Pension law update: recent developments

This newsletter describes a number of recent developments in the area of pensions that have recently come into effect or will do so in the near future.

Powers of the works council with respect to pensions

On 21 June 2016, the Dutch Senate adopted the bill amending the Works Council Act and the Pension Act in connection with the powers of the works council with respect to pensions.

The Works Council Act (*Wet op de ondernemingsraden or WOR)* currently prescribes that works councils have a right of consent regarding a decision to adopt, change or withdraw a pension insurance scheme and a decision to adopt or withdraw (and thus not change) a pension agreement placed with a company pension fund, a voluntary industry-wide pension fund or a voluntary scheme with a compulsory industry-wide pension fund. Additionally, the Pension Act (*Pensioenwet)* regulates that works councils have a right of consent regarding the decision to place the pension agreement with a pension institution in a different Member State or a PPI (pension premium institute).

The powers of the works council will as of 1 October 2016 be expanded to include a right of consent regarding the adoption, change or withdrawal of all pension agreements, also when placed with a pension fund or a foreign pension administrator.

Moreover, the powers of the works council with respect to the pension agreement will be concentrated in the WOR, in which it will be regulated that works councils have a right of consent regarding 'arrangements based on a pension agreement' placed with all pension administrators (fund, insurer or PPI), unless the pension agreement has been placed with a compulsory industry-wide pension fund and this fund is subsequently obliged to execute the pension agreement. That means that works councils only have a right of consent with respect to a mandatory industry-wide pension fund insofar as the pension agreement is voluntarily executed by such fund (voluntary affiliations) or insofar as voluntary supplementary schemes are involved. All as far as not already regulated by a CLA or an employment conditions scheme adopted by a public authority.

Falling under the definition of 'arrangements based on a pension agreement' are also those arrangements included in an implementation agreement (*uitvoeringsovereenkomst*) that are influencing the pension agreement. This, in any event, includes the manner in which premiums are set, the conditions for the granting of indexation and the choice of pension provider, including foreign pension funds and insurers. The employer is thus obliged to inform the works council of any intended adoption, change or withdrawal of an implementation agreement.

Amendments defined contribution (DC) plans

In the Netherlands it was prescribed in case of a DC plan or a capital plan that the accrued capital will, by no later than the retirement date, be converted into a lifelong fixed pension annuity. Continued investment of this capital was therefore not possible. This has all changed on 1 September 2016, when the Improved Premium Scheme Act (*Wet verbeterde premieregeling*) came into effect. This law allows participants in a DC plan or a capital plan to opt for continued investment during the payment phase, irrespective of whether the capital is being held by an insurer, a PPI or a pension fund. Participants can therefore choose between fixed pension benefits that commence on the retirement date or an annuity that remains under investment and is therefore variable. A combination is also possible. Moreover, participants can choose between a variable payment in euro or investment units or variable benefits with fixed decrease. If no choice is made, then a fixed pension is default.

For participants who opt for a variable risk-bearing pension, the investment risks and developments in life expectancy and mortality results will continue to influence the level of the pension benefits. Although a variable pension may turn out higher than a fixed pension, it could of course also turn out lower if the results of continued investment prove disappointing. As the variable pension must be lifelong, it will have to be determined in such a manner that it can be paid out for life on the basis of the yield expectations (projected interest) and life expectancy. Windfalls and setbacks can be spread out, currently over a period of five years, which will be extended to ten years.

The projected interests, together with the periodic fixed decrease, determine the level of the future variable pension benefits. Applying a projected interest that is too high creates the risk of a sharper decrease in pension benefits at a later age in order to compensate the (too) high pension benefits paid at the beginning of retirement. Using a risk-free interest rate rules out the possibility of receiving higher pension benefits at the beginning of retirement than if one had opted for fixed pension benefits.

Taking into account the risks that pension beneficiaries run with variable pension benefits, the provision of additional information will be compulsory, including a specification by the pension administrator, determined using a uniform calculation method, of the variable pension benefits in a pessimistic, neutral and optimistic scenario. This information must be provided once every ten years, also after the retirement date. Additionally, a general duty of care will be introduced to the effect that all pension administrators of premium agreements and variable benefits must pursue an investment policy that respects the interests of (former) participants and pension beneficiaries. This can be based on a life cycle or any other method of which it can be adequately substantiated that it is better equipped to dampen downward investment risks. It should be noted that pension beneficiaries cannot take over the investments during the payment phase. Indeed, they can choose exclusively between the various profiles offered by the pension administrator, whereby great responsibility rests upon the pension administrator.

While the investment risk and life expectancy can be allocated both individually and collectively, the mortality result will always be allocated collectively. In case of collective allocation, an allocation group is determined, whereby it is also possible to establish different allocation groups for different risks. An allocation group may consist not only of pension beneficiaries, but also (former) participants who will reach the target retirement age within ten years. The risks are periodically (spread over no more than five years) settled within the allocation group. All members of the allocation group have an individual capital that serves as the basis for variable benefits and no reallocation between age groups may be applied when determining the collective projected yield.

Although all participants should have the opportunity to opt for variable benefits, not every pension provider is required to offer this option. If the own pension provider does not offer variable benefits, the participant is entitled to purchase the right from a different pension provider. A PPI may not administrate or offer fixed benefits, but may now offer the administration of variable benefits on the condition that these entail no insurance risks.

All participants of a DC plan or a capital plan with an insurer or a PPI are now entitled to purchase fixed or variable pension benefits from a different provider. Participants in a pension fund offering a DC plan or a capital plan are only entitled to purchase fixed or variable pension benefits elsewhere if such is not possible from the own pension fund.

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