Pusch Wahlig Workplace Law

Practice Group

Company pension schemes

The company pension often tend to have an unremarkable presence - in particular in medium-sized companies. In some cases, pension commitments have existed for decades. Actuarial reports for the tax and commercial balance sheets are regularly requested for the company pension, contributions are transferred to the Pension Protection Fund (Pensions-Sicherungs-Verein, PSV) and company pensions due are paid out. The ongoing low interest rates and the increasing life expectancy are causing the costs of company pension to rise. Many companies turn a blind eye and come to term with this situation. Often, the reality check comes when a company is to be sold and the existing company pension proves to be an obstacle for potential acquirers. A trained eye for the existing company pension as part of a due diligence audit might reveal risks which the employer had not expected so far and which might become a deal breaker. This is particularly critical if - as is often the case with company pensions - those risks have a broad impact and thus the financial risk accumulates. Notwithstanding the above, there may also be the risk that employees entitled to benefits suddenly assert claims for pension benefits and that previously unidentified risks materialize for the employer.

Companies should therefore keep an eye on the following, potentially problematic aspects regarding their pension systems:

Discrimination against employees: Were groups of employees (e.g. women, part-time employees, older employees) excluded from the company pension without justification? Were there discriminations against employee groups in the application of the factors determining the amount of the pension (e.g. lower calculation factors if an employee leaves the company early)? The Federal Labor Court is very active in this field and is constantly developing its case law.

Compensation of vested rights or pensions: In the context of an intended sale of a company, the question often arises as to whether vested rights or rights arising from current pension obligations can be compensated in order to reduce the pension burden. Is this possible unilaterally or only in agreement with the employees entitled to the pension? Is it possible to capitalize pensions? Is an already agreed waiver effective at all? What applies for employees, what for managing directors or board members? The assessment of these questions should not only begin, when a potential acquirer has already been found.

Obligation to review the adjustments of current pensions pursuant to sec. 16 BetrAVG (Company Pension Act): In principle, the employer has a duty to review whether the regular pension has to be adjusted. The requirements of sec. 16 BetrAVG and the principles developed by case law must be observed. Does the employer have to adjust the pensions at all? Were the pensions correctly adjusted in accordance with the statutory provisions? Have the employees with company pension claims been informed correctly? Are there any risks that missed adjustments have to be made up? Missing or insufficient adjustments are a classic “finding” in the course of a due diligence audit and might turn out to be unwelcome liability claims.

Unrecognized pension entitlements: Have claims to benefits arisen which are considered company pensions under the Company Pension Act (Betriebsrentengesetz, BetrAVG), but which have not been recognized or identified as such so far (e.g. in the case of regular granting of benefits in connection with the early exit/retirement of employees, pension-type non-cash benefits, entitlements from company practice, etc.) and which can now no longer be withdrawn? Have employees who left early acquired any vested rights to these benefits? Were old pension schemes effectively concluded and henceforth made unavailable for newly recruited employees? Have previously existing regulations on company pensions been effectively replaced? All this should be known because every additional pension entitlement is a possible deduction of the purchase price.

De-risking for M&A transactions: Often, potential acquirers of a company want to avoid taking over existing obligations towards employees entitled to company pensions. This requires early planning to determine whether the employee entitled to a company pension can be incorporated into a separate pension company, for example via an asset deal or a transformation under corporate law and thus be separated from the company's operations.

Due diligence with a focus on compliance with company pension law: As part of a due diligence with a focus on company pension law, it is recommended to check not only compliance with the obligation to make adjustments but also the proper transfer of contributions to the Pension Protection Fund, compliance with transitional provisions existing in the BetrAVG as well as – in the case of processing via investment companies – the sufficient funding of the pension commitments.

Outsourcing of pension obligations from balance sheets: Potential acquirers often show a more critical view on high provisions for pensions in the balance sheets. Transferring pension obligations to a trustee can offer a way-out in order to improve balance sheet ratios. Corresponding contractual trust arrangements are well tested models in this case.
For employers who want to sell their company, it is advisable to have the previously mentioned points checked in the context of a pre due diligence and not to unnecessarily burden later sales negotiations, which are often conducted under time pressure. In particular the clarification of pension commitments – some of which date back decades –, pension histories and the procurement of documents, which are preferably as complete as possible, often represent the "bottleneck" in our practical experience.

Our lawyers in our practice group "company pension schemes", who are experienced in company pension law, will be happy to assist you.

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