



# Recent developments in occupational benefits matters

[Vincent Carron, Wilfried Dovetta](#)

## Key Take-aways

- 1.** The AHV 21 reform entered into force on January 1, 2024. It makes the 2nd pillar retirement age more flexible.
- 2.** Retirement benefits from 2nd pillar can now be drawn in at least three stages.
- 3.** The first partial withdrawal must be equal to at least 20% of the retirement pension or, if any, of the lump-sum.

# 1 Introduction

The AVS 21 reform and the resulting flexibilization of the retirement age have an impact on occupational benefits law. In addition, a number of recent Federal Court decisions have provided welcome clarification on various occupational benefits issues.

## 2 Legislative and prudential changes

### 2.1 Impact of the AHV 21 reform on occupational benefits

The term „ordinary retirement age“ has been replaced by the term „reference age“. For women, it will gradually reach 65 by 2028, in accordance with the **transitional provisions of the Federal Law on Old-Age and Survivors' Insurance (AHVG)**, which also apply to the 2nd pillar. The pension fund (**PF**) remains authorized to provide for a regulatory reference age lower than 65, provided it is greater than or equal to 58.

As of January 1, 2024, the insured persons have the **legal right to anticipate or postpone their 2nd pillar retirement**. This possibility no longer depends on a provision to this effect in the PF regulations. The insured persons may thus draw their 2nd pillar retirement benefits from the age of 63 and until the age of 70 at the latest. The PF may not make postponement conditional on the payment of savings contributions by the employee or the employer: the legal obligation to contribute ends at the reference age. As before the reform, however, the PF may offer the possibility of contributing beyond this age.

The old-age pension can now be drawn **at least in three stages**, to ensure a **smooth transition between working life and retirement**. If the PF regulations allow the insured to receive a lump-sum benefit instead of a pension, the lump-sum can now be withdrawn in **three instalments** (at most), which offers tax advantages. However, this new flexibility of 2nd pillar withdrawals is subject to some restrictions:

- The first partial withdrawal must represent **at least 20% of the retirement benefit** (regardless of whether it is a pension or a lump-sum). The PF may set a lower minimum percentage.
- The PF may stipulate that in the case of partial early retirement, the retirement benefit must be paid in a single lump sum if the insured persons' remaining annual salary is below the salary threshold specified in the regulations.
- Also in the case of partial early retirement, the portion of the pension received before the regulatory reference age may not exceed the portion of the salary reduction.
- Retirement benefits may only be postponed beyond the reference age **if the insured person pursues gainful activity**. This also applies to the postponement of retirement benefits due from a vested benefits account, subject to transitional provisions applicable until December 31, 2029.

If the insured person is receiving or has received retirement benefits and subsequently resumes gainful employment or increases his or her employment level, the maximum 2nd pillar buyback amount is reduced by the amount of retirement benefits already received.

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## The 2nd pillar pension can be drawn in at least three stages.

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### 2.2. Minimal interest rate

Constant since January 1, 2017, the minimum interest rate for mandatory occupational benefits has been increased from 1% to **1.25% on January 1, 2024**.

### 2.3. Guidelines and communications

The Occupational Pension Supervisory Commission (**OPSC**) has issued guidelines D - 01/2024 as of January 1, 2024, which include instructions on the certificates issued by the accredited pension actuaries in accordance with Art. 52e para. 1 bis of the Swiss Federal Law on Occupational Retirement, Survivors' and Disability Pension Plans (**BVG**), as well as the certificates that may be made mandatory under Art. 1a of the Ordinance on Occupational Retirement, Survivors' and Disability Pension Plans (**BVV 2**) when an employer affiliates the same persons with several occupational pension plans.

The OPSC has also issued Communications C - 02/2023 (replacing Communications C-01/2021 of March 30, 2021) defining, as of January 1, 2024, the notion of **benefits improvement for PFs** within the meaning of Art. 46 BVV 2. These provisions apply to collective or joint PFs and restrict the possibilities of benefit improvement when investment fluctuation reserves have not been fully accrued. The legality of these communications is disputed.

The new technical guidelines DTA 7, which came into force at the beginning of the year, regulate the **obligations of the accredited pension actuary** within the framework of the statutory periodic audit required when a PF is **in competition with other PFs**. In their new version, DTA 7 are now recognized as a minimum standard by the OPSC.

## 3 Recent case law

### 3.1. Ancillary activity subject to BVG

An employee who is subject to mandatory insurance for his or her main independent or dependent gainful activity, and also carries out an ancillary activity is not subject to mandatory insurance for the latter. According to BGE 148 V 234, however, this exemption rule is inapplicable when both the ancillary activity and the principal activity are carried out with the same employer. In this case, the salaries of both activities are added together and are subject to mandatory occupational benefits.

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## The 2nd pillar pension can only be postponed if the insured person is still working.

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### 3.2. Orphan's pension for apprentices or students

The 2nd pillar orphan's pension does not expire at the of 18, but at the age of 25 if the orphan is pursuing an apprenticeship or studies. According to BGE 148 V 334, unlike the AHV pension, the 2nd pillar pension remains in place even if the orphan's income exceeds the maximum AHV old-age pension (CHF 2,450 per month in 2024). The rules set out in art. 49bis para. 3 of the Old Age and Survivors' Insurance Regulations (AHVV) are not applicable to occupational benefits. This is due to the different purposes of the 1st and 2nd pillars. Unlike the AVS, the 2nd pillar does not aim to cover vital needs, but rather to maintain the standard of living.

### 3.3. Renting a property purchased with 2nd pillar funds

When a lease agreement is concluded for an indefinite period and can be terminated with three months' notice, the landlord **retains control** of the property and the possibility of occupying it again within a reasonable period of time. In such a case, the lease is not equivalent to granting a third party a right economically equivalent to a transfer of ownership, which would oblige the person who acquired the property with occupational benefits funds to reimburse the PF. Thus, when an insured person has occupied his or her property and subsequently decides to rent it out, he or she is in principle only obliged to repay the funds in characterized cases, such as the granting of a usufruct or the conclusion of a very long-term, non-terminable lease for a symbolic rent (BGE 147 V 377).

### 3.4. Distrainability of funds held in a vested benefits institution

A vested termination benefit is subject to distraint (or arrest) when it comes due. Naturally, it is due when it is paid in cash to the insured person. A vested termination benefit held by a vested benefits institution may be withdrawn no earlier than five years before the reference age. However, the insured person may keep these funds in the institution for up to five years after the reference age (since January 1, 2024, subject to the transitional provisions, provided the insured person demonstrates that he or she is gainfully employed). As long as the insured person has not requested payment of these benefits in cash, the funds held in the vested benefits institution hence remain exempt from distraint (BGE 148 III 232). In any case, the benefit may be distrained once the maximum age has been reached.

### 3.5. Rate of interest on arrears, subrogation or compensation

The question of **interest on arrears** arises, for instance, in the case of a retroactive pension payment or a late payment of contributions. In the absence of regulatory provisions, this interest amounts to 5% per annum. In BGE 149 V 106, the Federal Court ruled on a case in which the pension fund regulations provided for the absence of interest on arrears in favor of the insured person in the event of retroactive payment of a pension. The Federal Court ruled that such a provision was not applicable, considering that the pension fund could not provide in its regulations for a rate of interest on arrears lower than the minimum BVG interest rate.

In cases where an insured person who has changed PF is recognized as invalid, it is not always easy to determine immediately which PF is competent for paying the disability benefits. Under mandatory insurance, the insured person's last PF must pay an advance benefit. Once it has been determined which PF is responsible for benefits, the latter reimburses the advance benefit to the PF that paid it. After denying the right to interest on arrears on this claim (BGE 145 V 18), the Federal Court recently ruled, in BGE 147 V 10, that in addition to reimbursement of the amounts paid, the PF may claim interest on subrogation or compensation. Such interest is equal to the minimum BVG interest rate, plus 1%, to compensate for the fact that the PF providing the advance benefit was unable to obtain a return on the amounts paid.

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## The mandatory minimum BVG interest rate has been raised to 1.25%.

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### 3.6. Overcompensation calculations

For mandatory occupational benefits, the coordination of insurance benefits is regulated by law. For **non-mandatory occupational benefits**, the PF is free to define the rules applicable to overcompensation. However, it remains bound by the **concepts of social insurance and general principles**. In this case, a regulation provided for an overcompensation calculation that took into account a full 1st pillar pension in all cases, even for insured persons who do not receive a full 1st pillar pension due to a lack of contribution years. The Federal Court ruled that such a provision was unfair, contrary to the objective pursued (i.e. to avoid overcompensation) and in breach of the principle of equal treatment (BGE 147 V 146).

### 3.7. Examination of the legality of remediation measures

It is not always clear whether a dispute should be processed by the court appointed by the canton to rule on occupational benefit disputes (art. 73 BVG), with the possibility of appeal to the Federal Supreme Court, or whether it should be submitted to the supervisory authority, with the possibility of appeal to

the Federal Administrative Court and then to the Federal Court. In a case where a pension fund was claiming more than CHF 6 million in remediation contributions from a former affiliated employer, the Federal Court ruled that the following delimitation of jurisdiction had to be observed: the supervisory authority is responsible for examining the legality of the remediation measures, while the occupational benefits court is responsible for enforcing the remediation, and in particular for recovering unpaid remediation contributions from an employer (decision 9C\_244/2021, intended for publication).

### 3.8. Continuation of insurance under Art. 47 BVG

In its decision 9C\_430/2022, the Federal Court addressed the scope of Art. 47 BVG, which allows insured persons who cease to be subject to mandatory insurance to maintain their occupational benefits coverage with the Substitute Occupational Benefit Institution to the same extent as before. In this case, this institution had held that this option was not available to an insured person who had reached the age of

58 and that, in any case, the application of this provision was limited to two years, as stated in particular by the Swiss Tax Conference. On the contrary, the Federal Court concluded that an insured person who, after reaching the age of 58, ceases to be subject to mandatory insurance may continue to be insured under the conditions set out in art. 47 BVG, without any two-year limit. Administrative directives and circulars mentioning such a time limit did not create new rules of law and were not binding on the judge.

## 4 Conclusion

In addition to these few changes, we will be keeping a close eye on developments in occupational benefits over the next years, the most significant of which is the BVG 21 reform.



**Vincent Carron**  
Partner  
Certified Specialist SBA Labor Law  
[vincent.carron@swlegal.ch](mailto:vincent.carron@swlegal.ch)



**Michael Hess**  
Counsel  
Certified Specialist SBA Labor Law  
[michael.hess@swlegal.ch](mailto:michael.hess@swlegal.ch)



**Dr. Christine Beusch-Liggenstorfer**  
Of Counsel  
[christine.beusch@swlegal.ch](mailto:christine.beusch@swlegal.ch)



**Wilfried Dovetta**  
Associate  
[wilfried.dovetta@swlegal.ch](mailto:wilfried.dovetta@swlegal.ch)

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**Schellenberg Wittmer AG**  
Rechtsanwälte

**Zürich**  
Löwenstrasse 19  
Postfach 2201  
8021 Zürich / Schweiz  
T +41 44 215 5252  
[www.swlegal.com](http://www.swlegal.com)

**Genf**  
15bis, rue des Alpes  
Postfach 2088  
1211 Genf 1 / Schweiz  
T +41 22 707 8000  
[www.swlegal.com](http://www.swlegal.com)

**Singapur**  
Schellenberg Wittmer Pte Ltd  
6 Battery Road, #37-02  
Singapur 049909  
T +65 6580 2240  
[www.swlegal.sg](http://www.swlegal.sg)