



STATE OF NEW MEXICO

## Educational Retirement Board

### PRE-RETIREMENT

#### MODEL ORDER AND INSTRUCTIONS FOR DIVIDING ERB BENEFITS

#### Introduction

The New Mexico Educational Retirement Board (“ERB”) has prepared this package to assist you in drafting an acceptable court order (“order”) to divide retirement benefits due to a divorce. Following these instructions, you will find a Model Order. If the member has already retired, please use the POST-RETIREMENT Model Order and Instructions for Dividing Benefits. If the member is to retain their retirement as their sole and separate property, please submit a Marital Settlement Agreement or an ERB Release of Claims Form. All forms can be found on the ERB website, [www.nmerb.org](http://www.nmerb.org).

The Educational Retirement Act, NMSA 1978, §§ 22 -11-1, *et seq.*, (“the Act”) governs the ERB Plan (“the Plan”). The Plan is a defined benefit plan which means that members may receive retirement benefits when they reach certain eligibility requirements (a combination of age and service credits.)

The ERB is a “governmental plan” for the purposes of 29 USC § 1002, and is therefore exempt from the provisions of the federal Employees Retirement Income Security Act of 1974 (ERISA) and the Retirement Equity Act of 1984. Thus an ERISA “Qualified Domestic Relations Order” (QDRO) **is not appropriate or acceptable** to divide the community interest in the ERB benefits. Rather, the order must be consistent with the Act.

As specified in the Act, there are four possible scenarios when members or their beneficiary(ies) may be eligible to receive benefits.

- Members can receive a monthly pension when they meet the eligibility requirement for retirement and submit a complete retirement application package to the ERB.
- Members can receive a monthly disability benefit if they meet the disability requirements of the Plan.
- Members can request a refund of their contributions plus interest or roll them over to their IRA or other eligible plan if they have terminated employment with all

ERB employers. Note: under the Plan, Members are entitled to a refund of their contributions plus interest, but are not entitled to a refund of any of the employer's contributions.

- The Act entitles the member's beneficiary(ies) to receive a death refund if the member dies prior to retirement.

Under the Plan, a retirement benefit continues for the duration of the members' lives and does not end when they deplete their accumulated contributions plus interest. At retirement, the member has a one-time irrevocable choice to name a refund beneficiary under Option A or to choose a survivor annuitant under Option B (100% annuity) or C (50% annuity).<sup>1</sup> If the member chooses a refund beneficiary under Option A, that individual would receive the difference, if any, between the member's contributions plus interest at the time of their retirement minus the retirement benefits paid out. If the member chooses a survivor annuitant, that individual will receive a lifetime monthly benefit.

The ERB designed the attached Model Order and Instructions to help Plan members comply with the Act. The Model Order provides a number of acceptable alternatives for the parties to select under the Plan. If both spouses are ERB members, the ERB requires a separate order for each member regarding the division of their retirement benefits.

**Please note that under the Educational Retirement Act, the co-payee cannot receive a benefit until the member is eligible to receive benefits. Members are eligible to receive a benefit if they reach retirement eligibility and complete an application for retirement, terminate employment and request a refund of contributions, apply and are eligible for a disability benefit or die prior to retirement.**

**Unless provided with an acceptable endorsed court order, ERB cannot divide a member's benefits. ERB's decision on the acceptability of court orders is final.**

**FOR THE ERB TO ACCEPT AN ORDER, THE ORDER MUST COMPLY WITH ERB STATUTES AND OTHER APPLICABLE LAWS, RULES AND REGULATIONS AND MUST NOT CONTAIN LANGUAGE OR PROVISIONS NOT FOUND IN THE MODEL ORDER. THE ERB WILL REJECT ANY ORDERS THAT DO NOT COMPLY WITH OR THAT DEVIATE FROM THE LANGUAGE OF THE MODEL ORDER AND ITS ALTERNATIVES.**

**The ERB strongly advises parties to forward a draft order dividing ERB benefits to its Legal Department for informal pre-approval prior to submitting the order to the court for signature. To inquire further about these instructions and the model order, please contact the ERB's Legal Division at (505) 585-3510.**

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<sup>1</sup> (Note: under Option A, the member may change the beneficiary at a later date but not the payment option chosen)

## **Instructions:**

The following is an explanation of the various paragraphs and alternatives in the Model Order. Not all paragraphs are necessary, however since certain information is indispensable for an order to be acceptable, the ERB urges the parties to include all the paragraphs used in the Model Order. See page 8 for a checklist that follows these instructions setting forth the minimum requirements that an order must include.

**Paragraph 1** - informs the ERB that this order divides retirement benefits under the Act. Parties must be divorced or legally separated for this order to be effective under ERB statutes.

**Paragraph 2** - identifies the member spouse (hereinafter “the member”) whose account is the subject of division by the court order. The ERB will not issue state warrants (checks) without the payee’s name, Social Security number, date of birth and address. Because the order will be a public record, it calls for only the last four digits of the member’s Social Security number. **The full Social Security number must appear in a separate cover letter. Failing to provide the Social Security numbers, addresses and birthdates will cause a delay in the processing of benefits.**

**Paragraph 3** - identifies the non-member spouse (hereinafter “the co-payee”). As with the member, the order must include the co-payee’s name, last four digits of the Social Security number, date of birth and address. **The full Social Security number must appear in a separate cover letter. Failing to provide the Social Security numbers, addresses and birthdates will cause a delay in the processing of benefits.**

**Paragraph 4** – provides a method for the member and co-payee to update their demographic information without amending the order in a court proceeding. The member and co-payee **must** inform the ERB of any address change to insure that they will be able to receive their benefits. It is not the ERB’s responsibility to search for payees who have moved without notifying the ERB. If the warrant is returned as undeliverable, the money will accumulate until the member or co-payee claims it and furnishes a current address. Members or co-payees will not be entitled to interest on the delayed payments if they failed to properly inform the ERB of their address change.

**Paragraph 5** - identifies the dates of marriage and divorce. This information is necessary so the ERB can determine the community interest portion of the member’s account.

**Paragraph 6** – provides the ERB with the formula to determine the community interest in the member’s account. This formula takes into account that service provided to an ERB employer either before marriage or after divorce or legal separation is not included in the community property portion that is divided between the member and the co-payee. Please note that if the parties are contemplating a cash buyout or dollar for dollar trade in the divorce settlement, the property division methods included in this Model Order **do not** determine the actuarial present value of a member’s retirement account. In a defined benefit plan like the ERB Plan, the member’s contributions plus interest do not determine the present value of their account. Rather, years of service and final average salary at the time the member retires determine the amount of the

retirement benefits which are paid for the life of the member or the named survivor annuitant, whoever lives longer. If the parties require an actuarial present value of an ERB account, they will need to hire a private actuary. **The ERB cannot provide actuarial evaluations.**

**Paragraph 7** – divides the community interest in the retirement benefits or contributions as calculated by paragraph 6. “Benefits” refers to pensions paid at retirement and “contributions” refers to money paid into the fund by the member before retirement, plus applicable interest.

**Alternative 1** defines each party’s percentage interest of the **community portion** of the gross benefits and awards the remainder to the member.

**Alternative 2** divides the community interest in the member’s benefits by a percentage other than 50%, as agreed upon by the parties and/or their counsel. Please note that the Act does not allow an assignment of a member’s benefit, but allows a division of the benefits due to a divorce or legal separation, so the maximum amount of the community property portion of a member’s benefit that an order can award to the co-payee is 99%.

**Alternative 3** divides the benefits by assigning a fixed monthly amount to one spouse (usually the non-member) and the remainder to the other. Please note that this alternative precludes the spouse receiving the fixed amount from receiving any future cost of living increases that may be due from the member’s account. This alternative also requires a designation of the parties’ percentage interest of the community portion should there be a lump sum payment of the account.

**Alternative 4** divides the benefits by *initially* assigning a fixed monthly amount to one spouse (usually the non-member) and the remainder to the other. By using this alternative, the spouse initially receiving a fixed monthly amount will receive future cost of living increases based on that spouse’s percentage of the entire benefit at the time of the member’s retirement. This alternative also requires a designation of the parties’ percentage interest of the community portion should the member elect a refund or rollover the account before retiring or the member dies prior to retirement so that a death benefit is to be paid.

**Please note that the division of benefits cannot change throughout the course of the payment of benefits. If the parties wish to alter the division of the benefits in the future, they are to submit a new court order to the ERB.**

**Paragraph 8** – identifies the form of payment of retirement benefits that the order directs members to choose at the time they retire. Under the Act, this choice is irrevocable (with a few narrow exceptions). The choices include a straight life (Option A) in which the member receives a benefit for life with no survivor annuitant. (See NMSA 1978 §22-11-30) or Option B or C as described in NMSA 1978, §22-11-29. Option B (100% annuity) or C (50% annuity) provides the beneficiary with a lifetime benefit if the member predeceases them. If the member chooses Option B or C, an actuarially calculated amount, based upon the age and gender of the member and the chosen beneficiary will reduce the monthly benefit. The amount of this reduction in the monthly benefit is divided between the member and the co-payee based upon the percentage split between the parties of the monthly benefit and cannot be shifted into a different formula.

This section offers eight alternatives regarding the selection of a retirement benefit form of payment. See the chart below for a further explanation of the manner in which the choice of benefits affects future payouts.

**ERB strongly recommends that both parties and their attorneys consult with the ERB benefits office regarding the effects of each form of payment before choosing one of these alternatives.**

**Alternative 1** is for use if the member plans to choose Option A, naming the co-payee as the refund beneficiary.

**Alternative 2** is similar, except it allows the member to choose someone other than the co-payee as the refund beneficiary.

**Alternative 3** is for use when the member must choose either Option B or C under NMSA 1978, §22-11-29 and must choose the co-payee as the survivor beneficiary. **This option requires that the parties provide a copy of the co-payee’s birth certificate at the time they provide the order to the ERB.**

**Alternative 4** is similar to alternative 3, except that it allows the member to choose someone other than the co-payee as the survivor beneficiary.

**Alternative 5** is similar to alternative 4, except that if the member chooses an Option B or C beneficiary other than the co-payee, and the named survivor beneficiary and the co-payee divide the Option B or C benefit.

**Alternative 6** is similar to alternative 3 in that the co-payee is the Option B or C beneficiary. However, instead of the co-payee receiving entire survivor amount, they receive their portion and the member’s share goes to the member’s estate until the death of the co-payee. **This option also requires that the parties provide a copy of the co-payee’s birth certificate at the time they provide the order to the ERB.**

**Alternative 7** allows the member to choose any form of payment under the plan and name any survivor beneficiary.

**Alternative 8** allows the member to choose any form of payment under the plan, but requires the member to choose the co-payee as the refund or survivor beneficiary.

**Paragraph 8 Alternative benefit chart**

<b>Alt No.</b>	<b>Option Choice Allowed</b>	<b>Beneficiary Choice Allowed</b>	<b>When All Benefits Cease</b>	<b>Who Receives Benefits If Member Predeceases Co-Payee</b>
1	A	Co-payee	At member’s death	The co-payee would receive the undivided difference if any, between the member’s contributions at the time of retirement minus the amount paid out in retirement benefits
2	A	Anyone	At member’s death	The difference, if any, between the member’s contributions at the time of retirement minus the amount paid out in retirement benefits would be paid to the named beneficiary <sup>2</sup>

<sup>2</sup> For co-payee to receive their community portion when member selects Option A, the Order must include Paragraph 11.

3	B or C	Co-payee	At co-payee's or member's death, whichever comes later	Co-payee receives an undivided monthly benefit for their life
4	B or C	Anyone	At beneficiary's or member's death, whichever comes later	If member named an Option B or C ("B or C") beneficiary other than co-payee, beneficiary receives an undivided survivor benefit; co-payee benefit ceases at member's death
5	B or C	Anyone	At beneficiary's or member's death, whichever comes later	If member named a B or C beneficiary other than co-payee, co-payee will receive their community portion and the named beneficiary will receive remainder
6	B or C	Co-payee	At co-payee's or member's death whichever comes later	Co-payee receives community portion of benefits; Member's estate to receive remainder until all benefits cease
7	Any	Anyone	A – at death of member; B or C at beneficiary's or member's death, whichever comes later	If Option A ("A") is chosen, the named beneficiary, if other than the co-payee, would receive the undivided difference, if any, between the member's contributions at the time of retirement minus the amount paid out in retirement benefits.* If member chooses a B or C beneficiary other than co-payee, the named beneficiary receives a divided monthly benefit for life and the co-payee's benefit would cease upon the named beneficiary's death
8	Any	Co-payee	A – at death of member; B or C at beneficiary's or member's death, whichever comes later	If A is chosen, co-payee receives the difference, if any, between the member's contributions at the time of retirement minus the amount paid out in retirement benefits; If B or C is chosen, co-payee receives undivided B or C amount for their life

**Paragraph 9** - determines what happens to the co-payee's share if the co-payee predeceases the member and/or the member's survivor pension beneficiary. **Alternative 1**, if the co-payee predeceases the member or the member's survivor pension beneficiary, the co-payee's benefit ceases and their part of the community interest returns to the member or the member's survivor pension beneficiary. **Alternative 2** if the co-payee predeceases the member or the member's survivor

pension beneficiary, the EB will pay the co-payee's share to the co-payee's estate as long as the ERB pays benefits on the account.

**NOTE: IF THE PARTIES LEAVE OUT THIS PARAGRAPH OR THE QDRO IS OTHERWISE SILENT ON THE ISSUE OF THE DIVISION OF BENEFITS IN THE EVENT THAT THE CO-PAYEE PREDECEASES THE MEMBER, THE ERB WILL ASSUME THAT THE CO-PAYEE'S SHARE WILL GO TO THE CO-PAYEE'S ESTATE UNTIL ALL BENEFITS CEASE.**

**Paragraph 10** – instructs the **ERB to divide the benefits and pay each party separately**. Because the ERB cannot divide benefits with separate payments without this paragraph being included in the order, it will reject the order if the parties leave out this essential paragraph.

**Paragraph 11** – for use **only** if the parties stipulate that the member may choose Option A upon retirement. The parties are not to use this paragraph if the order directs the member to select either Option B or C.

**Paragraph 12** – prevents a member who has terminated ERB employment from withdrawing his or her contributions without the co-payee receiving his or her portion of the contributions.

**Paragraph 13** – protects co-payee's interest in the member's retirement account in the event of the member's death before retirement. **Note:** Active members should make sure they update their beneficiary on the proper ERB form after the divorce to reflect any beneficiary changes. The ERB will not automatically remove ex-spouses as the beneficiary upon divorce or legal separation. No change is necessary if the parties agree that the ERB will pay the death refund in full to the ex-spouse.

**Paragraph 14** – provides that the co-payee is to receive their portion of any disability benefits paid to the member.

**Paragraph 15** – provides that each party will pay any taxes due on benefits or contributions paid by the ERB when the parties receive the benefit or contribution according to the withholding information on file with the ERB. Upon receipt of a "tax deduction" form, the ERB will withhold federal and state income taxes from pension payments. All members employed and contributing to the ERB before 1983 have contributions that were previously taxed.

**Paragraphs 16 & 17** – are self-explanatory.

**Paragraph 18** – reserves the court's jurisdiction to amend that portion of the order relating to retirement benefits or contributions.

## CHECKLIST OF MINIMUM REQUIREMENTS

**At a minimum, to be acceptable, the order MUST include the following:**

- ❑ A statement that the Order divides retirement benefits under the Educational Retirement Act, NMSA 1978, §§ 22-11-1 et seq. (Paragraph 1 of the model order);
- ❑ The name, Social Security number, date of birth, current address of each party. Any information withheld from the order for security concerns, **must** be submitted on a separate cover letter(Paragraphs 2 and 3);
- ❑ Instructions on ERB notification in case of either party's address or name change. The ERB requires such notice, in writing and signed before a notary public (Paragraph 4);
- ❑ The dates of the marriage and divorce (Paragraph 5);
- ❑ A declaration of a community interest in the member's retirement benefits and clear acceptable instructions to the ERB to divide the member's benefits (Paragraph 6);
- ❑ The percentage or dollar amount of each party's interest in the member's ERB account (Paragraph 7);
- ❑ What, if any, payment option(s) members are limited to selecting at the time of retirement and whether they are required to select the co-payee as the refund or survivor beneficiary or if they may choose anyone they want (Paragraph 8);
- ❑ A direct order to the ERB to issue separate warrants (checks) for each party(Paragraph 10); and,
- ❑ A statement of each party's federal tax liabilities (Paragraph 15).

**Please call the ERB Legal Division at (505) 585-3510 if you have any questions.**



STATE OF \*  
COUNTY OF \*  
NAME OF COURT

NAME OF PARTY

Petitioner,  
vs.

NAME OF PARTY

Case No. \*

Respondent.

**ORDER DIVIDING ERB RETIREMENT BENEFITS**

1. Pursuant to NMSA 1978, §22-11-42, this Order adjudicates retirement benefits accrued under the Educational Retirement Act, NMSA 1978, §22-11-1, et seq. Any payments pursuant to this order shall only be made when contributions are refunded or a pension is payable in accordance with the Educational Retirement Act.

2. \_\_\_\_\_, last four digits of Social Security No. \_\_\_\_\_, is a member (hereinafter “the member”) of the Educational Retirement Board (ERB). The member’s current address is: \_\_\_\_\_  
\_\_\_\_\_.

3. \_\_\_\_\_, last four digits of Social Security No. \_\_\_\_\_, the non-member spouse is the co-payee (hereinafter “the co-payee”) of the ERB retirement benefits. Co-payee’s current address is: \_\_\_\_\_  
\_\_\_\_\_.

4. The information in paragraphs 2 and 3 above regarding the parties’ addresses or names may be modified if a party changes his or her address or name by that party notifying the ERB in writing, with a notarized signature, of the change of address or name, or Social Security number, should that be necessary.

5. The parties were married on \_\_\_\_\_ and were divorced on \_\_\_\_\_.

6. A certain percentage of the retirement benefits or contributions accrued in the member’s name are community property. The percentage is to be derived from a fraction, with the numerator being the number of quarters of the member’s service during the marriage and the denominator the total number of quarters of ERB service. The percentage of community interest in retirement benefits or contributions will be determined when the member spouse either retires, receives a disability retirement, terminates public employment and requests a refund of contributions, or dies prior to retirement. “Benefit” shall be described as the “gross benefit” and is

defined as the total benefit before any deductions are made for taxes. "Total years of service" is defined as including actual time of employment, service time purchased for previous education experience and/or military service, or acquired by any other legal means.

7. This Order determines and divides the parties' rights of the community interest in retirement benefits or contributions identified above as follows:

**Alternative 1**

Each party is entitled to 50% of the community interest in the benefits or contributions and the member spouse is entitled to the balance.

**Alternative 2**

The member is entitled to \_\_\_\_\_% and the co-payee is entitled to \_\_\_\_\_% of the community interest in the benefits or contributions accrued in the member's name and the member spouse is entitled to the balance.

**Alternative 3**

\_\_\_\_\_ is entitled to \$\_\_\_\_\_ per month, and  
\_\_\_\_\_ is entitled to the balance.

The parties agree and understand that the party receiving the flat rate is not entitled to any Cost of Living Adjustments ("COLA's").

If the member dies prior to retirement OR refunds or rolls over the account OR if the member retires under Option A as specified under NMSA 1978, §22-11-30 and dies before there is paid an aggregate amount equal to his or her accumulated contributions at the time of retirement, the member is entitled to \_\_\_\_\_% and the co-payee is entitled to \_\_\_\_\_% of the community interest in the benefits or contributions accrued in the member's name and the member spouse is entitled to the balance.

**Alternative 4**

\_\_\_\_\_ is entitled to \$\_\_\_\_\_ per month, and  
\_\_\_\_\_ is entitled to the balance.

Co-payee is entitled to all Cost of Living Adjustments ("COLA's") based on co-payee's percentage of the entire benefit at the time of member's retirement.

If the member dies prior to retirement OR refunds or rolls over the account, the member is entitled to \_\_\_\_\_% and the co-payee is entitled to \_\_\_\_\_% of the community interest in the benefits or contributions accrued in the member's name and the member spouse is entitled to the balance.

8.

**Alternative 1**

The member shall elect form of payment as specified in NMSA 1978, §22-11-30, at the time he/she retires, and shall designate the co-payee as the refund beneficiary in the event of member's death before the accumulated contributions are paid out.

**Alternative 2**

The member shall elect form of payment as specified in NMSA 1978, §22-11-30, at the time he/she retires, and may designate anyone as refund beneficiary in the event of member's death before the accumulated contributions are paid out.

**Alternative 3**

The member shall elect form of payment under Option B or C as specified in NMSA 1978, § 22-11-29, at the time he/she retires, and shall name the co-payee as survivor pension beneficiary.

**Alternative 4**

The member shall elect form of payment under Option B or C as specified in NMSA 1978, § 22-11-29, at the time he/she retires, and may designate anyone as survivor pension beneficiary. If the member chooses a beneficiary other than the co-payee, the co-payee's benefit shall cease upon the death of the member.

**Alternative 5**

The member shall elect form of payment under Option B or C as specified in NMSA 1978, § 22-11-29, at the time he/she retires, and may designate anyone as survivor pension beneficiary. If the member predeceases the co-payee and has named a beneficiary other than the co-payee, the survivor benefit is to be divided between the named Option B or C beneficiary and the co-payee or co-payees estate until all benefits cease as calculated in paragraph 7.

**Alternative 6**

The member shall elect form of payment under Option B or C as specified in NMSA 1978, § 22-11-29, at the time he/she retires, and shall name the co-payee as survivor pension beneficiary. In the event that the member predeceases the co-payee, the survivor benefit shall be divided between the member's estate and the co-payee as calculated in paragraph 7.

**Alternative 7**

The member may choose any form of payment at the time he/she retires, and may name any person as the refund or survivor pension beneficiary.

**Alternative 8**

The member may choose any form of payment at the time he/she retires, and shall name the co-payee as the refund or survivor pension beneficiary.

9.

**Alternative 1**

If the co-payee predeceases the member and/or the member's survivor pension beneficiary, the co-payee's interest in the retirement benefit shall cease.

**Alternative 2**

If the co-payee predeceases the member and/or the member's survivor pension beneficiary, the co-payee's interest in the retirement benefit shall be paid to the co-payee's estate. In all cases, payments made to the co-payee or any person designated by the co-payee to receive payments shall cease when benefits to the member or their survivor beneficiary cease.

10. The ERB is hereby ordered to divide the member's retirement benefit according to the percentages stated in paragraph 7, and issue separate warrants for the proper amounts to each party using the information stated in paragraphs 2-3, or the information as modified according to paragraph 4.

11. If the member retires under Option A as specified under NMSA 1978, §22-11-30 and dies before there is paid an aggregate amount equal to his or her accumulated contributions at the time of retirement, the difference between the amount of the accumulated contributions and the aggregate amount of pension paid shall be divided between the co-payee and the member's refund beneficiary or estate, as calculated in paragraph 7.

12. The ERB is hereby ordered to refrain from refunding the accumulated member contributions of the member, except according to the percentages stated in paragraph 7. Any such refund shall be made by issuing separate warrants for the proper amounts to each party using the information stated in paragraphs 2-3, or the information as modified according to paragraph 4.

13. If the member dies prior to retirement, the co-payee shall be entitled to the portion of any pension benefit payable as described in paragraph 7.

14. If the member should become eligible for any disability benefits under the Act, the co-payee shall be entitled to the portion of any such disability benefits as described in paragraph 7.

15. All retirement benefits or contributions except for non-taxable benefits or contributions paid to each party pursuant to this Order shall constitute individual gross income for taxation purposes and the ERB shall withhold the appropriate amounts as permitted or required. (All pre-1983 contributions shall be assigned according to the formula as described in paragraphs 6 and 7).

16. Copies of this Order shall be transmitted by counsel for the (member) (co-payee) to the ERB Plan Administrator. The ERB shall notify the parties within a reasonable

time after receipt of the Order whether the Order conforms to the requirements of the applicable statutes and rules and is administratively feasible.

17. The co-payee shall be entitled to communicate with the ERB and receive the necessary information that concerns the member's interest in the plan.

18. The court reserves jurisdiction on the issue of the final qualification of this Order in order to correct, amend or enforce this Order. There is no just reason for delay for entry of a final order and decree containing the terms stated in this section, and for the other provisions of the decree and settlement.

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Judge

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Petitioner

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Respondent