



1 removed by E&Y to this Court, the operative first amended complaint (“FAC”) was filed on  
2 behalf of four named plaintiffs: Fernandez, David Ho (“Ho”), John Maxton (“Maxton”), and  
3 Nathan Lay (“Lay”). The Court subsequently granted summary judgment for E&Y with respect  
4 to Ho’s claims, and approved the parties’ stipulated dismissal of Maxton and Lay; only  
5 Fernandez’s claims remain.

6 Fernandez holds a degree in accounting from California State University, Long Beach.  
7 Prior to graduation, she worked for E&Y as an intern in the summer of 2003. In September  
8 2004, following graduation, she started as a “staff 1” in E&Y’s Assurance and Advisory Business  
9 Services (“AABS”) group. At that time she was twenty-three years old, and her starting salary  
10 was \$41,000.<sup>2</sup> The description of AABS staff positions read in part as follows: “Will serve as  
11 members of multiple client engagement teams which primarily assist in performing audits of  
12 financial statements as well as often being involved with providing other assurance services that  
13 include: reviews, compilations, special reports, SEC compliance, debt compliance, comfort  
14 letters, reviews of interim data, internal control reviews, and regulatory and other compliance  
15 reporting.” Declaration of Bin Wolfe, Exh. A, Position Description. At all relevant times,  
16 employees in the AABS group were organized into the following positions, in ascending order:  
17 staff 1, staff 2, senior 1, senior 2, senior 3, manager, senior manager, executive director, and  
18 partner/principal. Wolfe Decl. at ¶ 4.

19 Fernandez initially received positive performance reviews and was promoted to “staff 2.”  
20 However, after this initial period, her reviews reflected concerns about tardiness and excessive  
21 time spent on personal instant messaging, sidekick sametime, and email. On July 13, 2005,  
22 Fernandez was given a performance improvement plan specifying that she was to: limit her use  
23 of personal instant messaging, sidekick sametime, and email; concentrate on finishing  
24 assignments on time; ask for additional work when she finished a project; and arrive to client  
25 locations on time. Declaration of Gregory Knopp, Exh. 3, Performance Improvement Plan.

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27 <sup>2</sup> There is some discrepancy in the record as to whether Fernandez’s starting salary was  
28 \$41,000 or \$45,000; this discrepancy is immaterial to the present analysis.

1 Fernandez admits that although she tried to comply with the plan at first, after a few months she  
2 no longer tried. Knopp Decl., Exh. 1, Fernandez Depo., 208:13-25. Fernandez conceded that  
3 eventually she was “just doing whatever was necessary to get by.” *Id.* 219:8-10. Fernandez was  
4 fired in July 2006.

5 Fernandez claims that she was misclassified as a salaried employee exempt from  
6 California’s wage and hour laws, and that in fact she is entitled to overtime pay. She sues on  
7 behalf of herself and all similarly situated E&Y employees for: (1) unpaid overtime wages under  
8 California Labor Code § 1194; (2) unlawful business practice in violation of California Business  
9 & Professions Code § 17200; (3) statutory interest on unpaid wages under California Labor Code  
10 § 218.6; (4) waiting penalties under California Labor Code § 203; and (5) wages for worked  
11 break time under California Labor Code § 226.7. E&Y seeks summary judgment on the basis  
12 that Fernandez was classified properly as an exempt employee.

## 13 **II. LEGAL STANDARD**

14 A motion for summary judgment should be granted if there is no genuine issue of  
15 material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.  
16 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears  
17 the initial burden of informing the Court of the basis for the motion and identifying the portions  
18 of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that  
19 demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S.  
20 317, 323 (1986).

21 If the moving party meets this initial burden, the burden shifts to the non-moving party to  
22 present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e);  
23 *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents  
24 evidence from which a reasonable jury, viewing the evidence in the light most favorable to that  
25 party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49;  
26 *Barlow v. Ground*, 943 F. 2d 1132, 1134-36 (9th Cir. 1991).

## 27 **III. DISCUSSION**

28 Subject to certain exceptions, California Labor Code § 510 requires overtime pay for

1 “[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any  
2 one workweek and the first eight hours worked on the seventh day of work in any one  
3 workweek.” Cal. Lab. Code § 510(a). The Industrial Welfare Commission (“IWC”) is  
4 empowered to establish exemptions from the general overtime requirement. Cal. Lab. Code §  
5 515(a). At issue in this case is the administrative exemption established by the IWC in Wage  
6 Order 4-2001, codified at Cal. Code Regs., tit. 8, § 11040.<sup>3</sup> As relevant here, the administrative  
7 exemption applies to any employee: (1) whose duties involve “[t]he performance of office or  
8 non-manual work directly related to management policies or general business operations of  
9 his/her employer or his employer’s customers”; (2) “[w]ho customarily and regularly exercises  
10 discretion and independent judgment”; (3) “[w]ho performs under only general supervision work  
11 along specialized or technical lines requiring special training, experience, or knowledge” *or*  
12 “[w]ho executes under only general supervision special assignments and tasks”; and (4) “[w]ho is  
13 primarily engaged in duties that meet the test of the exemption.” 8 Cal. Code. Regs.  
14 11040(1)(A)(2)(a)-(f). The employee also must earn a monthly salary equivalent to at least twice  
15 the state’s minimum wage for full-time employment. 8 Cal. Code Regs. 11040(1)(A)(2)(g).

16 There is no dispute that the salary element is met in this case. The Court thus turns its  
17 attention to the first four elements listed above.

18 The undisputed evidence in the record establishes that the first element is met, that is, that  
19 Fernandez performed office work directly related to the business operations of E&Y and its  
20 customers. Section 11040 expressly incorporates provisions of the Code of Federal Regulations  
21 defining such work to include “work in functional areas such as tax; finance; accounting;  
22 budgeting; auditing . . . .” *See* 8 Cal. Code Regs. § 11040(1)(A)(2)(f); 29 C.F.R. § 541.201(b)  
23 (West 2006); *see also* §§ 541.201(c) (stating that tax experts or financial consultants may be  
24 administratively exempt), 541.203(b) (West 2006) (stating that employees in the financial

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26 <sup>3</sup> At page one of its opening memorandum of points and authorities, E&Y asserts that  
27 Fernandez is both administratively and professionally exempt from California’s overtime  
28 requirements. However, E&Y does not thereafter address the professional exemption in the body  
of the memorandum; nor is the professional exemption addressed in the reply. Accordingly, the  
Court addresses only the application of the administrative exemption.

1 services industry generally meet the duties requirements for the administrative exemption). The  
2 Court has no difficulty concluding as a matter of law that Fernandez performed the type of work  
3 required under the first element.

4 However, the evidence is in conflict as to the degree to which Fernandez exercised  
5 independent judgment and worked under only general supervision (second and third elements  
6 above), and as to the amount of time Fernandez spent performing work that meets the test of the  
7 exemption (fourth element above).

8 **A. Degree To Which Fernandez Exercised Independent Judgment And Worked Under**  
9 **Only General Supervision**

10 As the moving party, E&Y has the initial burden of demonstrating that Fernandez  
11 satisfies the requirements that she exercised independent judgment and worked under only  
12 general supervision. E&Y relies upon Fernandez’s deposition testimony with respect to certain  
13 of her assignments. For example, Fernandez testified that with respect to one client, she went  
14 through the expenses of individuals on the Board of Directors to ensure that “they weren’t  
15 expensing over a certain amount and that the expenses seemed reasonable, that they weren’t for  
16 like things that just shouldn’t be expensed on the business.” Fernandez Depo. 119:18-23.  
17 Fernandez testified that the manager “basically gave me like a general guideline and just used  
18 normal, you know, logic” to identify expenses “that any normal person would expect not to –  
19 shouldn’t be charged to a business.” *Id.* at 120:4-9.

20 E&Y points to Fernandez’s testimony regarding “footing and tying” another client’s SEC  
21 filing. Fernandez testified that “I had to add every number column or row and make sure – I had  
22 to test their – if they said there were certain ratios, I had to recalculate the ratios, and then I had to  
23 get the working papers from [the client’s] file and just make sure the numbers came – to show  
24 that the numbers came from that worksheet then look to the financial statement, that the numbers  
25 that the team had tested were exactly being illustrated on the 10K.” *Id.* at 108:25 - 109:7. If  
26 Fernandez found any anomalies, she was to flag them and let her senior know there was a  
27 problem. *Id.* at 109:18-21.

28 E&Y also cites Fernandez’s testimony that she did “drop and counts” for two weeks at a

1 client’s facility in Las Vegas. Fernandez testified that a “drop and count” is “when you go and  
2 watch in the surveillance room, you watch the money counters collect all the money from the –  
3 cash from the tables and the coins, and then you watch them count them from the room.” *Id.* at  
4 93:15-19. The purpose is to verify that the numbers stated at the end of the day are correct. *Id.* at  
5 93:20-22. Fernandez was the only E&Y employee present for that particular assignment. *Id.* at  
6 94:12-16.

7 E&Y asserts that Fernandez’s testimony and other evidence is sufficient to meet E&Y’s  
8 initial burden to show that Fernandez exercised independent judgment and worked under only  
9 general supervision. The Court is not persuaded that such characterizations necessarily follow  
10 from the evidence. But even assuming for purposes of this motion that E&Y has met its initial  
11 burden, Fernandez presents her own declaration statements<sup>4</sup> to clarify her deposition testimony  
12 and to show that in fact she did not regularly exercise independent judgment or work under only  
13 general supervision. For example, Fernandez states that with respect to the first assignment  
14 referenced above (reviewing board members’ expenses), she was directed to report to her  
15 superiors any expenses that exceeded specific guidelines she had been given or that seemed to be  
16 abnormal business expenses. Fernandez Decl. ¶ 23. She herself did not make any decision as to  
17 whether any of the expenses were or were not proper business expenses; those determinations  
18 were made by her superiors. *Id.* Fernandez states that despite these restrictions, that particular  
19 assignment actually gave her more responsibility than usual, because she was permitted to assist  
20 with “characterization” of client data, while for the most part she was given assignments  
21 involving “verification” that the clients’ numbers added up and were documented properly. *Id.* at  
22 ¶ 24.

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<sup>4</sup> E&Y objects to portions of Fernandez’s declaration as irrelevant, lacking foundation and personal knowledge, and conflicting with her prior deposition testimony. The objection is overruled. The portions of the declaration relied upon by the Court are relevant and based upon Fernandez’s personal experience at E&Y. There is no direct conflict between these portions of the declaration and Fernandez’s prior deposition testimony. Fernandez moves to strike E&Y’s objection on various grounds. Given the Court’s ruling with respect to the objection, the motion to strike is denied as moot.

1 With respect to the “drop and counts” assignment in Las Vegas, Fernandez states in her  
2 declaration that her job consisted of “12 hour shifts of observing casino employees count cash in  
3 the cash counting room.” *Id.* at ¶ 18. She was to report any instances in which an employee  
4 pocketed cash or otherwise failed to count cash properly. *Id.* She did not observe any such  
5 conduct. *Id.* She personally counted certain cash bundles to confirm that the amount of such  
6 bundles had been accurately reported. *Id.* Although Fernandez was the only E&Y employee  
7 present during these shifts, her superiors decided to what extent the employee counts should be  
8 observed and how many counts Fernandez personally should make. *Id.*

9 Fernandez states that for the most part she performed footing and tying work, which  
10 consisted of matching up financial data that already had been characterized by the client, and  
11 reporting any numbers that did not match. *Id.* at ¶ 19. She also prepared comfort letters for her  
12 superiors’ signature; those were form letters containing standard language. *Id.* at ¶ 21. She states  
13 explicitly that she was not given responsibility for determining the scope of the audits, making  
14 audit conclusions, or making decisions about whether errors in client information were material.  
15 *Id.* at ¶ 2. She characterizes her job as similar to reconciling a bank statement against a  
16 checkbook ledger. *Id.* at ¶ 4.

17 Fernandez also points to other portions of her deposition testimony in support of her  
18 position. For example, Fernandez testified that the training she received for her Staff I (salaried)  
19 position was the same training as that she received for her intern (hourly non-exempt) position.  
20 Fernandez Depo. 245:8-14. In addition, she testified as to her limited involvement and lack of  
21 independence with respect to various projects on which she worked. *See, e.g., id.* at 66:1-10,  
22 69:20-25, 86:6-20, 100:17-25.

23 Fernandez’s declaration statements and deposition testimony are sufficient to create a  
24 triable issue of material fact as to the degree of independent judgment Fernandez exercised and  
25 the amount of supervision given her. A triable issue of material fact thus exists as to whether she  
26 came within the administrative exemption during her employment with E&Y.

1 **B. Amount Of Time Fernandez Spent Performing Work That Meets The Test Of The**  
2 **Exemption**

3 Because triable issues of material fact exist as to the two elements of the administrative  
4 exemption discussed above, the Court need not reach the question of whether Fernandez was  
5 “primarily engaged in duties that meet the test of the exemption” while at E&Y. *See* 8 Cal.  
6 Code. Regs. 11040(1)(A)(2)(f). Nonetheless, the Court will address this element briefly. The  
7 “primarily engaged” element has been construed to require that the employee spend at least fifty  
8 percent of his or her time on work that meets the test of the exemption. *See Combs v. Skyriver*  
9 *Communications, Inc.*, 159 Cal. App. 4th 1242, 1267 (2008). In analyzing this element, the  
10 Court must consider both how the employee actually spends his or her time *and* whether the  
11 employee’s conduct diverges from the employer’s realistic expectations. *Ramirez v. Yosemite*  
12 *Water Co., Inc.*, 20 Cal. 4th 785, 802 (1999) (discussing a different wage order containing a  
13 similar requirement that the employee spend more than fifty percent of his or her time on  
14 specified duties). An employee that “falls below the 50 percent mark due to his own substandard  
15 performance should not thereby be able to evade a valid exemption.” *Id.*

16 E&Y argues that Fernandez spent at least fifty percent of her time on duties falling within  
17 the exemption, and that any failure to meet this element was due to Fernandez’s own substandard  
18 performance. E&Y submits substantial evidence that Fernandez’s performance in fact was  
19 substandard, including her own deposition testimony that she did just enough to get by, regularly  
20 was late, and on one occasion failed to report to work until nearly lunchtime because she had  
21 gone to Mexico for the weekend. Fernandez Depo. 219:8 - 221:23. It is apparent that Fernandez  
22 was a less than exemplary employee. However, it simply is not clear from this record whether  
23 her position, performed as legitimately expected by E&Y, met the elements of the administrative  
24 exemption.



1 **IV. ORDER**

2 Good cause therefore appearing, IT IS HEREBY ORDERED that:

- 3 (1) E&Y's motion for summary judgment as to the claims of Sarah Fernandez is  
4 DENIED;
- 5 (2) A case management conference is set for March 6, 2009 at 10:30 a.m.  
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9 DATED: January 15, 2009

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11 JEREMY FOGEL  
12 United States District Judge  
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