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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JASON CAMPBELL and
SARAH SOBEK, individually,
and on behalf of all other
similarly situated current
and former employees of
PricewaterhouseCoopers, LLP,,

NO. CIV. S-06-2376 LKK/GGH

Plaintiffs,

v.

PRICEWATERHOUSECOOPERS, LLP,
a Limited Liability Partnership;,
and DOES 1-100, inclusive,

ORDER

Defendant.

_____ /

This is a wage-and-hour action brought by plaintiffs Jason Campbell and Sarah Sobek, individually and on behalf of other similarly situated individuals, against defendant PricewaterhouseCoopers LLP ("PwC"), the largest accounting firm in the world. Plaintiffs allege that PwC misclassified them as exempt employees under California law, failed to pay them overtime, and failed to provide other benefits that an employer must provide to non-exempt employees under California law.

1 Pending before the court are cross motions for summary
2 judgment or partial adjudication on the issue of whether members
3 of the plaintiff class, unlicensed employees with the position of
4 Attest Associate at PwC's California offices, were properly
5 classified as exempt employees.¹ The court grants plaintiffs'
6 motion. PwC's motion further (and separately) challenges
7 plaintiffs' claims for waiting time penalties and for punitive
8 damages. Because plaintiffs have not responded to these
9 challenges, the court concludes that these claims are abandoned,
10 and PwC's motion is granted in this respect.

11 I. BACKGROUND²

12
13 ¹ At various places both plaintiffs and defendants refer to
14 class members as unlicensed accountants. It appears to the court,
15 however, that such a designation may beg the question that is in
16 issue.

17 ² Several evidentiary objections and motions to exclude are
18 pending. Plaintiffs have moved to exclude the expert declaration
19 of Michael Moomaw. PwC relies on this testimony solely in arguing
20 that class members exercise discretion and independent judgment.
21 Because the court does not reach this issue, plaintiffs' objection
22 is moot.

23 Plaintiffs also move to exclude the testimony of Donna Dell.
24 The stated purpose of Dell's declaration is to "provide an opinion
25 . . . as to . . . the appropriateness under California and federal
26 law of applying the 'learned professional' criteria contained in
the [IWC wage order] to certain non-licensed accounting
professionals." Dell Decl., ¶ 7. Dell also opines on the
relationship between Cal. Bus. & Prof. Code § 5053 and the wage
order. These legal conclusions are an improper subject for expert
testimony, and are excluded. See, e.g., Mukhtar v. Cal. State
Univ., 299 F.3d 1053, 1066 (9th Cir. 2002) (citing McHugh v. United
Serv. Auto. Ass'n, 164 F.3d 451, 454 (9th Cir. 1999)). The agency
documents attached as exhibits to Dell's declaration are not
excluded.

PwC conversely objects to the declarations of Michael Ueltzen
and named plaintiffs Jason Campbell and Sarah Sobek. Because the
court does not rely on these declarations, these objections are
moot.

1 **A. General Background**

2 PwC has over 30,000 employees in its United States offices.
3 In California, PwC maintains six offices, in Irvine, Los Angeles,
4 Sacramento, San Diego, San Francisco, and San Jose. Decl. of Carl
5 Overstreet, ¶ 4. Plaintiff class consists solely of employees of
6 the California offices. The two named plaintiffs, Jason Campbell
7 and Sarah Sobek, were employed by the Sacramento office.

8 PwC's organizational structure is complex. PwC's professional
9 services are divided into three lines of service, which are
10 designated Assurance, Tax, and Advisory. Overstreet Decl. ¶ 3.
11 The assurance division is further subdivided into the Attest,
12 Systems Process Assurance, and Transaction divisions. The
13 certified class encompasses only employees in the Attest division.

14 Within the Attest division, there is a seven tiered hierarchy
15 of personnel job titles. From bottom to top, these levels are
16 associate, senior associate, manager, senior manager, director,
17 managing director, partner. Individuals at or above the level of
18 manager are required to hold CPA licenses, whereas associates and
19 senior associates need not be licensed. The Attest division may
20 also employ interns, who work below associates. Plaintiff class
21 consists only of unlicensed associates who are within the Attest
22 division, and work in California offices. In total, the class

23
24 Finally, PwC objects to plaintiffs' introduction of portions
25 of the "PwC Audit Guide" and other internal PwC documents on the
26 ground that these have not been properly authenticated. These
documents bear indicia of authenticity sufficient to satisfy Fed.
R. Evid. 901.

1 includes approximately 2000 members.

2 **B. PwC's Attest Division**

3 In essence, the Attest division performs audits. The audits
4 seek to assure that a company's financial statements are prepared
5 in accordance with Generally Accepted Accounting Principles
6 ("GAAP"), and are free of misstatements, whether caused by error
7 or fraud. See Overstreet Decl. ¶ 7. The ultimate recipient of
8 PwC's audit work is the client company's Board of Directors, often
9 through the board's audit committee. These audits demonstrate
10 clients' compliance with various regulatory mandates, and may also
11 provide a necessary predicate for access to investment capital.

12 In addition to verifying compliance, the Attest division
13 provides some advice to clients. The scope of this advice is
14 limited by statutory and professional independence rules. These
15 rules preclude PwC from performing management functions for clients
16 of the attest division, although PwC may "provide advice, research
17 materials, and recommendations to assist the client's management
18 in performing its functions and making decisions." Decl. of Norman
19 Hile in Supp. PwC's Mot. Summ. J., Ex. 3 (Decl. of Ruben Davila ¶
20 45, Appendix J - ET 101-3); see also Decl. of William Kershaw in
21 Supp. Pls.' Reply, ("Kershaw Decl. II") Ex. 1, 114:18-115:9.
22 Consistent with this limit, when PwC identifies deficiencies in the
23 client's accounting in the course of the audit process, PwC
24 communicates such findings, as well as recommendations arising from
25 them, to the client. This communication takes the form of
26 "management letters" that are among the documents delivered to the

1 client at the end of the audit process. PwC's Undisputed Facts
2 Supp. Summ. J. ("UF") 89-90.

3 PwC refers to the work performed on behalf of a particular
4 client as an "engagement." The team working on an engagement does
5 not persist from project to project, and has no other significance
6 within PwC. Within any particular engagement, associates and
7 senior associates may serve as the "in charge," and some class
8 members have performed this function. PwC's UF 94. The "in
9 charge" reports to and is supervised by the manager, and "helps to
10 manage the day-to-day activities of the engagement." Overstreet
11 Decl. ¶ 16. The "in charge" designation is particular to an
12 individual engagement, and is not a permanent position.

13 **B. What Do Attest Associates Do?**

14 Within the Attest division, all attest associates are
15 unlicensed and assist Certified Public Accountants (CPAs). Attest
16 associates' primary obligation is to verify financial statement
17 items by obtaining and reviewing their underlying documentation.

18 The parties sharply disagree about the nature of class
19 members' work within the Attest division. Many of these disputes
20 are not material to the present motions, because the court resolves
21 the motions on other predicates. Two questions are salient: the
22 degree of supervision over class members, and whether class members
23 perform work directly related to the internal administration of
24 PwC.

25 Class members' supervision is mandated by two sets of
26 standards. The first is California Business and Professions Code

1 § 5053, which requires "control and supervision" of unlicensed
2 employees. The second is the professional standards set by the
3 American Institute of Certified Public Accountants, which contains
4 a similar directive. PwC's internal policies confirm that PwC
5 complies with these standards. For example, associates are
6 prohibited from signing documents communicating substantive
7 opinions, conclusions or determinations to clients. Kershaw Decl.
8 II, Ex. 3, PWC 00670; Ex. 4 at PWC 00938 (excerpting PwC's internal
9 documents); see also id. at Ex. 1, 131:13-22; Ex. 2 67:23-77:4,
10 79:1-8, 123:24-125:2 (depositions of PwC's Fed. R. Civ. P. 30(b) (6)
11 witnesses). In addition, PwC requires that all associate work be
12 subjected to at least one level of detailed review. Id. at Ex. 6,
13 PWC 02770; Ex. 7, PWC 010230. Review "has to include the reviewer
14 being satisfied with both the quality of the work done and the
15 quality of the documentation in the Client file." Id. at Ex. 7,
16 PWC 010230.

17 PwC argues that class members participate in PwC's internal
18 administration in two ways. Class members have served on internal
19 committees, such as the "Unique People Experience," "Great Place
20 to Work," and "Connectivity" committees. PwC's UF 102. These
21 committees serve essentially social functions, e.g., "to bring
22 people in the Banking group together," Hile Decl., Ex. 14 (Decl.
23 of Ashlee Pierce, ¶ 23) (Unique People) and to improve relationship
24 "between PwC employees and the community, as well as the
25 relationships between various members of the PwC community." Hile
26 Decl., Ex 17 (Decl. of Lambert Shui, ¶ 7) (Great Place to Work and

1 Connectivity). Class members spend a minority of their time on
2 these projects. Pierce Decl. ¶ 23 ("2 to 10 hours per month"),
3 Shui Decl. ¶ 7 (up to 500 hours annually).

4 Furthermore, some evidence indicates that class members
5 supervise other associates, complete performance evaluations for
6 those they supervise, prepare initial drafts of engagement budgets,
7 and are involved in monitoring budgets. PwC's UFs 95-97, 99-100.
8 Neither party has directed the court to evidence of how much time
9 is spent on any of these activities.

10 **C. Statutory and Regulatory Background**

11 Plaintiffs' claims allege violations of various provisions of
12 the California Labor Code, as well as a violation of California's
13 Unfair Competition Law. California Labor Code section 515(a)
14 authorizes the California Industrial Welfare Commission ("IWC") to
15 "establish exemptions from [these laws] . . . for executive,
16 administrative, and professional employees, provided [inter alia]
17 that the employee is primarily engaged in duties that meet the test
18 of the exemption, [and] customarily and regularly exercises
19 discretion and independent judgment in performing those duties."
20 Cal. Lab. Code § 515(a). These exemptions are defined in "wage
21 orders," regulations promulgated by the IWC. More generally, the
22 IWC "is the state agency empowered to formulate regulations (known
23 as wage orders) governing employment in the State of California."
24 Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 561
25 (1996) (citing Cal. Lab. Code §§ 1173, 1178.3, 1182), Nordquist v.
26 McGraw-Hill Broad. Co., 32 Cal. App. 4th 555, 561 (1995).

1 The IWC has promulgated different wage orders that apply to
2 distinct groups of employees. See Cal. Code Regs. tit. 8, §§
3 11010-11170. The parties agree that the regulation applicable to
4 the employees in this case is Wage Order No. 4-2001, covering
5 "Professional, Technical, Clerical, Mechanical and Similar
6 Occupations," published at Cal. Code. Regs. tit. 8, § 11040.

7 Enforcement of the wage orders is the province of a separate
8 agency, the California Division of Labor Standards and Enforcement
9 ("DLSE"). "[T]he Legislature empowered the DLSE to promulgate
10 necessary 'regulations and rules of practice and procedure,'" and
11 DLSE has issued manuals, opinion letters, and bulletins
12 interpreting the wage orders. Bradshaw, 14 Cal. 4th at 570 (citing
13 Cal. Lab. Code § 98.8.) However, Bradshaw held that the DLSE
14 manuals under consideration (promulgated prior to 1996) were
15 enacted in violation of the California Administrative Procedures
16 Act, and as such, the Court refused to give "weight to the DLSE's
17 interpretation of the wage orders" contained therein. Id. at 576.
18 Under Bradshaw, the reasoning of these manuals may still be
19 considered, but the manuals are entitled to no deference. Since
20 Bradshaw was decided, DLSE has issued two updated versions of its
21 manual. It is unclear whether the APA problems have been resolved.
22 The DLSE website currently states that "Pursuant to Executive Order
23 S-2-03, the DLSE opinion letters and the Enforcement Policies and
24 Interpretations Manual are currently under review to determine
25 their legal force and effect and to ensure compliance with the
26 requirements of the Administrative Procedures Act."

1 <http://www.dir.ca.gov/dlse/Manual-Instructions.htm>

2 In contrast to the manuals, the California Supreme Court has
3 held that DLSE opinion letters, which are not subject to the same
4 APA requirements, are persuasive authority. Morillion v. Royal
5 Packing Co., 22 Cal. 4th 575, 584 (2000).

6 **II. STANDARD FOR SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56**

7 Summary judgment is appropriate when it is demonstrated that
8 there exists no genuine issue as to any material fact, and that the
9 moving party is entitled to judgment as a matter of law. Fed. R.
10 Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157
11 (1970); Poller v. Columbia Broadcast System, 368 U.S. 464, 467
12 (1962); Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Loehr
13 v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th
14 Cir. 1984).

15 Under summary judgment practice, the moving party

16 [A]lways bears the initial responsibility of
17 informing the district court of the basis for
18 its motion, and identifying those portions of
19 "the pleadings, depositions, answers to
20 interrogatories, and admissions on file,
together with the affidavits, if any," which
it believes demonstrate the absence of a
genuine issue of material fact.

21 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the
22 nonmoving party will bear the burden of proof at trial on a
23 dispositive issue, a summary judgment motion may properly be made
24 in reliance solely on the 'pleadings, depositions, answers to
25 interrogatories, and admissions on file.'" Id. Indeed, summary
26 judgment should be entered, after adequate time for discovery and

1 upon motion, against a party who fails to make a showing sufficient
2 to establish the existence of an element essential to that party's
3 case, and on which that party will bear the burden of proof at
4 trial. Id. at 322. "[A] complete failure of proof concerning an
5 essential element of the nonmoving party's case necessarily renders
6 all other facts immaterial." Id. In such a circumstance, summary
7 judgment should be granted, "so long as whatever is before the
8 district court demonstrates that the standard for entry of summary
9 judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

10 If the moving party meets its initial responsibility, the
11 burden then shifts to the opposing party to establish that a
12 genuine issue as to any material fact actually does exist.
13 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
14 586 (1986); First Nat'l Bank of Arizona v. Cities Serv. Co., 391
15 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d
16 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980).

17 In attempting to establish the existence of this factual
18 dispute, the opposing party may not rely upon the denials of its
19 pleadings, but is required to tender evidence of specific facts in
20 the form of affidavits, and/or admissible discovery material, in
21 support of its contention that the dispute exists. Rule 56(e);
22 Matsushita, 475 U.S. at 586 n.11; First Nat'l Bank, 391 U.S. at
23 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The
24 opposing party must demonstrate that the fact in contention is
25 material, i.e., a fact that might affect the outcome of the suit
26 under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S.

1 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec.
2 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the
3 dispute is genuine, i.e., the evidence is such that a reasonable
4 jury could return a verdict for the nonmoving party, Anderson, 242
5 U.S. 248-49; Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436
6 (9th Cir. 1987).

7 In the endeavor to establish the existence of a factual
8 dispute, the opposing party need not establish a material issue of
9 fact conclusively in its favor. It is sufficient that "the claimed
10 factual dispute be shown to require a jury or judge to resolve the
11 parties' differing versions of the truth at trial." First Nat'l
12 Bank, 391 U.S. at 290; T.W. Elec. Serv., 809 F.2d at 631. Thus,
13 the "purpose of summary judgment is to 'pierce the pleadings and
14 to assess the proof in order to see whether there is a genuine need
15 for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P.
16 56(e) advisory committee's note on 1963 amendments); International
17 Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1405
18 (9th Cir. 1985).

19 In resolving the summary judgment motion, the court examines
20 the pleadings, depositions, answers to interrogatories, and
21 admissions on file, together with the affidavits, if any. Rule
22 56(c); Poller, 368 U.S. at 468; SEC v. Seaboard Corp., 677 F.2d
23 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party
24 is to be believed, Anderson, 477 U.S. at 255, and all reasonable
25 inferences that may be drawn from the facts placed before the court
26 must be drawn in favor of the opposing party, Matsushita, 475 U.S.

1 at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655
2 (1962) (per curiam)); Abramson v. University of Hawaii, 594 F.2d
3 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn
4 out of the air, and it is the opposing party's obligation to
5 produce a factual predicate from which the inference may be drawn.
6 Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D.
7 Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

8 Finally, to demonstrate a genuine issue, the opposing party
9 "must do more than simply show that there is some metaphysical
10 doubt as to the material facts. . . . Where the record taken as a
11 whole could not lead a rational trier of fact to find for the
12 nonmoving party, there is no 'genuine issue for trial.'" Matsushita,
13 475 U.S. at 587 (citation omitted).

14 **III. ANALYSIS**

15 Both parties seek summary judgment or adjudication on the
16 question of whether class members are exempt employees under one
17 of the three exemptions provided in the 2001 wage order, for
18 professional, executive, or administrative employees. Exemption
19 is an affirmative defense to be claimed by an employer, and the
20 burden of showing exemption ultimately lies on defendant. Ramirez
21 v. Yosemite Water Co., 20 Cal. 4th 785, 794-95 (1999).

22 Much of the briefing and evidence submitted in this case
23 concerns a requirement common to all three exemptions, that
24 employees exercise "discretion and independent judgment." Although
25 this requirement is "arguably the single most important issue,"
26 Class Cert. Order at 19, it is a necessary, but not a sufficient,

1 element of exemption. As explained below, analysis of the factors
2 particular to each exemption demonstrates that plaintiffs are
3 entitled to summary judgment as to all three exemptions on other
4 grounds.

5 **A. Professional Exemption**

6 The crux of the parties' dispute is whether the Attest
7 Associates may be exempt under the wage order's "Professional
8 Exemption." This provision exempts any employee "who meets all of
9 the following requirements:"

- 10 (a) Who is licensed or certified by the State of California
11 and is primarily engaged in the practice of one of the
12 following recognized professions: law, medicine,
13 dentistry, optometry, architecture, engineering,
14 teaching, or accounting; or
15 (b) Who is primarily engaged in an occupation commonly
16 recognized as a learned or artistic profession. For the
17 purposes of this subsection, "learned or artistic
18 profession" means an employee who is primarily engaged
19 in the performance of:
20 (i) Work requiring knowledge of an advanced type in a
21 field or science or learning customarily acquired
22 by a prolonged course of specialized intellectual
23 instruction and study, . . . ; or
24 (ii) Work that is original and creative in character in
25 a recognized field of artistic endeavor . . . ; and
26 (iii) Whose work is predominantly intellectual and varied
in character (as opposed to routine mental, manual,
mechanical, or physical work)
(c) Who customarily and regularly exercises discretion and
independent judgment in the performance of duties set
forth in subparagraphs (a) and (b).
[(d) - (i) omitted]

22 Cal. Code Regs., tit. 8, § 11040(1)(A)(3). The court refers to
23 subsection (a) as the "enumerated professions" exemption and
24 subsection (b) as the "learned professions" exemption.³

25 ³ The parties refer to these as the "recognized" and "learned"
26 exemptions. However, this terminology engenders confusion when

1 Defendants argue that class members, who are unlicensed
2 employees who assist licenced accountants, may be exempt under
3 subsection (b), the "learned professional" exemption. Plaintiffs
4 argue that, inter alia, defendant's interpretation of the
5 regulation renders subsection (a), the "enumerated professional"
6 exemption, surplusage. Defendants reply that excluding the
7 enumerated professions from the learned professions would, inter
8 alia, contradict settled expectations about who may be exempt--for
9 example, plaintiffs' reading would mean that new law firm
10 associates awaiting their bar passage results were non-exempt
11 employees.

12 Although both parties' arguments carry great force, the court
13 adopts plaintiffs' construction. The court reaches the following
14 conclusions, explained in further detail below. Arguably, the
15 issue turns on whether the "or" at the end of paragraph "a" is
16 conjunctive or disjunctive. The regulatory text itself is
17 ambiguous as to whether unlicensed employees engaged in an
18 enumerated profession may be exempt under the learned professions
19 exemption. Moreover, the various agency interpretive documents do
20 not explicitly or clearly speak to this question. Turning to the
21 problem of surplusage, subsection (a), the enumerated professions
22 provision, is surplusage unless application of that provision
23 exempts an employee who would otherwise be non-exempt, or vice

24 _____
25 "recognized professions" are contrasted with professions
26 "recognized as . . . learned." The attest associates are not
engaged in an artistic profession.

1 versa. The court concludes that the enumerated professions
2 provision does not exempt any employees who would otherwise be non-
3 exempt, because the regulatory history and interpretive documents
4 make it clear that absent the enumerated professions provision, all
5 licensed or certified members of those professions would satisfy
6 the requirements of the learned professions provision. These same
7 interpretive authorities, however, do not provide a clear
8 indication as to whether or not the enumerated professions are
9 excluded from the learned professions provision--the point
10 ultimately at issue in this case. Faced with this ambiguity, the
11 court's obligations to avoid surplusage constructions and to
12 construe the wage orders in favor of employees both compel the
13 conclusion that the unlicensed accounting assistants do not fall
14 within the learned professions exemption.⁴

15 **1. Principles Governing Interpretation of the Wage Order**

16 The wage order is interpreted according to principles of
17 California law. The California Courts of Appeal have concluded
18 that wage orders are "quasi-legislative regulations," and as such,
19 are to be "construed in accordance with the ordinary principles of
20 statutory interpretation." Singh v. Superior Court, 140 Cal. App.
21 4th 387, 393 (2006) (citing Collins v. Overnite Transportation Co.,

22

23 ⁴ The court would be less than frank not to recognize the
24 difficulties this interpretation tenders for some of the employees
25 identified in PwC's brief. They are not before this court and thus
26 no opinion concerning them need be reached. I note in passing,
without intending to suggest resolution of other issues, that at
least arguably the work engaged in by the class members is more
like the work of paralegals than law clerks.

1 105 Cal. App. 4th 171, 179 (2003)); see also Ramirez, 20 Cal. 4th
2 at 801 (concluding that in general the wage orders were "quasi-
3 legislative," although a provision not at issue in this case also
4 "interpreted" the statutory exclusion of outside salesmen.).

5 "When construing a statute, a court's goal is to ascertain the
6 intent of the enacting legislative body so that [the court] may
7 adopt the construction that best effectuates the purpose of the
8 law." Gattuso v. Harte-Hanks Shoppers, Inc., 42 Cal. 4th 554, 567
9 (2007) (internal quotation omitted); see also People v. Arias, 45
10 Cal. 4th 169, 177 (2008). The first step in this process is to
11 look to the "ordinary meaning" of the statute's words "in their
12 statutory context," because this "is usually the most reliable
13 indicator of legislative intent." Gattuso, 42 Cal. 4th at 567.
14 However, "[l]iteral construction should not prevail if it is
15 contrary to the legislative intent apparent in the statute; and if
16 a statute is amenable to two alternative interpretations, the one
17 that leads to the more reasonable result will be followed." Arias,
18 45 Cal. 4th at 177; see also Gattuso, 42 Cal. 4th at 567. "A
19 statute is regarded as ambiguous if it is capable of two
20 constructions, both of which are reasonable." Hughes v. Bd. of
21 Architectural Examiners, 17 Cal. 4th 763, 775 (1998).

22 In resolving an ambiguity in a statute (and, by extension, a
23 quasi-legislative regulation), interpretations by an agency charged
24 with administering the statute are persuasive, but not controlling,
25 authority. Yamaha Corp. of America v. State Bd. of Equalization,
26 19 Cal. 4th 1, 11 (1998); see also Jones v. The Lodge at Torrey

1 Pines Partnership, 42 Cal. 4th 1158, 1173 (2008). Thus, both IWC
2 and DLSE interpretations of the wage orders may be informative.
3 Morillion, 22 Cal. 4th at 584.

4 Finally, the California Supreme Court has held that "statutes
5 governing conditions of employment are to be construed broadly in
6 favor of protecting employees." Murphy v. Kenneth Cole
7 Productions, Inc., 40 Cal. 4th 1094, 1103 (2007) (citing Sav-On
8 Drug Stores, Inc. v. Superior Court 34 Cal. 4th 319, 340 (2004),
9 Ramirez, 20 Cal. 4th at 794, and Lusardi Construction Co. v. Aubry,
10 1 Cal. 4th 976, 985 (1992)).

11 **2. Class Members Are Engaged in The Profession of**
12 **Accounting**

13 The tension between the enumerated and learned professions
14 provisions is only relevant to this case if class members are
15 primarily engaged in the enumerated profession of "accounting," as
16 opposed to some other activity, perhaps "accounting assistance."
17 As I now explain, class members are engaged in accounting within
18 the meaning of the wage order.

19 The California Business and Professions Code defines "public
20 accounting" to include the practices of "prepar[ing] . . . for
21 clients reports on audits or examinations of books or records" and
22 "making audits . . . as a part of bookkeeping operations for
23 clients." Cal. Bus. & Prof. Code §§ 5051(d), (f). It is
24 undisputed that class members assist in this type of audit
25 activity. PwC's UF 29, 34, 39-43.

26 Moreover, the Business and Professions Code permits

1 uncertified individuals to serve as assistants to certified
2 accountants provided that they are subject to their control or
3 supervision of a certified accountant. Cal. Bus. & Prof. Code §
4 5053. One California court has held that uncertified individuals
5 "remain free to perform . . . accounting services[;]" they are only
6 prohibited from advertising themselves as public accountants.
7 Carberry v. State Bd. of Accountancy, 28 Cal. App. 4th 770, 775
8 (1994); see also Cal. Bus. & Prof. Code §§ 5055-5056. In sum, it
9 appears that California law does not prohibit class members from
10 performing accounting work provided that they are subject to
11 supervision, in the sense that accountants might also perform these
12 tasks in the course of performing their professional duties, and
13 the undisputed facts demonstrate that class members are in fact
14 engaged in such work.

15 **3. The Structure of the Wage Order Is Ambiguous**

16 Plaintiffs' first argument on this issue is that the structure
17 of the wage order and the associated language compel the conclusion
18 that the learned and enumerated professions do not overlap. The
19 Professional Exemption begins by providing that to be exempt, and
20 employee must satisfy "all of the following requirements," i.e.,
21 that all of subsections (a) through (i) must to be satisfied for
22 an employee to fall under the professional exemption. The question
23 is whether "or" separating (a) from (b), indicates a disjunction.
24 It would be absurd to conclude that, to be an exempt professional,
25 an employee must both be licenced in a enumerated profession and
26 engaged in a learned or artistic profession, and neither party

1 advocates this interpretation. Instead, the professional exemption
2 applies to an employee who satisfies one of (a) or (b), and all of
3 (c) through (i).

4 Plaintiffs accept this interpretation, but argue that in order
5 to give effect to the conjunctive, compulsory meaning of "all," an
6 employer must not be able to choose between subsections (a) and
7 (b). Plaintiffs therefore propose reading "all of the following
8 requirements" to mean "all applicable requirements," and
9 interpreting subsections (a) and (b) as mutually exclusive, such
10 that only one may apply to any particular employee.

11 The structure of the wage order, and in particular the words
12 "all" and "or," does not itself compel this interpretation. The
13 concurrent use of the words "all" and "or" creates some tension,
14 but at most, this demonstrates some ambiguity. The words "all of
15 the following requirements" alone do not oblige the conclusion that
16 the enumerated and learned professions do not overlap.⁵ The court

17
18 ⁵ In a related argument, plaintiffs also rely on the term
19 "primarily engaged," arguing that one cannot be simultaneously
20 primarily engaged in both a learned and a recognized profession.
21 Plaintiffs assume that the two cannot be the same thing, whereas
22 this assumption is precisely the question at issue.

23 Finally, plaintiffs seek to bolster their structural argument
24 with a lengthy discussion of the distinction between the inclusive
25 and exclusive meanings of "or." It is true that "or" has two
26 meanings. An inclusive-or means "either A, or B, or both A and B."
An exclusive-or means "either A or B, but not both A and B." This
distinction, although sometimes useful in logic, has no relevance
here. Strictly speaking, treating the "or" in the wage order as
an "exclusive-or" would not mean that a profession could not be
both enumerated and learned; it would instead mean that an
employee who belonged to such a profession was not exempt. See
generally Jon Barwise & John Etchemendy, Language, Proof, and Logic
(2002).

1 therefore turns to the substance of these two subsections, to
2 determine whether there is an interpretation that permits the two
3 to overlap while giving meaning and effect to each.

4 **4. The Content of Subsections (a) and (b)**

5 The enumerated professions are not explicitly excluded from
6 the learned professions. However, under California law, the
7 controlling issue is the IWC's intent. Arias, 45 Cal. 4th at 177,
8 Gattuso, 42 Cal. 4th at 567. Both parties cite various
9 interpretive documents which they argue are probative of this
10 intent. Plaintiffs also argue that an intent to exclude must be
11 inferred because subsection (a) would otherwise be surplusage.

12 The court therefore examines the history and development of
13 the wage order, as well as the various interpretive documents, to
14 answer the related questions of whether such an exclusion is
15 necessary to give meaning to subsection (a), and whether the IWC
16 or DLSE have recognized such an exclusion. Neither of these
17 questions is necessarily controlling. A surplusage construction
18 should be avoided "unless absolutely necessary," Arias, 45 Cal. 4th
19 at 180, and the available agency interpretations are at most
20 persuasive authority.

21 **a. Development of the Wage Order**

22 The court reviews three separate versions of the wage order:
23 the 1980 wage order, which predated adoption of the "learned
24 professional" language; the 1989 wage order, which adopted the
25 term; and the 2001 wage order, which is presently in effect, and
26 which substantially changed the structure of the exemption.

1 **i. The Wage Order Prior to Adoption of the Term**
2 **“Learned Professional”**

3 The exemption section of the relevant 1980 wage order provided
4 that

5 No person shall be considered to be employed
6 in an administrative, executive, or
7 professional capacity unless one of the
8 following conditions prevails:

- 9 (1) The employee is engaged in work which is
10 primarily intellectual, managerial, or
11 creative, and which requires exercise of
12 discretion and independent judgment, . .
13 . ; or
14 (2) The employee is licensed or certified by
15 the State of California and is engaged in
16 the practice of one of the following
17 recognized professions: law, medicine,
18 dentistry, pharmacy, optometry,
19 architecture, engineering, teaching, or
20 accounting.

21 Former Cal. Code. Regs. tit. 8, § 11040(1)(A) (1980). Thus, this
22 order differed from the present order in that, inter alia, it
23 lacked a “learned professions” exemption, and it included an
24 exemption for employees engaged in “primarily intellectual” work.

25 Contrary to defendant’s assumption, the “primarily
26 intellectual” and “learned professions” exemptions are not the
27 same. In 1984, DLSE issued an Interpretive Bulletin addressing
28 whether, under this order, an unlicensed accountant could be an
29 exempt employee under the “primarily intellectual” provision.
30 (Dell Decl., Doc. 275, p. 13-14.) The bulletin provided that
31 because these subsections (1) and (2) were stated disjunctively,
32 an accountant could in principle qualify under either one, and an
33 unlicensed accountant was not excluded from the primarily

1 intellectual exemption. However, the DLSE stated that such
2 qualification was unlikely.

3 It is reasonable to conclude that the
4 Commission, when it used the phrase "primarily
5 intellectual," intended that the kinds of
6 activities associated with the day-in and day-
7 out conduct of the work of an accountant or
other occupations covered by the order would
not be "primarily intellectual." Otherwise,
the exemption--and perhaps the entire Order--
would be meaningless.

8 Id. Thus, pursuant to the DLSE interpretation, even most certified
9 accountants did not do work which was "primarily intellectual."
10 Interpretations of the learned professional exemption show that it
11 differs in this regard.

12 The enumerated professions provision of the 1980 wage order
13 therefore served to expand the scope of the exemption, as many
14 licensed enumerated professionals would not otherwise be exempt.
15 Conversely, the enumerated professions provision did not effect any
16 contraction on the scope of the wage order's exemptions, as
17 employees within the enumerated professions--licensed or not--were
18 not excluded from the "primarily intellectual" provision. See DLSE
19 Opinion Letter of February 28, 1989 (Def.'s RJN Ex. 1) (citing the
20 1984 interpretive bulletin for the proposition that "certain
21 accountants who are not CPAs may still qualify as professionals if
22 they meet the alternative requirements for the professional
23 exemption," i.e., the primarily intellectual test.).

24 **ii. The 1989 Wage Order, and The Stated Purpose of**
25 **The Learned Professional Exemption**

26 In 1989, the IWC amended the wage order to exempt individuals

1 "engaged in an occupation commonly recognized as a learned or
2 artistic profession."⁶ Former Cal. Code Regs. tit. 8, §
3 11040(1)(A)(2) (1989). This learned professions exemption was
4 added to the enumerated professions provision, and did not replace
5 the primarily intellectual provision. The 1989 wage order provided
6 that

7 No person shall be considered to be employed
8 in an administrative, executive, or
9 professional capacity unless one of the
10 following conditions prevails:
11 (1) The employee is engaged in which work is
12 primarily intellectual . . . ; or
13 (2) The employee is licensed or certified by
the State of California and is engaged in
the practice of one of the following
recognized professions: law, . . . or
accounting, or is engaged in an
occupation commonly recognized as a
learned or artistic profession.

14 Former Cal. Code Regs. tit. 8, § 11040(1)(A) (1989). The IWC's
15 "Statement of Basis" for the new rule explained that

16 Emerging occupations, such as those in the
17 fields of science and high technology, . . .
18 while exempt under federal law, rarely, if
19 ever, qualified for a professional exemption
20 under the IWC Orders. . . . In response to
21 [various] concerns, . . . the IWC decided that
22 the professional exemption relied too much on
23 credentialism. Consequently, the IWC proposed
24 language which would add persons engaged in an
occupation commonly recognized as a 'learned
or artistic' profession to the licensed
professionals already listed in the order.
This broad language would eliminate the need
for the IWC to modify the list . . . each time
it wished to recognize a new group of
professionals, because it would allow

25 ⁶ The 1989 DLSE opinion letter cited in the preceding
26 paragraph was released prior to the adoption of this amendment, and
the letter interprets the 1980 wage order.

1 enforcement staff to consider individual
2 situations and actual duties when applying the
3 exemption.

4 IWC's Statement As To the Basis Upon Which Industrial Welfare
5 Commission Order No. 4-89 Is Predicated, Section 1, Applicability
6 (1989); see also DLSE Opinion Letter 1997.03.05.

7 The statement of basis demonstrates that one purpose of the
8 learned professions provision is to expand the scope of the
9 exemption beyond the enumerated professions. This document does
10 not demonstrate whether the learned professions provision was also
11 intended to expand the scope of the exemption within the enumerated
12 professions. Although the IWC stated that the learned profession
13 allowed consideration of "individual situations and actual duties,"
14 the stated purpose of such consideration is to "recognize . . . new
15 group[s] of professionals." It seems unlikely that such "new
16 groups" would include groups of unlicensed individuals within the
17 enumerated professions. Similarly, while the IWC criticized
18 reliance on "credentialism," this criticism could be directed
19 toward either the focus on individual employees' credentials, or
20 the focus on professions for which credentials are available.

21 Despite the above ambiguity, the statement of basis makes it
22 clear that the relationship between the enumerated professions and
23 the learned professions is not the same as the relationship between
24 the enumerated professions and the "primarily intellectual"
25 exemption. The 1984 DLSE interpretive bulletin concluded that the
26 "primarily intellectual" and enumerated professions provisions
generally referred to different types of employees, such that the

1 enumerated professions provision exempted many employees whose work
2 was not primarily intellectual. In contrast, the IWC's statement
3 of basis for the 1989 wage order implies that the only difference
4 between enumerated professions and the learned professions is
5 whether IWC has had an opportunity to specifically enumerate the
6 profession. The 2001 wage order further supports this conclusion.

7 **iii. The 2001 Wage Order**

8 The present wage order was adopted in 2001. This order was
9 the first to separate administrative, executive and professional
10 employees into different categories. Within the professional
11 exemption, the order deleted the "primarily intellectual"
12 exception, moved the "learned professions" from the "recognized
13 professions" to a separate provision, and added the current
14 language describing what constitutes an exempt learned profession.
15 The IWC "developed the duties that meet the test for the
16 professional exemption" by referring to the then-applicable federal
17 regulations. IWC Statement of Basis for the 2001 Wage Orders. As
18 part of this elaboration, the IWC adopted the federal regulation's
19 requirement that a learned professional's work be "predominantly
20 intellectual and varied in character." Cal. Code Regs. tit. 8 §
21 11040(1)(A)(3)(b)(iii). The present order's text furthermore
22 explicitly refers to specific sections of the former regulation for
23 use as interpretive authority. Id. § 11040 (1)(A)(3)(e).

24 By emulating and referring to the federal regulations, the IWC
25 further indicated that in general, the learned professions refer
26 to the same type of work as the enumerated professions. The

1 federal scheme lacks an analogous "enumerated professions"
2 provision. Instead, doctors, lawyers, and accountants are exempt
3 from federal labor laws because they fall under the general
4 "learned professions" exemption for positions "requiring knowledge
5 of an advanced type in a field of science or learning customarily
6 acquired by a prolonged course of specialized instruction and
7 study." Former 29 C.F.R. § 541.301(a) (2001).

8 This brings the court to the crux of this case. The fact that
9 the federal learned professional exemption includes the professions
10 enumerated by the California wage order, and that the IWC copied
11 this language, indicates that the enumerated professions are also
12 learned professions. However, rather than copying the federal
13 scheme entirely, the IWC chose to preserve a separate enumerated
14 professional exemption. Plaintiffs suggest that this decision
15 provides a counter-indication that the enumerated professions are
16 not learned professions for purposes of the California wage order.
17 The IWC and DLSE interpretive documents surprisingly do not
18 directly address this question. What these documents do indicate
19 is that, absent exclusion from the learned professions, the
20 enumerated professions provision is surplusage.

21 **b. Neither DLSE Nor IWC Has Addressed Whether**
22 **Accountants May Be Learned Professionals**

23 Contrary to the parties' contentions, neither DLSE nor IWC has
24 addressed whether enumerated professions are also learned
25 professions. Defendant places significant emphasis on the DLSE's
26 conclusion under the 1980 wage order that accountants, including

1 unlicensed accountants, may be engaged in work that is "primarily
2 intellectual." This interpretation does not apply to the learned
3 professional exemption. At the time this interpretation was
4 provided, the learned professional exemption had not been adopted.
5 When the learned professional exemption was added, it was not added
6 to the subsection containing the primarily intellectual exemption.
7 Moreover, the history of the two provisions at the least strongly
8 suggest that they identify different types of employees, and serve
9 different purposes in the wage order. Therefore, notwithstanding
10 the fact that the present learned professions exemption requires
11 that learned professionals' work be "predominantly intellectual,"
12 (a requirement borrowed from the former federal regulations, see
13 former 29 C.F.R. § 541.306), the DLSE's interpretations regarding
14 the former primarily intellectual exemption do not apply to the
15 learned professional exemption.

16 Next, plaintiffs argue that the 1998 DLSE Manual (interpreting
17 the 1989 wage order) indicates that unlicensed employees engaged
18 in the enumerated professions cannot be exempt as learned
19 professionals. In the 1989 order, the term "learned professions"
20 occurred in a separate clause of the same subsection as the
21 enumerated professions. The 1998 manual states that "Employees
22 exempted under the nine enumerated professions must be . . .
23 licensed," § 37.1.1, and that "License or certification means that
24 while a certified public accountant is exempt, an uncertified
25 accountant is not," § 37.1.3. Because the manual did not provide
26 any reasoning for this conclusion, it is unclear whether the

1 manual's statements refer to exemption under that subsection, or
2 merely under the enumerated professions clause. In light of both
3 this uncertainty and the DLSE manuals' potential invalidity under
4 the California APA, the court does not give weight to this
5 argument. See Bradshaw, 14 Cal. 4th at 570.

6 In 2002, the DLSE released an updated manual. Like the 1998
7 manual, the new manual may have been adopted without compliance
8 with the California APA.⁷ In addition, the manual does not clearly
9 speak to the question at issue. The new manual notes that "some
10 employers erroneously believe that anyone employed in the field of
11 accountancy . . . will qualify for exemption as a professional
12 employee by virtue of such employment. While there are many exempt
13 employees in [the field of accounting], the exemption of [an]
14 individual depends upon his or her duties and the other listed
15 criteria." 2002 DLSE Manual, § 54.10.6.2. By explaining that an
16 accounting employee's exemption status depends on his duties, the
17 DLSE implied that a license is not the sole determinative factor.
18 See also id. § 54.10.6.3. However, this may merely reflect the
19 fact that even a licensed accountant must engage in duties
20 requiring discretion or independent judgment.⁸ Furthermore, the

21
22 ⁷ As noted above, the DLSE website currently states that
23 "Pursuant to Executive Order S-2-03, the DLSE opinion letters and
24 the Enforcement Policies and Interpretations Manual are currently
under review to determine their legal force and effect and to
ensure compliance with the requirements of the Administrative
Procedures Act."

25 ⁸ The DLSE may also have meant that an accountant's duties may
26 render his or her exempt under the administrative or executive
exemptions. This interpretation would be in some tension with the

1 enumerated professions provisions' licence requirement may be one
2 of the "other listed criteria" identified by the manual.

3 Finally, plaintiffs cite a 2003 DLSE opinion letter regarding
4 whether unlicensed teachers may be exempt. The opinion letter
5 stated that "there is no indication that the Commission intended
6 to undo the clearly defined intent to limit the teacher exemption
7 to those workers meeting the definition contained in the Order by
8 allowing those workers to be exempted under the learned
9 professional categories." Pls.' RJN at Ex. B, 7-6, Doc. 300. The
10 DLSE based this conclusion on a later provision of the wage order,
11 that explicitly states that "'Teaching' means, for purposes of
12 section 1 [which includes all the exemption provisions] of this
13 order, the profession of teaching under a certificate from the
14 Commission on Teacher Preparation and Licensing or teaching in an
15 accredited college or university." Cal. Code Regs. tit. 8 §
16 11040(1)(R). The wage order does not similarly define accounting,
17 and thus, does not express an analogously forceful intent to limit
18 the availability of exemptions for accountants.

19 **c. Absent An Exclusion, The Enumerated Professions**
20 **Provision Is Surplusage**

21 The court therefore turns to plaintiffs' surplusage argument.
22 A regulatory provision is surplusage when it is "redundant" or
23 "does not add meaning." Black's Law Dictionary, 8th Edition, 1484.

24
25

 court's conclusion below that the statutorily mandated supervision
26 of unlicensed accountants precludes their qualification for the
administrative exemption.

1 A surplusage construction is to be avoided. "In analyzing
2 statutory language, we seek to give meaning to every word and
3 phrase in the statute to accomplish a result consistent with the
4 legislative purpose." Hughes, 17 Cal. 4th at 775. "[E]very part
5 of a statute be presumed to have some effect and not be treated as
6 meaningless unless absolutely necessary." Arias, 45 Cal. 4th at
7 180.

8 Under a strict view, a provision lacks meaning when, if that
9 provision was deleted, the application of the regulation would
10 nonetheless produce the exact same outcome in every case.⁹ For
11 subsection (a), the enumerated professions provision, to change the
12 outcome of the application of the professional exemption, it must
13 either (1) identify some employees who are exempt even though they
14 are not learned professionals, or (2) identify some employees who
15 would be exempt as learned professionals if subsection (a) was
16 deleted from the regulation, but whom subsection (a) nonetheless
17 renders non-exempt.¹⁰

18 Prior to the adoption of the learned professions exemption,
19

20 ⁹ Thus, although some provisions may be purely illustrative,
21 courts should avoid interpreting a provision as such unless the
22 regulation compels this interpretation. Arias, 45 Cal. 4th at 180
23 (surplusage constructions avoided "unless absolutely necessary");
24 see also Lamie v. United States Tr., 540 U.S. 526, 536 (2004) (In
evaluating an interpretation that would make the inclusion of
"attorney" in a list of compensable individuals surplusage, noting
that "our preference for avoiding surplusage constructions is not
absolute.").

25 ¹⁰ To return to plaintiffs' earlier argument, in the above
26 sentence, the "or" is inclusive--subsection (a) would have meaning
if it both included some additional employees and excluded other
additional employees.

1 the enumerated professions provision did the first of these things,
2 because it was the only exemption applicable to, e.g., most
3 accountants. However, under the current wage order, all licensed
4 enumerated professionals also satisfy the requirements of the
5 learned professions exemption (unless the enumerated professions
6 provision specifically excludes them from it), so the enumerated
7 professions provision no longer expands the scope of the
8 professional exemption.¹¹ Therefore, the enumerated professions
9 provision does not affect the application of the wage order, and
10 is therefore surplusage, unless it excludes some employees who
11 would otherwise be exempt.¹²

12 **5. Conclusion on The Professional Exemption**

13 For the reasons stated above, the language of the wage order
14 is ambiguous as to the meaning of the enumerated professions
15 provision. Neither party's interpretation of the professional
16 exemption is so unreasonable that it must be rejected out of hand.
17 Hughes, 17 Cal. 4th at 775.

18 Nothing in the text of the regulation itself suggests that the
19 enumerated professions cannot also be learned professions. If the

20
21 ¹¹ Note that under this interpretation of surplusage, the
22 enumerated professions provision does not have any meaningful
23 effect if it causes certain employees to be excluded from the
24 learned professions provision only to exempt exactly that same
25 group of employees. In such a case, the outcome of the application
26 of the wage order would remain the same.

24 ¹² Plaintiffs suggest that employees engaged in an enumerated
25 profession should also be excluded from the administrative and
26 executive exemptions. The above surplusage argument lends no
support to this suggestion, and the court is not aware of any other
authority to this effect.

1 court could interpret this text alone, it might interpret the
2 learned professions provision in the way the DLSE interpreted the
3 former "primarily intellectual" provision; i.e., as setting an
4 overlapping, but generally stricter, set of criteria. However, the
5 IWC's intent is controlling, and when the text is considered in
6 light of the history of the wage order's development and the
7 various agency interpretive documents, it appears that the IWC
8 intended for the learned professions provision to have a broader
9 meaning, in that it extends the professional exemption to
10 additional professions. What is less clear is why, when the IWC
11 rewrote the wage order by borrowing language from the federal
12 regulations, the IWC deliberately preserved the enumerated
13 professions provision. It may be that this decision was
14 inadvertent, and that the IWC did not intend for the present
15 enumerated professions to have any meaning at all. This court,
16 however, must assume the contrary. Arias, 45 Cal. 4th at 180.¹³

17 Faced with this ambiguity, the California Supreme Court's
18 instructions to avoid surplusage constructions, Arias, 45 Cal. 4th
19 at 180, and to construe ambiguous statutes in favor of employees,
20 Murphy, 40 Cal. 4th at 1103, both strongly suggest the conclusion
21

22 ¹³ See also Bell v. Farmers Ins. Exchange, 87 Cal. App. 4th
23 805, 812 (2001). In interpreting the 1989 wage order, the Bell
24 court refused to adopt an interpretation of "primarily
25 intellectual" exemption that would render the phrase
26 "administrative, executive or professional capacities" surplusage.
However, Bell drew additional support for this conclusion from the
fact that the phrase "administrative, executive or professional
capacities" was added to the regulation at a later date than the
term "primarily intellectual," a circumstance not present here.

1 that employees primarily engaged in accounting cannot be exempt
2 under the learned professionals provision, Cal. Code Regs., tit.
3 8, § 11040(1)(A)(3)(b). Accordingly, the court adopts this
4 conclusion.

5 The court expresses no opinion on whether other specific
6 employees engaged in the enumerated professions, such as law firm
7 associates whose bar admissions are still pending, may be learned
8 professionals. As Justice Holmes wrote, "the life of the law has
9 not been logic; it has been experience." *The Common Law*, 1 (1881).
10 The experience of those cases will be markedly different, both in
11 terms of the history of the wage order's enforcement and the
12 absence of administrative agencies' statements that such
13 individuals are routinely wrongly classified.

14 **B. Executive Exemption**

15 The executive exemption requires, among other things, that an
16 employee: (1) manage a customarily recognized department or
17 subdivision thereof; (2) customarily and regularly direct the work
18 of two or more employees; and (3) make recommendations as to the
19 hiring or firing, advancement, promotion, or change of status of
20 other employees that carry particular weight. Cal. Code Regs.,
21 tit. 8, § 11040(1)(A)(1). PwC argues that some class members meet
22 these requirements by virtue of serving as the "in charge" of
23 engagements.

24 In this court's class certification order, the court held that
25 the "team of employees assembled for a particular engagement is not
26 a 'recognized department.'" Class Cert. Order, 26:18-20. "Although

1 the question of whether a team of employees working on an
2 engagement constitutes a 'recognized department' is one on the
3 merits, there is little dispute as to its answer. . . .
4 Accordingly, . . . the executive exemption does not apply at all."
5 Id. at 27. If this question was left unresolved by the
6 certification order, it is now clear that engagements are not
7 customarily recognized departments.

8 A "customarily recognized department or subdivision" must be
9 "a unit with permanent status and function." Former 29 C.F.R. §
10 541.104(a), referred to by Cal. Code Regs. tit 8 §
11 11040(1)(A)(1)(e). PwC cites Sutton v. Engineered Sys., Inc., 598
12 F.2d 1134, 1137 (8th Cir. 1979) in support of its defense, which
13 held that a project "with an expected work period of 480 calendar
14 days" could be a recognized department. PwC, who bears the burden
15 of proof on this issue, has not directed the court to any evidence
16 that could indicate that any engagement has such effectively
17 permanent status. This reason is itself sufficient to grant
18 summary adjudication for plaintiffs on this issue.

19 **C. Administrative Exemption**

20 The administrative exemption's requirements fall into three
21 categories. First, an employee's duties and responsibilities must
22 involve "The performance of office or non-manual work directly
23 related to management policies or general business operations of
24 his/her employer or his employer's customers." Cal. Code Regs.
25 tit. 8, § 11040(1)(A)(2)(a)(I). To be directly related, the work
26 must be of "substantial importance." Bratt, 912 F.2d at 1069

1 (citing former 29 C.F.R. § 541.205); see Cal. Code Regs. tit. 8 §
2 11040(1)(A)(2)(f) (adopting this provision of the former CFR).

3 Second, the employee must satisfy one of the following: the
4 employee must "regularly and directly assist[] a proprietor, or an
5 employee employed in a bona fide executive administrative
6 capacity," the employee must "perform[] only under general
7 supervision work along specialized or technical lines requiring
8 special training, experience, or knowledge," or the employee must
9 "execute[] under only general supervision special assignments and
10 tasks." § 11040(1)(A)(2)(c)-(e).

11 Third, the employee must "customarily and regularly exercise[]
12 discretion and independent judgment." § 11040(1)(A)(2)(b).¹⁴

13 Here, defendant argues that class members perform exempt work
14 in administering both PwC and PwC's clients. The evidence
15 indicates that class members may perform some work directly related
16 to the administration of PwC. However, no class members are
17 "primarily engaged in duties that meet the test of the exemption,"
18 as California courts have interpreted this term. §
19 11040(1)(A)(2)(f); see Ramirez, 20 Cal. 4th at 802. Class members
20 are therefore not exempt under the administrative exemption.

21 **1. The California Courts' Interpretation of "Primarily**
22 **Engaged In"**

23 "The 'primarily engaged' element has been construed to require
24 that the employee spend at least fifty percent of his or her time

25 ¹⁴ The professional and executive exemptions contain analogous
26 requirements.

1 on work that meets the test of the exemption." Ho v. Ernst & Young
2 LLP, 2009 U.S. Dist. LEXIS 5294 (N.D. Cal. Jan. 15, 2009) (citing
3 Combs v. Skyriver Communications, Inc., 159 Cal. App. 4th 1242,
4 1267 (2008)). In evaluating whether employees are primarily
5 engaged in exempt duties, the court considers both the employees'
6 actual duties and the employer's expectations. As the California
7 Supreme Court noted in Ramirez, however, both these components are
8 problematic:

9 On the one hand, if hours worked on [an exempt
10 activity] were determined through an
11 employer's job description, then the employer
12 could make an employee exempt from overtime
13 laws solely by fashioning an idealized job
14 description that had little basis in reality.
15 On the other hand, an employee who is supposed
to be engaged in [an exempt activity] during
most of his working hours and falls below the
50 percent mark due to his own substandard
performance should not thereby be able to
evade a valid exemption.

16 Ramirez, 20 Cal. 4th at 802 (discussing whether, under a separate
17 wage order, a requirement that an employee spend at least fifty
18 percent of his time as an outside salesman was satisfied).
19 Accordingly, Ramirez instructed trial courts to "steer clear of
20 these two pitfalls by inquiring into the realistic requirements of
21 the job." Id. (emphasis in original). "In so doing, the court
22 should consider, first and foremost, how the employee actually
23 spends his or her time. But the trial court should also consider
24 whether the employee's practice diverges from the employer's
25 realistic expectations." Id. Ramirez thus envisions the synthesis
26 of two components, one directed at the employee and one directed

1 at the employer.

2 The California Supreme Court has also clarified the import of
3 Ramirez in the class action context. An employer's realistic
4 expectations are "likely to prove susceptible to common proof," but
5 how employees actually spend their time "has the potential to
6 generate individual issues." Sav-On Drug Stores, Inc. v. Superior
7 Court, 34 Cal. 4th 319, 337 (2000) (applying the Ramirez framework
8 to the "primarily engaged in" requirement). Despite this
9 potential, class-wide determination was appropriate on both
10 questions in Sav-On, because the primary issue was whether certain
11 activities were exempt or non-exempt. See id. at 330-31 ("As
12 plaintiffs argued to the trial court, '[t]he only difference
13 between Defendant's declarations and Plaintiffs' evidence is that
14 the parties disagree on whether certain identical work tasks are
15 "managerial" or "non-managerial."'). This determination was
16 similarly appropriate with regard to the professional and executive
17 exemptions in this case. Because the court concluded that class
18 members were not engaged in any activities satisfying those
19 exemptions, there was no need to conduct the Ramirez "primarily
20 engaged" analysis. As explained in the following sections, the
21 Ramirez analysis is only slightly less cut and dried with respect
22 to the administrative exemption.

23 **2. Work Administering PwC's Clients**

24 Work performed on behalf of an employers' clients may satisfy
25 the administrative exemption. Class Cert. Order, 23:23-24:1,
26 Webster v. Pub. Sch. Employees of Wash., Inc., 247 F.3d 910, 911,

1 915-17 (9th Cir. 2001); see also Roe-Midgett v. CC Servs., 512 F.3d
2 865, 868, 876 (7th Cir. 2008). Nonetheless, class members' work
3 on behalf of PwC's clients does not satisfy the administrative
4 exemption, because in performing such work, class members are
5 subject to more than general supervision.

6 To be exempt as administrative employees, class members must
7 satisfy one of subsections (c), (d), or (e) of Cal. Code Regs. tit
8 8 § 11040(1)(A)(2). PwC properly concedes that class members do
9 not satisfy subsection (c), i.e., that members do not "regularly
10 and directly assist[] a proprietor, or an employee employed in a
11 bona fide executive administrative capacity." Therefore, class
12 members would need to satisfy subsection (d) or (e), both of which
13 require that employees work under only "general supervision."

14 The general supervision requirement has received relatively
15 little interpretation. The 2002 DLSE Manual has provided a few
16 illustrations of employees satisfying (d) and (e). The manual
17 stated that subsection (d) was satisfied by "tax experts, insurance
18 experts, sales research experts, wage-rate analysts, foreign
19 exchange consultants, and statisticians." 2002 DLSE Manual § 52.3
20 ¶ 2. Subsection (e) includes "buyers, field representatives, and
21 location managers for motion picture companies," as well as
22 "customers' brokers in stock exchange firms and so-called 'account
23 executives' in advertising firms." Id. ¶ 3. These examples merely
24 repeat without explanation the phrase "under general supervision."

25 Obviously, some degree of supervision is not fatal to
26 exemption. To the extent that the DLSE's examples illustrate the

1 meaning of "general" supervision, they suggest supervision in the
2 form of review or approval of overall results and conclusions.
3 This interpretation is consistent with a common-sense understanding
4 of the term. Class members are subject to closer supervision than
5 this. Unlike the various employees given in the DLSE examples,
6 class members are subject to statutorily mandated "control and
7 supervision [by] a certified public accountant." Cal. Bus. & Prof.
8 Code § 5053. Professional rules similarly mandate supervision of
9 class members. See, e.g., American Institute of Professional
10 Accountants Professional Standards § 311.12 (Assistants should
11 bring to the supervisor's attention "significant accounting and
12 auditing questions raised during the audit so that he may assess
13 their significance."), § 311.13 ("The work performed by each
14 assistant should be reviewed to determine whether it was adequately
15 performed."). PwC's own policies (no doubt informed by these
16 requirements) subject class members to review of, and thereby
17 supervision over, all the predicate steps and processes involved
18 in their work. PwC's own training documents state that "[a]ll of
19 the work that [associates] document will be reviewed by the team
20 manager for that area." Kershaw Decl. II, Ex. 7, PWC 010230; see
21 also id. at Ex. 6, PWC 02770.

22 PwC attempts to counter this argument by highlighting the
23 degree of discretion and independent judgment exercised by class
24 members. The "general supervision" and "discretion and independent
25 judgment" elements of the administrative exemption are distinct.
26 The two requirements occur in separate subsections, and while all

1 administrative employees must exercise discretion and independent
2 judgment, only some must work under no more than general
3 supervision. This court alluded to this distinction in the class
4 certification order by identifying several examples of employees
5 who could be said to exercise independent judgment despite the fact
6 that they were subject to supervision. Class Cert. Order, 33.¹⁵
7 Class members may exercise independent judgment in completing the
8 steps of the audit (the court does not reach this issue), but this
9 possibility does not call into question the conclusion that
10 whenever class members make decisions, those decisions are subject
11 to supervision.

12 It may be that, as a matter of law, the supervision mandated
13 by Cal. Bus. & Prof. Code § 5053 precludes any unlicensed
14 accountant from falling within the administrative exemption.
15 Absent illustrations of other supervisory schemes that comply with
16 this section, the court declines to address this issue. As to the
17 instant case, the evidence of PwC's supervision of class members,
18 interpreted in the light most favorable to PwC, does not raise a
19 triable question as to whether class members are subject to only
20 general supervision in performing the steps of an audit.
21 Accordingly, class members' accounting work, which includes all the

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23 ¹⁵ In discussing the "discretion and independent judgment"
24 requirement, I held that "the fact that the work of PwC associates
25 and senior associate[s] is subject to review is not sufficient to
26 prove that they are performing non-exempt work." Class Cert.
Order, 33. That statement, however, did not address the
administrative exemption's separate general supervision
requirement.

1 work that allegedly administers clients, is necessarily subject to
2 more than general supervision, and therefore nonexempt.

3 **3. Administering PwC**

4 Defendant identifies a limited range of purportedly
5 administrative work class members perform on behalf of PwC. This
6 includes supervising junior associates, participating without
7 authority in hiring and recruiting, participating in internal
8 committees, such as the "great place to work" committee, evaluating
9 the performance of people class members supervise, and proposing
10 draft engagement budgets.

11 Much of this work is not administrative. As explained by the
12 former federal regulations cited by the wage order, an employee
13 whose work "directly relate[s] to management policy or general
14 business operations" is one who "determines or effects . . .
15 policies," former C.F.R. 29 § 541.205(c)(3), or who "obtain[s]
16 solutions to complex business, scientific, or engineering
17 problems," § 541.204(c)(7). Supervision of junior associates,
18 participation in recruiting, and evaluation of other associates are
19 clearly outside the scope of this requirement.

20 The remaining activities are insufficient to support
21 exemption. It may be that these activities are also not exempt.
22 Both may be unrelated to management policy or operations, and in
23 proposing budgets, associates may be subject to more than general
24 supervision. Even assuming that these activities are exempt,
25 however, it is clear that class members are not "primarily engaged"
26 in them. PwC does not reasonably expect class members to spend

1 more than half of their time proposing budgets or working on
2 internal committees, and there is no evidence that any class member
3 actually spends their time in this way. PwC's argument is that
4 these tasks, coupled with performance of other exempt work, warrant
5 exemption. This argument fails because the court has held that
6 class members are not engaged in any other form of exempt work.
7 Class members are therefore not exempt under the administrative
8 exemption. Accordingly, class members are not exempt, and
9 plaintiffs' motion for summary judgment is granted.

10 **D. Remaining Issues.**

11 PwC's motion raises a number of other issues separate from the
12 question of exemption, to which plaintiffs have not responded.¹⁶
13 Summary adjudication is appropriate for PwC as to two of these
14 issues: plaintiffs' claims for waiting time penalties and for
15 punitive damages.

16 **1. Waiting Time Penalties**

17 An essential element of plaintiffs' claim for waiting time
18 penalties is that the defendant "willfully" withheld wages. Cal.
19 Labor Code § 203. A "'good faith dispute' that any wages are due
20 will preclude imposition of waiting time penalties" Cal.
21 Code Regs. tit. 8, § 13520. Here, PwC's defense demonstrates the
22 existence of such a good faith dispute. § 13520(a). This question
23 involved application of several provisions of the wage order that
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25 ¹⁶ Plaintiffs' failure to address these issues is particularly
26 noteworthy in light of the fact that the court granted plaintiffs'
permission to file a 55 page opposition to PwC's motion.

1 have previously received only unclear interpretation, and which
2 defendant could have reasonably believed exempted class members.
3 Therefore, as a matter of law, PwC did not act "willfully" in
4 classifying class members as exempt, and the claim for waiting time
5 penalties must be dismissed.

6 **2. Punitive Damages**

7 PwC also argues that plaintiffs' are not entitled to punitive
8 damages on their claims relating to failure to pay overtime, missed
9 meal periods, itemized wage statements, and violation of
10 California's Unfair Competition Law. By not addressing this aspect
11 of PwC's motion, plaintiffs have abandoned their claims for
12 punitive damages. Moreover, the court notes that an order in the
13 related case of Le/Kress v. PricewaterhouseCoopers, No. 08-cv-965,
14 16 (E.D. Cal. Aug. 18, 2008) held that punitive damages were
15 unavailable for all but the first of these claims.

16 **IV. CONCLUSION**

17 For the reasons stated above, the court GRANTS plaintiffs'
18 motion for summary adjudication on the issue of exemption. Class
19 members are not exempt under the 2001 wage order. The court
20 conversely DENIES IN PART defendant's cross-motion, as it pertains
21 to this issue. However, the court GRANTS IN PART defendant's
22 cross-motion for summary adjudication on the issues of waiting time
23 penalties and punitive damages.

24 The court notes that the determination regarding exemption is
25 one involving a controlling question of law, that there is
26 substantial ground for difference of opinion, and that an immediate

1 appeal from the order will materially advance the ultimate
2 termination of the litigation.

3 ACCORDINGLY, the court certifies the matter for interlocutory
4 appeal pursuant to 28 U.S.C. § 1292.

5 IT IS SO ORDERED.

6 DATED: March 10, 2009.

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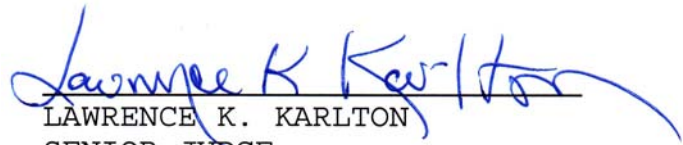
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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT