KPMG report: Employee or independent contractor; common law test in new tax paradigm

The common law test for determining whether an individual is an employee or independent contractor is relevant for a variety of purposes extending well beyond the withholding of employment taxes.

Now the reach of the test is further, affecting the new 20% deduction, the tax on exempt organization excess executive compensation, and the global intangible low-taxed income (GILTI) calculation.

Changes made by the 2017 tax law (often referred to as the “Tax Cut and Jobs Act”) render the common law test relevant to the application of a variety of new tax paradigms including sections 199A and 4960 as well as extension of the U.S. rules to the calculation of GILTI under section 951A. In particular, section 199A (the measure that permits an owner of a sole proprietorship, S corporation, or partnership to deduct up to 20% of the income earned by the business) and section 4960 (the provision that imposes an excise tax on certain remuneration and excess parachute payments) both incorporate the definition of common law employee.
