



**NEW MEXICO
EDUCATIONAL
RETIREMENT
BOARD**

**RETURN TO WORK LAWS
AND EDUCATIONAL RETIREMENT**

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Cooperative Educational Services v. NMERB

August 2017 – NMERB sued by Cooperative Educational Services, a procurement agent for public school districts.

Issue is placement of recent retirees by third party entities and compliance with return to work statutes and rules.

NEW MEXICO STATUTE

“A member shall not be on a retirement status while engaged in employment unless the employment falls within an exception established by statute or rule of the board.”

NMSA 1978, section 22-11-27(C)

Three Exceptions Allowing Return to Work After Retirement

- A) The Return to Work Program Statute
- B) The Return to Work Exception Rule
- C) Independent Contractors

A) The Return to Work Program

A retired member in the Return to Work Program may work for a local administrative unit (LAU) and is not required to suspend retirement benefits. NMSA 1978, section 22-11-25.1.

- Must not render service to a local administrative unit for at least twelve consecutive months after date of retirement.
- Must submit an application to NMERB for approval of participation in the Return to Work Program.
- Upon return to work, retired member must pay non-refundable NMERB contributions.

Return to Work Program Sunset

The Return to Work Program sunsets on January 1, 2022.

“....beginning January 1, 2002 and continuing until January 1, 2022, a retired member **may begin employment** at a local administrative unit and shall not be required to suspend retirement benefits if the member has not rendered service to a local administrative unit for at least twelve consecutive months after the date of retirement.” NMSA 1978, section 22-11-25.1(A).

B) Return to Work Exception Rule

A retired member may return to employment with a local administrative unit and continue to receive pension benefits. Section 2.82.5.16 NMAC.

- Can return to work under the exception immediately after retirement.
- Can earn up to \$15,000 per fiscal year or the amount possible working under .25 or less Full-Time Equivalency (FTE), whichever is greater.
- If more than these limits are earned during the fiscal year, the retired member's retirement benefit will be suspended.
- Neither the employee nor the employer make contributions under the Return to Work Exception.

C) Independent Contractors

Retired members who perform services for local administrative units as an independent contractor must meet the criteria set forth for an independent contractor. Sections 2.82.7.9(E) and 2.82.2.11(D) NMAC.

Criteria for determination of independent contractor status includes factors set out in IRS guidelines relating to:

- Behavioral control
- Financial control
- Type of relationship of the parties

Violations of Return to Work

“The board shall recover all overpayments that are made.”
NMSA 1978, section 22-11-53.

NMERB rules specifically require retirees to repay any overpayments that are made because of violations of the Return to Work Program or Return to Work Exception. Subsection F of 2.82.5.15 and subsection B of 2.82.5.16 NMAC.

IRS Requirements

As a qualified retirement plan under section 401(a) of the IRS code, NMERB can only distribute retirement benefits upon certain distributable events, including:

- Termination of employment
- Death
- Disability

IRS Requirement: Bona Fide Termination

According to the IRS, a “bona fide termination of employment” is essentially a **question of intent** as shown by the facts and circumstances of each individual situation.

1) Did the employer and employee **reasonably anticipate that no further services would be performed after a certain date?**

or

2) Did the level of bona fide services that the employee performs **permanently decrease by a significant amount?**

IRS Requirement: Bona Fide Termination

Easiest Example of what is not a Bona Fide Termination

- ▶ When an employer “proposes to allow employees to ‘retire’ on one day in order to qualify for the . . . pension benefit, and return to work the very next day or perhaps after a week has passed.”

What about a temp agency or placement agency that “hires” a recent retiree and places them in an LAU without regard to the Return to Work law and rules?

Is this an end around the Return to Work rules?

Violation of Return to Work rules is also a violation of IRS requirements.

Violation of IRS requirements could lead to loss of “qualified plan” status of Educational Retirement Fund.

Loss of “qualified plan” status could lead to:

- Members being required to pay taxes on contributions made in the year they are made.
- Plan being required to pay taxes on earnings.

Challenges

What are the driving factors:

- Lack of adequate workforce
- Budget constraints

Causes these challenges:

- Confusion
- Constant monitoring
- Abuse
- Third party entities
- Maintain integrity of pension plan

Which Retirees Use Return to Work the Most?

Job Class	FY 16	FY 17
Administrator	134	142
Other Certified	197	209
Left Blank by LAU	884	893
Teacher	833	899
Non-Certified	905	922
TOTAL Return to Work Program & Rule Participation	2953	3065

Which LAUs Use Return to Work Retirees the Most?

- 1. Albuquerque Public Schools**
FY 16: 561 retirees; FY 17: 562 retirees
- 2. University of New Mexico**
FY 16: 443 retirees; FY 17: 475 retirees
- 3. New Mexico State University**
FY16: 235 retirees; FY 17: 229 retirees
- 4. Las Cruces Public Schools**
FY 16: 161 retirees; FY 17: 164 retirees
- 5. Roswell Independent Schools**
FY16: 104 retirees; FY17: 104 retirees

Return to Work vs. Working Longer

- Retirees that return to work will accumulate more income in the short term; however, there will eventually be a “crossover date” where the retiree will accumulate more income by continuing to work than with participating in the RTW Program.
- In the long term: Return to Work does not pay

