

TITLE 2 PUBLIC FINANCE
CHAPTER 82 EDUCATIONAL RETIREMENT
PART 3 MEMBER AND ADMINISTRATIVE UNIT CONTRIBUTIONS

2.82.3.1 ISSUING AGENCY: Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129
[2.82.3.1 NMAC - Rp, 2.82.3.1 NMAC, 7-1-2012]

2.82.3.2 SCOPE: This rule defines earnings on which member contributions shall be made, refund of contributions, purchase of contributory employment and non-reported service, and the payment of interest on refunds.
[2.82.3.2 NMAC - Rp, 2.82.3.2 NMAC, 7-1-2012; A, 10-15-2012]

2.82.3.3 STATUTORY AUTHORITY: The Educational Retirement Act, Section 22-11-1 to 22-11-55, NMSA 1978.
[2.82.3.3 NMAC - Rp, 2.82.3.3 NMAC, 7-1-2012]

2.82.3.4 DURATION: Permanent
[2.82.3.4 NMAC - Rp, 2.82.3.4 NMAC, 7-1-2012]

2.82.3.5 EFFECTIVE DATE: July 1, 2012, unless a later date is cited at the end of a section.
[2.82.3.5 NMAC - Rp, 2.82.3.5 NMAC, 7-1-2012]

2.82.3.6 OBJECTIVE: Clarification of the definition of earnings on which member contributions shall be made, the process to obtain refunds and to purchase contributory employment and non-reported service and the calculation of interest on such refunds and purchases.
[2.82.3.6 NMAC - Rp, 2.82.3.6 NMAC, 7-1-2012]

2.82.3.7 DEFINITIONS:

A. Terms used herein shall have the definitions as set forth in the Educational Retirement Act. Additional definitions used in this regulation are set forth below.

B. "Non-reported service" means service for which contributions should have been made by both a member and a local administrative unit pursuant to the Educational Retirement Act, but which were not made.

C. "Refund rate" means the rates at which interest is calculated for refunds to a member pursuant to Section 22-11-15 NMSA 1978, or to the beneficiary or estate of a member for refunds pursuant to Section 22-11-29 NMSA 1978. The refund rate shall be calculated based upon the process adopted by the board in its resolution entitled "the educational retirement board of trustees' adoption of a revised process for calculating and credit interest for refunds", June 4, 2010, or by a superseding resolution.

D. "Student teacher" means a person engaged in classroom teaching as part of a teacher education or training program whose employment in a local administrative unit is incidental to that person's status as a student. For purposes of example, a student in a teacher training program who receives a stipend, salary or other compensation while student teaching is a "student teacher"; a regular employee of a local administrative unit who also is enrolled in classes, possibly related to that employee's employment, in that or another local administrative unit, is not a student teacher.

[2.82.3.7 NMAC - N, 7-1-2012]

2.82.3.8 SALARY COVERED; SALARY EXCLUDED:

A. Except as otherwise set forth herein and subject to the limitations set forth in Section 22-11-21.2 NMSA 1978, a member's annual salary for the purpose of contributions to the fund and computation of the member's benefit shall consist of total compensation or wages paid to the member for services rendered during each of the four calendar quarters of a fiscal year, beginning July 1 and ending June 30, excluding any salary earned while employed under the return to work program of the Educational Retirement Act. For purposes of determining contribution rates, a member's expected annual salary at the beginning of the fiscal year shall be considered. When relevant, a member's annual salary shall take into consideration the FTE of the position and the aggregation of salaries if the member will have multiple positions with the same or other local administrative units during the fiscal year. If a member's total annual salary is more than \$20,000, the member shall be subject to the contribution rate set

forth in Subsection A of Section 22-11-21 NMSA 1978. If a member's total annual salary is \$20,000 or less the member shall be subject to the lower contribution rate set forth in Subsection B of Section 22-11-21 NMSA 1978. When a member whose salary is \$20,000 or less earns in excess of the \$20,000 limit during the fiscal year, the member shall be subject to the higher contribution rate in Subsection A of Section 22-11-21 NMSA 1978 effective the first day of the month in which the member earns in excess of the \$20,000 limit. However, if a member whose salary is \$20,000 or less changes positions with a local administrative unit during the fiscal year or engages in additional employment with the same or other local administrative unit during the fiscal year, and that change in employment creates the expectation that the member's total annual salary shall be more than \$20,000, then the member's contribution rate shall be adjusted in accordance with the change in employment beginning the first day of the month of the change in employment.

(1) Salary includes payments made directly to the member or to a third party on behalf of or for the benefit of the member. Salary includes, without limitation:

(a) base salary, compensation, or wages;

(b) salary, compensation or wages for additional services rendered; examples include: teaching courses in addition to or above a full teaching load during the September to May academic year; teaching courses or performing research during summer (e.g., June through August) where such courses or research are not included in the duties on which the member's salary is based; and, performing work in addition to that specified in the employee's job description; performing administrative duties, such as serving as a department head, head of a faculty or staff group, or for providing other additional services;

(c) salary, compensation or wages based on professional certifications or qualifications, or skills such as being bilingual or multilingual;

(d) overtime, shift differential, and 'on-call' or call back pay.

(2) Retirement contributions shall be made by a local administrative unit and a member on base salary earnings before the salary is reduced due to the local administrative unit and member entering into a voluntary "cafeteria" plan.

(3) The salary or compensation paid to a member under a school bus owner-driver contract shall be covered for contributions and benefit calculation purposes. Contributions for compensation paid under a school bus owner-driver contract shall be based upon and limited to the compensation amount paid to a person who drives a single school bus owned by that person over a regularly established route under a regular contract in that person's name with a local administrative unit.

(4) Tips or other remuneration paid to a member by a third party are considered salary to the extent that a local administrative unit reports such amounts as the member's income for tax purposes.

B. The following items shall not be considered annual salary for the purposes of contributions to the fund and computation of the member's annual benefit:

(1) Bonuses, awards and prizes, pay supplements or salary supplements or other "one-time" payments which do not increase an employee's annual base pay or which are made in lieu of an increase in base pay, and similar additional payments, as well as allowances or reimbursements for travel, housing, food, equipment or similar items.

(2) Lump-sum payments to the member for accrued sick leave made at any time, and lump-sum payments of accrued annual leave (also referred to as "vacation leave") made after July 1, 2010. Lump-sum payments for accrued annual leave made on or before July 1, 2010 shall be includable as annual salary only to the extent that it does not include payment for more than 30 days of such leave.

(3) Payments made by a local administrative unit to a member where services are not rendered. By way of example, and with limitation to such examples: (a) payments by an employer to "buy-out" the remaining term of a member's employment contract or in connection with an early retirement program are not payments for services rendered, irrespective of whether payment is made in a lump-sum or distributed over a period of time, and (b) payments as a result of a legal settlement, whether related to the member's employment or otherwise, are not payments for services rendered, unless such payments are specifically made for salary that was not previously paid.

(4) Stipends, salary, or other compensation paid to student teachers.

(5) Stipends or one-time payments for attending training sessions where such payments are not reimbursements for travel expenses.

(6) Allowances or reimbursements for, or expenses related to, travel, housing, food, equipment, cars, or similar items.

(7) After July 1, 2012, additional pay or a pay differential that is based solely on a member performing duties at (a) a location that is different than the location at which the member regularly performs his or

her job duties or (b) that is based on the member performing duties outside of the United States and its insular areas, territories, and possessions (e.g., a location differential or hazard or hazardous duty pay).
[2.82.3.8 NMAC - Rp, 2.82.3.8 NMAC, 7-1-2012; A, 10-15-2012; A, 9-26-2017]

2.82.3.9 REFUNDS OF CONTRIBUTIONS:

A. In the event that a member should terminate employment for reasons other than retirement, disability, or death, the member shall be entitled to a refund of the member's contributions, plus interest calculated at the refund rate, reduced by the sum of any disability benefits which that member might have previously received. Contributions made by an employer on behalf of an employee (also referred to as a "member") pursuant to Subsection A of Section 22-11-21 NMSA 1978 are "employee contributions" and are subject to refund. A member is not entitled to a refund of any "employer contributions" (also referred to as "local administrative unit contributions") made pursuant to Subsection B of Section 22-11-21 NMSA 1978. Interest paid by a member to reinstate withdrawn service credit is nonrefundable.

B. Any employee who was retired pursuant to the Public Employees Retirement Act (Chapter 10, Article 11 NMSA 1978) and who had made contributions to the fund prior to July 1, 2003, shall be entitled to a refund of such contributions, with interest calculated at the refund rate upon a bona fide termination of employment with the local administrative unit.

C. In order to obtain a refund of contributions, the eligible member must file a written request with the director on forms provided by the board.

D. A refund of a terminated member's contributions shall be made as soon as practical after receipt of a fully executed refund request form in the office of the board. If the member's record has been inactive for a full calendar quarter, the refund may be processed without further certification of termination by the last employer or the final monthly report upon which the member appears. If the member requesting a refund has an active record (i.e., a record reflecting contributions made in the preceding completed calendar quarter), the refund request shall not be processed without the last employer's certification of termination and the final monthly report upon which the refunding member will appear. No refund shall be processed until the board has received all required contributions. The board shall not accept contributions subsequent to the submission of the final monthly report, as certified by the employer. If a refunding member returns to employment with any local administrative unit before the refund process is complete, the refund request shall be denied. For purposes of this rule, "termination" means a complete severance of the employment relationship with no contract for, promise of, or expectation of future employment with any local administrative unit.

E. Refund of contributions for any period of service performed subsequent to July 1, 1957, will cancel all "prior service" credit which may have been credited to the member at the time of the refund. Restoration of all contributions withdrawn, together with interest calculated at the refund rate, will cause the prior service to be restored; provided, however, that as set forth Subsection C of 2.82.3.11 NMAC, effective July 1, 2011, a member who was a member at any time prior to July 1, 2010 and who, on or before June 30, 2010, had all of his or her member contributions refunded pursuant to Section 22-11-15 NMSA 1978, and who, on or after July 1, 2010, returns to employment or returns the withdrawn contributions to the fund together with interest at the rate set by the board, is eligible to retire as if initially becoming a member on or after July 1, 2010.

F. Whenever a terminated member leaves a balance of \$500.00 or less in the member's account, the account shall be closed into "unallocated income" after the member has been terminated for a period of not less than two years. The record of the terminated member's contribution balance at the time that it was closed into "unallocated income" shall be maintained. If the terminated member subsequently returns to employment, the balance shall be restored to that member's account. Alternatively, if the terminated member should later claim or request a refund of the amount transferred to unallocated income, such amount shall be restored to the terminated member's account and refunded.

G. Whenever a terminated member has received a refund in excess of the amount due the member, such excess may be "closed out" into unallocated income by the director if it does not exceed \$1,000.00 after the excess refund has been outstanding for a period of not less than two years, provided that staff has first made two or more separate attempts to contact the terminated member in writing and collect the excess refund. All such attempts must be documented by staff. All such "close out" actions shall be reported to the board in writing at its first regular meeting following that action. If a terminated member who received an excess refund that was closed into "unallocated income" should return to employment, such excess refund shall be charged to the member's contribution account.

H. If a terminated member shall have received a refund in excess of \$1,000.00 over the amount due that member, and two or more separate attempts have been made to contact the terminated member and collect the

excess refund, the director may, after taking into account the costs of doing so, direct staff to pursue legal action to recover the excess. If the amount is deemed uncollectible by the director, the matter shall be brought before the board to determine any further action.

I. Member contributions which have been withheld and paid to the educational retirement fund in error for a member who is not eligible to receive service credit for the time covered by the withholding, shall be returned to the employer, without interest, upon the member's written request or upon the board learning that the member was not eligible to receive service credit for the time covered. The employer shall be responsible for returning such contributions to the member.

[2.82.3.9 NMAC - Rp, 2.82.3.9 NMAC, 7-1-2012; A, 6-30-2016; A, 9-26-2017]

2.82.3.10 REFUNDS OF CONTRIBUTIONS IN THE EVENT OF DEATH OF MEMBER OR BENEFICIARY:

A. In the event of the death of an active member who is not vested, member contributions together with interest calculated at the refund rate shall be refunded to the member's beneficiary or to the member's estate upon completion of the proper refund forms as provided for herein.

B. In the event of the death of a vested member who did not select Option B benefits prior to the effective date of retirement, the deceased member's beneficiary shall have the option of electing to receive a refund of the member's contributions or receiving benefits in the form of Option B as provided in Section 22-11-29 NMSA 1978. Refunds, together with interest calculated at the refund rate and reduced by the sum of any disability benefits which that member might have previously received, shall be paid to the member's surviving beneficiary or estate. If a beneficiary defers payment after the member dies as described in Section 22-11-29 NMSA 1978 and requests a lump sum payment in lieu of benefit under Option B, interest shall be calculated at the refund rate through the end of the calendar quarter prior to the date on which the completed refund request is received by the ERB. Under the provisions of Options B and C, if both the member and the designated beneficiary die before the total of the retirement benefits received by the member and the beneficiary equal the total contributions made by the member, the difference, less any disability benefits previously paid to the member, shall be paid to the member's or the beneficiary's estate.

C. In order to obtain a refund of contributions after the death of a member, the member's beneficiary must notify the director of the member's death and furnish a copy of the death certificate or other proof of death acceptable to the director, whereupon the director shall furnish the beneficiary the proper forms to request a refund.

D. If the amount of a deceased member's contribution does not exceed the sum of \$1,000.00 and no written claim is made to the board for it within one year from the date of the member's death, by the member's surviving beneficiary or estate, payment thereof may be made to the named beneficiary or, if none is named, to the person that the board determines to be entitled to the contribution under the laws of New Mexico.

[2.82.3.10 NMAC - Rp, 2.82.3.10 NMAC, 7-1-2012; A, 10-15-2012]

2.82.3.11 RETURN OF REFUNDED CONTRIBUTIONS AND RETIREMENT ELIGIBILITY:

A. Member contributions which have been withdrawn from the fund by a member who has terminated employment may be returned to the fund, together with interest at the rate set by the board, without the member being required to return to employment if the termination was under one of the following circumstances:

- (1) the member terminated employment for reasons other than by retirement, disability or death;
- (2) the member exempted himself or herself from the Educational Retirement Act; or
- (3) the member has not been reemployed following a period of disability during which the member received disability benefits.

B. Contributions restored to the fund after having been withdrawn by a member that were originally made prior to July 1, 1971 shall not be considered as having been paid to the fund after July 1, 1971 for the purpose of earning interest and no interest shall be paid on such restored contributions.

C. Effective July 1, 2011, a member who was a member at any time prior to July 1, 2010 and who, on or before June 30, 2010, had all of his or her member contributions refunded pursuant to Section 22-11-15 NMSA 1978, and who, on or after July 1, 2010, returns to employment or returns the withdrawn contributions to the fund together with interest at the rate set by the board, is eligible to retire as if initially becoming a member on or after July 1, 2010.

[2.82.3.11 NMAC - Rp, 2.82.3.11 NMAC, 7-1-2012, A, 10-15-2012]

2.82.3.12 PURCHASE OF NON-REPORTED SERVICE; FAILURE TO DEDUCT MEMBER CONTRIBUTIONS:

A. Non-reported service must be purchased at the time it is discovered. Payment for non-reported service shall be at the contribution rate in effect at the time the non-reported service is discovered. The full fiscal year salary for the position for which the member was hired shall determine whether a member pays the contribution rate applicable to members who earn \$20,000 or less per year in accordance with Section 22-11-21 NMSA 1978.

B. If the local administrative unit fails to deduct the applicable contribution from the salary paid to a member for each payroll period, the local administrative unit shall be responsible to remit to the fund the total amount due for both the member and the local administrative unit plus interest at a rate set by the board.
[2.82.3.12 NMAC - N, 7-1-2012; A, 9-26-2017]

2.82.3.13 INTEREST CREDITS AND PAYMENTS ON MEMBER CONTRIBUTIONS: At the time of refund of a member's contributory balance, interest shall be paid at the refund rate through the end of the calendar quarter preceding the date of the refund; except that no interest shall be paid on contributions credited to a member's account for any period prior to July 1, 1971, nor shall interest be paid on contributions on deposit for less than one year.

[2.82.3.13 NMAC - N, 7-1-2012]

HISTORY OF 2.82.3 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 6-30-67.

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

ERB Rule III, Member and Administrative Unit Contributions, filed 7-2-82.

History of Repealed Material:

2.82.3 NMAC, Member and Administrative Unit Contributions, filed 11-16-2001 - Repealed effective 7-1-2012.