirement accounts or annuities (including those providing rollover advice).

In the non-qualified plan realm, audits and tax litigation involving section 409A of the Internal Revenue Code are likely to increase and there have from time to time been legislative proposals to require accelerated tax on such arrangements, which would reduce the attraction of such vehicles.

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