

This is an amendment to 2.82.5 NMAC, Sections 8, 10, 12, and 15 through 21, effective 7/14/2020.

2.82.5.8 ELIGIBILITY:

A. A member shall not be considered eligible to retire unless he shall have completed at least five years of contributory employment even though such member might otherwise be eligible by reason of age and service, and tender of payment for contributory employment.

B. A school bus owner-driver shall not be eligible to retire unless ~~[he/she]~~ the owner-driver terminates the owner-driver contract with the public schools.
[6/30/1999; 2.82.5.8 NMAC - Rn, 2 NMAC 82.5.8, 11/30/2001; A, 10/17/2017; A, 7/14/2020]

2.82.5.10 COMPUTATION AND COMMENCEMENT OF RETIREMENT BENEFITS:

A. Upon retirement, the following procedures shall apply with regard to commencement of the member's benefit:

(1) If the retiring member's employment terminated at least 90 days prior to the effective date of retirement, the benefit may be commenced at the end of the month following the effective date of retirement.

(2) If the retiring member's employment terminated within 90 days prior to the effective date of retirement, the retiring member's benefit may be estimated by the director and commenced at the end of the month following the effective date of retirement.

(3) After the employer report is received from the administrative unit, reporting the retiring member's final earnings, the director shall determine whether or not the estimated benefit is correct. If the estimated benefit is incorrect, the director shall make the appropriate adjustment to the member's benefit, retroactive to the effective date of the benefit. This adjustment, if required, shall be made at the earliest practical date. The retiring member shall be advised regarding the nature of any such adjustment. An adjustment will be made in this manner if and only if the adjustment based upon the member's actual earnings would result in a monthly benefit which differs more than one dollar from the estimated benefit.

B. Whenever a retiring member completes the academic or fiscal year prior to July 1, ~~[he]~~ the member shall not be entitled to retirement benefits for the months of July or August if ~~[he]~~ the member returns to employment at the beginning of the next following academic or fiscal year. If a member shall have received benefits for such months, ~~[he]~~ the member shall be required by the director to return the sums received, to the educational retirement fund, in accordance with Section 22-11-40 NMSA 1978.

C. The retiring member shall be furnished with copies of all computations including a listing of ~~[his]~~ the member's service credit, and ~~[he]~~ the member shall have 90 days after receipt of same in which to file notice of correction with the director, after which time the computations and service may not be corrected by the member.

D. A member's average annual salary as defined in Section 22-11-30 NMSA 1978 shall be the average annual earnings of the member in the last 20 calendar quarters in which there were earnings preceding retirement or the average annual earnings of any 20 consecutive calendar quarters in which there were earnings, whichever is greater. Salary earned by a retiree who has returned to employment under ~~[the return-to-work program described in] 2.82.5.15 NMAC, [or the return-to-work .25 FTE or less provision described in] 2.82.5.16 NMAC or 2.82.5.17 NMAC~~ shall not be used in determining a member's average annual salary.

E. When determining a member's last five-year average annual salary (last 20 calendar quarters), the director shall use the reported earnings on which contributions have been made by the member during the 20 quarters of employment immediately preceding the member's date of termination, except that if a member's last employment terminated at least one month prior to the close of the calendar quarter (or one month prior to the close of the academic year if such ends in May), the member's last five years' earnings shall be the reported earnings upon which contributions have been made by the member during the five years of employment preceding the end of the month in which termination occurs. In such cases, any earnings in a calendar quarter shall be considered as earnings for the full quarter, except for the first quarter and the last quarter of the last five years of employment.

F. When the member's application for benefits has been approved and ~~[his]~~ the member's effective date of retirement has been reached, the member shall then be retired.

G. Benefits shall not be commenced until the retiring member has elected the retirement benefit as provided in Section 22-11-30 NMSA 1978, or an optional benefit pursuant to Section 22-11-29 NMSA 1978.

H. Re-retirement benefits shall be computed in the following manner:

(1) The re-retirement benefit will be calculated in the same way as the member's last benefit and will be based on the last five-year average or the highest consecutive five-year average, whichever is greater, for which contributions were made, and the member's total service at re-retirement. The retirement benefit formula will be the same as at last retirement unless the member returns to employment for at least four quarters after the effective date of change in the formula. If this occurs, the benefit computation will be based on the benefit formula in effect at the time of re-retirement.

(2) The re-retirement benefit calculated above is reduced under the following conditions:

(a) At re-retirement the member's retirement age shall be the member's chronological age less any period of time(s) during which benefits were received while in retirement. If this age is under 60 and the member's total service is under 25 years, the benefit is reduced by six-tenths percent for each quarter year under 60, down to age 55, plus one and eight-tenths percent for each quarter year this age is under 55.

(b) If the last benefit was payable as a reduced benefit under the terms of an option, the same terms and reduction shall apply to the re-retirement benefit.

(c) In no case can the member's re-retirement benefit be less than the member was receiving when the member returned to employment.

[6/30/1999; 2.82.5.10 NMAC - Rn, 2 NMAC 82.5.10, 11/30/2001; A, 10/31/2002; A, 10/17/2017; A, 11/12/2019; A, 7/14/2020]

2.82.5.12 APPROVAL OF RETIREMENT APPLICATION: The director ~~[of educational retirement]~~ is authorized to approve duly executed applications for age and service retirement on behalf of the board in order to insure timely approval of same; however, all such approvals must be ratified by the educational retirement board at a subsequent meeting of the board.

[6/30/1999; 2.82.5.12 NMAC - Rn, 2 NMAC 82.5.12, 11/30/2001; A, 7/14/2020]

2.82.5.15 RETURN TO WORK PROGRAM:

A. In order to qualify to return to employment (hereinafter "return to work") as provided for in Subsections A and F of Section 22-11-25.1 NMSA 1978, a retired member must have a period of at least 12 consecutive months in which they have not been employed as an employee or independent contractor by a local administrative unit (hereinafter, a "break in service").

(1) To satisfy the requirements of a "break in service," the retired member must not have rendered service of any nature whatsoever to a local administrative unit for the 12 consecutive month period. "Service" shall be defined to include, without limitation, all employment whether full time, part-time including service allowed under Subsection B of 2.82.2.11 NMAC, substitute teaching, performing duties as a volunteer, which would otherwise be, or in the past have been, performed for the local administrative unit by a paid employee or independent contractor, or services rendered as an independent contractor, an employee of an independent contractor, or any other employment as described in Subsections A through D of 2.82.2.11 NMAC. A "local administrative unit" shall include any entity controlled by or subject to the control of a local administrative unit, including without limitation, a corporation or other entity regardless of legal form and of whether such corporation or entity is created for profit or non-profit purposes.

(2) The break in service must have commenced after the effective date of retirement and been completed prior to the first day of re-employment, but need not have been the 12 consecutive months immediately prior to the first day of such re-employment (i.e. the break in service could have occurred at any time during the period after the effective date of retirement and before the first day of re-employment but must have been at least 12 consecutive months within that period).

B. To satisfy the provisions of Subsection F of Section 22-11-25.1 NMSA 1978, a member who retired on or before January 1, 2001, and who subsequently removed him or herself from retirement (also referred to as "suspending retirement") pursuant to Section 22-11-25 NMSA 1978, and thereafter re-retired, must not have rendered service to a local administrative unit for at least 12 consecutive months from the date of the initial retirement. The 12 consecutive month period shall not include any scheduled breaks, vacations, paid administrative or sick leave, or holidays consisting of more than two business days.

C. Any and all time that a retired member has provided service to a local administrative unit under the return to work program cannot be used in the calculation of retirement benefits and a retired member is not entitled to acquire service credit or to acquire or purchase service credit in the future for the period of the retired member's re-employment with a local administrative unit under the return to work program.

D. A retired member is not eligible for the return to work program until the member submits a completed and signed ~~[and notarized]~~ return to work application as supplied by ERB, (the "return to work

application”), verifying their eligibility for the return to work program and ERB has approved the retired member’s return to work application.

E. The date of suspension of retirement for any retired member shall be the last day of the month in which the member suspended retirement.

F. Any retired member who is participating in the return to work program who has violated the provisions of the program, failed to submit the required return to work application, or is discovered to have been ineligible to participate in the program shall have their retirement immediately suspended and shall pay the educational retirement fund a sum equal to all retirement payments that they have received while ineligible under the provisions of the return to work program plus interest at a rate to be set by the board. Before his or her monthly retirement benefits can resume, the suspended retired member must certify to ERB that they have terminated any and all employment that would disqualify them from retirement under the Educational Retirement Act and must reapply for retirement. To re-qualify for the return to work program, the retired member must complete the minimum break in service as described in Subsection A of 2.82.5.15 NMAC, calculated from the date of reinstatement of retirement.

G. A retired member is qualified under Subsection B of Section 22-11-25.1 NMSA 1978 to return to full time employment without being required to suspend retirement benefits if the member:

- (1) retired on or before January 1, 2001; and
- (2) did not work more than .25 FTE at any time after January 1, 2001 or provide any other service to a local administrative unit after that date that would have required the member to suspend retirement benefits under the act; and
- (3) did not suspend retirement after January 1, 2001; and
- (4) completed and received approval of a return to work application with ERB.

H. A member who qualifies under Subsection B of Section 22-11-25.1 NMSA 1978 may begin full time employment immediately after ERB approval without any additional waiting period.
[2.82.5.15 NMAC - N, 11/30/2001; A, 12/14/2001; A, 10/31/2002; A, 7/15/2003; A, 12/31/2008; A, 6/16/2015; A, 10/17/2017 A, 11/12/2019; A, 7/14/2020]

2.82.5.16 RETURN TO WORK .25 FTE OR LESS:

A. A retired member may return to employment (includes “substitution”) at a level of .25 FTE or less without affecting the retired member’s retirement benefit provided the retired member submits a return to work application and is approved by ERB prior to commencing employment.

B. In the event that a retired member enters into an agreement which provides for employment at a level greater than .25 FTE or actually works greater than .25 FTE and has not met the requirement in Subsections A [and] or F of Section 22-11-25.1 NMSA 1978, the retired member’s retirement benefit will be suspended for the duration of the employment, and the retired member will be returned to an active status effective the first day of the month following the month in which the retired member’s employment exceeded .25 FTE. The retired member shall pay the educational retirement fund a sum equal to all retirement payments the retired member received while ineligible plus interest at a rate to be set by the board.
[2.82.5.16 NMAC - N, 6/28/2013; 2.82.5.16 NMAC - N, 6/16/2015; A, 11/12/2019; A, 7/14/2020]

2.82.5.17 RETURN TO WORK LESS THAN \$15,000 PER YEAR:

A. A retired member may return to employment (includes “substitution”) pursuant to Subsection H of Section 22-11-25.1 NMSA 1978 without affecting the retired member’s retirement benefit provided that:

- (1) the retired member has not rendered service to a local administrative unit (LAU) for at least 90 consecutive days after the date of retirement;
- (2) prior to the date of retirement or within 90 days after the date of retirement, the retired member did not enter into a formal or informal agreement with a LAU or a contractor providing services to a LAU to return to employment;
- (3) the retired member earns less than fifteen thousand (\$15,000) per fiscal year; and
- (4) The retired member submits a return to work application and is approved by ERB prior to commencing employment.

B. If a retired member earns \$15,000 or more per fiscal year, the retired member’s retirement benefit shall be suspended for the duration of the employment and the retired member shall be returned to active status effective the first day of the month following the month in which the retired member has earnings in excess of the above limit. The retired member shall pay the educational retirement fund a sum equal to all retirement payments the retired member received while ineligible plus interest at a rate set by the board.

[2.82.5.17 NMAC - N, 7/14/2020]

[~~2.82.5.17~~] 2.82.5.18 TERMINATION OF PLAN; ACCRUED RIGHTS OF MEMBERS: The rights of members to benefits accrued, to the extent funded, will become vested to the extent required by and upon the events set forth in Treas. Reg. Section 1.401-6(a)(1). *See* 26 CFR 1.401-6.
[2.82.5.18 NMAC – Rn, 2.82.5.17 NMAC, 7/14/2020]

[~~2.82.5.18~~] 2.82.5.19 INTERNAL REVENUE CODE SELECTION: The Educational Retirement Act of New Mexico is intended to satisfy Section 401(a) of the Internal Revenue Code and to be a governmental plan within the meaning of Section 414(d) of the Internal Revenue Code.
[2.82.5.19 NMAC - Rn, 2.82.5.18 NMAC, 7/14/2020]

[~~2.82.5.19~~] 2.82.5.20 ROLLOVER DISTRIBUTIONS FOR NON-SPOUSE BENEFICIARIES: The Educational Retirement Act shall allow direct rollovers to non-spouse beneficiaries for lump sum distributions only, and such distributions must be requested before the end of the year after the year of the member's death. No partial rollovers shall be permitted. A direct rollover by a non-spouse beneficiary must be made into a traditional or Roth IRA established on behalf of the designated beneficiary and that will be treated as an inherited individual retirement account (IRA) pursuant to the provisions of Section 402(c) (11) of the Internal Revenue Code. The distribution must also otherwise satisfy the definition of an "eligible rollover distribution" under Section 401(a) (31) of the Internal Revenue Code. All other current rules applicable to rollover distributions under the Educational Retirement Act, or adopted by the board pursuant to the Educational Retirement Act, must be followed. The non-spouse beneficiary shall be notified that he or she is responsible for following the applicable minimum required distribution rules under Section 401(a) (9) of the Internal Revenue Code.
[2.82.5.20 NMAC - Rn, 2.82.5.19, 7/14/2020]

[~~2.82.5.20~~] 2.82.5.21 DEATH BENEFITS WHILE PERFORMING MILITARY SERVICE: In the case of a death or disability occurring on or after January 1, 2007, if a [~~participant~~] member dies while performing qualified military service (as defined in section 414(u)), the survivors of the [~~participant~~] member are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service not otherwise credited under the terms of the Educational Retirement Act) provided under the plan as if the [~~participant~~] member had resumed and terminated employment on account of death.
[2.82.5.21 NMAC - Rn & A, 2.82.5.20, 7/14/2020]