

Defining the Scope, Controlling the Financial Risks

Legal issues to be considered by employers when providing death benefits in company pension schemes

By Marco Maurer



It is evident that the contractual arrangement of death benefits always has to take account of the current developments in case law in order to be as legally secure as possible.

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There is a growing pressure on employers in Germany to offer company pension benefits. The supply level of the state pension insurance is expected to decrease in the

coming decades. Employees feel the need to bridge this gap through other supports in order to ensure an adequate future living for themselves and their dependents, preferably by way of a company

pension. Various tax privileges and other legal incentives in recent years have further increased the attractiveness of a company pension for both employers and employees. Thus, the implementation (and maintenance) of a competitive company pension scheme should play an important role in every employer's HR strategy to retain key employees and to attract talent.

Pursuant to the German Company Pension Act (*Betriebsrentengesetz*, BetrAVG), a company pension commitment can, besides old-age and invalidity benefits, provide for benefits to "survivors" in the event of an employee's death.

Even though this is not mandatory, in practice most pension schemes provide for such death benefits. The statutory law, however, neither specifies the type of benefits that legally qualify as death benefits, nor does it provide a definition of the term "survivor". Thus, there is leeway for the employer: The law can, for instance, define whether eligible survivors are provided with annuity payments or a one-off payment. The employer is

further free to define the scope of eligible survivors, which can include spouses, children, and/or other dependents; to a certain extent, the decision on who is to be considered an eligible dependent can even be transferred to the employee.

However, if a works council has been established, it has certain co-determination rights, in particular with regard to how the pension budget provided by the employer is to be distributed among the eligible survivors. The employer can further define the preconditions of eligibility and, correspondingly, limit the employer's own financial risk in connection with the provision of death benefits.

The provisions in company pension schemes are, however, subject to mandatory law, including but not limited to the principles of equal treatment pursuant to the German Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, AGG). The German Federal Employment Court (*Bundesarbeitsgericht*, BAG) is continuously developing and defining the limits to a permissible contractual design of death benefit provisions. The →

following examples of most recent case law developments on two typical clauses in company pension schemes, which both limit a spouse's eligibility for death benefits, may provide a sense of the legal situation.

Late Marriage Clauses

Company pension schemes often define a maximum age an employee may have at the time of his or her wedding as a precondition for the spouse's eligibility for death benefits. The main intention of such a so-called late marriage clause is to exclude spouses from death benefits if there is a reasonable suspicion that the primary purpose of the marriage was to provide the partner with such benefits.

Due to inconsistent case law in the recent years, there is considerable legal uncertainty regarding the permissibility of late marriage clauses. In 2015, the BAG had to rule on a clause that excluded spouses from death benefits if the employee had been older than 60 years of age at the beginning of the marriage. In this decision, the BAG held that late marriage clauses generally violated the prohibition of old-age discrimination pursuant to the AGG and were, therefore, invalid. Subsequently, the Court of Justice of the European Union (CJEU) decided that the

underlying EU directive, which permits age-related differentiations for old-age and disability benefits, also applied to late marriage clauses, provided that these clauses were based on a company pension scheme. In consideration of the CJEU's decision, the BAG modified its case law. It now considers the age-related differentiation in a late marriage clause justified if (i) the death benefit amount is determined on the basis of the amount of the company pension scheme's old-age benefit, and (ii) the maximum age specified in the late marriage clause is appropriate and necessary according to the AGG provisions. In the opinion of the BAG, the latter requirement is regularly met if the maximum age corresponds with the structural principles of company pension law, in particular with the age limit for the eligibility for old-age benefits as defined in the underlying company pension scheme.

These new principles developed by the BAG can form a profound legal basis for including late marriage clauses in future company pension schemes. However, further case law is still required to clarify the details of the aforementioned principles.

Age Gap Clauses

There is more consolidated case law with regard to another typical clause in company pension schemes under which a spouse is excluded from death benefits if he or she is a certain number of years younger than the employee. Such age gap clauses mainly serve the employer's legitimate interest in manageable and calculable pension liabilities by excluding those marriages from death benefit eligibility which bear a significant risk that a surviving spouse might outlive a former employee by many years. According to recent case law of the BAG, this legitimate interest of the employer generally justifies the age-related differentiation associated with such age gap clauses: Based on the fact that the age gap amounts to fewer than seven years in more than 80 percent of all marriages, the BAG considers it permissible to completely exclude from death benefits spouses who are at least 15 years

younger than the employee. In another case, the court considered it permissible to reduce the death benefit entitlements of spouses with an age gap of ten or more years on a pro rata basis. However, the court has yet to decide whether a ten-year age gap would also justify a complete exclusion.

Conclusion

Both examples show that there are legal possibilities for employers to define the scope of death benefits in company pension schemes and, correspondingly, control the financial risks associated with such commitments. However, it is evident that the contractual arrangement of death benefits always has to take account of the current developments in case law in order to be as legally secure as possible. ←



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