



1099 VS W2
DOL TEST



1099 vs W2 – DOL Test

The economic reality test uses multiple factors to see if an employment relationship exists under the FLSA (29CFR795.110). The goal of the test is to decide if the worker is economically dependent on the employer for work or is instead in business for themselves. All factors should be considered. No single factor determines a worker's status, and no one factor, or combination of factors are more important than the other factors. Instead, the totality of the circumstances of the working relationship should be considered.

OPPORTUNITY FOR PROFIT OR LOSS DEPENDING ON MANAGERIAL SKILL

This factor primarily looks at whether a worker can earn profits or suffer losses through their own independent effort and decision making. Relevant facts include whether the worker negotiates their pay, decides to accept or decline work, hires their own workers, purchases material and equipment, or engages in other efforts to expand a business or secure more work, such as marketing or advertising.

Taking such actions or having a real opportunity to take such actions but making a business decision not to (for example, because the potential profit to be gained may not justify the expense that would be incurred), indicates that the worker is an independent contractor. Not taking such actions or having only a theoretical opportunity to take such actions (for example, the worker must get approval from the employer), indicates that the worker is an employee.

A worker who decides to work more hours or take on more jobs when paid a fixed rate per hour, day, or job is generally not exercising managerial skill like an independent contract or even if those decisions may lead to more earnings.

INVESTMENTS BY THE WORKER AND THE EMPLOYER

This factor primarily looks at whether the worker makes investments that are capital or entrepreneurial in nature. Investments by a worker that support the growth of a business, including by increasing the number of clients, reducing costs, extending market reach, or increasing sales, weigh in favor of independent contractor status.

A lack of such capital or entrepreneurial investments weighs in favor of employee status. Costs to a worker of tools for a specific job and costs that the employer imposes on the worker are not capital or entrepreneurial investments that indicate independent contractor status. In addition to considering the nature of any investments by the worker, the worker's investments should be compared to the employer's investments in its overall business.

The worker's investments do not need to be equal to the employer's and should not be compared only in dollar amounts or size.

The focus should be on whether the worker makes similar types of investments as the employer (even if on a smaller scale) or investments of the type that would allow the worker to operate independently in the worker's industry or field.

Such investments by the worker, in comparison to the employer, weigh in favor of independent contractor status, while a lack of investments that support an independent business indicate employee status.

DEGREE OF PERMANENCE OF THE WORK RELATIONSHIP

This factor primarily looks at the nature and length of the work relationship.

Work that is sporadic or project-based, with a fixed ending date (or regularly occurring fixed periods of work), where the worker may make a business decision to take on multiple different jobs, indicates independent contractor status.

Work that is continuous, does not have a fixed ending date, or may be the worker's only work relationship indicates employee status.

The lack of a long working relationship does not necessarily suggest that the worker is an independent contractor unless it is because of the worker's business decision.

Short-term jobs for multiple employers may be due to the seasonal or temporary nature of the work or industry, and not the worker's business decision to market their services to multiple entities, and therefore may indicate employee status.

NATURE AND DEGREE OF CONTROL

This factor primarily looks at the level of control the potential employer has over the performance of the work and the economic aspects of the working relationship.

Relevant facts include whether the potential employer:

- controls hiring, firing, scheduling, prices, or pay rates;
- supervises the performance of the work (including via technological means);
- has the right to supervise or discipline workers; and
- takes actions that limit the worker's ability to work for others.

Where the potential employer maintains more control over these aspects of the work relationship, this factor weighs in favor of employee status.

Where the potential employer maintains less control over these aspects of the work relationship, this factor weighs in favor of independent contractor status.

Control that is for the sole purpose of complying with a specific, applicable federal, state, tribal, or local regulation—rather than the employer's own internal policies or customer standards—does not weigh in favor of an employment relationship.

EXTENT TO WHICH THE WORK PERFORMED IS AN INTEGRAL PART OF THE EMPLOYER'S BUSINESS

This factor primarily looks at whether the work is critical, necessary, or central to the potential employer's principal business, which indicates employee status.

Where the work performed by the worker is not critical, necessary, or central to the potential employer's principal business, this indicates independent contractor status.

This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the work they perform is an integral part of the business.

SKILL AND INITIATIVE

This factor primarily looks at whether the worker uses their own specialized skills together with business planning and effort to perform the work and support or grow a business.

The fact that a worker does not use specialized skills (for example, the worker relies on the employer to provide training for the job) indicates that the worker is an employee.

Additionally, both employees and independent contractors can be skilled, so the fact that a worker is skilled does not indicate one status or the other.

The focus should be on whether the worker uses their skills in connection with business initiative. If the worker does, that indicates independent contractor status; if the worker does not, that indicates employee status.