

**TITLE 2 PUBLIC FINANCE**  
**CHAPTER 82 EDUCATIONAL RETIREMENT**  
**PART 5 RETIREMENT BENEFITS**

**2.82.5.1 ISSUING AGENCY:** Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129  
[6/30/1999; 2.82.5.1 NMAC - Rn, 2 NMAC 82.5.1, 11/30/2001]

**2.82.5.2 SCOPE:** This rule applies to procedures and eligibility for retirement, and the calculation of and selection of options for benefits.  
[6/30/1999; 2.82.5.2 NMAC - Rn, 2 NMAC 82.5.2, 11/30/2001]

**2.82.5.3 STATUTORY AUTHORITY:** The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.  
[6/30/1999; 2.82.5.3 NMAC - Rn, 2 NMAC 82.5.3, 11/30/2001; A, 10/17/2017]

**2.82.5.4 DURATION:** Permanent  
[6/30/1999; 2.82.5.4 NMAC - Rn, 2 NMAC 82.5.4, 11/30/2001]

**2.82.5.5 EFFECTIVE DATE:** June 30, 1999, unless a later date is cited at the end of a section or paragraph.  
[6/30/1999; 2.82.5.5 NMAC - Rn, 2 NMAC 82.5.5, 11/30/2001]

**2.82.5.6 OBJECTIVE:** To specify procedures for retirement, benefits and options, and provide rules for the restoring process.  
[6/30/1999; 2.82.5.6 NMAC - Rn, 2 NMAC 82.5.6, 11/30/2001]

**2.82.5.7 DEFINITIONS:** [RESERVED]

**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 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]

**2.82.5.9 APPLICATIONS:**

**A.** Retirement application forms furnished by the director and made available in each local administrative unit, may be initiated by the member or his employer. The member may also write to the director to apply for benefits. In either case, the application must be signed by the member.

**B.** If a member seeking retirement is not employed at the time of application, the director shall deal directly with the member in processing the application, without reference to, or concurrence of the last employer.

**C.** The application for retirement (being the completed form supplied by the director) must be filed in the office of the director prior to the desired effective date of benefits.

**D.** A member who has been re-employed following a previous retirement shall make application for benefits in the same manner as one who has not previously been retired.

**E.** Any member with an effective retirement date on or after July 1, 2015 shall provide authorization to the director for the electronic transfer of pension payments to the retiree's banking institution. Such authorization shall be executed in the form prescribed by the director. The director may waive this requirement upon a showing of exceptional circumstances.

**F.** In order to implement Section 22-11-32 NMSA 1978, the director shall, at the time of the member's application for benefits, obtain the member's written statement that he or his beneficiary does or does not receive any other benefit from any public agency which would be adversely affected by his or his beneficiary's receipt of benefits pursuant to the Educational Retirement Act. If he or his beneficiary does, or will receive such benefits, the director shall make the benefit adjustment called for in this section.

**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, the member shall not be entitled to retirement benefits for the months of July or August if 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, 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 the member's service credit, and 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 2.82.5.15 NMAC, 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 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]

**2.82.5.11 EFFECTIVE DATE OF BENEFIT:**

**A.** Whenever a retiring member completes the academic year for which the member has been contracted or employed, the member's effective date of retirement shall be July 1, provided that application is made as stipulated in Subsection B of 2.82.5.11 NMAC. Whenever a retiring member terminates at a time other than at the end of the academic year for which the retiring member has been contracted or employed, the effective date may be the first day of the month following termination, provided that application must be as stipulated in Subsection B of 2.82.5.11 NMAC.

**B.** The effective date of benefits cannot in any case be earlier than the first day of the month following receipt of the completed application forms (as provided by the director) from the member or the member's employer, except as provided in Subsection D of 2.82.5.11 NMAC.

**C.** Section 22-11-28 NMSA 1978 shall be construed to mean that the effective date of benefits shall be in accordance with Subsection D of 2.82.5.11 NMAC, and further that on concurrence of the local administrative unit for retirement on a date other than July 1 has been given when the local administrative unit certifies the member's termination on the application form.

**D.** If a member's application for benefits is received after the effective date desired by the member, and such desired effective date would otherwise be in accordance with the law and rules of the board, the director may commence the member's benefit as of such date, only if the delay in filing was due to delay in processing by the local administrative unit, and not due to any fault or wish of the member. The director shall also consider an application to have been duly filed in this office on the date postmarked if the application is mailed.  
[6/30/1999; 2.82.5.11 NMAC - Rn, 2 NMAC 82.5.11, 11/30/2001; A, 10/17/2017; A, 11/12/2019; A, 07/26/2022]

**2.82.5.12 APPROVAL OF RETIREMENT APPLICATION:** The director 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]

**2.82.5.13 OPTIONS:**

**A.** Option B provided in accordance with Subsection D of Section 22-11-29 NMSA 1978 shall be operative:

- (1) during periods of non-participation, if contributions are not withdrawn, and
- (2) during periods of time when a member is receiving disability benefits, and
- (3) during the period of time from a member's effective retirement date until the final

election of option is received in the ERB office.

**B.** If a member with option B coverage should terminate employment and withdraw his contributions, thereby causing the option B to become inoperative, the member may restore the amount withdrawn, together with required interest, and cause the option to become operative again.

**C.** An option election on file with the director by a member who has not retired shall become void on July 1, 1984 at which time the member will automatically be afforded the coverage of option B.

**D.** Upon retirement, a member may elect an optional benefit in accordance with Section 22-11-29 NMSA 1978. If electing coverage under option B, the member may not designate a beneficiary more than 10 years younger than the member unless the beneficiary is the member's spouse. In order that the retiring member may have the opportunity to properly consider this decision and to allow sufficient time for the member and the board to carry out necessary administrative procedures relating to the election of an option, an option election filed with the director subsequent to the effective date of retirement, but prior to commencement of benefit payments, shall be deemed to have been filed in accordance with the provisions of Section 22-11-29 NMSA 1978.

**E.** Whenever a member with option B coverage dies prior to the member's effective retirement date, it shall be incumbent upon the member's beneficiary to furnish proof of death to the director. The director shall then advise the beneficiary of the amount payable as a lump-sum settlement. Additionally, the director shall advise the beneficiary of the monthly amount of benefit payable as of the first of the month following the death of the member, as well as the approximate monthly amount payable, if the beneficiary defers receipt of the benefit to the date on

which the member would have been age 60, had the member lived. The beneficiary shall then advise the director, in writing, whether he wishes to receive a lump-sum payment, commence the benefit at the earliest possible date, or defer the benefit to a date not later than the date on which the member would have attained age 60, had the member lived. If the beneficiary chooses a monthly benefit, he shall not be required to make formal application for such benefit as required of members seeking retirement status. If the beneficiary chooses to defer the benefit to a later date, he must advise the director at least 30 days in advance of the date on which he wishes benefit to start.

**F.** Upon the death of a member who has the automatic option B coverage, and who has failed to name or who has incorrectly named a beneficiary under the option, the following shall apply:

(1) If the member has named one person on the ERB beneficiary designation form or form 42, that person shall be declared the beneficiary under option B.

(2) If more than one person is named on the ERB beneficiary designation form or form 42 of which one is the spouse of the member, the spouse shall be declared the beneficiary for option B purposes.

(3) If the beneficiary named on the ERB beneficiary designation form or form 42 is deceased, a lump-sum payment of contributions plus applicable interest will be paid to the estate of the member.

(4) If the beneficiary named on the ERB beneficiary designation form or form 42 is a minor child, the legal guardian, if other than the parent, will designate the manner in which the alternative payments under option B will be paid to the minor.

(5) If the beneficiary named on the ERB beneficiary designation form or form 42 is a minor child in the care and custody of a parent, the parent shall designate the method of payment to the minor child under the option B.

(6) If more than one person is named on the ERB beneficiary designation form or form 42, none of which is the spouse of the member, a lump-sum payment of contributions plus appropriate interest shall be made to the beneficiaries as per the directions of the member on the ERB beneficiary designation form or form 42. In the absence of contrary directions by the member, equal shares will be made. If one or more of the beneficiaries are minors, the distribution to the minor(s) shall be made to:

(a) a trust fund for the minor(s), if established, or

(b) on behalf of the minor(s), a person who has care and custody of the minor, or

(c) directly to the beneficiary(ies) upon attainment of age 18.

(d) these methods of distribution of payments shall also apply to Paragraphs (4) and

(5) above.

(7) If the beneficiary named on the ERB beneficiary designation form or form 42 is not a human being, the beneficiary shall not be eligible for Option B coverage and shall receive a lump-sum payment of the member's contributions plus applicable interest at the rate set by the board.

[6/30/1999; 2.82.5.13 NMAC - Rn, 2 NMAC 82.5.13, 11/30/2001; A, 6/30/2016; A, 11/12/2019]

#### **2.82.5.14 COST-OF-LIVING ADJUSTMENTS:**

**A.** The adjustment factor to be applied annually to eligible benefits shall be determined by using the "*Consumer Price Index for All Urban Consumers U.S. City Average All Items*".

**B.** If a member who was certified by the board as disabled at the time of regular retirement returns to gainful employment with a local administrative unit in a position commensurate with the member's background, education and experience, the member's benefit shall no longer be subject to adjustments as provided for in Subsection G of Section 22-11-31 NMSA 1978. Any adjustments made prior to the date of reemployment shall remain in effect. All future adjustments shall be made solely as provided for in Subsections B and C of Section 22-11-31 NMSA 1978.

[6/30/1999; 2.82.5.14 NMAC - Rn, 2 NMAC 82.5.14, 11/30/2001; A, 6/30/2016]

#### **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 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 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]

**2.82.5.18 RETURN TO WORK 36 MONTHS:**

**A.** A retired member may return to employment pursuant to Subsection I 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 for at least 90 consecutive days after the date of retirement;

(2) the retired member returns to employment for a period of no more than 36 consecutive or nonconsecutive months; and

(3) the retired member submits a return to work application and is approved by ERB prior to commencing employment.

**B.** If a retired member returns to employment for more than 36 consecutive or nonconsecutive months pursuant to Subsection I of Section 22-11-25.1 NMSA 1978, the retired member's retirement benefit shall be suspended for the period of employment which exceeds 36 consecutive or nonconsecutive months 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's employment exceeded 36 consecutive or nonconsecutive months. 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.

[2.82.5.18 NMAC - N, 07/26/2022]

**2.82.5.19 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.

[2.82.5.19 NMAC - Rn, 2.82.5.18 NMAC, 7/26/2022]

**2.82.5.20 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.

[2.82.5.20 NMAC - Rn, 2.82.5.19 NMAC, 07/26/2022]

**2.82.5.21 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.

[2.82.5.21 NMAC - Rn, 2.82.5.20 NMAC, 7/26/2022]

**2.82.5.22 DEATH BENEFITS WHILE PERFORMING MILITARY SERVICE:** In the case of a death or disability occurring on or after January 1, 2007, if a member dies while performing qualified military service (as defined in section 414(u)), the survivors of the 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 member had resumed and terminated employment on account of death.

[2.82.5.22 NMAC - Rn, 2.82.5.21 NMAC, 7/26/2022]

**HISTORY OF 2.82.5 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the State Records Center and Archives under:

ERB 67-3, Rules and Procedures, filed 6/30/1967.

ERB 78-1, Rules and Procedures, filed 8/7/1978.

ERB Rule V, Retirement Benefits, filed 7/2/1982.

**History of Repealed Material: [RESERVED]**