JOHN CHIANG
California State Controller

July 31, 2008

The Honorable Arnold Schwarzenegger
Governor of California
State Capitol Building
Sacramento, CA 95814

Dear Governor Schwarzenegger,

I understand that today you signed an executive order (Order) demanding the salaries of more than 200,000 civil servants who are covered by the federal Fair Labor Standards Act (FLSA) be cut to the federal minimum wage of $6.55 an hour.

To the extent that the Order attempts to govern the constitutional duties for which I was independently elected to perform and, because it is based on faulty legal and factual premises, I will not comply with the Order.

Your Order to reduce the salaries of these civil servants, making them bear the brunt of the budget stalemate, appears to be based in part upon what you perceive to be a conclusive and unequivocal determination by the California Supreme Court in the case, *White v. Davis* (May 1, 2003) 30 Cal. 4th 528, that my authority to issue warrants to employees in the absence of a budget is limited to the minimum wage.

One of the main purposes of the FLSA in creating a minimum wage standard was to protect vulnerable employees from employer wage exploitation. In furtherance of that objective, and in order to afford employees some level of protection, Congress set a minimum salary level for all employees covered by the Act. The FLSA does not, in any way, prevent an employer from paying more than the minimum wage.

In *White v. Davis*, this office took the position that due to technical limitations inherent in a payroll system that was developed more than 25 years ago, it was infeasible, if not impossible, to adjust payroll for the workforce to minimum wage during a budgetary impasse and, after the budget has been passed, to promptly restore the unpaid wages in a manner consistent with the law. Given the choice of paying nothing, which is a clear violation of the FLSA, and continuing to pay full wages, my office opted for the latter option as a means of protecting the employees from unnecessary financial hardship and, moreover, from exposing the State to possible treble damages for failing to comply with the FLSA.

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In reviewing the matter, the California Supreme Court specifically declined to rule on the amount of salary that could lawfully be paid during a budget impasse. In its ruling, the court concluded that "in order to comply with the FLSA, the state, during a budget impasse, must timely pay nonexempt employees who do not work overtime ***at least*** at the minimum wage rate." (italics added) But the court declined to specify whether the federal minimum wage or full salary is appropriate, opining, on page 68 of the decision, "In any event, as already noted, the Controller's claim of infeasibility was not fully litigated below, and thus we do not believe it would be appropriate to attempt to definitively resolve the claim at this juncture. . . ."

Also, contrary to your statement that the State is at risk, due to the budget impasse, of having insufficient cash to pay state expenditures, it should be pointed out that there is enough cash to meet all expenditures through September. As of June 30, unused borrowable resources totaled $12.7 billion. This is $3.6 billion higher than the $9.1 billion projected in your May revision to the budget. Should it be determined that the cash is insufficient, the law authorizes me to borrow money either through a Revenue Anticipation Note should there be a budget in place, or a Registered Reimbursement Warrant, commonly known as a RAW, in the absence of a budget. Some form of external borrowing is part of the State's normal cash management process and will occur regardless of when a budget is passed or what solutions are contemplated in the budget. Reducing employees to minimum wage will not save the State money and will not impact any forthcoming borrowing decisions. In fact, deferring compensation until after the budget is passed may well expedite the need for cash to meet the unpaid amounts as soon as the budget is signed.

Finally, it appears as though your Order, while purporting to require compliance with the *White* decision, is actually inapposite of your reading of that decision. On one hand, you incorrectly indicate that there exists no authority to pay employees not working overtime more than the minimum wage and then, on the other hand, purport to authorize full pay to certain classes of employees. If your reading of the case is correct, then my office cannot make exceptions for those public employees who are engaged in "services and functions of state government deemed critical and exempt." In other words, your reading of the court conclusion in *White* would mean I do not have authority to pay full wages to any FLSA-covered employee, including the firefighters on the front line in Butte County, the peace officers who patrol our streets and any other employee dedicated to "preserve and protect human life and safety." Your assertion that I do not have the authority to pay some FLSA workers their full pay, but do for others, is not supported by the Supreme Court ruling in *White.* I either have the authority to only pay minimum wage, or I do not.

In closing, I must reiterate that any attempted adjustments to the payroll system would result in payroll problems that would continue for months after a budget is enacted. I also am compelled, as the State's chief fiscal officer, to remind you that such a drastic cut in pay would cause huge fiscal harm to the families of more than 200,000 devoted civil servants. The loss of spending dollars will increase the loss in consumer

confidence, and further deteriorate California's fragile economy. The *Sacramento Bee* on Thursday published an article noting that the pay cuts to the 112,500 state workers in the region would cost the area $15 million a day.

For these many reasons, I have no intention of complying with the Order and encourage you to continue to work with the Legislature on passing a budget and with my office to ensure we have sufficient funds to meet the State's financial obligations and pay for the education, health and public safety programs Californians expect and deserve.

Sincerely,

Original signed by:

JOHN CHIANG
California State Controller