

Adjusting company pensions in light of inflation

Employers have to make significant administrative efforts

By Dr. Marius Höfler



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The inflation rate in Germany keeps reaching new highs. The most recent consumer price index for measuring the inflation rate was 6.1% in August 2023. High inflation also has an impact on the level of company pensions, as these are generally based on the consumer price index. To avoid such a high adjustment, employers will have to make significant administrative efforts and disclose financially sensitive data to employees. Without this, employers will face a long period of legal uncertainty.

Requirements

Every three years, an employer must review an adjustment to the existing benefits of its company pension plan and

decide on this at its reasonable discretion; in particular, the interests of the beneficiaries and the financial situation of the employer must be taken into account [Section 16 (1) German Company Pension Act (Betriebsrentengesetz – BetrAVG)].

The interests of pension beneficiaries are affected, inter alia, if there has been a loss of the purchasing power of pension benefits between the start of the pension and the audit date. In this case, beneficiaries may request the employer makes an adjustment to their pension benefits based on the loss of purchasing power. The consumer price index is the decisive factor here. Consequently, the employer must comply with pension beneficiaries' entitlements to an adjustment of their pension benefits if, inter alia, the adjustment to their pension benefits is not less



Dr. Marius Höfler

Mayer Brown LLP, Frankfurt/Main
Attorney-at-Law, Senior Associate

mhoefler@mayerbrown.com
www.mayerbrown.com

than the increase in the consumer price index for Germany (see Section 16 (2) no. 1 BetrAVG).

Omission

If an employer is obliged to make an adjustment because the consumer price index has risen, the pension benefits still might not have to be adjusted if the employer's financial situation does not permit an adjustment. This is the case if expected profits do not permit the financing of the additional burdens resulting from the adjustment. To address this issue, a financial forecast is required based on a longer representative period (usually at least three years).

Even if an employer comes to the conclusion that its financial situation does not permit an adjustment to pension benefits, there will still be a long period of legal uncertainty for the employer with regard to the adjustment of the company pension plan. This is because the pension beneficiaries can still object to the employer's decision not to adjust the pension within three years of becoming aware of it. From the time the objection is filed, the pension beneficiaries have three additional years to file an action against the employer to adjust their pension benefits.

Presumption of liability

An employer can significantly shorten this period of legal uncertainty by using the presumption rule in Section 16 (4) no. 2 BetrAVG. Under this provision, an adjustment is

deemed to have been legally omitted if the employer informs the beneficiaries in writing of the company's financial situation, the beneficiaries have not objected in writing within three calendar months of receipt of the notification, and the beneficiaries have been informed of the legal consequences of not filing an objection in due time.

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When explaining the financial situation, the employer must explain the relevant reasons for the absence of an adjustment so that the pension beneficiaries can understand the decision as to why the employer will probably not be able to make the adjustment. The employer must describe the financial situation in such detail and at such length that this alone enables the pension beneficiaries to review the plausibility of the employer's decision. This means that the employer must present to the pension beneficiaries the expected development of the return on equity and the equity capitalization in such detail that they can understand why the adjustment of the company pension was not made. In doing so, the employer must provide the pension beneficiaries with the data on equity resulting from the balance sheets of the last three years

and the calculation of the return on equity for each year used to prepare the forecast. The employer must also inform the pension beneficiaries of the average equity and the return on equity for each of the years on which the forecast is based, resulting from the annual financial statements prepared in accordance with German commercial law.

In order to meet the requirements of the presumption of conformity, employers must therefore make significant administrative efforts and disclose commercially sensitive data (e.g., equity data) to pension beneficiaries. As a result, employers find themselves in a conflict of interest between their interest in legal certainty and their interest in confidentiality.

Practical advice

In the course of making its decision not to adjust company pensions, an employer must either accept the disclosure of commercially sensitive company data or the litigation risks associated with legal uncertainty. Either way, the employer's decision is not an easy one in practice. ←