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OBLIGATORY EMPLOYER SUBSIDY ALSO FOR OLD COMMITMENTS TO OCCUPATIONAL PENSION SCHEMES PURSUANT TO SEC. 1A PARA. 1A BETRAVG FROM JANUARY 1st, 2022

A new subsidy obligation for employers was introduced already some time ago for certain occupational pension commitments pursuant to sec. 1a para. 1a of the German Occupational Pensions Act (Betriebsrentengesetz, BetrAVG) when the Occupational Pensions Strengthening Act (Betriebsrentenstärkungsgesetz) came into force on January 1st, 2018. This subsidy obligation covers deferred compensation (Entgeltumwandlung) in favour of occupational pension schemes in the form of direct insurance (Direktversicherung) and pension funds (Pensionsfonds, Pensionskassen). Until now, however, this obligation only applied to deferred compensation agreements concluded after January 1st, 2019 (so-called "new commitments"). For agreements that existed prior to this date (so-called "old commitments"), the transitional provision in sec. 26a BetrAVG stipulates that sec. 1a para. 1a BetrAVG does not apply until January 1st, 2022. These new requirements in employment and social security law must now be implemented in good time before the turn of the year.

SUBSIDY OBLIGATION IN THE AMOUNT OF A MAXIMUM OF 15% OF THE CONVERTED RENUMERATION

The maximum amount of the subsidy according to sec. 1a para. 1a BetrAVG is 15% of the deferred compensation. However, this obligation only exists if and to the extent that the employer saves social security contributions through the deferred compensation.

Since deferred compensation in the amount of up to 4% of the contribution assessment ceiling (Beitragsbemessungsgrenze, BBG) of the statutory pension insurance (Rentenversicherung, RV) is exempt from social insurance, the employer saves his share of the social insurance contributions due on this part of the remuneration insofar as the remuneration is below the respective BBG. This saving is now to benefit the employee by obliging the employer to pay the savings in the form of a subsidy to the existing occupational pension scheme.

However, this subsidy is also limited to the employer's actual savings:

If the employer does not achieve any savings because even after the conversion of remuneration the employee's remuneration is still higher than the BBG´s of the pension and unemployment insurance as well as the health and long-term care insurance, the obligation to subsidise does not apply. The same applies if the deferred compensation is higher than the contribution-free 4% of the BBG of the German statutory pension insurance.

If, on the other hand, the employer achieves a lower saving than the 15% because the remuneration after the salary conversion is still below the BBG of the pension and unemployment insurance but above the BBG of the health and long-term care insurance, there is also only a claim for subsidy in the amount of the concrete, lower saving.

Against this background, the maximum subsidy for the year 2022 (based on the new calculation parameters already approved by the Federal Cabinet) assuming a 15% subsidy is as follows:

	Old federal states	New federal states
BBG RV / year gross	EUR 84,600	EUR 81,000
4% non-contributory deferred compensation	= EUR 3,384	= EUR 3,240
15% max. subsidy / year	= EUR 507.60	= EUR 486.00

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Attention: No consent obligation to increase the contributions of existing pension contracts for the pension institutions.

However, problems can arise in practice due to the fact, that the respective pension institutions are not obliged to agree to an increase in contributions for contracts concluded in the past. Especially in the case of contracts with a high guaranteed actuarial interest rate, as it is the case with many old contracts, they may have an interest in rejecting the increase in contributions, as they are currently hardly generating the guaranteed interest rate due to the persistently low interest rate environment. The subsidy could then only be used to take out an additional pension contract. However, this presupposes that a pension institution is willing to conclude a contract with a relatively low contribution level. If there are no pension institutions willing to conclude a contract, the alternative solution (according to prevailing opinion) is to replace part of the previous deferred compensation amount with the subsidy, so that the employee ends up paying a lower amount for the deferred compensation.

FATE OF ALREADY EXISTING SUBSIDY OBLIGATIONS

However, many old occupational pension commitments already contain an obligation on the part of the employer to subsidise the employee's deferred compensation. It is now necessary to examine to what extent this subsidy claim can be offset against the statutory subsidy obligation that is now coming into force. In principle, this requires a corresponding agreement with the employee entitled to a pension. However, it is currently being discussed in the legal literature whether the employee is even obliged to give his consent to such an agreement in individual cases due to the legal purpose of sec. 1a para. 1a BetrAVG.

Our lawyers specialising in labour and social security law will be happy to advise you on this and assist you in reviewing and, if necessary, adjusting your old commitments.