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KLEINROCK'S TAXEXPERT(R) ANALYSIS AND EXPLANATION
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Chapter 101. Employees and Independent Contractors

Kleinrock's TaxExpert Analysis and Explanation § 101.5

§ 101.5. Common Law Employees and Independent Contractors

Section 101.5.1. Distinguishing Employees and Independent Contractors

In determining whether an individual is an employee or an independent contractor, there are three issues to consider. First, there are common law principles for determining whether an employer-employee relationship exists; these common law principles also appear in the regulations. [4] In addition to these rules, the IRS has promulgated 20 factors that help determine whether sufficient control is present to establish an employer-employee relationship.

Second, if a common law employer-employee relationship exists, Section 530 of the Revenue Act of 1978 can provide an employer with employment tax relief in some circumstances. Finally, if the employer does not qualify for relief under Section 530, the employer's liability for employment taxes is determined under Code Section 3509.

Section 101.5.2. Common Law Employees

Generally, an employer-employee relationship exists under common law principles if the person for whom the services are performed has the right to control and direct the individual performing the services not only as to the result to be accomplished by the work, but also as to the details and the means by which that result is accomplished. If the person performing the services is subject to the will and control of the person for whom the services are performed as to both what must be done and how it must be done, that person generally is an employee. It does not matter, in making the determination, that the employee is given considerable discretion in the manner in which the work is done; if the employer has the legal right to control the method as well as the result of what is done, an employer-employee relationship exists.

These common law principles are reiterated nearly verbatim in three separate sections of the regulations. Reg. Section 31.3121(d)-1(c) refers to common law employees for purposes of Chapter 21, relating to social security and Medicare taxes. Reg. Section 31.3306(i)-1(b) refers to the common law employer-employee relationship for purposes of Chapter 23, relating to the federal unemployment tax. Reg. Section 31.3401(c)-1(b) refers to common law employees for purposes of Chapter 24, relating to the withholding of income taxes.

Another general indication that an employer-employee relationship exists is the right of the employer to discharge the employee. Other factors that are not necessarily present in every case but are nevertheless indicative are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. Reg. Section 31.3401(c)-1(b).

The regulations make clear that the designation or description of the relationship by the parties is not controlling. If the requisite circumstances exist, the relationship is that of an employer and employee, and it makes no difference if the employee is designated a partner, co-adventurer, agent, independent contractor, or by any other name. Reg. Section 31.3401 (c)-1(e). The IRS will recharacterize the relationship if it does not agree with the characterization used by the parties. See Planning Articles, and

No distinction is made among classes or levels of employees in determining whether there is an employee-employer relationship. Superintendents, managers, and other supervisory personnel are all employees. As noted in Kleinrock's Analysis Section 101.2.1, an officer of a corporation is generally an employee, but a director is not. Reg. Section 31.3401(c)-1(f). However, professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession in which they offer their services to the public generally are not employees. Reg. Section 31.3401(c)-1(c). Whether such people are employees or independent contractors, however, will depend on the facts of each case. Reg. Section 31.3401(c)-1(d). Generally, if the person for whom the services are performed has the right to control or direct only the result of the work and not the means and methods of accomplishing the result, the person performing the services will not be an employee. [5]

> PRACTICE TIP: Either an employer or employee, with or without the other's knowledge or assent, may request the IRS to make a determination as to whether or not a particular worker is an employee. To have the IRS make the determination, file a Form SS-8, Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding. However, the information that must be submitted in connection with a Form SS-8 request can raise enough questions to cause a payroll tax audit. The IRS will not issue a ruling on whether the prospective employment status of an individual is that of an employee or an independent contractor. However, the IRS may issue a ruling with regard to prior employment status. Rev. Proc. 2008-3, 2008-1 I.R.B. 110, Sections 3.01(66).

A bona fide member of a partnership cannot be an employee of the partnership for employment tax purposes. Rev. Rul. 69-184, 1969-1 C.B. 256. Whether a person is a bona fide partner in a partnership is a question of federal law. While state law can provide indicia of partnership status (e.g., whether a person has the ability to bind the partnership), a person who is not a partner for state law purposes may be a partner for federal law purposes where other indicia are present. An Of Counsel attorney will be a bona fide partner of a law firm for federal income tax purposes if a bona fide partnership exists between the Of Counsel attorney and the partners of the firm. However, an attorney who has no interest in the profits, losses, or capital of the firm, has no managerial rights, and cannot bind the firm, is not a partner for federal tax purposes. CCM 200215053. The IRS will not issue a ruling on whether a worker is a bona fide partner, and therefore, not an employee of the business. Rev. Proc. 2008-3, 2008-1 I.R.B. 110, Sections 3.01(67).

The IRS also will not issue a ruling on whether, under the common law rules applicable in determining the employer-employee relationship, a professional staffing corporation (loan-out corporation) or the subscriber is the employer of individuals, if: (i) the loan-out corporation hires employees of the subscriber and assigns the employees back to the subscriber, or (ii) the loan-out corporation assigns individuals to subscribers for more than a temporary period (one year or longer). Rev. Proc. 2008-3, 2008-1 I.R.B. 110, Section 3.02 (7).

Section 101.5.3. IRS Guidelines for Determining Relationship

The IRS for many years used a list of 20 factors in determining whether sufficient control is present to establish an employer-employee relationship or the person providing the services is an independent contractor. See Kleinrock's Analysis Section 101.5.3.2. However, the IRS has shifted the focus away from the 20-factor analysis and more toward an analysis of behavioral factors. IRS Training Manual 3320-102 (October 1996), Independent Contractor or Employee. See Kleinrock's Analysis Section 101.5.3.1. According to the IRS, the 20 common law factors are not the only ones that may be important, and some of the 20 factors are no longer as relevant as they once were.

Section 101.5.3.1. Primary-categories-of-evidence analysis

The primary-categories-of-evidence approach focuses on three primary categories of evidence -- behavioral control, financial control, and relationship of the parties. IRS Training Manual 3320-102 (October 1996), Independent Contractor or Employee. The IRS considers whether the service recipient has behavioral and financial control over the worker and evaluates the relationship between the parties, including how they view their relationship. IRS Publication 15A, Employer's Supplemental Tax Guide.

(1) BEHAVIORAL CONTROL. Behavioral controls are evidenced by facts that indicate whether the service recipient has a right to direct or control the how the worker performs the tasks for which he is hired. Facts that illustrate the right to control how a worker performs a task include the provision of training or instruction.

(2) FINANCIAL CONTROL. Financial controls are evidenced by facts that indicate whether the service recipient has a right to direct or control the financial aspects of the worker's activities. These include the extent of the worker's investment, the extent to which the worker has unreimbursed business expenses, the extent to which the worker makes services available to the relevant market, how the business pays the worker, and the extent of the worker's opportunity for profit or loss.

(3) RELATIONSHIP OF THE PARTIES. The relationship of the parties is generally evidenced by examining the parties' agreements and actions with respect to each other, paying close attention to those facts that show not only how they perceive their own relationship but also how they represent their relationship to others. Facts that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of, employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship, and whether the services performed are part of the service recipient's regular business activities. [6]

Other factors that will typically provide less useful evidence of whether a worker is an independent contractor or an employee include (1) part-time or full-time work, (2) place of work, and (3) hours of work. IRS Training Manual 3320-102 (October 1996), Independent Contractor or Employee.

Section 101.5.3.2. The 20-factor analysis

In applying the 20-factor analysis, the IRS noted that the factors were to be considered only as guidelines and that not all factors would be applicable in every case. All relevant factors are considered in making a determination, and no one factor is decisive. Further, the label put on the relationship does not matter -- the IRS will apply all relevant factors depending on the facts of the relationship. IRS Publication 15A, Employer's Supplemental Tax Guide. Special scrutiny is required in applying the 20 factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement. Rev. Rul. 87-41, 1987-1 C.B. 296.

> OBSERVATION: Training Manual 3320-107 (July 1996) the "IRS Final Training Guide" instructs IRS field agents how to apply the 20 factors when conducting a payroll tax audit. The explanations are fortified with case studies. Practitioners should be aware of the fact that the guide was finalized during (not after) Congressional consideration of the 1996 Tax Act.

The 20 factors identified by the IRS as indicating whether an individual is an employee or independent contractor, and referred to in Rev. Rul. 87-41, 1987-1 C.B. 296, are as follows:

(1) INSTRUCTIONS. An employee must comply with instructions about when, where, and how to work. Even if no instructions are given, the control factor is present if the employer has the right to control how the work results are achieved.

(2) TRAINING. An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods and receive no training from the purchasers of their services.

(3) INTEGRATION. An employee's services are usually integrated into the business operations because the services are important to the success or continuation of the business. This shows that the employee is subject to direction and control.

(4) SERVICES RENDERED PERSONALLY. An employee renders services personally. This shows that the employer is interested in the methods as well as the results.

(5) HIRING ASSISTANTS. An employee works for an employer who hires, supervises, and pays workers. An independent contractor can hire, supervise, and pay assistants under a contract that requires him to provide materials and labor and to be responsible only for the results.

(6) CONTINUING RELATIONSHIP. An employee generally has a continuing relationship with an employer. A continuing relationship may exist even if work is performed at recurring although irregular intervals.

(7) SET HOURS OF WORK. An employee usually has set hours of work

established by an employer. An independent contractor generally can set her own work hours.

(8) FULL-TIME REQUIRED. An employee may be required to work or be available full-time. This indicates control by the employer. An independent contractor can work when and for whom he chooses.

(9) WORK DONE ON PREMISES. An employee usually works on the premises of an employer or works on a route or at a location designated by an employer.

OBSERVATION: Factors 7, 8, and 9 may have become of less importance in view of computers and the internet that allow workers to perform just as well, and may be even better, away from the workplace.

(10) ORDER OR SEQUENCE SET. An employee may be required to perform services in the order or sequence set by an employer. This shows that the employee is subject to direction and control.

(11) REPORTS. An employee may be required to submit reports to an employer. This shows that the employer maintains a degree of control.

(12) PAYMENTS. An employee is generally paid by the hour, week, or month. An independent contractor is usually paid by the job or on a straight commission.

(13) EXPENSES. An employee's business and travel expenses are generally paid by an employer. This shows that the employee is subject to regulation and control.

(14) TOOLS AND MATERIALS. An employee is normally furnished significant tools, materials, and other equipment by an employer.

(15) INVESTMENT. An independent contractor has a significant investment in the facilities she uses in performing services for someone else.

(16) PROFIT OR LOSS. An independent contractor can make a profit or suffer a loss.

(17) WORKS FOR MORE THAN ONE PERSON OR FIRM. An independent contractor is generally free to provide his services to two or more unrelated persons or firms at the same time.

(18) OFFERS SERVICES TO THE GENERAL PUBLIC. An independent contractor

makes his services available to the general public.

(19) RIGHT TO FIRE. An employee can be fired by an employer. An independent contractor cannot be fired so long as he produces a result that meets the specifications of the contract.

(20) RIGHT TO QUIT. An employee can quit her job at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion or is legally obligated to make good for failure to complete it.

Section 101.5.4. Effect of Recharacterization as Employee

When a worker who has been treated as self-employed is reclassified as an employee, he is no longer subject to self-employment tax. See Kleinrock's Analysis Section 61.4. Instead, he is liable for social security and Medicare taxes, which are imposed at a lower rate, since the employee's portion of these taxes is one half the self-employment tax. See Kleinrock's Analysis Section 102.2 for discussion of who is liable for social security and Medicare.

COMPLIANCE TIP: Beginning with tax year 2007, employees who have been misclassified as independent contractors use Form 8919, Uncollected Social Security and Medicare Tax on Wages, to figure and report the employee's share of uncollected social security and Medicare taxes due on their compensation. Using Form 8919 allows the employee's social security and Medicare taxes to be credited to the employee's social security record.

OBSERVATION: A worker who is reclassified as an employee also loses the ability to deduct business expenses on Schedule C, since employee expenses are deductible only on Schedule A (and are subject to the 2 percent floor). See Kleinrock's Analysis Section 45.2. See Planning Article,

The employer is liable for the social security and Medicare taxes and income taxes that should have been withheld as well. Code Section 3509. See Kleinrock's Analysis Section 101.5.5 for a discussion of employer liability.

Section 101.5.5. Employer Liability

A proper determination of the status of an individual providing services as either an employee or independent contractor is of serious consequence to an employer. If an employer erroneously classifies an employee as an independent contractor and has no reasonable basis for doing so, the employer is liable for taxes determined under the income tax and social security and Medicare tax withholding provisions. Code Section 3509. Further, the individual person responsible for withholding and paying over the tax to the IRS could be held personally liable for a penalty equal to the amount of taxes that should have been paid. Code Section 6672. The determination may also affect any retirement or benefits plans maintained by the employer.

If the employer had a reasonable basis for not treating an individual as an employee,

however, the employer under certain circumstances may be relieved of the liability. [7] Section 530 of the Revenue Act of 1978, as amended, provides that if (1) for purposes of the employment tax provisions, a taxpayer did not treat an individual as an employee for any period, and (2) for periods after December 31, 1978, all federal tax returns (including information returns) that the taxpayer was required to file with respect to that individual for the period are filed as if the individual were a non-employee, then the individual will be deemed not to be an employee for that period, unless the employer had no reasonable basis for not treating the individual as an employee.

> OBSERVATION: To satisfy the first prong of this test, the taxpayer must show that it did not treat the worker as an employee at any time during the worker's tenure with the taxpayer. Kentfield Medical Hospital v. United States, 215 F.Supp2d 1064 (N.D. Cal. 2002). In contrast, the second prong applies on a period-by-period basis. CCM 200211037.

With respect to periods after December 31, 1996, the IRS must provide written notice of the provisions of Section 530 of the Revenue Act of 1978 to the taxpayer at the beginning of any audit involving worker classification issues. [8]

> OBSERVATION: IRS has issued Publication 1976, Independent Contractor or Employee (September 1996), which is a one page document that fulfills the notice requirement if delivered to the employer by the agent when commencing the payroll audit.

Relief under Section 530 is available whether or not the worker is an employee under common law standards. Thus, the taxpayer can take the position that the worker is an independent contractor without the possibility that IRS will deny Code Section 530 relief.

For an employer to obtain relief, the employer's basis for not treating the individual as an employee must be reasonable. A taxpayer may satisfy the reasonable basis requirement by showing that it reasonably relied on the advice of an attorney in making the decision to treat the worker as an independent contractor. [9]

It is doubtful that a corporation can show a reasonable basis for treating an officer or sole service provider as an independent contractor. The courts have consistently held that there is no reasonable basis for this conclusion. [10] The IRS, too, has concluded that treating officers of a corporation as independent contractors rather than as employees when they are performing duties normally within the scope of duties of a corporate officer is not reasonable. Rev. Rul. 82-83, 1982-1 C.B. 151. On the other hand, the IRS's Office of Chief Counsel has indicated that if a taxpayer did not treat a corporate officer as an employee and meets the other Act Section 530 requirements for relief -- including the reasonableness requirement -- the taxpayer would be entitled to Act Section 530 relief consideration. CCM 200038045. The Chief Counsel's Office also stated that filing a Form 1099 for a corporate officer would support a determination that the taxpayer did not treat the officer as an employee, provided the filing was consistent with the way the taxpayer treated the officer in other, non-filing contexts.

> OBSERVATION: In view of the position taken in the courts, it is uncertain whether the Chief Counsel's Office still believes a taxpayer may qualify for Act Section 530 relief with respect to a corporate officer.

The relief does not apply in a situation where an employee makes an arrangement with another business for the provision of the services of a technical service specialist. A technical service specialist is an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work. The inapplicability of Section 530 under such circumstances does not mean that such technical service specialists are necessarily employees. Their status is determined under common law principles. [11]

For any period after December 31, 1978, the relief provided by Section 530 of the Revenue Act of 1978 applies only if all federal tax returns, including Form 1099, required to be filed with respect to the worker for that period are filed on a basis consistent with treating the worker as one other than an employee. [12] This consistency test is applied on a period-by-period basis. Thus, failing to file Form 1099 for a worker for a one particular year will not necessarily disqualify an employer from Section 530 relief for that worker for a subsequent year; rather, the employer can receive Section 530 for the subsequent year as long as it files Form 1099 (and is otherwise entitled to Section 530 relief) for that worker for that subsequent year. CCM 200211037. Failing to file Form 1099 will not cause a taxpayer to fail the consistency test if the taxpayer had a reasonable basis for treating the worker as a volunteer, since Form 1099 would not have been required for a volunteer. TAM 200421001.

Relief is not available for a particular year where the Form 1099 for that year is filed only after the status of an individual was questioned on audit and after the deadline for filing the Form 1099 has passed. Rev. Rul. 81-224, 1981-2 C.B. 197.

Further, except in the case of certain test room supervisors and proctors, Section 530 relief will not apply to the employment tax treatment of any individual for any period ending after December 31, 1978, if the employer or any predecessor treated any individual holding a substantially similar position as an employee for any period beginning after December 31, 1977. Rev. Proc. 85-18, 1985-1 C.B. 518, Section 3.04. Nevertheless, Section 530 is available and does apply for an earlier period, even though the taxpayer treats a worker as an employee for a later period.

For remuneration paid for services performed after 2006, this consistency requirement does not apply to an individual who provides services as a test proctor or room supervisor by assisting in the administration of college entrance or placement examinations if (1) the individual is providing those services to a tax-exempt organization, and (2) the individual is not otherwise treated as an employee of the organization for employment tax purposes. Thus, if the requirements are met, the IRS is prohibited from challenging the treatment of these individuals as independent contractors for employment tax purposes, even if the organization previously treated individuals holding substantially similar positions as employees. Section 530, amended by Pub. L. 109-280, Pension Protection Act of 2006, Section 864.

> OBSERVATION: The Form 1099 reporting requirement under Code Section 6041 (a) is triggered by payments of $600 or more made in a trade or business. See Kleinrock's Analysis Section 618.2. Where a taxpayer serves merely as a financial intermediary between a worker and a third party, so that amounts the taxpayer pays to the worker do not constitute "payments" by the taxpayer to the worker, no Form 1099 reporting requirement is triggered for purposes of the consistency-in-reporting test. Marlar, Inc. v. United States, 151 F.3d 962 (9th Cir. 1998).

The consistency test for Section 530 relief is also applied on an entity-by-entity basis, not on

a consolidated basis. Thus, for example, a parent corporation and each of its subsidiaries is evaluated on an individual basis for Section 530 relief, even if the organization uses a paying agent for employment tax purposes. FSA 200129008.

The withholding of income tax or social security or Medicare tax, whether or not the withheld taxes are actually paid to the IRS, or the filing of an employment tax return or a W-2 Wage and Tax Statement with respect to an individual, whether or not a tax is actually withheld, is deemed to be treatment of the individual as an employee. Rev. Proc. 85-18, 1985-1 C.B. 518, Section 3.03.

Rev. Proc. 85-18 identifies three specific safe havens or safe harbors that are sufficient for providing a reasonable basis for not treating an individual as an employee:

> FIRST: An employer may rely upon judicial precedent or published rulings, or technical advice, letter rulings, or a determination letter from the IRS pertaining to that employer. Under the judicial precedent safe harbor, the judicial precedent relied on must have evaluated the employment relationship through a federal common law analysis. Peno Trucking, Inc. v. Commissioner, T.C. Memo. 2007-66.
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> SECOND: An employer may rely upon the fact that a past IRS audit (whether or not pertaining to employment tax issues) did not question the employment tax treatment of individuals holding positions substantially similar to those whose status may be at issue. For periods after December 31, 1996, however, for this safe haven to apply, the audit must involve an examination for employment tax purposes of whether the worker involved or workers holding a position substantially similar to that of the worker involved should be treated as an employee. [13] Reliance on a prior audit must be reasonable; therefore, taxpayer cannot reasonably rely on a prior audit if the taxpayer was involved in a fraudulent scheme to evade paying employment taxes. CCM 200402005.
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> THIRD: An employer may rely upon a long-standing recognized practice of a significant segment of the industry in which the employer is engaged, whether or not the practice is uniform throughout the entire industry. [14] For periods after December 31, 1996, a significant segment of the industry includes any figure over 25 percent of the industry and may be established as an even smaller percentage depending on the facts and circumstances. A practice that has continued for at least ten years will be considered long-standing, and a shorter period may be considered as such depending on the facts and circumstances. [15] Mere reliance on industry practice is not sufficient for this safe harbor; any such reliance must be reasonable. Marlar, Inc. v. United States, 151 F.3d 962 (9th Cir. 1998).
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> PRACTICE TIP: If he relies on any one of the above safe harbors, he meets his burden of proof by simply establishing a prima facie case. As long as the employer cooperates with the IRS investigation, the IRS bears the burden of proving the employer wrong.

An employer who fails to meet any one of these three safe havens nevertheless may be entitled to relief if some other reasonable basis for not treating the individual as an employee

can be demonstrated. Rev. Proc. 85-18, 1985-1 C.B. 518, Section 3.01. The legislative history indicates that Section 530 is to be "construed liberally in favor of taxpayers." [16]

The IRS takes the position that for any period after December 31, 1978, even if the employer falls within one of the safe haven situations, relief will not apply if the appropriate Form 1099 has not been timely filed with respect to the workers involved. Rev. Proc. 85-18, 1985-1 C.B. 518, Section 3.02. In contrast, the Tax Court has held that Section 530 does not impose a timeliness requirement, so that a late filing of Forms 1099 would not preclude a taxpayer from qualifying for Section 530 relief with respect to the workers involved. Medical Emergency Care Associates, S.C. v. Commissioner, 120 T.C. 436 (2003).

If an employer is relieved of liability under Section 530 of the Revenue Act of 1978, any liability for taxes as well as any personal liability for a penalty is no longer applicable. Rev. Proc. 85-18, 1985-1 C.B. 518, Section 3.07.

Thus, an employer who erroneously treats an employee as an independent contractor may escape the liability for taxes and the personal liability for a heavy penalty if there is a reasonable basis for treating that individual as not an employee and that employer has consistently treated the individual and others holding substantially similar positions as other than employees.

> PRACTICE TIP: IRS can offer a business under audit a standard closing agreement early in the administrative process pursuant to its classification settlement program (CSP). Under it, the assessment will be limited to one year. Furthermore, if the business has met the Section 530 reporting requirements and has a colorable argument that it satisfies the consistency requirements and the reasonable basis test, the assessment can be limited to 25 percent of the employment tax liability for the year of the assessment. The CSP is available exclusively for worker classification issues. Thus, for example, it is not available to resolve issues involving the nature of compensation (e.g., wages or dividends) paid to corporate officers. CCM 200038045.

FOOTNOTES:

n4 See Reg. Section 31.3121(d)-1(c), Reg. Section 31.3306(i)-1(b), and Reg. Section 31.3401(c)-1(b).

n5 Reg. Section 31.3401(c)-1(b). See, e.g., Milian v. Commissioner, T.C. Memo. 1999-366 (police officer employed by police department was an independent contractor while engaging in off-duty work where the department's control over the off-duty work did not relate to the details of that work); Sam v. United States, No. DKC-01-105 (D. Md. Nov. 27, 2002) (truck drivers who controlled when they worked, whether they would take a particular load, and which routes they would take in hauling loads were independent contractors); Jones v. Commissioner, T.C. Memo. 2007-249 (marble and tile installer who provided his own tools and hired and paid his own assistants while working on a condominium renovation was an independent contractor).

n6 PLR 200504009, PLR 200119035.

n7 Revenue Act of 1978, Pub. L. 95-600, Section 530. Section 530 of the Revenue Act of

1978 is not codified as part of the Internal Revenue Code; however, as amended by Section 269(c) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, the provisions of Section 530 were extended indefinitely. Rev. Proc. 85-18, 1985-1 C.B. 518.

n8 The Small Business Job Protection Act of 1996, Pub. L. 104-188, Section 1122.

n9 Select Rehab, Inc. v. United States, 205 F. Supp. 2d 376 (M.D. Pa. 2002); North Louisiana Rehabilitation Center, Inc. v. United States, 179 F. Supp. 2d 658 (W.D.La. 2001); Queensgate Dental Family Practice, Inc. v. United States, CIV Nos. 1:CV-90-0918, 1:CV-90-1290, 1:CV-90-1291 (M.D.Pa. Sept. 5, 1991).

n10 Darrell Harris v. United States, 770 F. Supp. 1492 (W.D. Okla. 1991) (district court held that the claim of the president of a corporation to be an independent contractor was not reasonable); Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990) (Ninth Circuit held that an accounting corporation's claim that its president was an independent contractor was unreasonable for Section 530 relief purposes, where the president was the corporation's only accountant); Joseph Radtke, S.C. v. United States, 12 F. Supp. 143 (E.D. Wis. 1989), aff'd, 895 F.2d 1196 (5th Cir. 1990) (per curiam) (S corporation's sole significant worker had to be treated as an employee); Veterinary Surgical Consultants, P.C. v. Commissioner, 54 Fed. Appx. 100 (3d Cir. 2002), aff'g 117 T.C. 141 (2001), cert. denied, 539 U.S. 943 (2003) (Third Circuit upheld the Tax Court's finding that an S corporation did not have a reasonable basis for treating its president and sole shareholder as a non-employee where the president provided substantial services as a veterinarian for the S corporation, was the S corporation's sole source of income, and received remuneration for his services); Yeagle Drywall Company, Inc. v. Commissioner, 54 Fed. Appx. 100 (3d Cir. 2002), aff'g T.C. Memo. 2001-284, cert. denied, 539 U.S. 944 (2003) (Third Circuit upheld the Tax Court's finding that an S corporation did not have a reasonable basis for treating its 99 percent shareholder and president as a non-employee where the president performed substantial services for the S corporation and received remuneration for those services); Joseph M. Grey Public Accountant, P.C. v. Commissioner, 119 T.C. 121 (2002), aff'd, 93 Fed. Appx. 473 (3d Cir. 2004) (Third Circuit upheld the Tax Court's finding that an S corporation's claim that its president and sole shareholder was not an employee of the corporation was unreasonable for Section 530 purposes; the Tax Court had also concluded that Section 530 relief is not available for any workers who, like corporate officers, are specifically defined as employees by the Code); Charlotte's Office Boutique, Inc. v. Commissioner, 121 T.C. 89 (2003), aff'd, 425 F.3d 1203 (9th Cir. 2005) (a closely held corporation's claim that its president and 50 percent shareholder was an independent contractor with respect to certain payments designated as royalty payments was unreasonable for purposes of Section 530 relief).

n11 The Tax Reform Act of 1986, Pub. L. 99-514, Section 1706.

n12 Henry v. United States, 793 F.2d 289 (Fed. Cir. 1986); Western Management, Inc. v. United States, 45 Fed. Cl. 543 (Fed. Cl. 2000); Dennis Katz, D.D.S., P.C. v. Commissioner, T.C. Memo. 2002-118; Rev. Proc. 85-18, 1985-1 C.B. 518, Section 2.01.

n13 The Small Business Job Protection Act of 1996, Pub. L. 104-188, Section 1122.

n14 Despite the plain language of the statute and Rev. Proc. 85-18, 1985-1 C.B. 518, the

IRS and some district courts have taken the position that the practice must be uniform, at least in the relevant segment of the industry, but this position has been rejected by some courts. See 303 West 42nd St. Enterprises Inc. v. IRS, 181 F.3d 272 (2d Cir. 1999); Springfield v. United States, 88 F.3d 750 (9th Cir. 1996), rev'g 873 F. Supp. 1403 (S.D. Cal. 1994). See also KM Systems, Inc. v. United States, 360 F.Supp. 2d 641 (D.N.J. 2004); TAM 200421001.

n15 The Small Business Job Protection Act of 1996, Pub. L. 104-188, Section 1122.

n16 H.R. Rep. 95-1748, 95th Cong., 2d Sess., 5 (1978).