

Date: November 21, 2019

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Adopted Rule: Educational Retirement Board HB360/SB664
Rulemaking

Proposed Rule Abstract

1. **Agency:** Educational Retirement Board
2. **Rule Citation:** 2.82.2 NMAC Membership; 2.82.3 NMAC Member and Administrative Unit Contributions; 2.82.4 NMAC Service Credit; and 2.82.5 NMAC Retirement Benefits
3. **Rulemaking Action:** Amendment
4. **Register Issue and Date of Notice of Proposed Rulemaking:** Volume 30, Issue 15, August 13, 2019
5. **Effective Date:** October 31, 2019
6. **Citation to Specific Legal Authority:** The agency cites general rulemaking authority in Paragraph 5 of Subsection A of Section 22-11-6 NMSA 1978
7. **Short Explanation of the Rule's Purpose:** The proposed amendments reflect changes to the Educational Retirement Act enacted by Laws 2019, Chapter 258 (HB360) and Laws 2019, Chapter 173 (SB664).
8. **Link to Full Text of the Rule:**
<https://www.nmerb.org/pdfs/2.82.2%20Membership%20-%20Proposed%20changes.pdf>
<https://www.nmerb.org/pdfs/2.82.3%20Membership%20and%20Administrative%20Unit%20Contributions%20-%20proposed%20changes.pdf>
<https://www.nmerb.org/pdfs/2.82.4%20Service%20Credit%20-%20Proposed%20changes.pdf>
<https://www.nmerb.org/pdfs/2.82.5%20Retirement%20Benefits%20-%20Proposed%20changes.pdf>
9. **How Information on the Rule Can Be Obtained:** Contact Amanda Olsen at 505-476-6133 or visit the ERB website at www.nmerb.org.
10. **Comment Period and Deadlines:** Written comments must be received no later than 5:00 pm on October 15, 2019.
11. **Rule Hearing:** October 18, 2019 at 9:00 AM
12. **Link to Permanent Agency Rulemaking Record:**
http://statenm.force.com/public/SSP_RuleHearingSearchPublic

Adopted Rule Abstract

13. **Register Issue and Date of Adopted Rule:** Volume 30, Issue 21, November 12, 2019
14. **Date Notice of Proposed Rulemaking Was Reported to the Committee:** September 27, 2019
15. **Link to Proposed Rule Report:**
<https://www.nmlegis.gov/handouts/ALESC%20092519%20Item%209%20A.2%20-%20PROPOSED%20RULE%20Education%20Retirement%20Board.pdf>
16. **Changes from the Rule as Proposed:** The Education Retirement Board (ERB) approved proposed amendments to 2.82.2 NMAC Membership, 2.82.4 NMAC Service Credit, and 2.82.5 NMAC Retirement Benefits. Three of the four sections ERB proposed to amend in 2.82.3 NMAC Member and Administrative Unit Contributions were approved. In the original proposed rule, PERA retirees who go to work for an ERB-covered employer would be required to make non-refundable contributions to ERB. The proposed change is not supported in statute. Statute now directs PERA retirees who go to work for an ERB-covered employer to make contributions to the ERB pension fund, but it does not specify that these contributions are non-refundable. ERB staff told the board they should consider supporting legislation to make the contributions non-refundable.

Summary of Adopted Rule

The August 13, 2019 issue of the *New Mexico Register* contained proposed amendments to multiple sections of Chapter 82 of Title 2 of the New Mexico Administrative Code, which contains rules promulgated by the Educational Retirement Board (ERB). The proposed rule would make several changes to reflect legislation passed during the 2019 legislative session, including:

- Eliminating an administrative rule that allowed a retired member to return to work without enrolling in the statutorily-authorized return-to-work program if he or she earned under \$15 thousand per year;
- Requiring retired members employed by an ERB-covered employer for less than one quarter time (0.25 FTE) to make nonrefundable contributions to the fund;
- Requiring retired members of the Public Employees Retirement Association (PERA), other than certified police officers make contributions to the educational retirement fund; and
- Increasing the income level an employee must reach before being required to pay a higher contribution to the educational retirement fund, from a \$20 thousand annual salary to a \$24 thousand annual salary.

Analysis

In 2019, the Legislature approved and the governor signed two bills amending the Educational Retirement Act: Chapter 258 (HB360), which made several changes to enhance the long-term sustainability of the educational retirement fund, and Chapter 173 (SB664), which designated a surviving spouse or domestic partner as the beneficiary of a deceased member's retirement plan if the member did not name a beneficiary.

Proposed Changes Related to House Bill 360

Changes to the Return-to-Work Exception. The proposed rule contains several amendments to comply with a new provision of the Educational Retirement Act that requires a retirement member working for an ERB-covered employer at a level greater than 0.25 FTE to suspend their retirement benefit or join ERB's return-to-work program. ERB's current rules contain an exception for retired members earning less than \$15 thousand or working 0.25 FTE or less. See page 24, 2.82.5.16 "Return to Work Exception." Because House Bill 360 contained a provision that required a retired member working greater than 0.25 FTE to suspend their retirement benefit or follow the return-to-work rules already outlined in statute, ERB must adopt this rule change to comply with the amended statute.

These changes to the Educational Retirement Act and the proposed rule will affect school district staffing and have a financial impact on employees working more than 0.25 FTE but earning less than \$15 thousand. While previously, these employees would not need to observe the one year break-in-service requirement of the return-to-work

program, beginning this fiscal year these individuals must do so. While some of the affected members may already qualify for the return-to-work program due to a prior break-in-service, any member who began providing services to an ERB-covered employer without a break-in-service, which was allowed by the return to work exception, will need to observe the one year break prior to applying for ERB's return to work program.

One group that will be affected by the changes in the return-to-work exception are retired teachers who return to work as substitute teachers for less than \$15 thousand per year. According to media reports and public comment on the proposed rule received by ERB, many retired teachers were taking advantage of the return-to-work exception and some may need to reduce the number of days they were working as a substitute teacher. Those retirees who remain at 0.25 FTE or less will be required to make nonrefundable contributions to the educational retirement fund, which is required by a provision of HB360. In addition, some retired teachers working as professors within colleges of education may be affected by the change. LESC staff have received reports that some professors have needed to limit the number of classes they teach to fall under the 0.25 FTE requirement.

A recent report from the National Association of State Retirement Administrators (NASRA) and the Center for State and Local Government Excellence (SLGE) notes every other state allows retired public employees to return to work for an employer covered by the same retirement system while continuing to receive their retirement benefit; however, states have placed different restrictions on this ability to protect the retirement plans' favorable tax treatment and to avoid abuses. All states require a break in service for public employees returning to work, due to regulations from the Internal Revenue Service which require a "bona fide termination" with no agreement for re-employment. However, the length of time needed to constitute a break in service varies from state to state and plan to plan.

While every other state allows retired public employees to return to work for a public employer covered by the same retirement system while continuing to receive an retirement benefit, the NASRA and SLGE report notes New Mexico's Public Employees' Retirement Association (PERA) is the one exception.

Changes Related to PERA Retirees. HB360 required public school employees who have retired from PERA to either suspend their PERA pension and become members of ERB or to make non-refundable contributions to the educational retirement fund. The proposed rule contains an amendment to the rule that allows PERA retirees to receive a refund of contribution with interest. Under HB360, this is not allowed for contributions made after July 1, 2019. A further amendment in the proposed rule provides the person shall not earn service credit unless the PERA benefit has been suspended. A similar provision is in the statute.

Although most PERA retirees must pay contributions, the law contained an exception for a police officer certified pursuant to the Law Enforcement Training Act that was hired prior to July 1, 2019. The proposed rule defines the term "police officer" and contains additional clarification on who ERB will consider a "police officer," even though the State Rules Act states that a word or phrase defined in an applicable statute should not be defined in rule. While the definition included in the proposed rule is largely consistent with the definition of "police officer" in that statute, the proposed rule goes on to provide examples of who ERB will or will not consider a "police officer." Under the proposed rule, ERB will determine if an employee is a police officer based

on the job duties of the employee, which could lead to disputes between ERB and members or employers if ERB determines an employee that holds certification as a police officer is not included in the definition of police officer based on job duties. Any conflict between a definition in rule and a definition in statute will be resolved in favor of the statute.

Changes Related to Member Contributions. HB360 changed the salary cap a member must reach before being required to make a larger contribution to the educational retirement fund. Previously, members earning \$20 thousand or less contributed 7.9 percent of salary to the fund. From July 1, 2019, members earning \$24 thousand or less will contribute 7.9 percent. The proposed rule contains several amendments striking “\$20,000” and replacing it with “\$24,000.”

Proposed Changes Related to Senate Bill 664

Senate Bill 664 provides that a surviving spouse or domestic partner of an ERB member who dies without naming a beneficiary will become that member’s beneficiary. The proposed rule contains a provision to bring rule into compliance with the bill. Prior to the new law, ERB could only distribute a refund of the member’s contributions to the member’s estate; under the new law a surviving spouse or domestic partner could choose to receive a survivor benefit or a refund.

The proposed rule includes additional clarification on who will be considered a domestic partner. The term “domestic partner” is not defined in the educational retirement act. To qualify as a domestic partner, a person will be required to submit a domestic partnership affidavit and two of the following documents:

- Proof of shared residence, which can be shown by a joint mortgage statement, joint rental agreement, or deed;
- Proof of joint ownership of a vehicle, which can be shown by title or registration;
- A joint checking, bank, or investment account statement;
- A joint credit account statement;
- A will or life insurance policy; or
- Other supporting documents approved by the director of ERB.