

Substitute Teachers as Educational Retirement Fund Members: Proposed Educational Retirement Board Rule Change

AGENCY: Educational Retirement Board

DATE: September 14, 2016

PURPOSE OF HEARING:
Explore a proposed Educational Retirement Board Rule that would remove the exemption for substitute teachers employed on a day-to-day basis.

WITNESS: Rick Scroggins, Deputy Director, Educational Retirement Board; Roderick Ventura, General Counsel, Educational Retirement Board; Tami Coleman, Chief Financial Officer, Albuquerque Public Schools; Antonio Gonzales, Associate Superintendent for Human Resources, Albuquerque Public Schools

PREPARED BY: Kevin Force and Joseph W. Simon, LESC Staff

EXPECTED OUTCOME:
Understand the impact of the proposed rule on school districts and charter schools.

At the June meeting, board members discussed whether or not day-to-day substitutes are employees of the district or independent contractors.

BACKGROUND INFORMATION

In February 2016, staff of the New Mexico Educational Retirement Board (ERB) proposed a series changes ERB regulations. One of the proposed changes would eliminate a paragraph that excludes any “substitute” from membership. This brief will discuss the history of the proposed rule in addition to what impact the rule may have on the operations of school district and charter schools.

The Educational Retirement Act defines a “member” as “an employee, except for a participant or retired member, coming within the provisions of the Educational Retirement Act.” Unlike New Mexico, many other states have a statutory minimum for annual service, generally half-time. A few states require teachers to be employed full-time to be eligible for membership. ERB rules say that anyone who is employed for less than 0.25 FTE is not eligible for membership.

History of Proposed Rule. The proposed rule deletes Paragraph C of 2.82.2 NMAC, which states:

“Any employee engaged on a day-to-day basis to replace another employee who is temporarily absent shall be considered a “substitute” and shall not be covered under the Educational Retirement Act. An employee engaged to fill a vacant position (including a position vacated by an extended leave of absence) is not considered a “substitute” and must be covered under the Educational Retirement Act.”

ERB indicates the current wording of Paragraph C attempts to differentiate between long-term and short-term substitute teachers, but the ambiguous phrasing has raised ERB’s concerns that the provision is being inconsistently applied by school district, charter schools, and higher education institutions. In addition, ERB staff reported some school districts were giving substitutes the option of ERB membership. Finally, ERB is concerned that some school districts are not following the rule as written by not making contributions for substitutes “engaged to fill a vacant position.” By deleting the entire paragraph, a substitute teacher’s status would be determined according to their FTE, consistent with determinations for other ERB-eligible employees. ERB believes the change will take ambiguity out of the rule by not separating short-term and long-term substitutes.

The board first considered the proposed rule change in April 2016, but tabled the rule for further consideration. The board then held another public rule hearing on June 24, 2016 to reconsider this matter. At that time, board members proposed further discussion with the Department of Finance and Administration and the Legislative Finance Committee before tabling the rule again.

Rio Rancho Public Schools (RRPS) calculated the proposed rule change would cost RRPS \$60 thousand per year.

Moriarty-Edgewood School District estimated costs at \$25 thousand per year.

In August, ERB held another public rule hearing but did not plan on approving the rule. At that time, representatives of NEA-New Mexico and Moriarty-Edgewood School District spoke against the proposed rule.

Public Comments. ERB received comments from three school districts and a question from one charter school on the proposed rule. Representatives of Las Cruces Public Schools said the proposed rule would be an administrative burden on the school district. Additionally, they said there was no way for the school district to predict how many days a particular substitute teacher would work in a given school year. The district also noted this would be a financial hardship, although they did not estimate the cost. A representative of Farmington Municipal Schools said the school district was against the change.

Following the initial comments, ERB staff asked representatives of Albuquerque Public Schools (APS) to comment on the proposed change. In their comment, APS calculated it would cost the school district \$742 thousand to make ERB contributions for all substitute teachers, but APS was not able to assign FTE to all 1,148 substitutes. An unknown number of these substitutes would be below the 0.25 threshold and some of these may be long-term substitutes that are required, under current rules, to make contributions, decreasing the estimated impact for APS.

Fiscal Implications. The effects of the proposed rule on school districts and charter schools are largely unknown. It is not clear how many substitute teachers would break the 0.25 FTE threshold. ERB recently finalized a rule that will require school districts to report data on all employees, rather than only on employees who are eligible for membership. When ERB receives this information it may have a better idea of how many substitute teachers the change will affect. Because of the lack of data, ERB has not been able to conduct an actuarial study and does not yet know what impact the proposed rule will have on the system's unfunded liability.

School districts and charter schools have raised several concerns with ERB regarding the proposed rule. First, school districts and charter schools have not budgeted for the proposed change and are concerned about what impact it will have in the current fiscal environment. Second, many schools are unsure how to calculate FTE for substitute teachers. ERB staff noted charter schools and rural school districts in particular have raised concerns. This may be due to limited capacity in many small school business offices. Additionally, some school districts are concerned about the administrative burden involved with tracking substitutes to determine if they have exceeded 0.25 FTE in a given quarter. This is made particularly difficult by a recently adopted rule that requires service to multiple schools to be aggregated for the purposes of calculating FTE. This may make budgeting for substitute teachers more difficult.

ERB Contribution Rates

\$20 Thousand or Less	
Employee	7.9%
Employer	13.9%

Over \$20 Thousand	
Employee	10.7%
Employer	13.9%

Source: ERB

Daily Substitute Rates

	HS Diploma	Bachelors
Low est	\$55	\$60
Highest	\$86	\$115
Median	\$65	\$75
Certified Teachers		
Low est	\$64	
Highest	\$115	
Median	\$80	

Source: LESC

Montana law allows substitutes to opt-out of the retirement system. If they do not, they are automatically enrolled after 210 hours of service.

In Washington state, substitute teachers may opt-in for membership credit at the end of the school year. Employers are required to contribute if the substitute opts-in.

Laws in Connecticut, Oklahoma, and West Virginia make substitutes ineligible for retirement system membership.

Additionally, some schools, particularly in rural New Mexico, already have a difficult time finding qualified substitutes. The changes, which will result in less take-home pay for substitute teachers, may result in some school districts and charter schools having to increase rates to maintain their substitute pool.

Impact on Teachers. To attempt to identify what impact this would have on substitute teachers, LESC staff surveyed New Mexico school districts to analyze pay practices for substitute teachers across the state. Staff received responses from 38 school districts. Thirty-three of these school districts provided a daily rate, while five school districts provided an hourly rate. Generally, hourly rates appear to compare with daily rates, although one school district paid \$7.50 per hour for substitutes without a degree, which is the hourly minimum wage in New Mexico.

According to the responses, daily rates ranged from \$55 per day to \$115 per day. Median pay ranged from \$65 to \$80, depending on educational attainment. Most substitute teachers are earning less than the \$20 thousand threshold for additional contributions and would contribute 7.9 percent. At current substitute teaching rates, an ERB contribution would have a significant impact on a substitute’s take-home pay. This could lead to a reduction in the number of people willing to be a substitute teacher.

Other States. LESC staff reviewed statutes and administrative rules of 22 states which, according to the Pew Charitable Trusts, have separate retirement systems for educational employees. A few states have specific laws or regulations on membership for substitute teachers. For example, California law requires substitute teachers to become members of the retirement system after 100 days of service in a single school year. Teachers that serve for less than 100 days “may elect membership” (Cal. Educ. Code § 22503). Texas regulations requires 90 days of service and the teacher must purchase the service credit (34 Texas Admin. Code § 25.4). Indiana law requires members to be “regularly employed teachers” but allows current members to purchase credit for previous substitute teaching experience (Ind. Code § 5-10.4-4-6).

QUESTIONS

- Some school districts have commented that it is difficult to determine the meaning of 0.25 FTE. Could the rule be clarified by substituting days of service for a percentage of FTE? For example, Texas and California specify days of service, rather than FTE. Alternatively, New Jersey applies a minimum salary, currently about \$8,300 (N.J. Stat. Ann. 18A:66-44).
- Should the Legislature amend the Educational Retirement Act to explicitly list who is eligible for membership?
- Are teachers that have served as substitutes for many years but haven’t accrued service credit able to purchase credit for the time they have served?

TITLE 2 PUBLIC FINANCE
CHAPTER 82 EDUCATIONAL RETIREMENT
PART 2 MEMBERSHIP

2.82.2.1 ISSUING AGENCY: Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129
[6-30-99; 2.82.2.1 NMAC - Rn, 2 NMAC 82.2.1, 11-30-2001]

2.82.2.2 SCOPE: This rule defines membership status and processes within the Educational Retirement Act, Section 22-11-1 to 22-11-55, NMSA 1978.
[6-30-99; 2.82.2.2 NMAC - Rn, 2 NMAC 82.2.2, 11-30-2001; A, 5-31-2012]

2.82.2.3 STATUTORY AUTHORITY: The Educational Retirement Act Section 22-11-1 to 22-11-55, NMSA 1978.
[6-30-99; 2.82.2.3 NMAC - Rn, 2 NMAC 82.2.3, 11-30-2001; A, 5-31-2012]

2.82.2.4 DURATION: Permanent
[6-30-99; 2.82.2.4 NMAC - Rn, 2 NMAC 82.2.4, 11-30-2001]

2.82.2.5 EFFECTIVE DATE: June 30, 1999, unless a later date is cited at the end of a section or paragraph.
[6-30-99; 2.82.2.5 NMAC - Rn, 2 NMAC 82.2.5, 11-30-2001]

2.82.2.6 OBJECTIVE: The purpose of this rule is to govern operations and define the types of membership eligible for coverage, as well as employees excluded from coverage.
[6-30-99; 2.82.2.6 NMAC - Rn, 2 NMAC 82.2.6, 11-30-2001]

2.82.2.7 DEFINITIONS: RESERVED]

2.82.2.8 EMPLOYEES AND EMPLOYERS COVERED BY THE EDUCATIONAL RETIREMENT ACT:

- A.** Employers who are designated by statute as "local administrative units" shall be the following schools, institutions, and agencies:
- (1) all public school districts in New Mexico;
 - (2) educational institutions enumerated in Article XII, Section 11 of the Constitution of New Mexico;
 - (3) public education department;
 - (4) educational retirement board;
 - (5) New Mexico girls' school;
 - (6) New Mexico boys' school;
 - (7) Los Lunas medical center;
 - (8) technical and vocational institutes created pursuant to the Technical and Vocational Institute Act;
 - (9) community colleges (also known as "junior colleges") created pursuant to Chapter 21, Article 13 NMSA 1978 (the "Community College Act"); and
 - (10) New Mexico activities association.

B. In addition to the local administrative units enumerated in Subsection A of this section, any state institution or agency providing an educational program and employing certified school instructors shall be a local administrative unit with coverage in such unit limited to certified school instructors.

C. All employees of the schools, institutions and agencies enumerated in Subsection A of this section, except for those employees enumerated in Section 11 of this rule, are either "regular" "retired" or "provisional" members under the "Educational Retirement Act."
[6-30-99; 2.82.2.8 NMAC - Rn & A, 2 NMAC 82.2.8, 11-30-2001; A, 5-31-2012]

2.82.2.9 REGULAR MEMBERS:

A. In four year colleges, technical and vocational institutes and community or junior colleges, "regular members" shall be all regularly employed teaching staff, whether full-time or part-time (except retired members participating in the return to work program and exclusions under Section 11 of this rule); all regularly employed administrators, whether full-time or part-time, who hold a bachelor's degree or the professional equivalent thereof and who have managerial and supervisory responsibilities, (except retired members participating in the return to work program and exclusions under Section 11 of this rule); and all regularly employed nurses, whether full-time or part-time (except retired members participating in the return to work program and exclusions under Section 11 of this rule).

B. In the public school districts and state operated schools other than those listed in Subsection A above, "regular members" shall be all regularly employed teachers, administrators, and nurses who are holders of appropriate certificates issued by the public education department, regardless of whether employed full-time or part-time, (except retired members participating in the return to work program and exclusions under Section 11 of this rule).

C. Any member except a retired member participating in the return to work program, who is regularly employed in any of the following local administrative units, shall be a "regular member" if he holds a teacher's, nurse's or administrator's certificate (which is issued by the public education department at the time of commencement of employment in such local administrative units:

- (1) northern New Mexico state school;
- (2) New Mexico boys' school;
- (3) New Mexico girls' school;
- (4) Los Lunas medical center;
- (5) public education department;
- (6) educational retirement board;
- (7) New Mexico school for the blind and visually impaired;
- (8) New Mexico school for the deaf; and
- (9) New Mexico activities association.

D. Except retired members participating in the return to work program, regular membership is a condition of employment and all local administrative unit employees who qualify as "regular members" must be covered under the Educational Retirement Act, commencing with the first day of employment.

E. Except retired members participating in the return to work program, any person regularly employed, whether full-time or part-time, in any state institution or agency described in Subsection B of 2.82.2.8 NMAC, shall be a regular member if he is employed in an educational program and if he holds a certified school instructor's certificate issued by the public education department.

[6-30-99; 2.82.2.9 NMAC - Rn & A, 2 NMAC 82.2.9, 11-30-2001; A, 5-31-2012]

2.82.2.10 PROVISIONAL MEMBERS:

A. All persons regularly employed by the schools, institutions, and agencies outlined in Section 8 of this rule who are not "regular members" are "provisional members" and if employed or re-employed after July 1, 1971 must be covered under the Educational Retirement Act beginning with the first day of employment or re-employment, as a condition of employment, or if employed by a local administrative unit set forth in Subsection E of 2.82.2.10 NMAC, such provisional member may make the election provided therein.

B. Provisional members who entered employment prior to July 1, 1971 could exempt themselves from coverage under the Educational Retirement Act in the manner provided in Section 22-11-17 NMSA 1978 Compilation, as that section existed prior to July 1, 1971. If such provisional member did not exempt him- or herself, that provisional member must be covered under the provisions of the Educational Retirement Act beginning with the first day of his employment.

C. For the purpose of coverage under the Educational Retirement Act, school bus owner-drivers shall be considered as provisional members. The term "owner-driver" shall be taken to mean the person who drives a school bus owned by the person, over a regularly established route, under a regular contract in that person's name, approved by the state director of school transportation, and using equipment approved by the state director of school transportation for the regular transportation of children.

D. Any provisional member who has exempted him-or herself may, at any future date, revoke such exemption and commence coverage under the Educational Retirement Act on the first day of the month following his revocation.

E. Any provisional member employed by any of the following local administrative units may elect to be covered under the public employees' retirement association in lieu of coverage under the Educational Retirement Act within the first 6 months of his employment or re-employment, but may not exempt himself.

- (1) New Mexico boys' school;
- (2) New Mexico girls' school;
- (3) New Mexico school for the deaf;
- (4) educational retirement board
- (5) public education department;
- (6) northern New Mexico state school;
- (7) Los Lunas medical center;
- (8) New Mexico school for the blind and visually impaired,
- (9) until or unless such provisional member does elect coverage under the Public Employees

Retirement Act that provisional member must be covered under the Educational Retirement Act commencing with the first day of his employment, or re-employment in any of the local administrative units enumerated in this section. Likewise, the election of coverage under the Public Employees Retirement Act requires continued coverage under that act for the duration of employment or re-employment in any of the units specified in this section.

(10) It shall be the policy of the board, in cooperation with the Public Employees Retirement Association ("PERA"), to determine annually if there are provisional members employed by these local administrative units who are retired from one system while having elected to participate in the second system.

F. To elect coverage under the Public Employees Retirement Act, a provisional member must complete a form provided by the board for that purpose. The local administrative unit shall forward the completed form to the director. The director shall approve the election of such coverage if it is in order and forward a copy of the approved form to PERA and to the local administrative unit as notice that the employee's election to be covered under the Public Employees Retirement Act has been approved. The director shall retain the original approved election form as the board's record of the approved election.

G. No provisional member may be covered under the Public Employees Retirement Act in lieu of the Educational Retirement Act unless a properly approved form electing such coverage is on file with the director.

H. All employees of the public schools who are engaged as teacher aides or classroom aides but who do not teach shall be classified as provisional members even though such employees may hold certificates in some form issued by the public education department.

I. There shall be no provisional membership extended to employees of the local administrative units described in Subsection B of 2.82.2.8 NMAC.

[6-30-99; 2.82.2.10 NMAC - Rn, 2 NMAC 82.2.10, 11-30-2001; A, 5-31-2012]

2.82.2.11 EMPLOYEES EXCLUDED FROM COVERAGE:

A. Any person enrolled as a student in any of the local administrative units outlined in Subsection A of 2.82.2.8 NMAC, and who is also employed by the local administrative unit in which he is enrolled, shall be considered a student and not eligible for either "regular" or "provisional" membership under the Educational Retirement Act, except that members of the faculty or full-time staff, who may be incidentally enrolled in classes, shall not be affected by this rule. Under no circumstances shall graduate assistants, teaching fellows, or students in positions of similar nature, be considered eligible for coverage under the Educational Retirement Act. This includes any and all participation in the teacher enhancement program or participation in similar graduate programs.

B. Any person whose full time equivalency ("FTE") is .25 or less, and who is not a covered employee of another local administrative unit, shall not be covered for contribution purposes. **For purposes of calculating a person's FTE, employment with all local administrative units shall be aggregated.** Any person employed on July 1, 1994 who was then covered under the Educational Retirement Act shall continue to be covered for the duration of that employment.

~~**C.** Any employee engaged on a day to day basis to replace another employee who is temporarily absent shall be considered a "substitute" and shall not be covered under the Educational Retirement Act. An employee engaged to fill a vacant position (including a position vacated by an extended leave of absence) is not considered a "substitute" and must be covered under the Educational Retirement Act.~~

~~**D]C.** Independent contractors who perform services for local administrative units on a fee basis are not eligible for membership under the Educational Retirement Act as a result of having performed such service, and sums paid for such service shall not be covered for purposes of contributions. The following factors shall be considered in determining whether an individual qualifies as an independent contractor:~~

- receipts tax;
 - (1) registration with the New Mexico department of taxation and revenue to pay gross
 - (2) the existence of a written contract with the local administrative unit setting forth the services to be provided and the compensation to be paid;
 - (3) whether the person receives benefits such as paid annual or sick leave, health insurance and other benefits that the local administrative unit provides its regular employees or is paid as an employee by the local administrative unit;
 - (4) whether the person satisfies internal revenue service guidelines for determining that an individual is an independent contractor rather than an employee;
 - (a) as necessary, the director shall make available forms for use by local administrative units for use in making this determination;
 - (b) the board reserves the right to examine the complete forms, contracts and other agreements, and any other materials as may be necessary for the purpose of determining whether an individual is an independent contractor or employee.

FID. All students enrolled in any public school, grade 1-12.

FIE. Employees who have a portion of their salaries paid through the Comprehensive Employment and Training Act (Public Law 95-524) shall not be covered for contributions on that portion except those employees who have vested.

[6-30-99; 2.82.2.11 NMAC - Rn, 2 NMAC 82.2.11, 11-30-2001; A, 10-31-2002; A, 9-15-2006; A, 5-31-2012; A, 6-16-2015]

2.82.2.12 RETIRED MEMBERS: For the purposes of the return to work program, a retired member shall be defined as any member who has retired pursuant to the Educational Retirement Act.

[2.82.2.12 NMAC - N, 11-30-2001]

2.82.2.13 MEMBERSHIP ENROLLMENT; RECORDS:

A. Enrollment; changes in contact information.

(1) Members are required to complete a new employment form each time that they are hired or rehired by a local administrative unit and to provide the board with contact information, including their mailing address and e-mail address.

(2) Active members and retirees are responsible for providing the board notice in writing of any change of their mailing address or e-mail address on forms made available for this purpose by the director.

B. Local administrative units. For the purposes of providing members information regarding the board and the members' accounts, local administrative units are required to provide the educational retirement board the e-mail addresses assigned to members by a local administrative unit upon the board's request.

[2.82.2.12 NMAC - N, 5-31-2012]

HISTORY OF 2.82.2 NMAC:

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

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

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

ERB Rule II, Membership, filed 7-2-82.

History of Repealed Material: [RESERVED]