Table of Contents

I	Introduction	1-1
2	Tax Treatment of Independent Contractors	2-1
3	Tax Treatment of Employers and Employees	3-1
4	Determining Worker Status for Federal Tax Purposes	4-1
5	Employer Liability for Misclassification	5-1
6	IRS Safe Harbor Relief	6-1
7	Federal Labor and Employment Laws	7-1
8	Pension and Employee Benefit Considerations	8-1
9	Employer Liability for Contracts and Torts	9-1
10	Drafting Independent Contractor Agreements	10-1
A	Appendix	A-1
Т	Tables/Index	T-1

Table of Contents

1	Introduction	
¶ 1.1	OVERVIEW	1-3
¶ 1.2	TYPES OF DISPUTES [A] Federal Tax [B] State Tax [C] Workers Compensation [D] Unemployment [E] Successive Disputes [F] Tort Suits [G] Labor Disputes [H] Union Organizations [I] Other Litigation [J] Private Rights of Action	1-5 1-5 1-5 1-5 1-6 1-6 1-7 1-7
¶ 1.3	DIFFICULTIES IN CLASSIFYING WORKERS	1-8
¶ 1.4	LABOR LAW CONSIDERATIONS	1-9
¶ 1.5	ADVANTAGES AND DISADVANTAGES OF CLASSIFICATION	1-11
¶ 1.6	COMMON LAW CRITERIA AND DEFINITIONS	1-13

¶ 1.7	IRS 20 FACTOR TEST DEFINITION	1-15
¶ 1.8	STATE UNEMPLOYMENT LAW ABC TEST	1-18
¶ 1.9	WORKERS COMPENSATION TEST	1-20
2	Tax Treatment of Independent Contractors	
¶ 2.1	TAX INCENTIVES TO INDEPENDENT CONTRACTOR STATUS [A] Federal Income Tax [B] State Income Tax [C] Federal Employment Tax [D] State Employment Tax SCHEDULE C TAX REPORTING [A] One Individual [B] IRS Recharacterization [C] Amending Tax Returns After Recharacterization [D] Mandatory Versus Permissive Filings After Recharacterization [E] Amended Expenses and Deductions After Recharacterization	2-3 2-4 2-4 2-4 2-5 2-6 2-7 2-7 2-8
¶ 2.3	INCORPORATED CONTRACTORS	2-11
¶ 2.4	WHAT CONSTITUTES A TRADE OR BUSINESS	2-13
¶ 2.5	REPORTING REQUIREMENTS FOR INDEPENDENT CONTRACTORS [A] Basic Reporting [B] Expense Reimbursements	2-14 2-14 2-14
¶ 2.6	DIRECTORS AND OFFICERS AS EMPLOYEES	2-15
¶ 2.7	PARTNERS AS EMPLOYEES	2-16

<u>3</u>	Tax	x Treatment of Employers and Employees	
¶ 3.1	WIT	THHOLDING ON WAGES	3-3
	[A]	Overview	3-3
	[B]	Federal Income Tax Withholding on Wages	3-3
		[1] Percentage Method of Withholding	3-3
		[2] Wage Bracket Method of Withholding	3-4
	[C]	Exemption From Withholding or Excess Allowances	3-4
	[D]	Payments Not Subject to Income Tax Withholding	3-5
	[E]	Withholding of Social Security Tax	3-6
	[F]	Time of Social Security Tax Withholding	3-7
		[1] Quarterly Deposits	3-7
		[2] More Frequent Than Quarterly Deposits	3-7
		[3] Filing Annually	3-7
	[G]	Withholding on Year-End Bonuses	3-8
	ĺΗΊ	Withholding Changes	3-8
¶ 3.2	DEF	FINITION OF WAGES	3-9
"	[A]	Importance of Determination	3-9
	[B]	Form of Wages Irrelevant	3-9
	[C]	Different Definitions of Wages	3-10
¶ 3.3	EXC	CEPTIONS FROM WAGES	3-18
∥ 5.5	[A]	Facilities or Privileges to Employees	3-18
	[B]	Travel and Business Expenses	3-20
	[C]	Summary of Fringe Benefit Rules	3-20
	رکا	[1] Statutory Non-Taxable Fringe Benefits	3-21
		[2] When Are Fringe Benefits Treated as Paid?	3-21
	[D]	Election Not to Withhold Income Tax on Personal	<i>5</i> 2 1
	[[]	Use of a Vehicle	3-22
	[E]	Payment for Labor or Services	3-23
	[2]	[1] Payments for Agricultural Labor	3-23
		[2] Payments to Domestics	3-23
		[3] Newspaper Delivery Services	3-24
		[4] Services Not in the Course of a Trade or Business	3-24
		[5] Services Performed by Nonresident Aliens	3-25
	[F]	Foreign Source Income	3-26
	[G]	Payments From Retirement Plans	3-26
	[H]	Medical Expense Reimbursement Plans	3-26
	[I]	Litigation Costs	3-27

	MEALS AND LODGING PROVIDED TO EMPLOYEES [A] Tests for Exclusion of Meals and Lodging [B] Business Premises of Employer [C] Convenience of Employer [D] Treatment of Meals Furnished by Employer [1] Meals Furnished Without Charge [2] Meals Furnished With Charge [3] Meals Furnished on Nonworkdays or With Lodging [4] Meals Furnished to Promote Employee Goodwill [E] Lodging [F] Meals and Lodging Examples	3-27 3-29 3-29 3-30 3-31 3-31 3-33 3-33 3-33
¶ 3.5	TREATMENT OF STOCK OPTIONS [A] Nonqualified Stock Options [B] Tax and Accounting Treatment of ISOs [1] Basic Tax Treatment of ISO [2] Sale of ISO Shares [3] Treatment by Employer [4] Accounting Treatment of ISOs	3-35 3-35 3-38 3-39 3-40 3-40
4	Determining Worker Status for Federal Tax Purposes	
4 ¶ 4.1	Determining Worker Status for Federal Tax Purposes OVERVIEW [A] Right to Control [B] Other Laws Generally Irrelevant [C] Class of Employees Irrelevant [D] Right to Control Professionals [E] Form SS-8	4-5 4-5 4-5 4-6 4-8 4-9

	[F]	Nature of Business or Occupation	4-14
	[G]	Power to Discharge	4-14
¶ 4.3	FΛC	CTORS BEARING ON EMPLOYEE STATUS	4-1:
∥ 4.3	[A]	Factors in General	4-1:
	[A]	IRS 20 Factor Test	4-1
	[ြ	[1] Instructions	4-1
		[2] Training	4-1
		[3] Integration	4-1
		[4] Services Rendered Personally	4-1
		[5] Hiring, Supervising, and Paying Assistants	4-1
		[6] Continuing Relationship	4-1
		[7] Set Hours of Work	4-19
		[8] Full-Time Required	4-2
		[9] Performing Work on Employer's Premises	4-2
		[10] Order or Sequence Set	4-2
		[11] Oral or Written Reports	4-2
		[12] Payment by Hour, Week, or Month	4-2
		[13] Payment of Business or Travel Expenses	4-2
		[14] Furnishing of Tools and Materials	4-2
		[15] Significant Investment	4-2
		[16] Realization of Profit or Loss	4-2
		[17] Working for More Than One Firm at a Time	4-2
		[18] Making Services Available to General Public	4-2
		[19] Right to Discharge	4-2
		[20] Right to Terminate	4-2
	[C]	Additional Factors to Consider	4-2
	[C]	[1] Parties' Understanding	4-2
		[2] Custom in Industry	4-2
		[3] Laws and Regulations	4-2
		[a] Laws That Control Workers	4-2
		[b] Control in Excess of Laws or Regulations	4-2
	[D]	Analysis of 20 Factor Test	4-2
	[E]	Three Factor Test	4-2
	[F]	Statutory Employees	4-3
	[G]	Statutory Nonemployees	4-3
	[Օ]	[1] Direct Sellers	4-3
		[2] Qualified Real Estate Agents	4-3
		[3] Companion Sitters	4-3
	[H]	Statutory Employers	4-3
	111	Diminion y 11111/10 y Clb	-r-J

4.4		DITIONAL CLASSIFICATION ISSUES AND AMPLES	4-
			4-
	[A]	Employee/Independent Contractor Status Relevant	4
		Only for Individuals	4-
		[1] Services Provided by a Corporation	4-
		[2] Section 3505 Liability	4-
	[B]	Risks of Reclassification	4-
	[C]	Examples of Worker Classification	4-
		[1] Appraisers	4-
		[2] Architects	4-
		[3] Assistants	4-
		[4] Athletes	4-
		[5] Attorneys	4-
		[6] Automobile Sales and Service	4-
		[7] Automobile Shuttle Services	4-
		[8] Bookkeepers and Accountants	4-
		[9] Bus Drivers	4-
		[10] Case Workers	4-
		[11] Child Care	4-
		[12] Collection Agents	4-
		[13] Computer Programmers	4-
		[14] Construction Workers	4
		[15] Consultants	4.
		[16] Corporate Directors	4.
		[17] Corporate Officers	4-
		[18] Drivers	4-
		[19] Editors	4-
		[20] Employment Agencies	4-
		[21] Farmers and Agricultural Workers	4-
		[22] Fishing Industry	4.
		[a] Employee Withholding	4.
		[b] Reporting Requirements	4-
		[c] Statement to Crew Members	4-
		£ 3	4-
		[23] Funeral Home Hosts	4-
		[25] Hair Stylists	4- 4-
		[26] Household Employees	-
		[27] Instructors	4-
		[28] Insurance Agents	4-
		[29] Judges	4-
		[30] Managers	4-
		[31] Music Industry	4-
		[32] Nurses	4-
		[33] Photographers	4-

	[34] Physicians [a] Classified as Employees [b] Classified as Independent Contractors [35] Religious Organization Employees [36] Salespersons [37] Tax-Exempt Organization Employees [38] Taxi Drivers [39] Truck Drivers and Helpers	4-90 4-91 4-94 4-95 4-98 4-101 4-101 4-103
	[a] Classified as Employees	4-104 4-106
<u>5</u>	Employer Liability for Misclassification	
¶ 5.1	OVERVIEW [A] Consider Criteria [B] Detailed Written Agreements [C] Indemnity Agreements [D] Employment Services as Employers	5-3 5-4 5-5 5-5 5-6
¶ 5.2	LITIGATION ON WORKER MISCLASSIFICATION [A] Suits by Workers [B] Microsoft Case [C] Status of Worker Suits as Class Actions [D] Private Rights of Action	5-7 5-7 5-8 5-11 5-12
¶ 5.3	IRS AUDITS [A] Proactive Measures Prior to Audit [B] Who and Why the IRS Audits [1] Agency Enforcement [2] Judicial Resolution [3] Pending Legislation and Executive Branch Enforcement	5-14 5-14 5-16 5-16 5-17
	 [C] Forms 941, 941-X, and Filing Misclassification [D] Implications of Misclassification for Workers [1] Form 8919 for Misclassified Workers [2] Steps to Be Taken by Misclassified Workers 	5-19 5-20 5-20 5-20
¶ 5.4	SECTION 3509 REDUCTION	5-21

¶ 5.5	IRS PENALTIES 5 [A] General Civil Penalties 5 [B] Criminal Penalties 5 [C] 100 Percent Penalty — Section 6672 5 [1] Imposition of Penalty 5 [2] Definition of Responsible Person 5 [a] In General 5 [b] Reasonable Cause Exception to Responsible Person Status 5 [c] Additional Exceptions to Responsible Person Status 5 [3] Examples of Responsible Person Status 5 [4] 60 Day Notice 5 [5] Right of Contribution 5 [6] Statute of Limitations 5 [7] Non-Deductibility of Penalty 5 [8] Recovery of Attorney Fees 5
6	IRS Safe Harbor Relief
¶ 6.1	REQUESTING IRS RULING [A] Form SS-8 Procedures [B] SS-8 Unavailable [C] SS-8 Use in Examination [D] Legal Effect of SS-8 Ruling
¶ 6.2	SAFE HARBOR FROM RECLASSIFICATION [A] Overview [B] Protection From Reclassification [1] Revenue Act of 1978 [2] 1996 Small Business Job Protection Act Changes [C] Particular Requirements for Relief Under Section 530 [1] Consistent Treatment Requirement [a] Must Not Have Treated Individual as an Employee
	[b] Consistency of Nonemployee Treatment of Individuals Holding Substantially Similar Positions

	[3] Reasonable Basis [a] Federal Judicial Precedents and Administrative Rulings [b] Prior Audit [c] Industry Practice [d] Other Reasonable Basis [D] IRS Classification Settlement Program	6-12 6-13 6-15 6-17 6-19 6-20
7	Federal Labor and Employment Laws	
¶ 7.1	OVERVIEW	7-3
¶ 7.2	TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 [A] Overview [B] Scope of Title VII Coverage [C] Tests to Determine Coverage [1] Economic Realities/Right to Control Test [2] Agency Test [D] Application of Economic Realities/Right to Control Test	7-4 7-4 7-6 7-10 7-11 7-11
¶ 7.3	AGE DISCRIMINATION IN EMPLOYMENT ACT [A] Scope of ADEA [B] Tests to Determine Independent Contractor Status [C] Application of Tests	7-26 7-26 7-28 7-33
¶ 7.4	REHABILITATION ACT OF 1973	7-40
¶ 7.5	FAIR LABOR STANDARDS ACT [A] Scope of FLSA [B] Economic Realities Test [C] Application of Test	7-42 7-42 7-43 7-46
¶ 7.6	NATIONAL LABOR RELATIONS ACT [A] Scope of NLRA [B] Common Law Right to Control Test [C] Application of Test [1] General Application [2] Trucking and Taxicab Owner-Operators [3] Newspaper Carriers and Distributors [4] Construction Contractors [5] Health Care Personnel	7-54 7-54 7-57 7-59 7-59 7-62 7-68 7-70 7-71

¶ 7.7	LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT	7-
	[A] Scope of LHWCA[B] Tests to Determine Independent Contractor Status[C] Application of Tests	7- 7- 7-
¶ 7.8	IMMIGRATION REFORM AND CONTROL ACT OF 1986	7-
¶ 7.9	FAMILY AND MEDICAL LEAVE ACT OF 1993	7-
¶ 7.10	AMERICANS WITH DISABILITIES ACT [A] Scope of ADA [B] Tests to Determine Coverage [C] Application of Tests	7- 7- 7- 7-
8	Pension and Employee Benefit Considerations	
¶ 8.1	OVERVIEW	8
¶ 8.2	INDEPENDENT CONTRACTOR DEFINITION FOR	
	EMPLOYEE BENEFIT PLAN PURPOSES	8
	[A] Statutory Definitions	8
	[B] Common Law Right to Control Test	8
	[2] Supreme Court <i>Darden</i> Decision	8
¶ 8.3	LITIGATION INVOLVING CLASSIFICATION CHANGE	
	FROM EMPLOYEE TO INDEPENDENT CONTRACTOR	8-
	[A] The Misclassification Issue	8-
	[B] Avoiding the Misclassification Issue	8-
$\P~8.4$	ADOPTION OF EMPLOYEE BENEFITS PLANS BY	
	INDEPENDENT CONTRACTOR	8-
	[A] Types of Plans	8-
	for Employees	8-
	[2] Life Insurance on Employee's Life	8-
	for Employees	8-
	[4] Health Coverage for Employees	8-
	[5] Educational Assistance Program for Employees	8-
	[6] Dependent Care Program for Employees	8-

xxix

		[7] Cafeteria Plans for Employees	8-18
		[8] Employee Fringe Benefits	8-18
	[B]	Self-Employment Issues	8-19
		[1] Cafeteria Plans	8-19
		[2] Deductibility of Health Benefits	8-20
		[3] Exclusion of Health Benefit Claims From Income	8-20
		[4] Qualified Pension and Profit-Sharing Issues	8-21
		[5] Deductions	8-22
		[6] Tax on Excess Benefits to 5-Percent Owners	8-23
		[7] Contribution Limit on Owner-Employees	8-23
		[8] Application of ERISA	8-23
		[9] IRS Reporting Requirements	8-24
	[C]	Self-Funded Health Plans	8-25
		[1] Non-Discrimination Requirements	8-26
		[a] Eligibility to Participate (Coverage)	8-26
		[b] Benefits	8-26
		[c] Discriminatory Operation	8-27
		[2] Self-Funded Plan	8-27
		[3] Definition of Employee	8-28
		[4] Definition of Highly Compensated Individual	8-29
		[5] Miscellaneous	8-29
		[6] Results of Failing Non-Discrimination Test	8-30
		[a] Discriminatory Benefits	8-30
		[b] Discriminatory Coverage	8-31
¶ 8.5	EFF	ECT OF INDEPENDENT CONTRACTORS ON OTHER	
0.0		ALIFIED RETIREMENT PLANS	8-32
		Coverage Requirements	8-32
	[B]	Controlled Groups and Affiliated Service Groups	8-34
	[-]	[1] Controlled Groups	8-35
		[2] Affiliated Service Groups	8-36
	[C]	Leased Employees	8-38

9	Employer Liability for Contracts and Torts			
¶ 9.1	CONTRACT VERSUS TORT LIABILITY	9-3		
¶ 9.2	DOCTRINE OF RESPONDEAT SUPERIOR [A] General Rule [B] Finding "Employment"	9-5 9-5 9-5		
	[C] Scope of Employment [1] General Factors [2] Foreseeability of Employee Action	9-6 9-7 9-8		
	[a] Employee Deviates From Job Duties [b] Employee Traveling to and From Work [D] Partial Liability [E] Liability for Intentional Wrongs by Employee [F] Liability for Acts Violating Orders [G] Liability for Criminal Acts of Employee	9-9 9-10 9-11 9-12 9-13 9-14		
¶ 9.3	LIABILITY FOR ACTS DIRECTED BY EMPLOYER [A] Authorized or Directed by Employer [B] Negligent Hiring	9-15 9-15 9-16		
¶ 9.4	LIABILITY FOR CONTRACTS BY EMPLOYEES	9-19		
¶ 9.5	NO LIABILITY FOR INDEPENDENT CONTRACTOR TORTS			
¶ 9.6	EXCEPTIONS CREATING LIABILITY FOR INDEPENDENT CONTRACTOR TORTS [A] Negligence in Hiring or Supervising Independent Contractor [1] Negligent Hiring [2] Failure to Provide Safe Work Premises [3] Negligent Directions by Employer [4] Acceptance of Independent Contractor's Work [B] Assigning Duties That Cannot Be Delegated [C] Hazardous Work Presenting Peculiar Risk of Harm [1] Hazardous Work	9-21 9-22 9-25 9-25 9-26 9-27 9-28 9-28		
	[2] Inherently Dangerous Work	9-30		

<u>10</u>	D	rafting Independent Contractor Agreements	
¶ 10.1	ADV	VANTAGES OF WRITTEN CONTRACTS	10-3
¶ 10.2	IMP	PACT OF CONTRACT ON CHARACTERIZATION	10-5
¶ 10.3	CON	NTRACT PROVISIONS SUPPORTING CONTRACTOR	
	CHA	ARACTERIZATION	10-7
	[A]	Overview	10-7
		[1] Name of Relationship	10-7
		[2] Title of Agreement	10-7
	[B]	Specific Contract Terms	10-8
		[1] Instructions	10-8
		[2] Training	10-8
		[3] Integration	10-9
		[4] Right to Delegate	10-10
		[5] Hiring, Supervising, and Paying Assistants	10-10
		[6] Duration of Arrangement	10-11
		[7] Set Hours of Work	10-11
		[8] Full-Time Required	10-12
		[9] Performing Work on Employer's Premises	10-12
		[10] Right to Control	10-13
		[11] Submission of Reports	10-13
		[12] Method of Payment	10-13
		[13] Payment of Business Expenses	10-14
		[14] Providing Equipment	10-14
		[15] Significant Investment	10-15
		[16] Realization of Profit or Loss	10-16
		[17] Exclusivity	10-16
		[18] Making Services Available to General Public	10-17
		[19] Right to Discharge	10-17
		[20] Right to Terminate	10-17
¶ 10.4	ADI	DITIONAL FACTORS	10-18
	[A]		10-18
		Withholding Language	10-19

<u>A</u>	Appendix	
¶ A.1	SAMPLE AGREEMENTS	A-3
	[A] Consulting Agreement	A-3
	[B] First Alternate Consulting Agreement	A-11
	[C] Long Form Consulting Agreement	A-15
	[D] Second Alternate Consulting Agreement	A-23
	[E] Consulting Agreement (Proprietary Rights)	A-27
	[F] Physician's Employment Agreement	A-33
	[G] Product Distributor/Independent Contractor Agreement	A-41
	[H] Sales Representative Agreement	A-55
	[I] Sales Agent Agreement	A-61
	[J] Independent Contractor Agreement (Version 1)	A-65
	[K] Independent Contractor Agreement (Version 2)	A-69
	[L] Independent Contractor Agreement (Version 3)	A-73
	[M] Work for Hire Agreement	A-81
	[N] Simple Employment Agreement	A-89
	[O] Executive Employment Agreement	A-93
	[P] Employment Agreement (Sales Position)	A-101
	[Q] Alternate Employment Agreement	A-105
¶ A.2	SAMPLE CORRESPONDENCE	A-111
"	[A] Client Letter Regarding Section 530 Relief	A-111
	[B] Client Letter Regarding Classification Settlement	
	Program	A-113
	[C] Client Letter Regarding Responsible Person Penalty	A-115
	[D] Appeal Letter Regarding Responsible Person Penalty	A-117
	[E] Letter to IRS Regarding Section 6672 Penalty and	
	Request for Disclosure	A-125
	[F] Letter to IRS Regarding Section 6672 Penalty and	
	Assessed Against a Volunteer	A-127
	[G] Notice to Employee of Intent to Withhold	A-129
	[H] Affidavit to Accompany ¶ A.2[G] Letter to IRS	
	Regarding Section 6672 Penalty and Assessed	
	Against a Volunteer	A-131
¶ A.3	CHECKLISTS AND QUESTIONNAIRES	
	[A] Worker Internal Evaluation Checklist	A-133 A-133
	[B] Checklist for Distinguishing Employee From	
	Independent Contractor	A-137
	[C] Checklist for Determining Independent Contractor	
	Status	A-139
	[D] Independent Contractor Questionnaire	Δ_1/15

¶ A.4	4 GOVERNMENT MATERIALS	
	Income Tax Withholding [C] IRS Notice 989 [D] Program Manager Technical Assistance 2009-035 [E] IRS Publication 15 (Circular E), Employer's Tax Guide [F] IRS Publication 15-A Employer's Supplemental Tax Guide [G] Joint Committee on Taxation Report on Worker	. A-167 . A-173 . A-193
	Classification [H] IRS Training Manual: Independent Contractor or Employee?	
<u>T</u>	Tables/Index TABLE OF INTERNAL REVENUE CODE	. 1-3
¶ T.1	TABLE OF TREASURY MATERIALS	
¶ T.3		
¶ T.4	TABLE OF NAMED AND OTHER STATUTES	. 1-13
¶ T.5	TABLE OF CASES	. 1-19
¶ T.6	TABLE OF AUTHORITIES AND SOURCES CITED	. 1-51
¶ T.7	INDEX	. 1-55