

Tax Notes

Book Reviews

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LEGAL GUIDE TO INDEPENDENT CONTRACTOR STATUS.

Robert W. Wood, editor, *Legal Guide to Independent Contractor Status* (1992), John Wiley & Sons, Inc., One Wiley Drive, Somerset, N.J. 08875. Telephone: (800) 225-5945.

It is somewhat unfortunate to note that the *Legal Guide to Independent Contractor Status*, like many other aspects of life in the U.S.A. circa 1992, is dominated by tax considerations. While most lawyers are made aware of the importance of determining whether a worker is an employee or an independent contractor in their first year torts class during consideration of an employer's liability for torts committed by its workers (as a tangential matter, how many readers still remember the distinction between the bus driver who shot a passenger and the trolley driver who smashed a passenger in the head with a fare box?), a subject duly covered in this book, relatively few employers are ever faced with potential liability for tortious conduct by a worker. Virtually all employers, on the other hand, need to determine whether a worker is an employee or an independent contractor for purposes of income and employment tax withholding. Since payments to independent contractors are not subject to withholding, it is no surprise that many workers prefer independent contractor status, and that many employers prefer to make payments to independent contractors. The classification issue usually arises, not surprisingly, when the IRS challenges an employer's classification of its workers as independent contractors, but also when an employer requests a private letter ruling under section 3121. (Diligent Tax Notes readers know that these rulings are quite common and are summarized in the IRS Letter Rulings department of each week's issue.)

For these reasons, the centerpiece of this book is the chapter entitled "Determination of Employee/Independent Contractor Status for Federal Tax Purposes." The IRS makes this determination by applying the common law "right to control" standard, which is in turn based on 20 factors the IRS has deemed important -- the so-called 20-factor test. This chapter contains a general analysis of the 20-factor test and brief summaries of each of the 20 factors, with citations to revenue rulings in which they have been applied. The chapter also includes examples of employee/independent contractor classification from A (appraisers) to T (truck drivers and helpers), again with citations to the relevant rulings and cases. Perhaps the next edition of this book will discuss undertakers, violinists, welders, X-ray technicians, yodelers, and zither repairmen.

The final two chapters of the book, which provide tips on how to draft independent contractor and employment agreements as well as samples of actual agreements, put the teachings of the "Determination" chapter to use by showing how to use written agreements to maximize the likelihood that independent contractor status will be respected by the IRS. The authors strongly recommend using a written agreement if both parties want the worker to be characterized as an independent contractor.

For employers whose workers are employees, the book provides a good discussion of the "Tax Considerations for Employers," which include withholding requirements, penalties for failure to withhold or pay over tax, definition of "wages" (the basis for withholding calculations), numerous exceptions to the definition, and tax treatment of meals and lodging provided to employees. For some reason, this chapter precedes the chapter containing the status determination discussion, even though that must be the starting point, since none of these "tax considerations" apply to employers who use only independent contractors. The order of these two chapters, therefore, should be reversed in the next edition.

The third tax-related chapter of the Legal Guide to Independent Contractor Status is a discussion of pension and employee benefit considerations. It provides an overview of the relevant IRC and ERISA provisions affecting independent contractors involved in pension and welfare plans. The chapter begins with a summary of the case law and revenue rulings dealing with the classification issue for employee benefit plan purposes and the recent flurry of legislative activity in this area. It moves to an explanation of the types of plans available to independent contractors, and the numerous issues that may arise (1) if the independent contractor is not incorporated, and (2) in connection with self-funded health plans. The final third of this chapter focuses on the effect of independent contractors on plans established [P. 282] by the companies for whom they work, and the impact of employees of those companies on plans established by the independent contractor. The last two sections of this chapter, while helpful, should be regarded more as a starting point than a definitive discussion. The issues covered in those sections could be the subject of an entire book.

Aside from tax matters, the book covers two other areas where the classification of workers is important: employer liability for independent contractor torts (as noted above), and independent contractor status (generally, that of a nonperson) under federal labor and employment laws. A brief review of these chapters reveals them to be comprehensive discussions of important areas of the law.

The Legal Guide to Independent Contractor Status should be of considerable interest and use to most attorneys whose practice includes employment-related matters.

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