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AOD 2021-3: Nonacquiescence to Eleventh Circuit decision, professional employer organization's claims for FICA credits

Action on Decision (AOD) 2021-3—which appears in the [Internal Revenue Bulletin 2021-24](#) [PDF 673 KB] (dated June 14, 2021)—announces the IRS nonacquiescence to a 2020 decision of the Eleventh Circuit in a case concerning a claim for tax credits based on the payment of FICA taxes by a “professional employer organization” (PEO).

The case is: *TriNet Group, Inc. v. United States*, 979 F.3d 1311 (11th Cir. 2020); read the [decision](#) [PDF 90 KB]

Briefly, the successor-in-interest to the PEO alleged there was a \$10 million overpayment of federal income tax. From 2004 to 2009, the PEO claimed tax credits based on its payment of Federal Insurance Contributions Act (FICA) taxes on the tip income of its client companies' employees. The IRS asserted that these credits were not allowed because the PEO was not the “employer” entitled to claim the credits pursuant to section 3401(d).

The Eleventh Circuit affirmed a grant of summary judgment for the PEO, concluding that it was the statutory employer entitled to claim the FICA tip credit because it—not its client companies—controlled the payment of the wages subject to withholding.

In AOD 2021-3, the IRS stated its disagreement with the decision and announced its nonacquiescence to the holdings that the PEO, rather than its clients, had “control of the payment of wages” and that the PEO was the statutory employer under section 3401(d).

KPMG observation

The nonacquiescence in AOD 2021-3 is similar to the IRS position in AOD 2020-1 in which the IRS announced its nonacquiescence to a decision of a federal district court that had found that professional employment organizations were statutory employers and were entitled to refunds of the employer portion of Social Security taxes. Read [TaxNewsFlash](#)

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