

REDLINE OF PROPOSED AMENDMENTS TO RULE 2  
FOR BOARD CONSIDERATION (cgs 4-11-2012)  
THE AMENDMENT WOULD BE EFFECTIVE UPON ADOPTION

**2.82.2 NMAC, MEMBERSHIP**

**2.82.2.1 ISSUING AGENCY:**

Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129

**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~~22-11-53, NMSA 1978.

**2.82.2.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, Section 22-11-1 to ~~22-11-55~~22-11-52, NMSA 1978.

**2.82.2.4 DURATION:**

Permanent

**2.82.2.5 EFFECTIVE DATE:**

June 30, 1999, unless a later date is cited at the end of a section or paragraph.

**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.

**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) ~~the~~ educational institutions enumerated in Article XII, Section 11 of the Constitution of New Mexico;
- (3) ~~department of public education;~~state department of education;
- (4) ~~the~~ educational retirement board;
- (5) New Mexico girls' school~~the New Mexico school for the visually handicapped at Alamogordo;~~
- (6) ~~the girls' welfare home;~~
- (67) ~~the~~ New Mexico boys' school ~~at Springer;~~

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(78) ~~the~~ Los Lunas medical center~~hospital and training school~~;

(89) technical and vocational institutes created pursuant to the Technical and Vocational Institute Act;

(94) community colleges (also known as "junior colleges") created pursuant to the Chapter 21, Article 13 NMSA 1978 (the "Community College Act")~~Junior Colleges Act~~; and

(104) ~~and the~~ New Mexico activities association. ~~(The NMAA was added to the statute effective July 1, 1982.)~~

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 an 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."

**2.82.2.9 REGULAR MEMBERS:**

A. In four year colleges~~the institutions of higher learning~~, 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~~of~~ 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~~colleges~~, "regular members" shall be all regularly employed teachers, administrators, and nurses who are holders of appropriate certificates issued by the public education department~~state department of education~~, 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~~state department of education~~) at the time of commencement of employment in such local administrative units:

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- (1) northern New Mexico state school;
- (2) New Mexico boys' school; ~~N.M. boys' school~~
- (3) New Mexico girls' school; ~~girls' welfare home~~;
- (4) Los Lunas medical center~~hospital and training school~~;
- (5) public education department; ~~state department of education~~;
- (6) educational retirement board;
- (7) New Mexico school for the blind and visually impaired~~handicapped~~;
- (8) New Mexico school for the deaf; and
- (9) New Mexico activities association ~~(was added to the statute effective July 1, 1982).~~

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 Educational Retirement Act~~ERA~~, 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~~state board~~.

**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 Educational Retirement Act~~ERA~~ 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 Educational Retirement Act~~ERA~~ 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 himself, he must be covered under the provisions of the Educational Retirement Act beginning with the first day of his employment.

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C. For the purpose of coverage under the Educational Retirement Act~~ERA~~, 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 that person~~him~~, over a regularly established route, under a regular contract in that person's~~his~~ 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 Educational Retirement Act~~ERA~~ 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 reemployment, but may not exempt himself.

(1) New Mexico boys' school; ~~N.M. boys' school~~

(2) New Mexico girls' school; ~~girls' welfare home~~;

(3) New Mexico ~~N.M.~~ school for the deaf;

(4) educational retirement board;

(5) public education department; ~~state department of education~~

(6) northern New Mexico state school;

(7) Los Lunas medical center~~hospital & training school~~;

(8) New Mexico ~~N.M.~~ school for the blind and visually ~~impaired~~handicapped.

(9) Until or unless such provisional member does elect coverage under the Public Employees Retirement Act, that provisional member~~PERA~~, ~~he~~ 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 ~~selection of PERA requires the continued PERA coverage~~ 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.

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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. ~~membership under PERA, a provisional member must complete ERA Form 44, "election of coverage under PERA," in triplicate. The local administrative unit shall obtain all three copies from the member and forward them to the educational retirement board. The director of the educational retirement shall approve the election if it is in order, and forward one copy to the executive secretary of the public employees' retirement association which shall serve as the employees' notice to said association of his election to be covered by PERA. One copy of the election shall be returned to the local administrative unit as evidence of approval of the member's election to be covered under PERA, and the original copy shall be a permanent record on file with the educational retirement board.~~

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. ~~public employees' retirement association in lieu of ERA unless a properly executed "election of coverage under PERA," Form 44, is filed with the director of educational retirement.~~

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 ~~of education.~~

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.

**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 ~~ERA~~, 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 ~~ERA~~. 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. Any person employed on July 1, 1994 ~~the effective date of this rule and~~ who was

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~~they are currently~~ covered under the Educational Retirement Act shall continue to be covered for the duration of that employment.

(1) An retired member ERA retiree may return to employment (includes "substitution") and earn up to \$15,000 per fiscal year or the amount possible under the .25 or less FTE provision, whichever is greater, without effecting the retired member's retirement benefit. to the retirement benefit, if:

(2) In the event that a retired member enters into an agreement which provides for earnings in excess of the above limits or the retired member actually has earnings in excess of the above limits, the retired member's or actually has earnings in excess of the above limits, the retirement benefit will be suspended for the duration of the employment, and the retired member will be returned to an active status.

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 ActERA. 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 Educational Retirement ActERA.

D. Independent contractors who perform services for local administrative units on a fee basis are not eligible for membership under the Educational Retirement ActERA 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: contributory purposes. To be classified as an independent contractor, a person must meet at least the following criteria:

(1) registered 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~~have entered a contract must have been bid in accordance with the State Procurement Code;~~

(3) whether the person receive 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; and the person is not eligible for fringe benefits afforded regular employees of the local administrative unit and is not paid through the unit's payroll system;

(4) whether the person satisfies Internal Revenue Service guidelines for determining that an individual is an independent contractor rather than an employee.~~consultants must meet the criteria for an independent contractor established by FICA;~~

(a5) As necessary, the director shall make available forms for use by local administrative units for use in making this determination.~~the board shall provide each local administrative unit with "employee vs. independent contractor" (IC) determination forms for their use;~~

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~~(b6) The board reserves the right to examine the completed 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 an employee. the board shall further reserves the right to examine such completed forms, and copies of contracts or other agreements that exist between employers and individuals for the purpose of determining the relationship.~~

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 by July 1, 1979.

**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.

**2.82.2.13 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.