Unfiltered 401(k) Views On What Is Going On Now

By Ary Rosenbaum, Esq.

For years, dating back to college and law school, I had an unfiltered view of things. I have strong opinions and the opinions are based on my experiences. The problem, sometimes is that opinions do bother people and I certainly know that it might rub people the wrong way. However, I'm north of 50 and I can't change and if that keeps me out of speaking at some major events, so be it. Here are some unfiltered views on some of the topics of today.

Why would you offer an ESG fund, anyway?

I drive a Prius V, I recycle, and I like to eat Impossible Burgers, but I don't know why there is a push for ESG (environmental, social, and governance) funds within 401(k) plans. While the push and pull of ESG funds will depend on the inconsistent guidance of a Department of Labor (DOL) under the control of a Democrat or Republican President, I just think it's a solution looking for a problem. In my mind, the goal of a 401(k) fund lineup is maximum return and that's why ESG funds would be an investment option since they often lag the market. I understand the interest in ESG funds because it's the idea of putting money to promote a certain societal goal, but that is something to be reserved for someone's other investment. I liken an ESG fund to a sector-type fund, except for the fact that between fund companies, there is a debate as to what an ESG investment is. What one fund company might think a company is an ESG company to own a position in, that might be different from what another company invests in. Until the use of ESG funds is allowed under a DOL regulation, it's not something I would recommend.

PEPs is a slow process of building

If you build it, he will come. That was the lesson of the movie, Field of Dreams. The problem is that if you build a Pooled Employer Plan (PEP), the adopting employers may not come. PEPs aren't much different than the old Open Multiple Employer Plans (MEPs). Essentially, PEPs are Open MEPs that have the fiduciary protection of a Pooled Plan Provider (PPP) and are codified in law. The PEP building is. extremely slow and you're mostly dealing with adopting employers that have no plan or little assets. While a state-mandated retirement savings program will be a great push to get adopting employers because most companies would rather deal with a private 401(k) PEP than a government IRA program, it's going to take years and years to actually grow a PEP to a size where there are actual savings to an adopting employer. The big sales pitch for a PEP is fiduciary protection because most PEPs won't be large enough to offer real plan expense savings. While some people take a very dim view of PEPs and there are some that just want to put all their plan business into a PEP, I'm in the middle. While I run some PEPs as a PPP and created others for other PPPs, I think there are just too many PEPs for the marketplace. Thankfully, I haven't seen plan providers cut their fees low on PEPs, which was a concern that I had. Lowering fees to chase assets is a never-ending chase. There is nothing wrong with focusing on PEPs, but too much focus to the detriment of single-employer business is a bad idea. You will see PEPs close down their doors because there aren't enough assets to make it worthwhile for the advisor or the third-party administrator (TPA) that offer it.

Stand out during these volatile times

As I write this, the stock market is currently in bear territory. These are difficult times for the participants who see their account balances plummet. While common sense would dictate that this pullback and dollar cost averaging will help participants in the long run, common sense and participant behavior usually act inversely. During these times as an advisor or a TPA, this might be the time to stand out and offer help to your clients by offering guidance on what is going on out there. It's a time like these that plan sponsor clients need to know you are there to help.

Some of this litigation is absurd

If you know anything about me, you will know that when I started my practice in

2010, I was a huge supporter of fee disclosure and against excessive 401(k) administrative fees. The fee disclosure regulations in 2012 gave plan sponsors the right to see the fees being charged against their plan when they had their fiduciary duty to only pay reasonable plan expenses. It also caused fee compression and a rise in class action litigation against larger plan sponsors as well as mutual fund companies that offered their own funds in their 401(k) plans. Recently, one law firm filed about a dozen lawsuits targeting 401(k) plans that offer a Target Date fund through Blackrock. These 401(k) plans offered the BlackRock LifePath Index Funds. These Target Date Funds received the highest rating in the Morningstar 2022 Target-Date Landscape report. Despite this high rating, the lawsuits argue that plan fiduciaries failed to consider the BlackRock TDFs' return potential and instead only "chased the low fees" charged by the funds. The lawsuits allege that these BlackRock funds don't match up the returns with offerings by Vanguard and T. Rowe Price, which is absurd because the BlackRock funds have a different glide and are passive, as compared to these other offerings. I think this litigation is absurd and is grasping at straws. Federal courts are getting tired of so many fee cases on the docket and I think most cases will get thrown out because Federal courts are not going to want to second guess what a plan sponsor would do in a situation where they are debating using a target date fund that is passive versus one that is active, both with different glide paths. Some of these cases remind me of the scene in Donnie Brasco, where members of the crew were hammering parking meters for the loose change because they needed to make their take for the week. Sometimes, class action litigation on the 401(k) side is just a different method to secure a quick settlement. I just don't think these cases are going to be slam-dunks for the plaintiffs and the law firm that decided to take this case.

You have to be crazy, pushing Crypto

I invest in Bitcoin and Ethereum, so I'm not going to say Crypto is some form of Ponzi scheme. What I will say is that despite the dreams of providers that want to offer that option with a 401(k) plan, it's just a bad idea trying to push this for your plan sponsor clients. A qualified 401(k) plan is heavily regulated with loads of liability for a plan sponsor, so why offer a volatile unregulated investment as a plan investment option, especially with the DOL having its strong misgivings about 401(k) crypto offerings? I don't think that plan participants have the stomach to deal with an investment that has such wild swings in gain and loss. Until the DOL offers guidance that would give its blessings for Bitcoin in a 401(k) plan, I think it's a bad idea.

Conferences will need to differentiate themselves with a struggle of attendance

I started That 401(k) Conference in 2018 because I was no longer getting invitations to speak at major events and I was trying to develop an event of my own that would be different. Speaking at so many industry events over the year, both large and small, I thought the biggest common denominator is that they were held at hotels that served what I called "rubber chicken." So I decided to hold small regional events at Major League Baseball and National Football League Stadiums, where we would do a stadium tour and a meet and greet with former sports greats. We've held more than 20 of these events over the years and I've been to parts of the country that I never thought I would go to like Kansas City and Seattle. I've had the pleasure of welcoming Hall of Famers such as Tony Oliva and Andre Dawson to these conferences. Despite the initial success of attendance at the events, I don't have to be a genius and notice that attendance has struggled after COVID. Whether it's my events or these large national events, I'm convinced that a large part of the audience will never go back to live events, even if COVID was eradicated tomorrow. To spur attendance, I think anyone hosting a plan sponsor or plan provider event should think about what they can do to be unique. One of my criticisms of synagogues, when I was Vice President at one, is that they would host the same events, a journal dinner, a casino night, and a plea for donations during the High Holidays. So I had a comedy show with Sal The Stockbroker from The Howard Stern Show that raised money from people who weren't members. I've been saying for years that retirement plan events should be unique. I was happy to see Barry Ritholtz say something similar in a recent article of his. It's hard to draw people to attend live events and rubber chicken won't do it. We will be back with live events for That 401(k) Conference in cities like Detroit and Arlington in 2023, as well as a virtual National Conference in January that you can attend for $2.23 (cheap plug here).

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