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NMERB Presentation Before the Legislative Education Study Committee
Tabled Rule Change: Substitute Teachers as Members Under the
Educational Retirement Act

September 14, 2016

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Timeline of Educational Retirement Board's proposed change to Rule 2.82.2, Membership

- **February 12, 2016.** In anticipation of a rulemaking hearing in April 2016, the New Mexico Educational Retirement Board (NMERB) posted proposed changes to five of its administrative rules. One of the proposed changes was to delete subsection 2.82.2.11(C) NMAC relating to substitute teachers. If this section were to be deleted, substitutes would be treated the same as all other classes of school employees whose FTE status is used to determine ERB membership.

The public comment period for the proposed rule changes was from February 12 to March 31, 2016, a period slightly longer than 45 days. The full text of the proposed changes were made available on the NMERB website. Notice of the comment period was published in the New Mexico Register on February 12, 2016. NMERB also emailed the rule change notice to payroll and HR staff of NMERB employers, as well as to about 8,000 plan members.

- **April 22, 2016.** The rulemaking hearing was held during the April 22, 2016 board meeting. Although the Board approved most of the proposed changes, the Board did not approve the rule change pertaining to the deletion of the substitute rule. Of particular concern at the April 22, 2016 board meeting were potential budgetary effects on schools if substitutes who were greater than .25 FTE were to be ERB members. Rio Rancho public schools had commented that eliminating the substitute rule would result in a \$60,000 cost to the school district due to additional employer contributions that would have to be remitted. This was the only school district that identified a cost to changing the substitute rule. The Board tabled the proposed change to the membership rule so that staff could contact larger school districts regarding their potential costs.
- **June 24, 2016.** Continuation of rulemaking hearing. After the April board meeting, Santa Fe Public Schools and Albuquerque Public Schools (APS) were contacted by NMERB and were asked specifically what would be the budgetary impact of deletion of the substitute rule. Santa Fe Public Schools did not respond, but APS stated that if they had to withhold ERB contributions from all substitute salaries, it would cost the district an additional \$742,260 based on a report that APS ran on all substitute salaries. The report presumed that all substitutes would be greater than .25 FTE. The report revealed 1148 substitutes in the APS system with wages ranging from \$11.67 to \$18,060 yearly. The Board again tabled the rule and asked that NMERB staff meet with budget experts at LFC and with LESC to determine how the rule may affect school budgets.
- **August 4, 2016.** NMERB met with representatives from LFC and LESC to discuss the potential rule change and the effects it might have on school budgets. At the meeting it was determined that not enough information from schools were available to know the true impact any change to the substitute rule may have on school budgets.

- **August 26, 2016.** At the Board meeting, NMERB staff recommended that the Board keep the substitute rule as currently written at this time. The Board did approve changes to rule 2.82.2 that allows aggregation of FTEs for ERB purposes when an individual is employed at multiple schools (a non-substitute issue). The Board specifically and expressly did not adopt any deletions or changes to the substitute rule. Accordingly, at this time, the section of the rule allowing an exemption of “substitutes” to NMERB membership remains intact.

Proposed rule changes to Rule 2.82.2.11 as posted in February 2016:

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:

- (1) registration with the New Mexico department of taxation and revenue to pay gross receipts tax;
- (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.

~~**D.**~~ **D.** All students enrolled in any public school, grade 1-12.

~~**E.**~~ **E.** 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.

Actual final rule change as passed by the Educational Retirement Board on August 26, 2016:

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. 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:

- (1) registration with the New Mexico department of taxation and revenue to pay gross receipts tax;
- (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.

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

F. 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.

Summary of written public comments received by Educational Retirement Board regarding proposed rule change (deletion of “substitute rule”):

Elizabeth Marrufo

On behalf of Las Cruces Public Schools

Disagree with proposed change—Las Cruces Public Schools (LCPS) has concerns regarding the proposed change to delete Section 2.82.2.11.C which relates to substitute teachers.

The result of the change is that substitutes will be treated the same as all other classes of school employees whose FTE status is used to determine ERB membership. As with other employees, LCPS will be required to determine a substitute’s FTE status at the time of hire and any substitute working more than an FTE of .25 (which equates to more than 1 sub day a week) will be required to pay into ERB. Our concerns are as follows:

- a) It will be an incredible administrative burden on the Human Resources and Finance Department to determine a substitute’s FTE status. Our substitutes work sporadically or over a limited period of time. They may choose to sub 1 day in one week and then choose to sub 3 days in another week. Because of this, we do not know at the time of hire what their FTE status will be, and then the possibility of it changing throughout the year is likely.
- b) Unless the ERB sets very specific rules as to how to determine a substitute’s FTE status when the substitute doesn’t work a consistent schedule, it is highly unlikely that you will have uniform compliance throughout the state.

Randy Evans

On behalf of Río Rancho Public Schools

Río Rancho Public Schools has two major concerns regarding the proposed change to delete Section 2.82.2.11.C which relates to substitute teachers. The result of the change is that substitutes will be treated the same as all other classes of school employees whose FTE status is used to determine ERB membership. As with other employees, RRPS will be required to determine a substitute’s FTE status at the time of hire and any substitute working more than an FTE of .25 (which equates to more than 1 sub day a week) will be required to pay into ERB. Our concerns are as follows:

- The majority of substitutes working for Río Rancho are greater than an FTE of .25. We have calculated that the employer contribution of 13.9% to cover these substitutes will be at least \$60,000 a year. With funding already tight at the state level, our district cannot absorb this additional expense. The additional deduction to the substitute would also be an added hardship to an already low-paid individual.
- It will be an incredible administrative burden on the Human Resources and Finance Department to determine a substitute’s FTE status. Our substitutes work sporadically or over a limited period of time. They may choose to sub 1 day in one week and then

choose to sub 3 days in another week. Because of this, we do not know at the time of hire what their FTE status will be, and then the possibility of it changing throughout the year is likely. Unless the ERB sets very specific rules as to how to determine a substitute's FTE status when the substitute doesn't work a consistent schedule, it is highly unlikely that you will have uniform compliance throughout the state.

Thanks for your consideration of our comments. If you have further questions about our position concerning changes to Rule 2, please feel free to call or e-mail.

Veronica Moreno Assistant Controller for Las Cruces Public Schools

Our District hires and employs a pool of substitutes. They are hired to substitute for Contractual employee positions that need coverage on an intermittent basis, so that a hardship is not experienced in the classroom etc. They substitute for Teachers, Educational Assistants, Custodians, Food Service workers. There is really no way to predict - how many jobs during the course of the fiscal year this substitute will

- 1) Accept from the call out sub-finder system
- 2) How many hours/days they will actually work during the course of the fiscal year.
- 3) Even if a formula was applied to determine [actual days worked/normal contract for absentec] you would have to apply the formula for the full fiscal year to get the average. This is too late to make any Category changes and the Substitute is probably not employed by the district.
- 4) This would result in financial hardship for the District. Due to having to remit both Member and Employer contributions.
- 5) Very much a hardship to districts large and small.

Mari McClanahan On behalf of Farmington Municipal Schools

We are against this change. This will place an additional financial burden on LAU's. Substitutes are truly at-will on call employees that often work less than 16 days per quarter to make them eligible for retirement. How will short and long term substitutes be determined?

**Carrie Robin Brunder, Director of Government Affairs & Policy;
Patricia Nabors, Director Human Resources Operations**

On behalf of Albuquerque Public Schools

"According to APS pay records, withholding ERB contributions from all sub salaries would cost the district an additional (non-redeemable) \$742,260. This sum reflects the employer contribution rate. The proposed rule change would cost the substitute employees \$421,860. This sum reflects the employec contribution rate.

While we understand that we must work together to guarantee fiscal solvency for the ERB system, we are worried that the contribution requirements will be a hardship for our low paid employees. We also are concerned that there were no budget considerations made in HB2 for the increases employers will inevitably be required to pay in FY17 if the rules are implemented immediately.”

Patricia Nabors clarified that their figures were derived from a Human Resources Information Systems (HRIS) report they ran for all substitute salaries at APS. The report revealed 1148 substitutes in the APS system. Wages of APS substitutes according to this report range from \$11.76 to \$18,060 yearly.

Ms. Nabors indicated that APS does not and cannot assign FTE to substitutes as their schedule is determined day by day.