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NOTICE OF PROPOSED RULEMAKING

Public Hearing: Notice is hereby given that the New Mexico Educational Retirement Board (hereafter, “Board”) will convene a Rule Hearing at 9:00 am (MT) on May 30, 2024, at the Albuquerque Public Schools Headquarters, located at 6400 Uptown Blvd. NE, Albuquerque, New Mexico 87110.

Purpose: The purpose of the Rule Hearing is to receive public comment and to consider adoption of the proposed repeal and replacement of 2.82.5 NMAC - Retirement Benefits and repeal and replacement of 2.82.9 NMAC – Administrative Unit Reports and Remittances.

Statutory Authority: Educational Retirement Act, Paragraph (5) of Subsection A of Section 22-11-6 NMSA 1978.

Summary of Proposed Amendments:

The replacement of 2.82.5 NMAC removes all references to the return to work program requiring a 12 month layout period authorized under Section 22-11-25.1 NMSA 1978 because the program is no longer available to new applicants pursuant to Subsection A of Section 22-11-25.1 NMSA 1978.

Proposed Section 15 of 2.82.5 NMAC would allow a retired member who is otherwise qualified for a return to work program, and who returned to employment with a local administrative unit (“LAU”) without prior Educational Retirement Board (“ERB”) approval, to terminate employment or file an appropriate return to work application within 30 days following the date of the letter from the ERB notifying the retiree of their failure to file an application. A retiree who complies with the requirements would not be suspended and would not repay to the retirement fund any of the benefits received while the retiree was ineligible for benefits.

A retiree who fails to file an application would have their benefit suspended immediately, and they must verify that they have terminated employment, and reapply for retirement.

A retiree who receives a letter from the ERB notifying the retiree of their failure to file an application who is not qualified to return to work under any program and who returns to work would have their benefit suspended immediately, must repay to the retirement fund any of the benefits received while the retiree was ineligible for benefits, must verify that they have terminated employment, and must reapply for retirement.

The Rule clarifies that a retiree who has satisfied the 90-day layout period required for certain return to work programs need not complete another layout period to qualify for those programs. Also, time of employment and income received while employed without ERB approval would count against the time and income caps contained in the return to work programs.

Proposed Section 15 of 2.82.5 would also allow all retirees employed under an approved return to work program to switch to another approved program once per fiscal year during the month of July. The Rule would also clarify that a retiree who wishes to provide independent contractor services to an LAU must submit and obtain approval of an independent contractor application from ERB. A retiree who fails to submit and obtain approval as an independent contractor prior to providing services to an LAU may be considered employed during the period of providing services to the LAU. Section 15 would also provide notice that penalties for violations may be appealed. Finally, the Rule would require each LAU to create, maintain and publicize to its employees an internal return to work policy consistent with the applicable statutes and rules.

A Subsection C is added to each of Sections 16, 17 & 18 of 2.82.5 NMAC to provide that, if a retiree’s benefits are suspended due to a violation, the retiree must certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment and must reapply for retirement before their benefits can resume.

The replacement of 2.82.9 NMAC would assess a monetary penalty against an LAU for each failure to correctly include or identify an individual as employed or to miscategorize an employee when submitting a work report reflecting payment of wages as required pursuant to this rule. The penalty would be payable to ERB and shall be

assessed as follows: 1st failure – five hundred dollars (\$500), 2nd failure – one thousand dollars (\$1,000), 3rd and each subsequent failure – one thousand five hundred dollars (\$1,500). The ERB Executive Director can waive the penalty for a first violation. The Board of Trustees can waive the penalty for second and subsequent violations.

The replacement of 2.82.9 NMAC would also remove the one percent interest rate contained in Paragraph (3) of Subsection C that is added to the state treasurer's overnight investment program interest rate that is assessed against an LAU for submitting late contributions.

Details for Obtaining a Copy of Proposed Rule Amendments and Submitting Oral or Written Comments:

A copy of the proposed rule amendments is available on the NMERB website at <https://www.erb.nm.gov>. Hard copies are available for pick up at the NMERB offices located at 701 Camino de los Marquez, Santa Fe, NM 87505 or 8500 Menaul Blvd. NE, Suite B-450, Albuquerque, NM 87112 during regular business hours. The proposed rule replacement amendments are also posted on the New Mexico Sunshine Portal at <https://ssp.nm.gov>. Interested individuals may provide oral comments at the public rule hearing or submit written comments by mail to Amanda Olsen, New Mexico Educational Retirement Board, P.O. Box 26129, Santa Fe, NM 87502 or by email to NMERB.RuleChange@erb.nm.gov or by fax to (505) 827-1855. Written comments must be received by 5:00 pm (MT) on May 24, 2024. All timely submitted written comments will be posted on the NMERB website at <https://www.erb.nm.gov>.

Any person with a disability who needs a reader, amplifier, qualified sign language interpreter, or auxiliary aid or service to attend or participate in the hearing should contact Amanda Olsen at (505) 476-6133 as soon as possible or at least ten business days before the public hearing.

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
 [2.82.5.1 NMAC - Rp, 2.82.5.1 NMAC, xx/xx/xxxx]

2.82.5.2 SCOPE: This rule applies to procedures and eligibility for retirement, and the calculation of and selection of options for benefits.
 [2.82.5.2 NMAC - Rp, 2.82.5.2 NMAC, xx/xx/xxxx]

2.82.5.3 STATUTORY AUTHORITY: The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.
 [2.82.5.3 NMAC - Rp, 2.82.5.3 NMAC, xx/xx/xxxx]

2.82.5.4 DURATION: Permanent
 [2.82.5.4 NMAC - Rp, 2.82.5.4 NMAC, xx/xx/xxxx]

2.82.5.5 EFFECTIVE DATE: Month, day, year, unless a later date is cited at the end of a section or paragraph.
 [2.82.5.5 NMAC - Rp, 2.82.5.5 NMAC, xx/xx/xxxx]

2.82.5.6 OBJECTIVE: To specify procedures for retirement, benefits and options, and provide rules for the restoring process.
 [2.82.5.6 NMAC - Rp, 2.82.5.6 NMAC, xx/xx/xxxx]

2.82.5.7 DEFINITIONS: [RESERVED]

2.82.5.8 ELIGIBILITY:

A. A member shall not be considered eligible to retire unless the member 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.
 [2.82.5.8 NMAC - Rp, 2.82.5.8 NMAC, xx/xx/xxxx]

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 the member's 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 the member or the member's beneficiary does or does not receive any other benefit from any public agency which would be adversely affected by the member or the member's beneficiary's receipt of benefits pursuant to the Educational Retirement Act. If the

member or the member's beneficiary does, or will receive such benefits, the director shall make the benefit adjustment called for in this section.

[2.82.5.9 NMAC - Rp, 2.82.5.9 NMAC, xx/xx/xxxx]

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.

[2.82.5.10 NMAC - Rp, 2.82.5.10 NMAC, xx/xx/xxxx]

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.

[2.82.5.11 NMAC - Rp, 2.82.5.11 NMAC, xx/xx/xxxx]

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.

[2.82.5.12 NMAC - Rp, 2.82.5.12 NMAC, xx/xx/xxxx]

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 the member's 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 the member's 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, the member 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, the member must advise the director at least 30 days in advance of the date on which the member's 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.

[2.82.5.13 NMAC - Rp, 2.82.5.13 NMAC, xx/xx/xxxx]

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.

[2.82.5.14 NMAC - Rp, 2.82.5.14 NMAC, xx/xx/xxxx]

2.82.5.15 RETURN TO WORK PROGRAM:

A. A retired member cannot return to employment with any LAU until the member submits and ERB approves a return to work application prescribed by the Board verifying their eligibility for the return to work program.

B. For purposes of return to work, including Sections 15 through 18 of 2.82.5 NMAC, a retired member is deemed "employed" if a retired member is or should be included in the work report provided by the employing LAU to the ERB pursuant to 2.82.9.8. NMAC as being paid a wage.

C. If a retired member who would otherwise qualify for a return to work program receives a written notice (“Notice of Violation”) from ERB notifying the member that the member failed to submit the required return to work application prior to returning to employment, the member shall:

(1) Immediately terminate employment and notify ERB of such termination; or

(2) Submit a completed return to work application for the appropriate return to work program within 30 days of the date of the Notice of Violation.

D. If the retired member did not render service to any LAU for at least 90 consecutive days after the date of retirement (“layout”) and before they returned to employment, the member is not required to layout for an additional 90 consecutive days and shall be deemed to have satisfied the 90-day non-service requirement under Paragraph (1) of Subsection A of 2.82.5.17 NMAC and Paragraph (1) of Subsection A of 2.82.5.18 NMAC.

E. Periods of employment or wages received by a retired member prior to their approval in a return to work program under this Paragraph C shall count against the limits provided in rules 2.82.5.16, 2.82.5.17, and 2.82.5.18 NMAC.

F. A retired member who receives a Notice of Violation who would qualify for a return to work program but fails to terminate employment or submit a return to work application within 30 days of the date of the Notice of Violation shall have their retirement suspended immediately and before their monthly retirement benefits can resume must:

(1) certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment, and

(2) reapply for retirement by completing the application process provided in 2.82.5.9 NMAC as if a first-time applicant.

G. A retired member who receives a Notice of Violation who would not qualify for a return to work program because the member has not satisfied the 90-day layout has not had a bona fide termination and is ineligible to receive a retirement benefit and shall have their retirement suspended immediately and shall pay to the educational retirement fund a sum equal to the total retirement benefits the member received while employed and before their monthly retirement benefits can resume must:

(1) certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment, and

(2) reapply for retirement by completing the application process provided in 2.82.5.9 NMAC as if a first-time applicant.

H. No time that a retired member has been employed by a local administrative unit (“LAU”) under any return to work (“return to work”) program may be used in the calculation of retirement benefits and a retired member cannot acquire or purchase service credit for the period of the retired member’s re-employment with a LAU under any return to work program.

I. A retired member who returns to work under an approved return to work program may, if qualified, change programs once per year by submitting a return to work application for the different program within the month of July. If mailed, an application will be deemed submitted as of the postmark date.

J. Independent Contractors. A retired member who is not employed by an LAU and whose independent contractor application has been approved by ERB may provide services to that LAU as an independent contractor.

(1) A retired member who wants to provide services as an independent contractor to an LAU or through an arrangement with a third party contracting with an LAU shall submit and obtain approval of an independent contractor application from ERB prior to providing such services.

(2) A retired member who fails to submit and obtain approval as an independent contractor prior to providing services to an LAU may be considered employed during the period of providing services to the LAU and may be subject to any appropriate action contained in this rule.

K. Each LAU shall create, maintain and distribute to its employees an internal return to work policy consistent with the applicable statutes and 2.82.5 NMAC.

L. A final written decision of the director which results in a suspension of benefits for a violation of Sections 15 through 18 of 2.82.5 NMAC may be appealed pursuant to 2.82.11 NMAC.

M. All Notices of Violation shall be mailed certified via the United States postal service.

N. All applications, notices and other communications required from members pursuant to Sections 15 through 18 of 2.82.5 NMAC should be mailed certified via the United States postal service; provided that ERB shall accept delivery of any such applications, notices and other communications when received regardless of the delivery method. By accepting delivery of an application, notice or other communications, ERB does not waive any deadline, requirement for completion or other requirement contained in Sections 15 through 18 of 2.82.5 NMAC.

[2.82.5.15 NMAC - Rp, 2.82.5.15 NMAC, xx/xx/xxxx]

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 becomes ineligible to receive retirement benefits. The retired member’s retirement benefit will be suspended for the unauthorized period 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 benefits the retired member received while ineligible.

C. If suspended, before the member’s monthly retirement benefits can resume, the suspended retired member must certify to ERB and provide documentation from their employer(s) verifying that they have terminated all employment that would disqualify them from retirement under the Educational Retirement Act and must reapply for retirement.

[2.82.5.16 NMAC - Rp, 2.82.5.16 NMAC, xx/xx/xxxx]

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 fifteen thousand (\$15,000) or more per fiscal year, the retired member becomes ineligible to receive retirement benefits and 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 benefits the retired member received while ineligible.

C. If suspended, before the member’s monthly retirement benefits can resume, the suspended retired member must certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment and must reapply for retirement. The member’s retirement will commence as of the first day of the month following the date ERB has received the necessary documentation.

[2.82.5.17 NMAC - Rp, 2.82.5.17 NMAC, xx/xx/xxxx]

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 becomes ineligible to receive retirement benefits and 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.

C. If suspended, before the member's monthly retirement benefits can resume, the suspended retired member must certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment and must reapply for retirement. The member's retirement will commence as of the first day of the month following the date ERB has received the necessary documentation.

[2.82.5.18 NMAC - Rp, 2.82.5.18 NMAC, xx/xx/xxxx]

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 - Rp, 2.82.5.19 NMAC, xx/xx/xxxx]

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 - Rp, 2.82.5.20 NMAC, xx/xx/xxxx]

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 the member 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 - Rp, 2.82.5.21 NMAC, xx/xx/xxxx]

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 - Rp, 2.82.5.22 NMAC, xx/xx/xxxx]

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:

2.82.5 NMAC – Retirement Benefits, filed 6/30/1999, was repealed and replaced by 2.82.5 NMAC – Retirement Benefits, effective xx/xx/xxxx.

TITLE 2 PUBLIC FINANCE
CHAPTER 82 EDUCATIONAL RETIREMENT
PART 9 ADMINISTRATIVE UNIT REPORTS AND REMITTANCES

2.82.9.1 ISSUING AGENCY: Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129./
 [2.82.9.1 NMAC - Rp, 2.82.9.1 NMAC, xx/xx/xxxx]

2.82.9.2 SCOPE: This rule applies to local administrative units and state agencies required to file reports on contributions to the Educational Retirement Act (ERA) fund.
 [2.82.9.2 NMAC - Rp, 2.82.9.2 NMAC, xx/xx/xxxx]

2.82.9.3 STATUTORY AUTHORITY: The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.
 [2.82.9.3 NMAC - Rp, 2.82.9.3 NMAC, xx/xx/xxxx]

2.82.9.4 DURATION: Permanent.
 [2.82.9.4 NMAC - Rp, 2.82.9.4 NMAC, xx/xx/xxxx]

2.82.9.5 EFFECTIVE DATE: July 1, 2025, unless a later date is cited at the end of a section or paragraph.
 [2.82.9.5 NMAC - Rp, 2.82.9.5 NMAC, xx/xx/xxxx]

2.82.9.6 OBJECTIVE: Instructions for preparing and filing timely reports and specifies penalties for late filing of reports or late deposit of contributions.
 [2.82.9.6 NMAC - Rp, 2.82.9.6 NMAC, xx/xx/xxxx]

2.82.9.7 DEFINITIONS:

- A.** “**Fiscal year**” means the New Mexico state government fiscal year – July 1 through June 30.
- B.** “**LAU**” means local administrative unit.
- C.** “**Terminate**” means to leave employment with an LAU for any reason.

2.82.9.8 EMPLOYER REPORTS:

- A.** Instructions for the preparation and handling of employer reports and monthly remittances by the local administrative units shall be outlined in detail once each year and electronically transmitted to each local administrative unit by the director.
- B.** Employer reports shall encompass all local administrative unit employees including those employees whom the local administrative unit has identified as excluded from coverage except that an employer may omit student employees and resident physicians.
- C.** Monthly contributions from employees and local administrative units shall be electronically transmitted no later than the 15th day of the month following the month for which contributions are withheld.
 - (1)** Employer reports and contributions shall be electronically transmitted or postmarked no later than the 15th of the following month. The director may enter into an agreement with a local administrative unit for an extension of this deadline for the employer report. No such extension is available for submission of the contributions.
 - (2)** When the 15th of the month falls on a weekend or holiday, the report and contributions are due on the next workday.
 - (3)** Local administrative units shall be assessed late charges for not submitting reports or contributions in accordance with the above schedule. A charge of fifty dollars (\$50) per day shall be assessed for untimely reports. Upon a written showing of good cause, the director may waive charges to the local administrative unit for untimely reports. No such waiver of charges is available for late contributions. The charges for late contributions will be calculated at a rate equal to the state treasurer's overnight investment program rate. The rate will be applied daily and cumulatively for the period of time from the 15th to the date of postmark. The late charge

shall be the greater amount calculated by applying the foregoing rate or ten dollars (\$10). The director shall report any and all such assessments and waivers to the board.

(4) A local administrative unit shall be assessed a penalty for each failure to correctly include or identify an individual as employed or to miscategorize an employee when submitting a work report reflecting payment of wages as required pursuant to this rule. The penalty shall be payable to ERB and shall be assessed for each report filed incorrectly as follows: 1st failure – five hundred dollars (\$500), 2nd failure – one thousand dollars (\$1,000), 3rd and each subsequent failure – one thousand five hundred dollars (\$1,500). Upon a written showing of good cause, the director may waive the penalty for a first failure. Upon a written showing of good cause, the Board may waive the penalty for a second and any subsequent failure.

D. The director shall prepare forms for all regular reports or make available other means for such regular reports from the local administrative units as may be required in the administration of the Educational Retirement Act.

[2.82.9.8 NMAC - Rp, 2.82.9.8 NMAC, xx/xx/xxxx]

HISTORY OF 2.82.9 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 IX, Administrative Unit Reports and Remittances, filed 7/2/1982.

History of Repealed Material:

2.82.5 NMAC – Retirement Benefits, filed 6/30/1999, was repealed and replaced by 2.82.9 NMAC – Retirement Benefits, effective xx/xx/xxxx.

Rule Hearing Search

EXHIBIT 4

Hearing Date:	Comments	Agency:
All ▼	Deadline Date:	Educational Retirement Board ▼
	All ▼	

[Return to Search Results](#)
Proposed Rule Name:

2.82.5 & 2.82.9 NMAC -Repeal & Replacement

Agency:

Educational Retirement Board

Purpose:

The purpose of the Rule Hearing is to receive public comment and to consider adoption of the proposed repeal and replacement of 2.82.5 NMAC - Retirement Benefits and repeal and replacement of 2.82.9 NMAC – Administrative Unit Reports and Remittances

Summary:

The replacement of 2.82.5 NMAC removes all references to the return to work program requiring a 12 month layout period authorized under Section 22-11-25.1 NMSA 1978 because the program is no longer available to new applicants pursuant to Subsection A of Section 22-11-25.1 NMSA 1978. Proposed Section 15 of 2.82.5 NMAC would allow a retired member who returned to employment with a local administrative unit ("LAU") without prior ERB approval to terminate employment or file an appropriate return to work application within 30 days following the date of the letter from the Educational Retirement Board ("ERB") notifying the retiree of their failure to file an application. A retiree who complies with the requirements would not be suspended and would repay to the retirement fund 25% of the benefits received while the retiree was ineligible for benefits. The Rule clarifies that a retiree who has satisfied the 90-day layout period required for certain return to work programs need not complete another layout period to qualify for those programs. Also, time of employment and income received while employed without ERB approval does not count against the time and income caps contained in the return to work programs.

A retiree who fails to comply with the requirements would have their benefit suspended as of the first day of the month in which they were employed without prior ERB authorization and would repay all benefits received while ineligible.

Proposed Section 15 of 2.82.5 would also allow all retirees employed under an approved return to work program to switch to another approved program once per year during the month of July. The Rule would also clarify that a retiree who wishes to provide independent contractor services to an LAU must submit and obtain approval of an independent contractor application from ERB. A retiree who fails to submit and obtain approval as an independent contractor prior to providing services to an LAU may be considered employed during the period of providing services to the LAU.

A Subsection C is added to each of Sections 16, 17 & 18 of 2.82.5 NMAC to provide that, if a retiree's benefits are suspended due to a violation, the retiree must certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment and must reapply for retirement before their benefits can resume.

The replacement of 2.82.9 NMAC would assess a monetary penalty against an LAU for each failure to correctly include or identify an individual as employed or to miscategorize an employee when submitting a work report reflecting payment of wages as required pursuant to this rule. The penalty would be payable to ERB and shall be assessed as follows: 1st failure – five hundred dollars (\$500), 2nd failure – one thousand dollars (\$1,000), 3rd and each subsequent failure – one thousand five hundred dollars (\$1,500).

Administratives Codes:

2.82.5 NMAC - Retirement Benefits & 2.82.9 NMAC – Administrative Unit Reports and Remittances

Rule Complete Copy :

A copy of the proposed rule amendments is available on the NMERB website at <https://www.erb.nm.gov>. Hard copies are available for pick up at the NMERB offices located at 701 Camino de los Marquesz, Santa Fe, NM 87505 or 8500 Menaul Blvd. NE, Suite B-450, Albuquerque, NM 87112 during regular business hours. The proposed rule replacement amendments are also posted on the New Mexico Sunshine Portal at <https://ssp.nm.gov>.

Corrections:
[Click Here to access Rule Corrections](#)
Rule Explanatory Statement:
[Click Here to access the Rule Explanatory Statement](#)
Related New Mexico Register Publications:
[Click Here to access Related New Mexico Publications](#)

For any additional information or questions concerning this rule making or posting please contact:

Randall J. Cherry
 randall.cherry@erb.nm.gov
 (505) 525-7333

Last Updated Date

4/24/2024 3:58 PM

How to submit Comments:

Interested individuals may submit written comments by mail to Amanda Olsen, New Mexico Educational Retirement Board, P.O. Box 26129, Santa Fe, NM 87502 or by email to NMERB.RuleChange@erb.nm.gov or by fax to (505) 827-1855.

When are comments due:

The deadline for submitting comments has changed. The new deadline is shown below
 5/24/2024 5:00 PM

Hearing Date:

The public rule hearing date/time have changed. The new date/time are shown below
 5/30/2024 9:00 AM

Public Hearing Location:

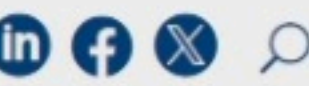
Albuquerque Public Schools Headquarters, located at 6400 Uptown Blvd. NE, Albuquerque, New Mexico 87110 5/30/2024 (9:00 AM -5:00 PM)

How to participate:

The New Mexico Educational Retirement Board (hereafter, "Board") will convene a Rule Hearing at 9:00 a.m. on Thursday, May 30, 2024, at the Albuquerque Public Schools Headquarters, located at 6400 Uptown Blvd. NE, Albuquerque, New Mexico 87110. Interested individuals may provide oral comments at the public rule hearing or submit written comments by mail to Amanda Olsen, New Mexico Educational Retirement Board, P.O. Box 26129, Santa Fe, NM 87502 or by email to NMERB.RuleChange@erb.nm.gov or by fax to (505) 827-1855. Written comments must be received by 3:00 pm (MT) on May 24, 2024. All timely submitted written comments will be posted on the NMERB website at <https://www.erb.nm.gov>. Any person with a disability who needs a reader, amplifier, qualified sign language interpreter, or auxiliary aid or service to attend or participate in the hearing should contact Amanda Olsen at (505) 476-6133 as soon as possible or at least ten business days before the public hearing.

📄 If the document is not visible on the previewer, please download the file.

File	File Name	File Type	Description
View Document	ERB - Notice of Proposed Rulemaking_2.82.5 2.82.9 - 040124	PDF	
View Document	Rule 2.82.9 Replacement	PDF	
View Document	Rule 2.82.5 - Replacement	PDF	



Public Rulemaking

Legislation

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- [Administrative Rules](#)
- [Recent Legislation / Legislative Proposals](#)
- [Public Rulemaking](#)

Public Notice and Proposed Amendment

NMERB will conduct a public rulemaking hearing on May 30, 2024, 9:00 a.m. (MT) at the Albuquerque Public Schools Headquarters, located at 6400 Uptown Blvd. NE, Albuquerque, New Mexico 87110.

The purpose of the hearing is to receive public comments and to consider adoption of the proposed repeal and replacement of 2.82.5 NMAC – Retirement Benefits and repeal and replacement of 2.82.9 NMAC – Administrative Unit Reports and Remittances.

[Notice of Public Rulemaking Hearing](#) (Complete text)

[Rule 2.82.5 NMAC Replacement](#)

[Rule 2.82.9 NMAC Replacement](#)

Learn more about New Mexico Administrative Codes (NMAC) that impact ERB on the [Educational Retirement Act](#) page.



Managing the retirement assets of New Mexico Educators since 1957.

Contact Information

Santa Fe
(Main Office)
8am-5pm

[Member Services Contact Form](#)

Physical Address
701 Camino de los Marquez
Santa Fe, NM 87505

Mailing Address
PO Box 26129
Santa Fe, NM 87502

Toll-Free
1(866) 691-2345

Main Office
(505) 827-8030

Fax
(505) 827-1855

Albuquerque Office
8am-5pm
Email or call ahead for an appointment.

[Member Services Contact Form](#)

Physical Address
8500 Menaul Blvd. NE, Suite B-450
Albuquerque, NM 87112

Phone
(505) 888-1560

Fax
(505) 830-2976

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From: [Cherry, Randall, ERB](#)
To: lcs@nmlegis.gov
Subject: RE: Educational Retirement Board - Rulemaking 2.82.5 & 2.82.9 NMAC
Date: Tuesday, April 23, 2024 8:29:00 AM
Attachments: [ERB - Notice of Proposed Rulemaking 2.82.5 2.82.9 - 040124.pdf](#)
[image001.png](#)
[Rule 2.82.5 - Replacement.pdf](#)
[Rule 2.82.9 Replacement.pdf](#)

Dear Legislative Council Service (LCS):

The New Mexico Educational Retirement Board (NMERB) will conduct a public rule hearing on May 30, 2024 at 9:00 a.m. The rule hearing will be conducted at Albuquerque Public Schools headquarters, 6400 Uptown Blvd. NE, Albuquerque, NM 87110.

The purpose of the public rule hearing is to receive public comment on the proposed repeal and replacement of 2.82.5 NMAC, Retirement Benefits and 2.82.9 NMAC, Administrative Unit Reports and Remittances. In March, 2022, Governor Lujan Grisham signed House Bill 73 (HB73) regarding educational retirees returning to work (2022 N.M. Laws, ch. 20, § 1). The bill sunsets the 12-month return to work program as of January 1, 2024, among other changes. Rule 2.82.5 NMAC was amended to address the other provisions of HB73 effective July 26, 2022. The current rulemaking will remove all references to the return to work program requiring a 12 month layout period authorized under Section 22-11-25.1 NMSA 1978 because, as of January 1, 2024, the program is no longer available to new applicants.

The rulemaking makes additional changes. Proposed Section 15 of 2.82.5 NMAC would allow a retired member who is otherwise qualified for a return to work program, and who returned to employment with a local administrative unit (“LAU”) without prior Educational Retirement Board (“ERB”) approval, to terminate employment or file an appropriate return to work application within 30 days following the date of the letter from the ERB notifying the retiree of their failure to file an application. A retiree who complies with the requirements would not be suspended and would not repay to the retirement fund any of the benefits received while the retiree was ineligible for benefits. A retiree who fails to file an application or terminate employment would have their benefit suspended immediately, and they must verify that they have terminated employment, and reapply for retirement. A retiree who receives a letter from the ERB notifying the retiree of their failure to file an application who is not qualified to return to work under any program and who returns to work would have their benefit suspended immediately, must repay to the retirement fund any of the benefits received while the retiree was ineligible for benefits, must verify that they have terminated employment, and must reapply for retirement.

The Rule also clarifies that a retiree who has satisfied the 90-day layout period required for certain return to work programs need not complete another layout period to qualify for those programs. Also, time of employment and income received while employed without ERB approval would count against the time and income caps contained in the return to work programs.

Proposed Section 15 of 2.82.5 would also allow all retirees employed under an approved return to

work program to switch to another approved program once per fiscal year during the month of July. The Rule would also clarify that a retiree who wishes to provide independent contractor services to an LAU must submit and obtain approval of an independent contractor application from ERB. A retiree who fails to submit and obtain approval as an independent contractor prior to providing services to an LAU may be considered employed during the period of providing services to the LAU. Section 15 would also provide notice that penalties for violations may be appealed. Finally, the Rule would require each LAU to create, maintain and publicize to its employees an internal return to work policy consistent with the applicable statutes and rules.

A Subsection C is added to each of Sections 16, 17 & 18 of 2.82.5 NMAC to provide that, if a retiree's benefits are suspended due to a violation, the retiree must certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment and must reapply for retirement before their benefits can resume.

The replacement of 2.82.9 NMAC would assess a monetary penalty against an LAU for each failure to correctly include or identify an individual as employed or to miscategorize an employee when submitting a work report reflecting payment of wages as required pursuant to this rule. The penalty would be payable to ERB and shall be assessed as follows: 1st failure – five hundred dollars (\$500), 2nd failure – one thousand dollars (\$1,000), 3rd and each subsequent failure – one thousand five hundred dollars (\$1,500). The ERB Executive Director can waive the penalty for a first violation. The Board of Trustees can waive the penalty for second and subsequent violations.

The replacement of 2.82.9 NMAC would also remove the one percent interest rate contained in Paragraph (3) of Subsection C that is added to the state treasurer's overnight investment program interest rate that is assessed against an LAU for submitting late contributions.

The Notice of Proposed Rulemaking and the proposed amendments are attached for your convenience. This notification is provided to LCS pursuant to the State Rules Act, NMSA 1978, § 14-4-2(E)(7).

Respectfully,
Randall Cherry



Randall J. Cherry

General Counsel

- Office: 505-476-6125 Cell: 505-525-7333
- randall.cherry@erb.nm.gov
- nmerb.org
- 701 Camino De Los Marquez, Santa Fe, NM 87505

From: [Cherry, Randall, ERB](#)
To: lesc@nmlegis.gov
Cc: [Maule, Jacob, ERB](#)
Subject: FW: RE: Educational Retirement Board - Rulemaking 2.82.5 & 2.82.9 NMAC
Date: Tuesday, April 23, 2024 8:32:00 AM
Attachments: [ERB - Notice of Proposed Rulemaking 2.82.5 2.82.9 - 040124.pdf](#)
[image001.png](#)
[Rule 2.82.5 - Replacement.pdf](#)
[Rule 2.82.9 Replacement.pdf](#)

Dear Legislative Education Study Committee:

The New Mexico Educational Retirement Board (NMERB) will conduct a public rule hearing on May 30, 2024 at 9:00 a.m. The rule hearing will be conducted at Albuquerque Public Schools headquarters, 6400 Uptown Blvd. NE, Albuquerque, NM 87110.

The purpose of the public rule hearing is to receive public comment on the proposed repeal and replacement of 2.82.5 NMAC, Retirement Benefits and 2.82.9 NMAC, Administrative Unit Reports and Remittances. In March, 2022, Governor Lujan Grisham signed House Bill 73 (HB73) regarding educational retirees returning to work (2022 N.M. Laws, ch. 20, § 1). The bill sunsets the 12-month return to work program as of January 1, 2024, among other changes. Rule 2.82.5 NMAC was amended to address the other provisions of HB73 effective July 26, 2022. The current rulemaking will remove all references to the return to work program requiring a 12 month layout period authorized under Section 22-11-25.1 NMSA 1978 because, as of January 1, 2024, the program is no longer available to new applicants.

The rulemaking makes additional changes. Proposed Section 15 of 2.82.5 NMAC would allow a retired member who is otherwise qualified for a return to work program, and who returned to employment with a local administrative unit (“LAU”) without prior Educational Retirement Board (“ERB”) approval, to terminate employment or file an appropriate return to work application within 30 days following the date of the letter from the ERB notifying the retiree of their failure to file an application. A retiree who complies with the requirements would not be suspended and would not repay to the retirement fund any of the benefits received while the retiree was ineligible for benefits. A retiree who fails to file an application or terminate employment would have their benefit suspended immediately, and they must verify that they have terminated employment, and reapply for retirement. A retiree who receives a letter from the ERB notifying the retiree of their failure to file an application who is not qualified to return to work under any program and who returns to work would have their benefit suspended immediately, must repay to the retirement fund any of the benefits received while the retiree was ineligible for benefits, must verify that they have terminated employment, and must reapply for retirement.

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The replacement of 2.82.9 NMAC would also remove the one percent interest rate contained in Paragraph (3) of Subsection C that is added to the state treasurer's overnight investment program interest rate that is assessed against an LAU for submitting late contributions.

The Notice of Proposed Rulemaking and the proposed amendments are attached for your convenience.

Respectfully,
Randall Cherry



Randall J. Cherry

General Counsel

- Office: 505-476-6125 Cell: 505-525-7333
- randall.cherry@erb.nm.gov
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- 701 Camino De Los Marquez, Santa Fe, NM 87505

From: [McFall, Melissa, ERB](#)

To: [Aaron Burks](#); [Savoia, Aaron](#); [adstolle@actecschools.com](#); [Alice Duran](#); [Alicia Herta](#); [Alicia Luksich](#); [Alicia Visciano - CLV](#); [Amanda Daugherty](#); [Amanda Gallegos Ortiz](#); [Knight, Amanda](#); [Amanda Silva](#); [Archuleta, Amber](#); [Pena, Amber](#); [Amy Begay](#); [GARCIA, AMYCHRISTINE](#); [Morga, Amy](#); [Andrea Martinez](#); [Corliss, Angela](#); [Cress, Anna](#); [Annabelle Carlos](#); [Kirk, Annette](#); [Annette Kirk COR](#); [ORTIZ, ANNETTE](#); [McCarty, Paul](#); [anvgiil](#); [Arielle John](#); [Arlene Cortez](#); [Ashley Barranca](#); [Cook, Ashley](#); [Ashley Grissom](#); [Ashley Ryan GAL](#); [Wolfel, Ashley](#); [Horschel, Audra](#); [Kahl, Audra](#); [Baird, Myra](#); [Chavez, Barbara](#); [LUCERO, BENJI](#); [Bennie Cruz](#); [Betty Mitchell](#); [COVERT, BEVERLY](#); [Beverly Volonich](#); [Barela, Bibi](#); [Blanca Bustos](#); [Newland, Bobbi](#); [Lightfoot, Bonnie](#); [Brandon Bussell](#); [Brenda De La Pena UNM](#); [Gallegos, Brenda](#); 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Cc: [Herrera, Selina, ERB](#); [Alva, Sandra, ERB](#); [Peery-Galon, Renada, ERB](#)

Subject: NMERB Notice of Proposed Rule Change

Date: Monday, April 22, 2024 1:00:13 PM

Attachments: [ERB - Notice of Proposed Rulemaking 2.82.5 2.82.9 - 040124.pdf](#)
[image001.png](#)
[Rule 2.82.9 Replacement.pdf](#)
[Rule 2.82.5 - Replacement.pdf](#)

Dear Local Administrative Unit,

Good afternoon, Please note that the New Mexico Educational Retirement Board has proposed amendments to certain of its rules (see attached). In summary, the changes will reduce the penalties for return-to-work violations and will impose penalties on local administrative units for errors in certain reports provided to ERB. ERB believes that these changes will significantly improve the RTW administrative process for the benefit of both ERB and our members. The Notice of Proposed Rulemaking provides more detail on the specific changes (attached).

Please feel free to share any comments or concerns. Thank you for your attention.



Melissa McFall

Compliance Advisor

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2.82.5.15 RETURN TO WORK PROGRAM:

A. A retired member cannot return to employment with any LAU until the member submits and ERB approves a return to work application prescribed by the Board verifying their eligibility for the return to work program.

B. For purposes of return to work, including Sections 15 through 18 of 2.82.5 NMAC, a retired member is deemed “employed” if a retired member is or should be included in the work report provided by the employing LAU to the ERB pursuant to 2.82.9.8. NMAC as being paid a wage.

C. If a retired member who would otherwise qualify for a return to work program receives a written notice (“Notice of Violation”) from ERB notifying the member that the member failed to submit the required return to work application prior to returning to employment, the member shall:

- (1) Immediately terminate employment and notify ERB of such termination; or
- (2) Submit a completed return to work application for the appropriate return to work program within 30 days of the date of the Notice of Violation.

D. A retired member who receives a Notice of Violation who would qualify for a return to work program but fails to terminate employment or submit a return to work application within 30 days of the date of the Notice of Violation shall have their retirement suspended immediately and before their monthly retirement benefits can resume must:

- (1) certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment, and
- (2) reapply for retirement by completing the application process provided in 2.82.5.9 NMAC as if a first-time applicant.

E. A retired member who receives a Notice of Violation who would not qualify for a return to work program because the member has not satisfied the 90-day layout has not had a bona fide termination and is ineligible to receive a retirement benefit and shall have their retirement suspended immediately and shall pay to the educational retirement fund a sum equal to the total retirement benefits the member received while employed and before their monthly retirement benefits can resume must:

- (1) certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment, and
- (2) reapply for retirement by completing the application process provided in 2.82.5.9 NMAC as if a first-time applicant.

F. If the retired member did not render service to any LAU for at least 90 consecutive days after the date of retirement (“layout”) and before they returned to employment, the member is not required to layout for an additional 90 consecutive days and shall be deemed to have satisfied the 90-day non-service requirement under Paragraph (1) of Subsection A of 2.82.5.17 NMAC and Paragraph (1) of Subsection A of 2.82.5.18 NMAC.

G. Periods of employment or wages received by a retired member prior to their approval in a return to work program under this Paragraph C shall count against the limits provided in rules 2.82.5.16, 2.82.5.17, and 2.82.5.18 NMAC.

H. No time that a retired member has been employed by a local administrative unit (“LAU”) under any return to work (“return to work”) program may be used in the calculation of retirement benefits and a retired member cannot acquire or purchase service credit for the period of the retired member’s re-employment with a LAU under any return to work program.

I. A retired member who returns to work under an approved return to work program may, if qualified, change programs once per year by submitting a return to work application for the different program within the month of July. If mailed, an application will be deemed submitted as of the postmark date.

J. Independent Contractors. A retired member who is not employed by an LAU and whose independent contractor application has been approved by ERB may provide services to that LAU as an independent contractor.

(1) A retired member who wants to provide services as an independent contractor to an LAU or through an arrangement with a third party contracting with an LAU shall submit and obtain approval of an independent contractor application from ERB prior to providing such services.

(2) A retired member who fails to submit and obtain approval as an independent contractor prior to providing services to an LAU may be subject to any appropriate action contained in this rule if ERB determines that the member was employed during the period of providing services to the LAU.

K. Each LAU shall create, maintain and distribute to its employees an internal return to work policy consistent with the applicable statutes and 2.82.5 NMAC.

L. A final written decision of the director which results in a suspension of benefits for a violation of Sections 15 through 18 of 2.82.5 NMAC may be appealed pursuant to 2.82.11 NMAC.

M. All Notices of Violation shall be mailed certified via the United States postal service.

N. All applications, notices and other communications required from members pursuant to Sections 15 through 18 of 2.82.5 NMAC should be mailed certified via the United States postal service; provided that ERB shall accept delivery of any such applications, notices and other communications when received regardless of the delivery method. By accepting delivery of an application, notice or other communications, ERB does not waive any deadline, requirement for completion or other requirement contained in Sections 15 through 18 of 2.82.5 NMAC. [2.82.5.15 NMAC - Rp, 2.82.5.15 NMAC, xx/xx/xxxx]

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 **an 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 fifteen thousand (\$15,000) or more per fiscal year, the retired member becomes ineligible to receive retirement benefits and 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 benefits the retired member received while ineligible.

C. If suspended, before the member’s monthly retirement benefits can resume, the suspended retired member must certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment and must reapply for retirement. The member’s retirement will commence as of the first day of the month following the date ERB has received the necessary documentation.

[2.82.5.17 NMAC - Rp, 2.82.5.17 NMAC, xx/xx/xxxx]

TITLE 2 PUBLIC FINANCE
CHAPTER 82 EDUCATIONAL RETIREMENT
PART 9 ADMINISTRATIVE UNIT REPORTS AND REMITTANCES

2.82.9.1 ISSUING AGENCY: Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129./
 [2.82.9.1 NMAC - Rp, 2.82.9.1 NMAC, xx/xx/xxxx]

2.82.9.2 SCOPE: This rule applies to local administrative units and state agencies required to file reports on contributions to the Educational Retirement Act (ERA) fund.
 [2.82.9.2 NMAC - Rp, 2.82.9.2 NMAC, xx/xx/xxxx]

2.82.9.3 STATUTORY AUTHORITY: The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.
 [2.82.9.3 NMAC - Rp, 2.82.9.3 NMAC, xx/xx/xxxx]

2.82.9.4 DURATION: Permanent.
 [2.82.9.4 NMAC - Rp, 2.82.9.4 NMAC, xx/xx/xxxx]

2.82.9.5 EFFECTIVE DATE: July 1, 2025, unless a later date is cited at the end of a section or paragraph.
 [2.82.9.5 NMAC - Rp, 2.82.9.5 NMAC, xx/xx/xxxx]

2.82.9.6 OBJECTIVE: Instructions for preparing and filing timely reports and specifies penalties for late filing of reports or late deposit of contributions.
 [2.82.9.6 NMAC - Rp, 2.82.9.6 NMAC, xx/xx/xxxx]

2.82.9.7 DEFINITIONS:

- A.** “**Fiscal year**” means the New Mexico state government fiscal year – July 1 through June 30.
- B.** “**LAU**” means local administrative unit.
- C.** “**Terminate**” means to leave employment with an LAU for any reason.

2.82.9.8 EMPLOYER REPORTS:

- A.** Instructions for the preparation and handling of employer reports and monthly remittances by the local administrative units shall be outlined in detail once each year and electronically transmitted to each local administrative unit by the director.
- B.** Employer reports shall encompass all local administrative unit employees including those employees whom the local administrative unit has identified as excluded from coverage except that an employer may omit student employees and resident physicians.
- C.** Monthly contributions from employees and local administrative units shall be electronically transmitted no later than the 15th day of the month following the month for which contributions are withheld.
 - (1)** Employer reports and contributions shall be electronically transmitted or postmarked no later than the 15th of the following month. The director may enter into an agreement with a local administrative unit for an extension of this deadline for the employer report. No such extension is available for submission of the contributions.
 - (2)** When the 15th of the month falls on a weekend or holiday, the report and contributions are due on the next workday.
 - (3)** Local administrative units shall be assessed late charges for not submitting reports or contributions in accordance with the above schedule. A charge of fifty dollars (\$50) per day shall be assessed for untimely reports. Upon a written showing of good cause, the director may waive charges to the local administrative unit for untimely reports. No such waiver of charges is available for late contributions. The charges for late contributions will be calculated at a rate equal to the state treasurer's overnight investment program rate **plus one percent**. The rate will be applied daily and cumulatively for the period of time from the 15th to the date of postmark.

The late charge shall be the greater amount calculated by applying the foregoing rate or ten dollars (\$10). The director shall report any and all such assessments and waivers to the board.

(4) A local administrative unit shall be assessed a penalty for each failure to correctly include or identify an individual as employed or to miscategorize an employee when submitting a work report reflecting payment of wages as required pursuant to this rule. The penalty shall be payable to ERB and shall be assessed for each report filed incorrectly as follows: 1st failure – five hundred dollars (\$500), 2nd failure – one thousand dollars (\$1,000), 3rd and each subsequent failure – one thousand five hundred dollars (\$1,500). Upon a written showing of good cause, the director may waive the penalty for a first failure. Upon a written showing of good cause, the Board may waive the penalty for a second and any subsequent failure.

D. The director shall prepare forms for all regular reports or make available other means for such regular reports from the local administrative units as may be required in the administration of the Educational Retirement Act.

[2.82.9.8 NMAC - Rp, 2.82.9.8 NMAC, xx/xx/xxxx]

HISTORY OF 2.82.9 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 IX, Administrative Unit Reports and Remittances, filed 7/2/1982.

History of Repealed Material:

2.82.5 NMAC – Retirement Benefits, filed 6/30/1999, was repealed and replaced by 2.82.9 NMAC – Retirement Benefits, effective xx/xx/xxxx.



Memorandum

Date: May 23, 2024
To: Education Retirement Board (ERB)
From: Joey Evans, Executive Director, HR Benefits & Employee Wellness 
Subject: UNM comments related to proposed rules under NMAC 2.82.9

UNM is grateful for the opportunity to comment on the ERB's proposed rule under NMAC 2.82.9.

1. Proposed rule 2.82.9.8(C)(4) is vague and ambiguous as it does not define or is unclear as to certain of its terms. For example, the term "miscategorize an employee" is neither defined nor explained. Clarity of this term is necessary to ensure a local administrative unit (LAU) has a clear and consistent understanding of its respective compliance obligations.
2. Proposed rule 2.82.9.8(C)(4) also is vague and ambiguous in regard to the actual basis for the penalty. The proposed rule states a penalty will be assessed "for each failure" to include/identify an employee or miscategorization of an employee, but later states the penalty will be assessed "for each report." The ERB's Summary of Proposed Amendments does not clarify the discrepancy. Clarification is needed with respect to whether penalties are assessed on every individual error on each report or if assessed per report. For example, if a monthly report contains 10 errors, is the penalty \$500 for the first assessment or \$5,000?
3. Aspects of the employer's required reporting depends on the accuracy of the information provided to the employer by the its new hires or rehires. Namely, (1) whether the new hire/rehire previously was or currently is employed by a different LAU; (2) whether the new hire/rehire retired from a different LAU; and/or (3) whether a new hire/rehire retired from the New Mexico Public Employees Retirement Association. Currently, ERB has no formal means by which an employer may verify this employee-provided information. This means an employer may inadvertently "miscategorize" an individual based on inaccurate information provided by new hires/rehires through no fault of its own, but still may be assessed a penalty for the same. What additional tools and resources will the ERB be developing prior to July 1, 2025 to assist LAUs in improving reporting accuracy? For example, a method to verify information a new employee has provided on the Employee Data Form.
4. If the penalty is assessed per individual, then there does not appear to be a maximum penalty cap. While LAUs no doubt will make all reasonable efforts to ensure accurate reporting, the proposed penalty assessment provision should recognize that the occurrence of human error cannot be completely eliminated and include a reasonable maximum cap, particularly when taking into account the items outlined in paragraph 3 above. Such a cap will provide certainty for the LAUs, thus, allow them to predetermine their maximum liability for budgeting purposes.
5. The proposed rule limits LAU flexibility for determining when an employee meets a definition of .25 FTE per the LAU's business needs. LAUs may have employee categories whose

expected FTE may fluctuate and identification of greater than .25 FTE for a quarter may occur retroactively.

6. As written in the proposed rule, penalties assessed in 2.82.9.8(C)(4) appear to exceed the statutory authority of the ERB provided for in the Educational Retirement Act (the "Act"), §§ 22-11-1 et al. NMSA 1978. Section 22-11-6(A)(5) expressly authorizes the Board to "adopt regulations pursuant to [the Act]." With respect to the assessment of penalties on local administrative units, §22-11-22(B) of the Act grants the Board authority to "asses an interest charge and a penalty charge on any remittance not made by its due date." The proposed rule, however, is broader than this grant of statutory authority in that it does not limit the assessment of penalties to late remittances.

Current (and proposed) Rule 2.82.9.8(B) sets forth the employer's reporting requirements in general terms. It mandates that an employer report encompass all local administrative unit employees, including those excluded from coverage. Despite the fact remittances will not be made for every individual identified in the report, as written, proposed rule 2.82.9(C)(4) will allow for the assessment of penalties for inaccurate reporting on individuals for whom remittance is not necessary and will not be made. This means a penalty potentially could be assessed for a reporting error that did not result in a late remittance.