The Daily Dish

# 82 Years Is Long Enough to Wait

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**Eakinomics: 82 Years Is Long Enough to Wait**

The Fair Labor Standards Act (FLSA) is a cornerstone of employer-employee relations, requiring employers to adhere to regulations concerning employees such as minimum wages, overtime, and record-keeping. Of note, the FLSA imposes no such requirements on employers' treatment of independent contractors. Here's the catch: The FLSA was enacted in 1938, and, in the 82 years since, the Department of Labor (DOL) has not provided a way to tell an employee from an independent contractor.

DOL took a step toward rectifying the situation this week by proposing a rule that would define "independent contractor" for the first time. AAF's Isabel Soto and Dan Bosch walk through the details and implications, but the basic idea is fairly straightforward. Per Soto and Bosch:

"The proposed rule uses two central factors to determine classification. The central factors in determining employer versus independent contractor status are:

1. the nature and degree of a worker's control over the work, and
2. the opportunity for profit (or loss) based on the worker's initiative.

If it is clear that the working relationship in question is one of economic dependence via both control and profit opportunity, then an employer-employee relationship applies. If both factors point in the other direction, then a contracting relationship is present." If it turns out the answer is ambiguous, DOL supplies three other factors that can be consulted to make a determination.

The nature of the employment relationship has been a contested policy issue in recent years and lies behind such volatile issues as the AB5 law in California and the PRO Act in Congress. The absence of a clear definition has contributed to difficulties in resolving disputes, which has occurred largely through patchwork legal precedents – especially the 1947 Supreme Court case *United States v. Silk*, where the five-part "economic realities test" was established – and sporadic DOL guidance.

If finalized, the rule could accomplish three things. First, clearer definitions will reduce disputes and the resulting litigation. For this reason, second, it will reduce the regulatory burden. But third, and most important, it will reduce the aversion some businesses may have to using independent contractors and allow those who prefer their autonomy more opportunities in the labor market.