



Executive Benefit
Solutions



Designing Nonqualified Deferred Compensation Plans To Competitive Advantage

*A Guide to Understanding What
You Need to Know and Why*

Business owners, professionals and senior managers today shoulder a burden of knowledge that would have buckled the knees of executives a decade ago.

In this information age, we have had to become our own best advisors on technology, economics, politics, marketing, globalism. An endless list. And, now, retirement planning. Perhaps one of the heaviest individual burdens of all.

Confusing terms pop up everywhere in our field: Wealth Accumulation vs. Retirement Adequacy. Defined Benefit vs. Defined Contribution Plans. Qualified vs. Nonqualified Plans. Tax-Advantaged vs. Tax-Deferred. Highly Compensated vs. Rank and File Employees.

The mission of this brochure is to demystify the foreign language of nonqualified deferred compensation (NQDC) plans—translate and simplify it—so that you can speak with authority in top-level company meetings. Please do not misunderstand. Even the smartest CEOs and HR executives stumble over the unfamiliar vocabulary of nonqualified plans.

Many millions of dollars are accumulating and growing in NQDCs, held by the Fortune 1000 for the retirement needs of their highly compensated executives. These plans offer an essential tool to enable executives to reach retirement goals and overcome restrictions on what can be contributed to qualified plans.

In reality, NQDC plans are quite straightforward; they are simply a way for companies to recruit, retain, and reward top talent, and for highly compensated executives to save money on a tax-deferred basis. Questions arise, however, in practical application. In our consulting work, we often hear company leaders ask:

- Where do I find a quick tutorial on NQDCs?
- Why do consultants recommend one plan feature over another?
- What is the real cost of implementing a plan?
- What assets do companies use to fund their plans?
- How complex is plan administration?

The discussion that follows will help lay the foundation of understanding and appreciation for effective design, security, funding, and administration of nonqualified plans.

Let's begin.

Inside NQDCs

NQDCs emerged more than a decade ago due to the cap put on contributions to government-sponsored retirement savings plans. High-income earners were unable to contribute the same proportional amounts to their tax-deferred retirement savings as low-income earners.

When the enactment of the Employee Retirement Income Security Act (ERISA) took place in 1974, an inequity between high- and low-income earners resulted. Companies began to offer savings plans considered “nonqualified.” The word nonqualified simply means that the plan is not subject to the requirements of a qualified plan regulated by ERISA.

NQDC plans can be designed for a select group, again, not subject to ERISA requirements, giving high-income earners a steadfast way to defer the actual ownership of income to avoid income taxes on earnings, and achieve tax-deferred investment growth.

NQDC plans are used to attract, retain, and reward top talent. In fact, 98 percent of companies responding to the 2020Newport/Plan Sponsor Executive Benefit Survey indicated they had at least one nonqualified plan. These plans have also begun to penetrate the small business sector in recent years.



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No other executive benefit delivers so much to participants at so little cost to employers.

Consequence of ERISA

Understandably, ERISA was enacted to protect rank and file employees from potential abuses by senior management and, in that regard, ERISA is a success. But the unintended consequence is discrimination against the very executives tasked with leading the corporation. Arguably, senior executives are highly compensated because they deliver relative value to the business enterprise, its ability to grow and profit.

High-income earners also assume greater risk and exposure to corporate liability in the course of their employment. Higher salaries, bonuses, and retirement incentives such as the NQDC plan help to offset this risk factor.

Plan Eligibility

ERISA rules stipulate that the highly compensated are not allowed to contribute any more than \$23,500 into the company's 401(k) (\$31,000 if you are over 50) in 2025. NQDC plans can be offered only to those the company deems eligible. ERISA clearly states that the plan must be intended for a "select group of highly compensated and/or management employees."

Companies must continue to find ways to attract and retain these highly valued contributors to succeed and create positive returns for their shareholders. The stakes have never been higher. An entire generation of corporate leaders is reaching retirement age—the boomers. Those born after 1964, Generation X, are fewer in number, and Generation Y (or the millennials) are still being groomed for top leadership spots in larger corporations. Recruitment of top talent in a limited labor pool is fiercely competitive and will remain so for the immediate future.

As a rule of thumb, highly compensated is defined as employees who earn in excess of \$160,000 in annual salary, although the Department of Labor guidelines do not set forth a specific definition. To be safe, companies should only provide this benefit for those employees earning over \$160,000 annually and only for up to 10 percent of the total employee population (1,000 employees permits 100 employees to participate in the plan).



Bridging Retirement Gaps

As mentioned earlier, retirement plans deemed to be “qualified” under ERISA include the ubiquitous 401(k) plan among others. The limits governing how much a person may contribute to a 401(k) plan make it only marginally valuable to highly compensated executives who could never accumulate retirement savings as a significant percentage of their annual compensation solely through their 401(k).

Let’s create a hypothetical executive named Joe Smith, who just turned age 50. He earns \$250,000 per year as a senior analyst with a financial firm.

He is in line for a 4 percent annual wage increase. Assume that he defers 15 percent of his income with a 50 percent company match, earning 7 percent per year.

Under the 401(k) limit, Joe can only accumulate 12.4 percent of his final income, compared to Jim Johnson, who earns \$50,000 per year who will receive the same increases, but can accumulate 47 percent of his final income. And, Jim will receive significantly higher Social Security benefits [See Chart I below].

Retirement Benefit as a Percent of Final Compensation

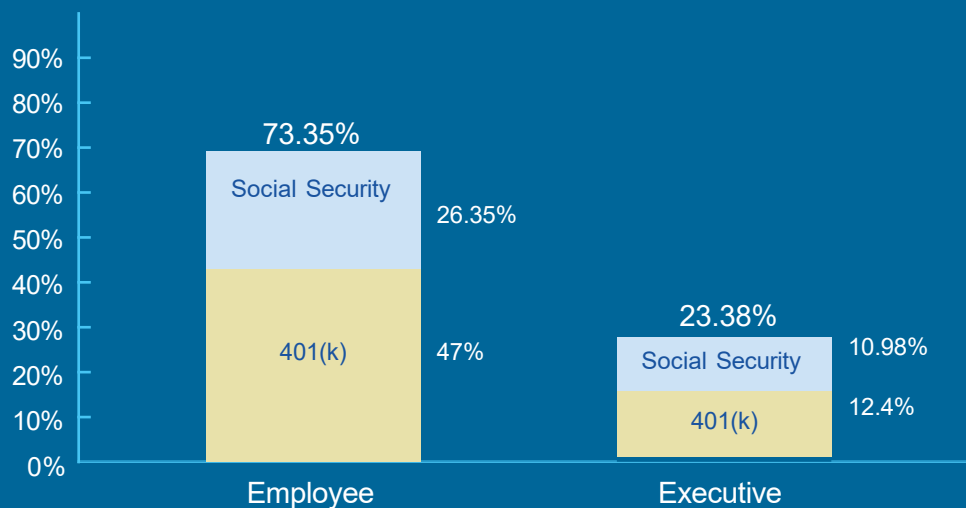


Chart I

As you can see above, ERISA restrictions create a substantial retirement gap for high income earners, one that can and should be narrowed with the benefit of a restorative NQDC plan.

First, however, begin with a clear and priority-specific plan design.

NQDC Objectives

Establish your plan objectives at the outset. A nonqualified plan can help a company attract, retain, reward, and motivate key employees, but what is the priority? Invest the time, do your homework, and select the precise design features to meet your company objectives. Here are some guidelines:

Attract, Retain, Reward, Motivate All nonqualified compensation plans can help a company attract, retain, reward, and motivate key employees. However, the plan can be structured to emphasize one of these areas over another.			
Attract	Retain	Reward	Motivate
• Deferral of signing bonus • High deferral limits • Flexibility	• Company contribution with vesting schedule • Retirement incentives	• High deferral limits • Flexibility	• Performance-based company match on contribution • Company stock

Moving Parts of Nonqualified

Before we get into the plan design, funding, and security issues, it is important to understand how all of the components of nonqualified plans work. Technically speaking, these components are separate and independent but pulling them together makes for a more efficient and attractive plan to both the participant and company.

Chart III illustrates the components divided by a “separation wall.” The separation wall divides the participants benefits (left side) from how the company decides to fund and secure the plan. As discussed earlier, these plans are technically unfunded; however, many companies informally fund and secure their plans. We will discuss these components in more detail in this report.

Flexible Plan Design

Flexibility is the cornerstone of today's NQDC plan. A typical design permits annual deferral elections of salary and/or bonus compensation to help meet the participant's future lifestyle needs. With the uncertainty surrounding social security and the certainty of rising healthcare costs, NQDCs continue to do the heavy lifting in retirement planning.



Chart III

The company is the architect in designing NQDC plans and has complete latitude in its selection of plan participants. As long as this benefit is provided only to a "select group of highly compensated and/or management personnel," companies can explore design options with significant flexibility, with special emphasis on key individuals. For instance, plan design can offer participants the ability to:

- Defer up to 80% of salary, 100% of bonus compensation (80% based on withholding requirement to cover FICA, medical insurance, and other withholdings);
- Select different annual payout schedules for every year of deferrals [see Chart IV];
- Vest 100% of employee's deferrals immediately;
- Withdraw monies while still employed without penalties [see Chart IV];
- Choose many benchmark investments (growth, fixed income, 401(k), company stock).

Finally, consider the addition of performance incentives to your plan to further safeguard against complacency or ineffectiveness, thus protecting the underlying vitality of corporate productivity.

Catching the Dream

Let's revisit our senior analyst, Joe Smith. Joe's high-schoolers will start college in 2025 and 2027, so he has allocated 20 percent to each child's college account to pay out benefits over a four-year period. After Tiffany and Chase are out of college, and Joe readies for retirement, he wants to indulge in his passion for sailing.

He decides to purchase a 45-foot cruising catamaran and starts saving by allocating 10 percent of this year's contribution to his retirement dream account. The chart below illustrates how he can elect to defer compensation to make his dream happen or handle an unexpected life event. Here, he can pick a different asset allocation than used for his children's college funds.

Now focusing on retirement, Joe sets up two buckets: one to pay a portion of his accumulation in a lump sum, simply because he wants to take some money off the table. After all, he is an unsecured creditor of the company (more about this later); the other bucket is for pay out over a 15- year

period. Next year, he can add to these buckets or establish new ones.

As an aside, another compelling feature of deferred compensation design is the ability to re-defer these elections. Under IRS Code §409A, an executive can re-defer as long as he makes the change one year in advance of the scheduled distribution and re-defers for at least five years.

For example, if Joe decides to change receipt of funds for his catamaran account from 2026 to a later date, he can do so as long as the re-deferral election is made by December 2025, and the new distribution date is no earlier than 2030. Joe can re- defer as long as he follows the re-deferral guidelines under §409A, which state a deferral for a minimum of five years from the original elected distribution.

Focus on the approach in Chart IV.

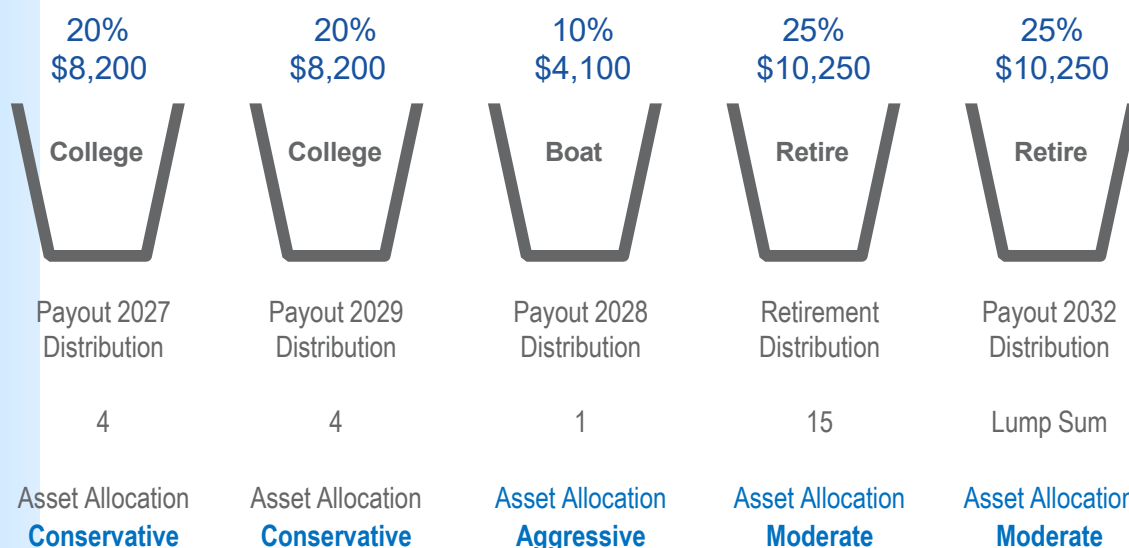


Chart IV

Pre-Tax vs. After-Tax Savings

One reason why NQDC plans are widely popular is their outright savings power. Consider these benefits beginning with the ability to:

- Defer far more pre-tax compensation than possible in a 401(k)
- Reduce current income tax liability by a significant degree
- Choose and use a variety of tax-advantaged investment options
- Realize higher equivalent rates of return compared to after-tax earnings
- Enjoy penalty-free scheduled distributions while employed
- Receive lump sum or installment distributions upon termination or retirement
- Elect payout timing and/or method by deferral year

Most of all, participants can easily meet short-term and long-term financial goals across of spectrum of life-changing events. We zeroed in on Joe's dream to sail to the Virgin Islands on his catamaran. But what if you needed to care for a suddenly ill parent or a catastrophic event demands immediate cash? Could you marshal the money? Joe can do it because of the hardship rules under §409A.

Without a doubt, tax-deferred savings without government limits make nonqualified plans far more attractive than mere personal savings after-tax. [See Chart V].

Pre-Tax vs. After-Tax Savings

	After-Tax Savings (Not Tax Deferred)	Pre-Tax Savings (Tax Deferred)
Annual Savings	\$20,000	\$20,000
Taxes on Savings	40%	0%
Estimated Taxes	\$8,000	\$0
Net Investment	\$12,000	\$20,000

Investment Returns are Tax-Deferred As Well

	After-Tax Savings (Not Tax Deferred)	Pre-Tax Savings (Tax Deferred)
Annual Invested	\$12,000	\$20,000
Investment Return	7%	7%
Annual Earnings	\$840	\$1,400
Tax on Investment	40%	0%
Net Account Earnings	\$504	\$1,400

Chart V

The power of tax-deferred compounding also gives NQDCs a muscular nature. Chart VI illustrates the advantage of compounding money on a tax-deferred basis versus investing after-tax. Note: The after-tax cash in 15 years (\$322,657) is \$68,528 more than a personal investment (\$254,129) outside of the plan.

Most plan designs allow participants to draw from their account balances over a period of time, which facilitates tax-deferred growth on the unpaid balance. If the participant selects installment distributions, the benefit of deferring is even greater. [See Chart VI below]

Pre-tax savings of \$20,000 annually for 15 years at 7% would grow to \$537,761 before tax and \$322,657 after tax.

\$68,529 more than would have accumulated using taxable savings.

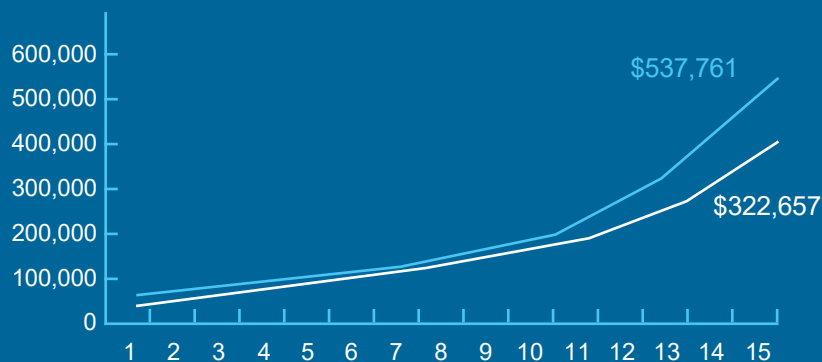


Chart VI

Notice the pay-out growth on the account balance of \$537,761 over 5, 10, or 15 years, assuming 7 percent growth.

Net Payouts

Over 5 Years: \$367,724

Over 10 Years: \$429,337

Over 15 Years: \$496,625

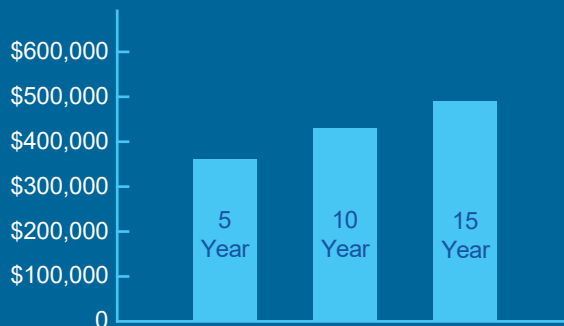


Chart VII

Elusive Higher Returns

For after-tax investing (based on a 40% tax rate) to achieve a return equivalent to pre-tax investing, the after-tax investment would have to earn a higher return. At this time of painfully low yields, it is unrealistic to expect high return, let alone double- digit returns.

If your tax-deferred of return is:	You'd need this rate without tax deferral
6.00%	10.00%
7.00%	11.67%
8.00%	13.33%
9.00%	15.00%
10.00%	16.67%

Chart VIII

The Funding Imperative

Once your plan design is complete, other challenges lie ahead. Plan funding demands special attention. Most companies informally fund plans to mitigate risk by using corporate-owned life insurance and/or mutual funds. In fact, analysts estimate that unfunded benefit obligations are approaching trillions of dollars in corporate America. Payment of these obligations present a potential drag on the national economy already stopped in its tracks by so many unexpected financial obstacles.



Informal vs. Formal Funding

In informal funding, deferral amounts are recorded as a liability on the company's balance sheet. As they grow over time, these deferral amounts can become a significant liability to the company. To offset this liability, companies often choose to informally fund their NQDC plans.

Compared to qualified retirement plans, which must offer fully secured benefits held in, and funded by, assets contributed by a tax-exempt trust, nonqualified plans must be unfunded. The money deferred by the participant goes into the company's general account and cannot be set aside to guarantee the plan's future obligations. Should the corporate plan sponsor become insolvent, the amount deferred is considered part of the company's assets and is subject to the claims of creditors. This is one of the risks assumed by a participant in an NQDC plan.

COLI Popularity

COLI products are popular because they provide certain tax advantages to the corporation. Any investment gains, dividends, or interest earned within a COLI insurance contract, held until maturity, are non-taxable to the corporation. Conversely, if the company seeking to informally fund its NQDC plan were to choose mutual funds, most gains would be taxable.

At this stage, the company should undergo an analysis to compare the cost of insurance with the taxes paid on

the mutual fund investment. Ideally, a plan sponsor should select the informal funding method that best offsets benefit liability growth created by ongoing contributions and earnings credited to participant accounts.

Failure to use the most appropriate funding method over time can result in negative economic consequences for the plan sponsor. In less severe situations, a plan sponsor may be forced to pay unnecessary or avoidable income taxes or life insurance costs. As a plan grows in size, these costs can be significant.

Even though COLI has been popular due to its tax-free build-up, it has declined in prevalence over the years due to its complexity and long-term hold requirement.

Formal funding, required in 401(k) plans, occurs when a company sets the money or investment outside the reach of its general creditors. The company cannot touch the monies earmarked for pay out under the plan. Should the company become insolvent, creditors cannot make claims against monies in formally funded programs.

Because nonqualified plans are informally funded, the plan sponsor takes a portion or all of the money it received from participant deferrals and invests it to ensure those funds are available when payout is required.

The NQDC sponsor also prefers to hedge these liabilities with an asset. Typically, companies invest in a whole array of vehicles to build an asset, but most prevalent are mutual funds or variable universal life insurance contracts owned by the company, termed COLI or corporate-owned life insurance.

According to the same Newport/Plan Sponsor Study, 46 percent of companies funded with mutual funds versus 63 percent with COLI (some companies use a combination). With a number of registered investment advisors entering the nonqualified field, they are better able to structure portfolios of investments and use other asset classes like ETFs to lower the tax burden and match assets to liabilities. What is happening more is a blending of COLI, mutual funds and other assets.

If the plan allows the participant to defer income into mutual funds similar to the 401(k) plan, then the company records the amount deferred, plus the pre-tax earnings from the mutual fund [Chart IX].

To offset that liability, the company would invest the deferrals into COLI insurance contracts with a similar mutual fund investment. Note the impact of recording the COLI asset on the company's books versus a company funding with mutual funds. [See Chart IX].

In order to earn the gains from COLI, the policy must be held until the participant dies, which could be several years after retirement.

Cost of Taxable Investment (Non-COLI)

Cost (COLI)

Year	Deferred Tax Expense	Current Taxation		Annual Income Tax	Total Tax Liability Cost	Insurance (Cost)/Benefit	Incremental Benefit
		Tax on Interest & Dividends	Tax on Long-Term Capital Gain Dividends				
1	(33,306)	30,143	21,501	(51,644)	(89,950)	(19,981)	64,969
2	(40,945)	62,001	72,278	(134,279)	(175,224)	(61,388)	113,836
3	(42,855)	95,793	131,509	(227,302)	(270,157)	(117,312)	152,845
4	(44,984)	131,350	193,559	(324,909)	(369,893)	(165,467)	204,426
5	(47,273)	168,711	258,715	(427,426)	(474,699)	(236,481)	238,218
6	(49,677)	207,972	327,186	(535,158)	(584,835)	(317,855)	266,980
7	(52,203)	249,229	399,138	(648,367)	(700,570)	(375,302)	325,268
8	(19,901)	261,145	452,543	(713,688)	(733,589)	(357,457)	376,132
9	(14,938)	273,477	478,817	(752,294)	(767,232)	(224,731)	542,501
10	(15,480)	285,790	500,360	(786,150)	(801,630)	(242,403)	559,227
Total	(361,526)	1,765,611	2,835,606	(4,601,217)	(4,962,799)	(2,118,377)	2,844,402

Assumptions:

- Sample Census - 20 Participants eligible
- Projected Deferrals - \$2,854,526
- Participation Rate - 50%
- Investment Rate - 8%
- Retirement Payout Duration - 10 Years
- Corporate Tax Rate:
 - 70% Corporate Dividend Exclusion
 - Securities classified as Trading under FAS-115
- Deferral Period - 7 Years
- Investment Rate - 8%
- Mortality Age - 80
- Retirement Age - The later of age 65 or 7 years of participation
- Withdrawals - Equal to Current Taxes and Retirement Benefits
- Trust Deposits - Equal to Projected Employee Deferrals

Chart IX

The Secure Rabbi

It is one thing to fund your plan; it is another to protect it. In most cases, companies that informally fund their plans also place their investments in an irrevocable trust, referred to as a Rabbi Trust. This trust protects participants by preventing the company from using those assets for any reason other than to pay benefits in the nonqualified plan.

In fact, 83 percent of companies in the Newport/Plan Sponsor Executive Benefit Study use Rabbi Trust to provide participants with benefit security. With a Rabbi Trust, assets are protected against corporate change of control, management's change of heart, or changes in the financial condition of the company, short of bankruptcy.

The Rabbi Trust originated when the IRS determined that an irrevocable trust established for a rabbi by his congregation was not subject to current income taxation of the assets. Those assets were regarded as subject to the claims of the congregation's general creditors.

Many tax practitioners looked at this private letter ruling and thought it to be the ideal device to protect an executive's nonqualified assets in the event of a change in control of the company, a change in the company's policy with regard to paying benefits, or a change in the company's financial condition short of bankruptcy. Official guidelines were issued by IRS in 1992 codifying its use as a benefit security device.

Overlooked Financial Impact

All retirement plans generate a financial impact on the plan sponsor. The expectation of payout on participant deferrals and interest earned create a liability, which is offset by assets created from deferred compensation and the investment income. While it seems simplistic, these figures must track with each other. If not, the mismatch can become a hard hit on the corporate balance sheet.

When liabilities exceed assets, the company must make up the difference. Often, executive participants do not realize that, as they defer salary, they incur cost to their companies. When an employee receives current compensation, the company takes on a net expense equal to the after-tax cost of paying the compensation.

Let's simplify. The actual cost of a \$100,000 payment in current compensation to a company in the 40 percent tax bracket is \$60,000. The company deducts the payment and saves \$40,000 in taxes. By offering the employee the opportunity to defer the \$100,000, the company is immediately liable for the \$60,000, or the after-tax cost of current compensation.

However, because the company credits the employee's deferred compensation account with the full \$100,000 deferral, it incurs an additional current cost, further increased when it credits the deferred compensation account with a pre-tax return.

Under a deferred compensation plan, the company actually gives its executive a number of investment choices. Let's assume the executive selects an equity mutual fund, which returns 8 percent. At year's end, the company's liability is now \$108,000.

The company has the flexibility to decide how to invest the employee's deferrals to hedge the company's liability. Assuming the company wants to informally fund the plan, there are two directions for this asset:

The company invests the \$100,000 in a mutual fund selected by the participant. Assume fund return mirrors the employee's selection and earns 8 percent on the invested asset. However, because gains earned are taxable, the effective return for the company is less than 8 percent.

The company invests \$100,000 in a COLI contract. Investment gains, interest, and/or dividends earned within an insurance contract, held until maturity, are non-taxable. Assume the company earns a 8 percent annual return within the contract, notwithstanding the cost of insurance, then the assets track plan liabilities.

Additionally, because the cost of insurance in a well-designed COLI product is generally less than the avoided tax, COLI is widely used by tax-paying entities.

Although COLI holds the advantage over mutual funds for most tax-paying entities, keep in mind that policies must be held until the death of the insured to realize the non-taxable return. Therefore, a key financing issue with COLI is creating the liquidity to pay benefits. Although the policy cash value can be accessed through policy loans or cash withdrawals to pay benefits, this can be an inefficient source of funds.

In short, when using COLI to hedge deferred compensation liabilities, companies should consider the trade-off between tax efficiency and liquidity.

COLI also works best when the plan has continuing growth in liabilities, as new deferrals can be used to fund future benefit cash flows.

Thus far, we have discussed plan design, funding, and security. Another critical aspect of an effective nonqualified plan is the way in which it is administered by the company.

Outsourcing Plan Administration

You can design a plan well, secure it effectively, and fund it efficiently, but if plan administration is flawed, serious consequences can emerge. Simply defined, plan administration is the steady stream of gathering data, analyzing information, managing detail, and communicating information. Depending on the number of participants, and the complexity of the plan, this process can overwhelm companies without a full-time staff dedicated to the process.

Most companies outsource plan administration because retirement plans require focused attention, a certain expertise, and established systems. Few companies maintain staff whose core competency centers on retirement planning. Although not

subject to the ERISA rules that govern qualified plans, nonqualified plans are subject to specific reporting and filing requirements.

These requirements call for annual enrollment, proper communication of plan balances and account status to the participants, and accounting and financial reports for the sponsors. Online administration with dedicated web sites is a convenient and practical way to allow participants to enroll, make certain elections, and check balances 24/7.

From the following list, you can familiarize yourself with the full extent of NQDC administrative services necessary to maintain best practices:

- Detailed recordkeeping with the periodic production of benefit statements
- Coordination of informal funding requirements (deposits via COLI premium payments, invoices, auditing, reconciliation, reporting, monitoring of informal funding adequacy)
- Disclosure of plan liabilities and related assets for financial reporting
- Accessibility of online enrollment and enrollment support services
- Preparation of clear and consistent plan communication materials
- Daily valuation and Internet access to participant account balances
- Ability to track assets to liabilities on a daily basis
- Proxy disclosure and SEC §16(b) reporting, as necessary
- Toll-free service center to assist participants with questions regarding the plan
- Development of a customized administration manual
- Preparation of an Annual Report Card summary
- Highly secure and independently audited systems

These requirements are crucial to the delivery of high standards of practice in plan administration. Fortunately, there are now many alternatives that provide high quality services including 401(k) providers, payroll companies like ADP, and third-party administration only firms like Deferral.com. Companies are finding it more cost effective and more coordinated to use such providers, compared to boutique firms which have specialized in selling COLI funding strategies.

Executive Benefit Solutions (EBS)

The principals and professional staff of EBS have worked together in the executive compensation and benefits market for more than 20 years, producing positive and measurable results for clients. By melding long-standing relationships with thinkers and builders in the field, EBS has created a rock-solid formation of talent and technology to push best practices in executive benefits to a higher elevation.

Global and domestic clients appreciate our market reach, experience in dozens of business sectors, thorough knowledge of executive benefits, and our ability to cross-fertilize the insight and innovation of our strategic partners.

EBS's competitive advantage is not **what** we do but **how** we do it we think critically about your needs, anticipate issues, create alternatives, and continually monitor actions for optimal results.

EBS delivers world-class service, consulting, plan design structure, funding strategies, asset management, and full-service plan administration. Our consultants, backed by an industry edge technology platform, provides overarching support to manage and oversee plan design, investment portfolios, benefit security, participant communication and education for all types of executive benefit plans.

EBS corporate offices are headquartered in Boston, with regional offices strategically located throughout the United States. We welcome your call to **617.904.9444** for more information or email our principals listed below.

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