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Changing the occupational pension scheme is not easily done. AXA's recently announced decision to withdraw from the BVG fully-insured pension fund business may be a reason to consider certain aspects involving a possible change of the occupational pension scheme. A particular aspect which must be kept in mind is that the employer is not entitled to make such a decision independently.



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Change of Pension Fund

Since one of the major players in the pension fund market has decided to withdraw from the fully-insured pension fund business, the question that had previously been practically neglected moves back into focus: What aspects does an employer need to take into consideration when changing a pension fund provider?

AXAs Withdrawal from the Fully Insured Pension Fund Market

On Tuesday 10 April 2018, AXA announced its withdrawal from the fully-insured pension fund business. In the future, the insurance company will focus on semi-autonomous solutions. Existing fully-insured pension foundations will be converted into semi-autonomous foundations by the beginning of 2019. AXA's decision is based on the fact that fully-insured pension funds are subject to FINMA's regulatory requirements. This means they have a much narrower investment scope compared to semi-autonomous foundations. These again have better earnings opportunities with existing pension capital due to less restrictive regulations. AXA also states in its press release that customers of semi-autonomous foundations will pay lower risk premiums. The insurer will support existing customers during the transition period and also provide the semi-autonomous collective foundations with additional reserves. The coverage ratio is planned to be 111% to start with. It is not clear to what extent, or if at all, AXA will unilaterally be able to enforce the conversion of the pension fund. This depends on the terms and conditions of the relevant affiliation contract.

In contrast to full insurance foundations, semi-autonomous foundations bear the investment risk themselves. As AXA points out in its press release, this means greater earnings opportunities – but it also means greater investment risks. While the risks of death and disability are also reinsured in a semi-autonomous

pension scheme, a semi-autonomous pension fund bears the long-life risk and the investment risk itself.

Bearing the investment risk itself means, among others, that if the pension fund is underfunded, restructuring measures, for example additional contributions from employers and employees, could become necessary. This risk could sometimes have unpleasant consequences, especially for smaller employers with low staffing. Despite the capital buffer with which the semi-autonomous foundations are to be equipped by AXA, not all customers are likely to be enthusiastic about this forced change.

Employee's Co-Determination with regard to the change of pension fund

If an employer wishes to change his pension fund or pension fund provider, for example because he is not happy with the coverage, various points must be considered. Most important are the termination provisions of the applicable affiliation contract, in particular the terms and notice periods.

Staff approval is required for the termination of an existing affiliation contract and re-accession to a new pension fund. Should a works council exist, it must approve of the change. Otherwise, all employees have a joint right to participate. The consent of the works council or the employees is an essential prerequisite for a change of pension fund. The acquiring pension fund is obliged to check whether an agreement between the employer and his staff actually exists.

The following requirements must be met in order to change the pension fund and/or its provider. The works council or the employees themselves must be sufficiently informed about the effects of the planned change. The employer must provide the works council or the employees with all useful information. The staff must be given enough time to evaluate the information and form opinions.

In companies without an existing works council, the question arises as to how the employees' consent can be obtained. Early planning and careful organisation are essential. The implementation of co-determination, e.g. the form of communication (e.g. in writing, town hall meeting etc.) or the quorum (e.g. majority of all employees, majority of employees present etc.) are preferably laid down in regulations. If there is no such provision, employee participation should be limited to the specific co-determination act, for example by electing an ad hoc delegation to exercise the right of co-determination with regard to the change of pension fund. In the absence of any regulation, a written vote and the quorum of the majority of all employees is to be assumed. Finally, the employees consent must be adequately documented.

If no agreement is reached between the employees and the employer, a neutral arbitrator decides on the change. The arbitrator shall be appointed by mutual agreement or, in the event of a disagreement, by the supervisory authority of the pension fund.

Change of Pensioners

Should the affiliated individuals to a pension fund consist of both active and retired individuals, it has to be clarified whether pensioners will also change to the new pension fund or remain in the existing one. If the affiliation contract provides for the pensioners to leave the current pension institution, the affiliation contract can only be terminated by the employer if the new pension institution

commits to accept the pensioners with their original conditions. Generally, the new pension fund accept the pensioners only if the employer is willing to pay substantial additional payments.

If the affiliation contract does not provide for such regulation, the existing and the new pension fund need to agree mutually on the possible change of the pensioners including all terms and conditions. In case no such mutual agreement is found, the pensioners will remain with the existing pension institution.

Partial Liquidation

In case an affiliation contract is terminated, the pension fund will be partially liquidated. In contrast to a withdrawal of vested benefits – i.e. when an insured person is leaving a pension fund for a reason other than old age, death or disability –, under a partial liquidation, the assets of a pension fund must be distributed equally. Hence, in case of partial liquidation not only a possible surplus but also a possible shortfall is distributed among the insured parties of a pension fund. Accordingly, the change from an inadequately funded pension fund to a well-endowed pension institution might result in financial losses for the insured employees.

Conclusion

When changing from one pension fund to another, numerous aspects must be taken into account. Just a brief selection of some of these aspects is mentioned above. A thorough analysis of the pros and cons as well as a careful and early planning of a potential change are indispensable.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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