

This is an amendment to 2.82.2 NMAC, Sections 9 and 11, effective 11/12/2019.

**2.82.2.9 REGULAR MEMBERS:**

**A.** In four-year colleges, technical and vocational institutes and community or junior colleges, public school districts, and state operated schools, "regular members" shall be all employees other than retired members, ~~[participants in the return to work program, participants in the return to work exception;]~~ retired members working in the return to work program under 2.82.5.15 NMAC, retired members working full time equivalency ("FTE") .25 FTE or less under 2.82.5.16 NMAC, participants in the alternative retirement plan (ARP) or employees excluded under 2.82.2.11 NMAC.

**B.** Any member except retired members ~~[participating in the return to work program, participants in the return to work exception]~~ working in the return to work program under 2.82.5.15 NMAC, retired members working .25 FTE or less under 2.82.5.16 NMAC, participants in the alternative retirement plan (ARP), or employees excluded under 2.82.2.11 NMAC, who is regularly employed in any of the following local administrative units, shall be a "regular member" if the member holds a license issued by the public education department at the time of commencement of employment in such local administrative units:

- (1) northern New Mexico college;
- (2) New Mexico boys' school;
- (3) girls' welfare home;
- (4) Los Lunas medical center;
- (5) public education department;
- (6) educational retirement board;
- (7) New Mexico school for the blind and visually impaired;
- (8) New Mexico school for the deaf;
- (9) New Mexico activities association; and
- (10) regional education cooperatives.

**C.** Except retired members ~~[participating in the return to work program, participants in the return to work exception;]~~ working in the return to work program under 2.82.5.15 NMAC, retired members working .25 FTE or less under 2.82.5.16 NMAC, participants in the alternative retirement plan (ARP) or employees excluded under 2.82.2.11 NMAC, regular membership is a condition of employment and all local administrative unit employees who qualify as "regular members" must be covered under the Educational Retirement Act, commencing with the first day of employment.

**D.** Except retired members ~~[participating in the return to work program, participants in the return to work exception;]~~ working in the return to work program under 2.82.5.15 NMAC, retired members working .25 FTE or less under 2.82.5.16 NMAC, participants in the alternative retirement plan (ARP) or employees excluded under 2.82.2.11 NMAC, any person regularly employed, whether full-time or part-time, in any state institution or agency described in Subsection B of 2.82.2.8 NMAC, shall be a regular member if employed in an educational program and holds a license issued by the public education department.

[2.82.2.9 NMAC - Rp, 2.82.2.9 NMAC, 10/31/2017; A, 11/12/2019]

**2.82.2.11 EMPLOYEES EXCLUDED FROM COVERAGE:**

**A.** Any person enrolled as a student in any of the local administrative units outlined in Subsection A of 2.82.2.8 NMAC, and who is also employed by the local administrative unit in which he is enrolled, shall be considered a student and not eligible for either "regular" or "provisional" membership under the Educational Retirement Act, except that members of the faculty or full-time staff, who may be incidentally enrolled in classes, shall not be affected by this rule. Under no circumstances shall graduate assistants, teaching fellows, or students in positions of similar nature, be considered eligible for coverage under the Educational Retirement Act. This includes any and all participation in the teacher enhancement program or participation in similar graduate programs.

**B.** Any person whose full time equivalency ("FTE") is .25 or less, and who is not a covered employee of another local administrative unit, shall not be covered for contribution purposes. On and after July 1, 2020, a retired member who has returned to employment at a level of .25 FTE or less, regardless of salary level, shall make nonrefundable contributions to the fund as would be required by Section 22-11-21 NMSA 1978 if the retired member were a non-retired employee. For purposes of calculating a person's FTE, employment with all

local administrative units shall be aggregated. Any person employed on July 1, 1994 who was then covered under the Educational Retirement Act shall continue to be covered for the duration of that employment.

**C.** Any employee engaged on a day-to-day basis to replace another employee who is temporarily absent shall be considered a "substitute" and shall not be covered under the Educational Retirement Act. An employee engaged to fill a vacant position (including a position vacated by an extended leave of absence) is not considered a "substitute" and must be covered under the Educational Retirement Act.

**D.** Independent contractors who perform services for local administrative units on a fee basis are not eligible for membership under the Educational Retirement Act as a result of having performed such service, and sums paid for such service shall not be covered for purposes of contributions. The following factors shall be considered in determining whether an individual qualifies as an independent contractor:

(1) registration with the New Mexico department of taxation and revenue to pay gross receipts tax;

(2) the existence of a written contract with the local administrative unit setting forth the services to be provided and the compensation to be paid;

(3) whether the person receives benefits such as paid annual or sick leave, health insurance and other benefits that the local administrative unit provides its regular employees or is paid as an employee by the local administrative unit;

(4) whether the person satisfies internal revenue service guidelines for determining that an individual is an independent contractor rather than an employee;

(a) as necessary, the director shall make available forms for use by local administrative units for use in making this determination;

(b) the board reserves the right to examine the complete forms, contracts and other agreements, and any other materials as may be necessary for the purpose of determining whether an individual is an independent contractor or employee.

**E.** All students enrolled in any public school, grades 1-12.

**F.** Any person retired pursuant to the Public Employees Retirement Act ("PERA") who is hired prior to July 1, 2019 by a local administrative unit as a certified police officer shall not make contributions to the fund. If subsequent termination of employment occurs, followed by re-employment as a police officer or in any other capacity on or after July 1, 2019, with either the same or a different local administrative unit, the provisions of Subsection B of Section 22-11-25.2 NMSA 1978 shall not apply and such person shall make contributions to the fund.

(1) For purposes of Subsection B of Section 22-11-25.2 NMSA 1978, "police officer" means an officer who is certified pursuant to the Law Enforcement Training Act and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal or traffic or highway laws of the state. For example, a university police officer, whose duty is to enforce the laws of the state, albeit within the boundaries set forth in Subsection B of Section 29-5-2 NMSA 1978, is a "police officer". Examples of employees who are not police officers include, but are not limited to, police dispatchers, administrative staff and security guards.

(2) Whether an employee is considered a police officer will be based primarily on the employee's specific job duties. A mere connection to law enforcement activity is insufficient by itself to meet the definition of police officer. An employee will not be considered a police officer unless his or her primary responsibility is the prevention and detection of crime or the enforcement of the penal or traffic or highway laws of the state.

(3) The local administrative unit that employs the police officer shall make contributions to the fund as provided in the Educational Retirement Act.

[2.82.2.11 NMAC - Rp, 2.82.2.11 NMAC, 10/31/2017; A, 11/12/2019]