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Contract Drafting Fall 2020

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Finding sample contracts & guidance



Your client—a local cleaning company—is planning to offer on-demand disinfecting services via a new mobile app. To that end, they've identified a software developer they'd like to hire as an independent contractor to write the program. You've been asked to draft the terms of this agreement.

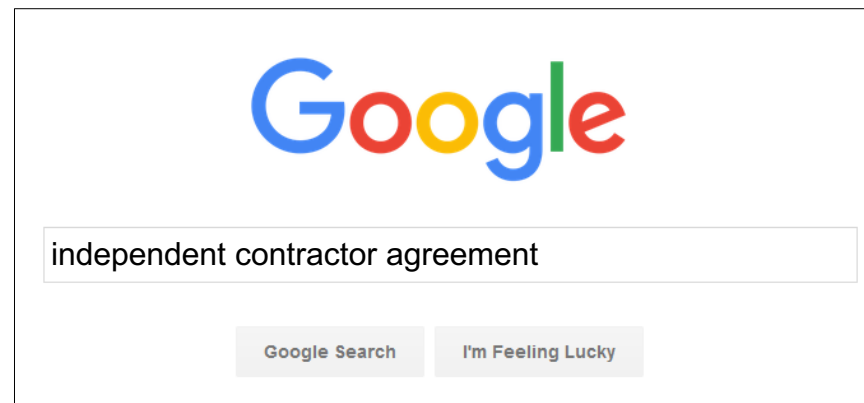
You've never written such a contract before and don't know how to get started.

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A common scenario:

- You are asked to draft a brand new contract or clause
- You have never written a contract like the one you have been asked to draft
- You might be tempted:



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- Author/creator
- Age of materials
- Contract style/clauses
- Content
- Industry
- Guidance/analysis

Fee-based sources of forms/sample contracts and guidance

- Bloomberg Law (forms & analysis)
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- CEB Pro (CA-specific; forms & analysis)
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Independent Contractor Agreement

Editor's Note: This agreement can be used when a corporate client seeks advice about retaining independent contractors and avoiding employee-status claims. Plaintiff's counsel also can use this model to compare with an agreement that a client might have been asked to sign. Additional or different terms can be added depending upon the client's goals and protected interests. Always check state law to determine if additional or different terms are required. See also **Checklist: Independent Contractor or Employee?**

*This document was contributed by **Kevin P. Hishta**, a shareholder in **Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**'s Atlanta office.*

ARTICLE I: PARTIES AND TERM OF AGREEMENT

1.01. This Independent Contractor Agreement ("Agreement") is entered into by and between *[insert company name and address]* ("Company") and *[insert contractor name and address]* ("Contractor"), an independent contractor, this _ day of ___, 20_, in consideration of mutual promises made herein as follows:

1.02. This Agreement will become effective on the _ day of ___, 20_, and will continue until *[insert specific date or "such time as the project for which Contractor*

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Drafting Independent Contractor Agreements

Editor's Note: Contractual provisions included in an independent contractor agreement are highly fact sensitive and ultimately depend on the nature of the services being provided. A specific kind of clause for one type of service may be a strong indication of employment status, while in another it may not necessarily compromise independent contractor status. Corporate counsel can utilize this checklist to determine how courts and administrative agencies have or may review certain clauses in independent contractor agreements. This checklist isn't intended to comply with the laws of any specific jurisdiction, but rather give a broader perspective on how certain contractual clauses would likely affect the defensibility of independent contractor status. In all cases, there is no single factor that is dispositive and the entire agreement, as a whole, along with the actual control exercised by the hiring entity, is reviewed in the analysis.

Contributed by [John Ho](#), of [Cozen O'Connor](#).

Variations in Factors by Jurisdiction

- ☐ Jurisdictions often use different tests when determining independent contractor status, which further complicates the issue. It is critical that counsel examine the specific jurisdiction's laws to determine the specific factors and

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1 ☐**Independent Contractor Resource Kit**

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Independent Contractor Tests and Risks of Worker Misclassification Practice Note **Independent Contractor** Classification Audits and Reclassifying Employees and **Independent Contractors** Practice Note **Independent Contractor** and Employee Classification: Special Tax Issues Practice Note **Independent Contractor** Classification: Training Presentation...

Independent Contractors State Law Content **Independent Contractor** State Practice Notes The following **Independent Contractor** practice notes provide practical guidance for all 50 states, as well ...

... well as the District of Columbia, regarding various issues relevant to **independent contractors**, including: • Tests used to determine whether a worker is an **independent contractor** or employee...

... resource kit provides links to non-jurisdictional and state-specific practical guidance on **independent contractors**. It includes Lexis Practice Advisor practice notes, annotated forms, and checklists. **Independent Contractor** General Guidance The following non-jurisdictional practical guidance documents address the primary issues employers face regarding **independent contractors**, including the tests used to determine whether a worker is properly classified as an ...

2 ☐**Independent Contractor Agreements: Major Negotiation, Drafting, and Legal Issues**

Non-jurisdictional | Practice Notes

... LLP This practice note will help you determine the legitimacy of **independent contractor** status for the worker at issue and assist you in drafting and negotiating a defensible **independent contractor agreement**. An effective **independent contractor agreement** will both withstand judicial and regulatory scrutiny of **independent contractor** status and provide a practical framework for the parties' relationship. Consider ...

... key issues we address below to draft and negotiate an effective **independent contractor agreement**...

Independent Contractor Agreements: Major Negotiation, Drafting, and Legal Issues This practice note will

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1 ☐**Independent Contractor Status Questionnaire (FLSA)**

U.S. Federal

Independent Contractor Status Questionnaire (FLSA) This form is an **independent contractor** status questionnaire that provides guidance for assessing whether a worker is an **independent contractor** or employee under the federal Fair Labor Standards Act (FLSA). This ...

... "yes" or "no" and then tally the respective employee (EE) and **independent contractor (IC)** indicators for each factor based on those answers. A preponderance of either EE or **IC** indicators for a factor suggests the factor supports the indicated status. ...

... that guarantees that a court will consider a particular worker an **independent contractor**. For information on evaluating workers' status and the risks of misclassifying employees as **independent contractors**, see **Independent Contractor** Tests and Risks of Worker Misclassification, **Independent Contractor** Classification Audits and Reclassifying Employees and **Independent Contractors**, and **Independent Contractor** Red Flag Checklist. For information on how to establish and maintain **independent contractor** status for workers, see **Independent Contractor** Agreements: Major Negotiation, Drafting, and Legal Issues, **Independent Contractor** Agreements: Major Negotiation, Drafting, and Legal Issues, ...

2 ☐**Independent Contractor Agreement (Pro-service Recipient) (CO)**

Colorado

Independent Contractor Agreement (Pro-service Recipient) (CO) This form is an **independent contractor agreement** between an **independent contractor** and the party for whom the **independent contractor** will perform specified services in Colorado. This form contains practical guidance, ...

... a result, the text of this form differs from the non-jurisdictional **Independent Contractor Agreement** (Pro-service Recipient). The terms "**Contractor**" and "Client" are used to help avoid the parties' relationship ...

... determination of whether a worker is characterized as an employee or **independent contractor** hinges on control. The more a client controls a **contractor**, the more likely an employee/employer relationship will be found to exist instead of a client/**independent contractor** relationship. The determination of whether a worker is properly classified as an employee or an **independent contractor** faces different scrutiny and has different considerations in other labor areas.



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California

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Independent Contractor Agreement (Pro-service Recipient) (CA) This form is an **independent contractor agreement** between an **independent contractor** and the party for whom the **independent contractor** will perform specified services in California. This form includes practical guidance, ...

... a result, the text of this form differs from the non-jurisdictional **Independent Contractor Agreement** (Pro-Service Recipient). The terms "**Contractor**" and "Client" are used to help avoid the parties' relationship ...

... determination of whether a worker is characterized as an employee or **independent contractor** hinges on control. The more a Client controls a **Contractor**, the more likely an employee/employer relationship exists instead of a client/**independent contractor** relationship. The determination of whether a worker is properly classified as an employee or an **independent contractor** faces different scrutiny and has different considerations in other labor areas ...

... ensure compliance with applicable law. For additional guidance, see Supply of Services **Agreements** Resource Kit. For more information on California's **independent contractor** laws and classification issues, see **Independent Contractors** State Practice Notes Chart. For state-specific **independent contractor agreement** forms, see the ...

2 ☐**Services Agreement (Pro-services Recipient) (CA)**

California

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... Service Provider and its employees, personnel, and permitted **contractors** performing any Services on behalf of Customer under this **Agreement** are **independent contractors** and not employees of Customer. Service Provider is not an agent ...

... no right or authority to make any contract, sale or other **agreement** in the name of or for the account of the Customer. ...

Independent Contractor Agreement (Pro-service Recipient) (CA) Actions



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Independent Contractor Agreement (Pro-service Recipient) (CA)

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This **agreement** for performance of services ("**Agreement**") is made on [date] (the "Effective Date"), between [name of person or firm engaging **independent contractor**'s services] ("Client"), with a principal place of business at [address], and [name of **independent contractor**] ("**Contractor**", an **independent contractor**, with a principal place of business at [address].

Article I. SERVICES TO BE PERFORMED BY **CONTRACTOR**.

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Independent Contractor Agreement (Pro-service Recipient) (CA)

▼ Summary

This form is an **independent contractor agreement** between an **independent contractor** and the party for whom the **independent contractor** will perform specified services in California. This form includes practical guidance, drafting notes, alternate clauses, and optional clauses.

This form has been drafted with terms that favor the client receiving the services and is intended for private employers. Its language has been customized to comply with California and federal law. As a result, the text of this form differs from the non-jurisdictional **Independent Contractor Agreement (Pro-Service Recipient)**.

The terms "**Contractor**" and "Client" are used to help avoid the parties' relationship being characterized as an employee/employer relationship. Note, however, that the key determination of whether a worker is characterized as an employee or **independent contractor** hinges on control. The more a Client controls a

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☐ > 1. Independent Contractor/Consultant Agreement (Pro-Client)

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An independent contractor agreement between an individual contractor and a client company for consulting or other services. This Standard Document is drafted in favor of the client company and is based on federal law. State and local law may impose different or additional requirements on independent contractor classification and agreements. For...

...State and local law may impose different or additional requirements, including language that must be included in independent contractor agreements. Companies engaging independent contractors should consider applicable state and local law with this Standard Document. For more information on state law requirements for independent contractors, see Independent Contractors: State Q&A Tool and Independent Contractor...

...Independent contractors can provide a significant financial benefit to a company in part because independent contractors are not entitled to many of the rights and protections available to employees (see Practice Note, Independent Contractor Classification: Benefits of Engaging Independent Contractors). This is also the reason, however, that the DOL, the IRS, state and local agencies, and the courts often construe independent contractor...

☐ > 2. Independent Contractor/Consultant Agreement (Pro-Client) (CA)

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A California-compliant independent contractor agreement between an independent contractor (a self-employed individual) and a client company for consulting or other services. This Standard Document is drafted in favor of the client company. This Standard Document has integrated notes with important explanations and drafting tips.

Independent Contractor/Consultant Agreement (Pro-Client) (CA)

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A California-compliant **independent contractor agreement** between an **independent contractor** (a self-employed individual) and a client company for consulting or other services. This Standard Document is drafted in favor of the client company. This Standard Document has integrated notes with important explanations and drafting tips.

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[ADDRESS LINE 1]

[ADDRESS LINE 2]

[DATE]

Dear [**INDEPENDENT CONTRACTOR** NAME],

This letter **agreement** (this "**Agreement**") sets forth the terms and conditions whereby you agree to provide

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Independent Contractor/Consultant Agreement (Pro-Client) (CA)
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Read This Before Using Document

This **independent contractor** or consultant **agreement** is a short-form letter **agreement** between an individual **independent contractor** and a client (assumed to be a corporate entity in this document) for consulting or other services. It is drafted in an informal letter format and may be appropriate for a short-term engagement or specific project.

This Standard Document assumes that the service provider is properly classified as an **independent contractor** and is not an employee of the client company. Companies must be aware of [A.B. 5](#), effective January 1, 2020, which requires compliance with the onerous "ABC" test for most **independent contractor** relationships to be valid (see [Drafting Note, A.B. 5 Codifies and Extends Dynamex's ABC Test](#) and [Practice Note, Legal Tests for Independent Contractor Classification Under California Law](#)). This Standard Document also assumes that the **independent contractor** is not a labor **contractor** providing workers to the client employer to perform labor that is within the usual course of the client employer's business, which would subject the labor **contractor** and client employer to the requirements of [Section 2810.3 of the California Labor Code](#) (for more information, see [Legal Update, California Law to Make Companies Liable for Employment Violations of Independent Labor Contractors](#)).

This Standard Document is intended for the engagement of an individual **independent contractor**. The individual may have organized their business as a sole proprietorship or [limited liability company](#) (LLC), for example, and may have hired or engaged employees or **contractors** to assist in providing services, but they are treated as an individual for purposes of this **agreement**. For a professional services **agreement** between two business entities, see [Standard Document Professional Services Agreement](#). For a short-form services **agreement** between

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[INDEPENDENT CONTRACTOR NAME]

[ADDRESS LINE 1]

[ADDRESS LINE 2]

[DATE]

Dear [INDEPENDENT CONTRACTOR NAME],

This letter **agreement** (this "**Agreement**") sets forth the terms and conditions whereby you agree to provide certain services (as described in Schedule 1) to [CLIENT COMPANY NAME], with offices located at [ADDRESS], a [STATE OF ORGANIZATION] [ENTITY TYPE] (the "**Company**").

1. Services.

1.1 The Company engages you, and you accept such engagement, as an **independent contractor** to provide certain services to the Company on the terms and conditions set forth in this **Agreement**.

1.2 You shall provide to the Company the services listed on Schedule 1 (the "**Services**").

1.3 The Company shall not control or direct the manner or means by which you [or your employees or **contractors**] perform the Services[, including but not limited to, the time and place you perform the Services]. [The Services performed are outside the usual course of the Company's business.] [You are customarily engaged in an independently established trade, occupation, or business of the same nature as the Services performed.]

1.4 Unless otherwise stated on Schedule 1, you shall furnish, at your own expense, the materials, equipment, supplies, and other resources necessary to perform the Services. [The Company shall provide you with access to its premises, materials, information, and systems to the extent necessary for the performance of the Services.]

1.5 You shall comply with all [third-party access] rules and procedures communicated to you in writing by the Company, including those related to safety, security, and confidentiality.



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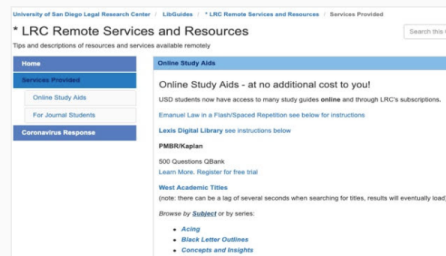
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Correcting a Mistake in a Trust Transfer Deed

Bruce A. Last August 24, 2020

As estate and trust practitioners, we're used to dealing with procedures and rules. Between the Tax Code, the Probate Code, Rules of Court, and local court rules, one might believe that when it comes to estate planning and administration, there's a specified rule for everything. Perhaps this is why...

Can a Drunk Person Enter Into a Contract?

Julie Brook August 21, 2020

People who are intoxicated often make bad decisions, including signing contracts they may regret when the hangover kicks in. Can they simply claim intoxication and get out of the deal? The short answer: maybe. One of the four essential elements to the existence of a contract is the capacity of all parties...



Amazon and the Exploding Laptop: Online Marketplaces May Become Strictly Liable in California

Maureen Mason August 21, 2020



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San Quentin Inmate Has Standing to Bring Gender-Based Challenge to Prisoner Property Regulation, Ninth Circuit Holds

Katherine Proctor August 21, 2020

The Ninth Circuit held Friday that a San Quentin inmate has standing to pursue a claim that prison officials discriminated against him based on his male gender by prohibiting him from purchasing prison vendor products available only to female inmates. The three-judge panel also held that intermediate...

Federal Courts Must Apply Federal Common Law Principles to Restitution Claims Under California UCL and CLRA, Ninth Circuit Holds

Katherine Proctor August 20, 2020

Relying on 82-year-old case law, the Ninth Circuit held in an amended opinion Thursday that federal courts must apply equitable principles derived from federal common law to claims for equitable restitution under California's Unfair Competition Law (UCL) and Consumer Legal Remedies Act (CLRA). The...

First District Stays Injunction Requiring Uber and Lyft to Classify Drivers As Employees

Katherine Proctor August 20, 2020



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PRACTICE GUIDES

in **Internet Law and Practice in California****§17.38 I. Form: Social Media Influencer Independent Contractor Agreement**

Comment: If the Social Media Influencer Independent Contractor Agreement is directly with an individual talent, as opposed to a media agency, then this release is not necessary.

This Statement of Work ("SOW") is entered into as of the date of the last signature below (the "SOW Effective Date") by and between _ _ [name of company] _ _ ("Company") and _ _ [name of consultant] _ _ ("Consultant"), and is subject to the terms of the Social Media Influencer Independent Contractor Agreement entered into by the parties on _ _ [date] _ , 2020 ("Agreement").

PRACTICE GUIDES

in **Working With Independent Contractors, Leased Workers, and Outsourcing****STEP 30. Draft Agreement Between Principal and Independent Contractor**

AGREEMENT BETWEEN PRINCIPAL AND INDEPENDENT CONTRACTOR

Draft an agreement that increases the defensibility of an independent contractor relationship:

PRACTICE GUIDES

in **Internet Law and Practice in California****§4.19 D. Form: Independent Contractor Consulting Agreement**

INDEPENDENT CONTRACTOR CONSULTING AGREEMENT

Comment: See §4.21 for a form of independent contractor nondisclosure agreement.

PRACTICE GUIDES

in **Drafting Employment Documents for California Employers****§4.33 I. Form: Preamble, General Conditions**

INDEPENDENT CONTRACTOR CONSULTING AGREEMENT

This Independent Contractor Agreement (hereinafter "Agreement") is made as of _ _ [date] _ , between _ _ [contractor's name] _ , an independent contractor ("Contractor"), and _ _ [principal's name] _ _ ("Company").



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- ▼ 4 Human Resources
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 - ▼ II. INDEPENDENT CONTRACTORS
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 - ▶ B. Classification of Independent Contractors
 - §4.18 C. Intellectual Property Issues in Independent Contractor Relationships
 - ▶ **§4.19 D. Form: Independent Contractor Consulting Agreement**
 - ▶ E. Independent Contractor Nondisclosure Agreement
 - ▶ III. ADVISORY BOARDS
- ▶ 5 Website and App Development; Disability Accommodation Issues
- ▶ 6 Hosting and Related Services; Cloud Computing
- ▶ 7 Electronic Contracting
- ▶ 8 Terms of Use; Online Agreements; Linking; Downloading; Social Networking
- ▶ 9 Privacy Law and Privacy Policies
- ▶ 10 E-Commerce Transactions; Tax and Insurance Issues
- ▶ 11 Strategic Alliances
- ▶ 12 Software License Agreements
- ▶ 13 Software Development Agreements
- ▶ 14 Content Clearances, Licensing, and Fair Use



4 Human Resources

Internet Law and Practice in California



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§4.19 D. Form: Independent Contractor Consulting Agreement

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INDEPENDENT CONTRACTOR CONSULTING AGREEMENT

This Independent Contractor Consulting Agreement (this "Agreement") is made as of __[date]__, between __[name of company]__, a __[specify entity, e.g., California corporation]__ ("Company"), and the person or entity identified as "Consultant" on the signature page of this Agreement ("Consultant").

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. SERVICES. Company hereby retains Consultant to perform the following services (the "Services"): __[List or describe services as specifically as possible. The services can be more specifically described in an attached exhibit if necessary.]__

Comment: The description of the services should be as precise as possible and should avoid the use of general terms such as "and such other services as may be added from time to time" or "such services as directed by the appropriate employees of Company" to lessen the risk of potential reclassification of the independent contractor as an employee.



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Employment Law

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- [Wrongful Employment Termination Practice: Discrimination, Harassment, and Retaliation](#)

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Douglas A. Wickham

Matthew J. Sharbaugh

Meredith Snyder

2 Immigration Issues in Hiring

Amanda S. Paquet

3 Employment Contracts

Margaret Hart Edwards

Daniel J. Cravens

Michael Pedhirney



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4 Independent Contractors

PRINT

§4.1 I. INTRODUCTION TO INDEPENDENT CONTRACTORS

In California, a person who performs services for compensation for another (the principal) can be either an employee or an independent contractor. The principal-independent contractor relationship differs in both nature and consequences from an employer-employee relationship. An employer has certain control rights and a multitude of obligations regarding an employee that are not part of a principal-independent contractor relationship. Further, although employees are entitled to a variety of benefits and protections afforded by various laws, such as unemployment benefits, workers' compensation, and unpaid leave, independent contractors are not entitled to any such benefits based on the performance of services for the principal.

Whether a person is an employee or independent contractor is determined under three primary tests: the common law control test (see [§§4.2–4.3](#)), the ABC test (see *Dynamex Operations W. v Superior Court* (2018) 4 CSth 903), and the economic realities test (see [§§4.4–4.5](#)). The common law control test (also referred to as the usual common law rules) is used for federal and state tax purposes as well as for statutes that do not expressly apply a different standard. The ABC test is used for wage and hour claims in California courts. The economic realities test is used for most federal employment laws that are intended to protect workers' rights, such as the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201–219) and the



BOOKS & TREATISES

Books



Kenneth A. Adams, *A Manual of Style for Contract Drafting* (4th ed. 2017); LRC Reading Room [KF807 .A33 2017](#)

Lenné Eidson Espenschied, *Contract Drafting: Powerful Prose in Transactional Practice* (3d ed. 2019); LRC Reading Room [KF807 .E84 2019](#)

George W. Kuney & Donna C. Looper, *Legal Drafting in a Nutshell* (4th ed. 2016); LRC Reference Reserve Materials [KF250 .343 2016](#); also available electronically via [West Study Aids](#)

Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2d ed. 2014); LRC Reserve Study Aid [KF807 .S73 2014](#)

Treatises and practice guides

David C. Burgess et al., *Drafting Business Contracts: Principles, Techniques, & Forms* (revised 2019); LRC Reading Room [KF801 .D72](#); also available electronically via [CEB OnLaw Pro](#)

Robert A. Feldman & Raymond T. Nimmer, *Drafting Effective Contracts: A Practitioner's Guide* (2019, [Westlaw](#))

Vladimir R. Rossman & Morton Moskin eds., *Commercial Contracts: Strategies for Drafting & Negotiating* (2020, [Westlaw](#))

Peter Siviglia, *Commercial Agreements: A Lawyer's Guide to Drafting and Negotiating* (2019, [Westlaw](#))

Tina L. Stark ed., *Negotiating and Drafting Contract Boilerplate* (2019, [Lexis](#))

Final thoughts



- Don't start from scratch—there are many resources that can provide starting points
- Google is not a great starting point for contract drafting
- Contact a reference librarian for help

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