PART I. DISCUSSION

CHAPTER 1. OVERVIEW OF INDEPENDENT CONTRACTOR LAW

§ 1:1	Introduction
§ 1:2	General rules for determining independent contractor status—Common-law tests—Right-to-control test
§ 1:3	— — Economic realities test
§ 1:4	— — Hybrid test
§ 1:5	—Statutory tests
§ 1:6	Employee versus independent contractor status under federal tax laws—IRS test
§ 1:7	—Section 530 Safe Harbor
§ 1:8	—Statutory employees and nonemployees
§ 1:9	—IRS audits
§ 1:10	—Penalties
§ 1:11	—Classification settlement program
§ 1:12	Employee versus independent contractor status under other state and federal laws
§ 1:13	—Workers' compensation insurance
§ 1:14	—Fair Labor Standards Act
§ 1:15	—National Labor Relations Act
§ 1:16	—Employee Retirement Income Security Act
§ 1:17	—Employment discrimination laws—Standard antidiscrimination statutes
§ 1:18	——Section 1981
§ 1:19	—Unemployment compensation
§ 1:20	Safeguards—Drafting a good contract
§ 1:21	—Making a hopeless case better
§ 1:22	—Employee leasing and incorporation of independent contractors
§ 1:23	—Form SS-8
§ 1:24	Audit checklist
§ 1:25	Resources
§ 1:26	First Amendment protections for independent contractors
§ 1:27	State misclassification laws
8 1.99	Conclusion

CHAPTER 2. CHECKLIST FOR DETERMINING INDEPENDENT CONTRACTOR STATUS

- $\S~2:1$ Worker status under federal tax law—Examine the relationship of the worker and the business
- § 2:2 —See if the IRS twenty-factors analytical tool is helpful
- § 2:3 —Determine if the firm is exempt from having independent contractors reclassified as employees during employment tax audits
- § 2:4 —Ensure that appropriate IRS reporting procedures are being followed
- § 2:5 Worker status under workers' compensation statutes
- § 2:6 Worker status under the Fair Labor Standards Act
- § 2:7 Worker status under the National Labor Relations Act
- § 2:8 Worker status under the Employee Retirement Income Security Act
- § 2:9 Worker status under employment discrimination laws
- § 2:10 Worker status under unemployment compensation laws

CHAPTER 3. INDEPENDENT CONTRACTOR STATUS UNDER WORKERS' COMPENSATION LAWS

- § 3:1 Introduction
- § 3:2 Tests to determine application of workers' compensation statute
- § 3:3 Statutory employment
- § 3:4 Right-to-control test—Factors used in the right-tocontrol test
- § 3:5 —The parties' relationship
- § 3:6 —Licensing
- § 3:7 Integral relation/economic realities test
- § 3:8 Relative nature of the work test
- § 3:9 Conclusion

CHAPTER 4. INDEPENDENT CONTRACTOR STATUS UNDER THE FAIR LABOR STANDARDS ACT

- § 4:1 Introduction
- § 4:2 Economic realities test
- § 4:3 —The Supreme Court sets the stage
- § 4:4 —Totality of circumstances

- § 4:5 —Evaluating the factors
- § 4:6 —Economic dependence
- § 4:7 Fact sheet 13: Employment relationship under the Fair Labor Standards Act
- § 4:8 Conclusion

Appendix 4-A. DOL Wage and Hour Division Administrator's Interpretation No. 2015-1—The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of

Employees Who Are Misclassified as Independent Contractors

CHAPTER 5. INDEPENDENT CONTRACTOR STATUS UNDER THE NATIONAL LABOR RELATIONS ACT

- § 5:1 Introduction
- § 5:2 The right-to-control test
- § 5:3 Case examples
- § 5:4 —Transportation workers
- § 5:5 —Nontransportation workers
- § 5:6 Conclusion

CHAPTER 6. INDEPENDENT CONTRACTOR STATUS UNDER ERISA

- § 6:1 Introduction
- § 6:2 Common law of agency test applied
- § 6:3 Determination of status
- § 6:4 —Effect of a contract
- § 6:5 —Factors taken as a whole
- § 6:6 —Vizcaino v. Microsoft
- § 6:7 —Preemption of state common-law claims
- § 6:8 —Failure to provide plan information under Title I
- § 6:9 —Section 510 claims—Interference with benefits
- § 6:10 Conclusion

CHAPTER 7. INDEPENDENT CONTRACTOR STATUS UNDER THE EMPLOYMENT DISCRIMINATION LAWS

- § 7:1 Introduction
- § 7:2 Applicable tests
- § 7:3 Age Discrimination in Employment Act
- § 7:4 —Hybrid test
- § 7:5 —Common-law agency test

§ 7:6	—Interference with relationship
§ 7:7	Title VII
§ 7:8	—Hybrid test
§ 7:9	—Inquiry necessary to determine jurisdiction
§ 7:10	—Employee status in the medical profession
§ 7:11	—Analogous state statutes
§ 7:12	Americans with Disabilities Act
§ 7:13	—Hybrid test
§ 7:14	—Common-law agency test
§ 7:15	—Analogous state statutes
§ 7:16	Americans with Disabilites Act—Rehabilitation Act
§ 7:17	EEOC Policy Statement Number 915 on control by
	third parties over the employment relationship
	between an individual and his/her direct employer
§ 7:18	Conclusion

CHAPTER 8. INDEPENDENT CONTRACTOR STATUS AND UNEMPLOYMENT COMPENSATION

- § 8:1 Introduction
- § 8:2 Common-law right-to-control test
- § 8:3 ABC test
- § 8:4 AB test
- § 8:5 AC test
- § 8:6 Personal services test
- § 8:7 Economic realities test
- § 8:8 Conclusion

CHAPTER 9. WORKER CLASSIFICATION UNDER FEDERAL TAX LAW

§ 9:1 Introduction Tax responsibilities of the corporation § 9:2 § 9:3 The IRS legal test for worker classification § 9:4 —Common-law right to control § 9:5 —Twenty factors -- Instructions § 9:6 § 9:7 — —Training — —Integration § 9:8 ——Services rendered personally § 9:9 § 9:10 ——Hiring, supervising, and paying assistants § 9:11 ——Continuing relationship § 9:12 ——Set hours of work § 9:13 ——Full-time employment

— — Doing work on employer's premises § 9:14 § 9:15 — Order or sequence set § 9:16 — Oral or written reports § 9:17 ——Payment by hour, week, or month § 9:18 ——Payment of business and/or traveling expenses § 9:19 — —Furnishing of tools and materials § 9:20 ——Significant investment § 9:21 — —Realization of profit or loss § 9:22 — — Working for more than one firm at a time § 9:23 — Making services available to the general public § 9:24 — Right to discharge § 9:25 — Right to terminate -Industry-specific guidelines § 9:26 § 9:27 Safe harbor of § 530 § 9:28 —Actual treatment § 9:29 —Reasonable basis § 9:30 — Judicial precedent, published rulings, and technical advice § 9:31 ——Past IRS audits — —Industry practice § 9:32 § 9:33 ——Filing of IRS forms § 9:34 Statutory nonemployees and employees § 9:35 IRS reporting procedures—Form 1099 -Form SS-8 § 9:36 § 9:37 Audits—Source of audits § 9:38 —What to expect § 9:39 —Time limitations § 9:40 —Review § 9:41 —Classification settlement program § 9:42 —Classification Settlement Program—Voluntary Classification Settlement Program § 9:43 Penalties § 9:44 —Amount of penalty § 9:45 —Who is liable? § 9:46 -Notices § 9:47 —Backup withholding —Abatement and offsetting § 9:48 § 9:49 Conclusion

CHAPTER 10. [Reserved]

CHAPTER 11. RECORD RETENTION REQUIREMENTS FOR COMPANIES USING INDEPENDENT CONTRACTORS

§ 11:1 Introduction

- § 11:2 Government record-keeping requirements
- § 11:3 Retaining documents that are not subject to government record-keeping requirements
- § 11:4 Record retention when involved in a government contract
- § 11:5 Checklist of suggested documents to retain
- § 11:6 —The contractual documents
- § 11:7 —Contract administration documents
- § 11:8 —Termination documents
- § 11:9 —How long should these be retained?
- § 11:10 Conclusion

PART II. LAWS, LEGISLATIVE HISTORY, AND REGULATIONS

CHAPTER 12. SELECTED FEDERAL STATUTES

- § 12:1 Section 530 of the Revenue Act of 1978 (Pub. L. No. 95-600, 95th Cong., 2d Sess.), as amended by the Tax Reform Act of 1986, the Small Business Job Protection Act of 1996, and the Pension Protection Act of 2006
- § 12:2 Sections 3508 and 3509 of the Tax Equity and Fiscal Responsibility Act (Pub. L. No. 97-248, 97th Cong., 2d Sess.)—Section 3508. Treatment of Real Estate Agents and Direct Sellers
- § 12:3 —Section 3509. Determination of Employer's Liability for Certain Employment Taxes

CHAPTER 13. LEGISLATIVE HISTORY

- § 13:1 Excerpts from the Legislative History of the Small Business Job Protection Act of 1996—Senate Report 104-281
- § 13:2 —House Report 104-737
- § 13:3 Legislative History of §§ 3508 and 3509 of the Tax Equity and Fiscal Responsibility Act—Alternative Standards for Determining Classification of Workers for Employment Purposes and Extension of Interim Relief Provision
- § 13:4 —Reduction of Certain Employment Tax Liabilities Where Workers Are Reclassified as Employees (§ 272 of the Bill and New § 3509 of the Code)

CHAPTER 14. REGULATIONS

§ 14:1 Internal Revenue Service, 26 C.F.R. §§ 31.3121(a)-1, 31.3121(a)-1T, 31.3121(a)-2—Relating to wages

§ 14:2 Internal Revenue Service, 26 C.F.R. § 31.3401(c)-1— Definition of "Employee" for Purposes of Withholding

PART III. IRS MATERIALS ON DETERMINING WORKER STATUS

CHAPTER 15. QUESTIONNAIRE FROM IRS FORM SS-8

- § 15:1 IRS Form SS-8
- § 15:2 IRS Instructions for Form SS-8

CHAPTER 16. IRS EMPLOYER'S SUPPLEMENTAL TAX GUIDE

§ 16:1 Excerpted IRS Publication 15-A

CHAPTER 17. CLASSIFICATION SETTLEMENT PROGRAM INFORMATION FROM THE IRS

- § 17:1 Introduction
- § 17:2 Background
- § 17:3 Description of the Classification Settlement Program
- § 17:4 Examination
- § 17:5 Two-Year Period
- § 17:6 Eligible Cases
- § 17:7 Voluntary Classification Settlement Program (VCSP) IRS Announcement 2012-45
- § 17:8 IRS Form 8952 (for VCSP Program)
- § 17:9 Instructions for Form 8952

CHAPTER 18. IRS REVENUE PROCEDURES AND RULINGS

- § 18:1 Revenue Procedure 85-18: How to Implement § 530 of the Revenue Act of 1978
- § 18:2 Summaries of IRS Revenue Rulings

CHAPTER 19. SUMMARIES OF IRS PRIVATE LETTER RULINGS AND OTHER IRS RULINGS

- § 19:1 LTR 7904114, October 27, 1978
- § 19:2 LTR 8904022, October 28, 1988
- § 19:3 LTR 9124005, March 13, 1991, National Office Technical Advice Memorandum

ş	19:4	LTR 9140048, July 2, 1991
Ş	19:5	LTR 9149001, July 23, 1991, National Office
e	10.6	Technical Advice Memorandum
3	19:6	LTR 9201001, September 24, 1991, National Office Technical Advice Memorandum
s	19:7	LTR 9320005, February 5, 1993, National Office
3	10	Technical Advice Memorandum
Ş	19:8	LTR 9336005, June 2, 1993, National Office Technical
		Advice Memorandum
ş	19:9	LTR 9337014, June 17, 1993, National Office
		Technical Advice Memorandum
Ş	19:10	LTR 9338039, June 29, 1993, National Office
		Technical Advice Memorandum
8	19:11	LTR 9345002, July 13, 1993, National Office
	10.10	Technical Advice Memorandum
3	19:12	LTR 9419004, January 28, 1994, National Office Technical Advice Memorandum
e	19:13	
8	19:15	LTR 9530001, April 13, 1995, National Office Technical Advice Memorandum
s	19:14	LTR 9619001, January 29, 1996, National Office
3	10.11	Technical Advice Memorandum
Ş	19:15	LTR 9639060, June 26, 1996, National Office
		Technical Advice Memorandum
ş	19:16	LTR 9715015, January 7, 1997, National Office
		Technical Advice Memorandum
Ş	19:17	LTR 9728013, April 9, 1997, National Office Technical
_		Advice Memorandum
Š	19:18	LTR 9728047, April 16, 1997, National Office
9	10.10	Technical Advice Memorandum
3	19:19	LTR 9801001, May 6, 1997, National Office Technical Advice Memorandum
ę	19:20	LTR 9814001, May 6, 1997, National Office Technical
8	13.20	Advice Memorandum
8	19:21	LTR 9736002, May 21, 1997, National Office
0	10.11	Technical Advice Memorandum
Ş	19:22	LTR 9735027, May 30, 1997, National Office
		Technical Advice Memorandum
ş	19:23	LTR 9737012, June 12, 1997, National Office
		Technical Advice Memorandum
8	19:24	LTR 9738015, June 18, 1997, National Office
	10.05	Technical Advice Memorandum
3	19:25	LTR 9746045, August 14, 1997, National Office
e	10.96	Technical Advice Memorandum
8	19:26	LTR 9747023, August 22, 1997, National Office Technical Advice Memorandum
S	19:27	LTR 9843012, July 20, 1998, National Office
2	10.41	Technical Advice Memorandum

- § 19:28 LTR 199920043, May 24, 1999
- § 19:29 LTR 199923014, June 14, 1999
- § 19:30 LTR 199923015, June 14, 1999
- § 19:31 LTR 200006033, February 14, 2000
- § 19:32 LTR 2001119035, May 14, 2001
- § 19:33 LTR 200129014, July 23, 2001
- § 19:34 CCA 200402005, November 3, 2003
- § 19:35 LTR 200345013, November 7, 2003
- § 19:36 LTR 200407014, February 13, 2004, National Office Technical Advice Memorandum
- § 19:37 LTR 200421001, May 21, 2004, National Office Technical Advice Memorandum
- § 19:38 LTR 200505005, February 5, 2005
- § 19:39 LTR 200813033, December 7, 2007
- § 19:40 LTR 200835025, May 21, 2008

CHAPTER 20. IRS TRAINING MATERIALS SUMMARY

§ 20:1 IRS Training Materials Summary

CHAPTER 21. IRS GUIDELINES

- § 21:1 Employment Tax Procedures: Classification of Workers within the Limousine Industry, IRS, March 1997
- § 21:2 Employment Tax Guidelines: Classifying Certain Van Operators in the Moving Industry, IRS, September 1998
- § 21:3 Employee vs. Independent Contractor—Seven Tips for Business Owners; IRS Summertime Tax Tip 2010-20
- § 21:4 Understanding Employee vs. Contractor Designation; IRS Press Release, July 2017

PART IV. SAMPLE FORMS AND CLAUSES

CHAPTER 22. SAMPLE INDEPENDENT CONTRACTOR CLAUSES

- § 22:1 Independent contractor clauses from consulting agreements—Independent contractor clauses
- § 22:2 —Independent contractor clause (dot com industry)
- § 22:3 —Independent contractor clause (marketing services)
- § 22:4 —Independent contractor clause (health care industry)
- § 22:5 —Independent contractor clause—Compliance with laws (consulting letter agreement)

§ 22:6	—Independent contractor clause (major utility)
§ 22:7	—Independent contractor clauses
§ 22:8	—Independent contractor relationship (professional services agreement)
§ 22:9	—Independent contractor clause (municipality)
§ 22:10	—Independent contractor (nontechnical services agreement)
§ 22:11	—Independent contractor clause
§ 22:12	—Independent contractor clause (professional services agreement)
§ 22:13	—Independent contractor clause (master education agreement)
§ 22:14	—Independent contractor (environmental services agreement)
§ 22:15	——Special conditions
§ 22:16	Independent contractor clauses from construction agreements—Independent contractor and subcontracts (major utility)
§ 22:17	—Independent contractor clause (contractor services agreement)
§ 22:18	Independent contractor clause (biotech consultant)
§ 22:19	Independent contractor clauses from construction agreements—Independent contractor clause
§ 22:20	—Independent contractor clause (bid proposal for repaving and sidewalk conditions)
§ 22:21	—Independent contractor clause (engineering contract)
§ 22:22	Independent contractor clauses from programmer/ software development agreements—Independent contractor clause (software)
§ 22:23	—Independent contractor clause (software consulting and development agreement)
§ 22:24	—Independent contractor clause (programmer's agreement)
§ 22:25	Independent contractor clause (supply agreement)
§ 22:26	Independent contractor clauses from programmer/ software development agreements—Inventions, copyrights clause (programmer's agreement)

CHAPTER 23. SAMPLE CONSULTING AGREEMENTS

- $\$ 23:1 Text of sample consulting agreements—Consulting agreement (short form)
- § 23:2 —General agreement for consulting services (long form)

§ 23:3 Summaries of sample consulting agreements
Bibliography
Table of Laws and Rules
Table of Cases
Index