

ARTICLE 11

Educational Retirement

22-11-1. Short title.

Chapter 22, Article 11 NMSA 1978 may be cited as the "Educational Retirement Act".

History: 1953 Comp., § 77-9-1, enacted by Laws 1967, ch. 16, § 125; 1991, ch. 118, § 2.

ANNOTATIONS

The 1991 amendment, effective July 1, 1991, substituted "Chapter 22, Article 11 NMSA 1978" for "Sections 77-9-1 through 77-9-45 New Mexico Statutes Annotated, 1953 Compilation".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 C.J.S. Schools and School Districts § 338 et seq.

22-11-2. Definitions.

As used in the Educational Retirement Act:

A. "member" means an employee, except for a participant or a retired member, coming within the provisions of the Educational Retirement Act;

B. "regular member" means:

(1) a person regularly employed by a state educational institution, except for:

(a) a participant; or

(b) all employees of a general hospital or outpatient clinics thereof operated by a state educational institution named in Article 12, Section 11 of the constitution of New Mexico;

(2) a person regularly employed by a junior college or community college created pursuant to Chapter 21, Article 13 NMSA 1978, except for a participant;

(3) a person regularly employed by a technical and vocational institute created pursuant to the Technical and Vocational Institute Act [Chapter 21, Article 16 NMSA 1978], except for a participant;

(4) a person regularly employed by the New Mexico boys' school, the girls' welfare home, the Los Lunas medical center or a school district or as a licensed school employee of a state institution or agency providing an educational program and holding a license issued by the department, except for a participant;

(5) a person regularly employed by the department holding a license issued by the department at the time of commencement of such employment;

(6) a member classified as a regular member in accordance with the rules of the board;

(7) a person regularly employed by the New Mexico activities association holding a license issued by the department at the time of commencement of such employment; or

(8) a person regularly employed by a regional education cooperative holding a license issued by the department at the time of commencement of such employment;

C. "provisional member" means a person described in Section 22-11-17 NMSA 1978;

D. "local administrative unit" means an employing agency however constituted that is directly responsible for the payment of compensation for the employment of members or participants;

E. "beneficiary" means a person having an insurable interest in the life of a member or a participant designated by written instrument duly executed by the member or participant and filed with the director to receive a benefit pursuant to the Educational Retirement Act that may be received by someone other than the member or participant;

F. "employment" means employment by a local administrative unit that qualifies a person to be a member or participant;

G. "service employment" means employment that qualifies a person to be a regular member;

H. "provisional service employment" means employment that qualifies a person to be a provisional member;

I. "prior employment" means employment performed prior to the effective date of the Educational Retirement Act that would be service employment or provisional service employment if performed thereafter;

J. "service credit" means that period of time with which a member is accredited for the purpose of determining the member's eligibility for and computation of retirement or disability benefits;

K. "earned service credit" means that period of time during which a member was engaged in employment or prior employment with which the member is accredited for the purpose of determining the member's eligibility for retirement or disability benefits;

L. "allowed service credit" means that period of time during which a member has performed certain nonservice employment with which the member may be accredited, as provided in the Educational Retirement Act, for the purpose of computing retirement or disability benefits;

M. "retirement benefit" means an annuity paid monthly to members whose employment has been terminated by reason of their age;

N. "disability benefit" means an annuity paid monthly to members whose employment has been terminated by reason of a disability;

O. "board" means the educational retirement board;

P. "fund" means the educational retirement fund;

Q. "director" means the educational retirement director;

R. "medical authority" means a medical doctor or medical review panel designated or employed by the board to examine medical records and report on the medical condition of applicants for or recipients of

disability benefits;

S. "actuary" means a person trained and regularly engaged in the occupation of calculating present and projected monetary assets and liabilities under annuity or insurance programs;

T. "actuarial equivalent" means a sum paid as a current or deferred benefit that is equal in value to a regular benefit, computed upon the basis of interest rates and mortality tables;

U. "contributory employment" means employment for which contributions have been made by both a member and a local administrative unit pursuant to the Educational Retirement Act;

V. "qualifying state educational institution" means the university of New Mexico, New Mexico state university, New Mexico institute of mining and technology, New Mexico highlands university, eastern New Mexico university, western New Mexico university, central New Mexico community college, Clovis community college, Luna community college, Mesalands community college, New Mexico junior college, northern New Mexico state school, San Juan college and Santa Fe community college;

W. "participant" means:

(1) a person regularly employed as a faculty or professional employee of the university of New Mexico, New Mexico state university, New Mexico institute of mining and technology, New Mexico highlands university, eastern New Mexico university or western New Mexico university who first becomes employed with such an educational institution on or after July 1, 1991, or a person regularly employed as a faculty or professional employee of the central New Mexico community college, Clovis community college, Luna community college, Mesalands community college, New Mexico junior college, northern New Mexico state school, San Juan college or Santa Fe community college who is first employed by the institution on or after July 1, 1999 and who elects, pursuant to Section 22-11-47 NMSA 1978, to participate in the alternative retirement plan; and

(2) a person regularly employed who performs research or other services pursuant to a contract between a qualifying state educational institution and the United States government or any of its agencies who elects, pursuant to Section 22-11-47 NMSA 1978, to participate in the alternative retirement plan; provided that the research or other services are performed outside the state;

X. "salary" means the compensation or wages paid to a member or participant by any local administrative unit for services rendered. "Salary" includes payments made for annual or sick leave and payments for additional service provided to related activities, but does not include payments for sick leave not taken unless the payment for the unused sick leave is made through continuation of the member on the regular payroll for the period represented by that payment and does not include allowances or reimbursements for travel, housing, food, equipment or similar items;

Y. "alternative retirement plan" means the retirement plan provided for in Sections 22-11-47 through 22-11-52 NMSA 1978; and

Z. "retired member" means a person whose employment has been terminated by reason of age and who is receiving or is eligible to receive retirement benefits.

History: 1953 Comp., § 77-9-2, enacted by Laws 1967, ch. 16, § 126; 1975, ch. 306, § 21; 1978, ch. 167, § 1; 1982, ch. 37, § 1; 1991, ch. 118, § 3; 1993, ch. 69, § 1; 1993, ch. 232, § 7; 1995, ch. 148, § 1; 1999, ch. 261, § 1; 2001, ch. 283, § 1; 2003, ch. 39, § 1; 2004, ch. 27, § 26; 2017, ch. 21, § 1.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, revised the definitions of "regular member", "provisional member", and "medical authority" in the Educational Retirement Act; changed "he" and "his" to "the member" and the "the member's" throughout the section; in Subsection B, Paragraphs B(1), (2), (3) and (4), after "employed", deleted "as a teaching, nursing or administrative employee of" and added "by"; in Paragraph B(4), after "boys' school, the", deleted "New Mexico", and after "girls'", deleted "school" and added "welfare home"; in Subsection C, after "means a person", deleted "not eligible to be a regular member but who is employed by a local administrative unit designated in Subsection B of this section, provided, however, that employees of a general hospital or outpatient clinics thereof operated by a state educational institution named in Article 12, Section 11 of the constitution of New Mexico are not provisional members" and added "described in Section 22-11-17 NMSA 1978"; in Subsection R, after "medical doctor", deleted "within the state or as provided in Subsection D of Section 22-11-36 NMSA 1978 either" and added "or medical review panel", after "to examine", added "medical records", and after "report on the", deleted "physical" and added "medical"; in Subsection V, after "western New Mexico university", deleted "Albuquerque technical vocational institute" and added "central New Mexico community college", and after "Luna", deleted "vocational technical institute, Mesa technical" and added "community college, Mesalands community"; and in Paragraph W(1), after "professional employee of the", deleted "Albuquerque technical vocational institute" and added "central New Mexico community college", and after "Luna", deleted "vocational technical institute, Mesa technical" and added "community college, Mesalands community".

The 2004 amendment, effective May 19, 2004, amended Paragraph (4) of Subsection B to change "certified school instructor" to "licensed school employee" and change "state board" to "department", and amended Paragraphs (5), (7) and (8) of Subsection B to change "state board" to "department" and to change "standard certificate" to "license".

The 2003 amendment, effective June 20, 2003, added "'Salary' includes payments made for annual or sick leave and payments for additional service provided to related activities, but does not include payments for sick leave not taken unless the payment for the unused sick leave is made through continuation of the member on the regular payroll for the period represented by that payment and does not include allowances or reimbursements for travel, housing, food, equipment or similar items;" at the end of Subsection X.

The 2001 amendment, effective June 15, 2001, inserted "or retired member" in Subsection A; and added Subsection Z.

The 1999 amendment, effective June 18, 1999, deleted "except for a participant" at the end of Subsections B(2) to B(4); added the language beginning "Albuquerque technical-vocational institute" at the end of Subsection V; and in Subsection W(1), substituted the language beginning "the university of New Mexico" and ending "or western New Mexico university" for "a qualifying state educational institution", and added the language beginning "or a person regularly employed" and ending "on or after July 1, 1999".

The 1995 amendment, effective July 1, 1995, added Subsection X and redesignated former Subsection X as Subsection Y.

The 1993 amendment, effective July 1, 1993, inserted "or community college" and substituting "Chapter 21, Article 13 NMSA 1978" for "the Junior College Act" in Paragraph (2) of Subsection B; substituted "New Mexico girls' school" for "girls' welfare home" and "Los Lunas medical center" for "Los Lunas mental hospital" in Paragraph (4) of Subsection B; deleted "or the public school finance division" following "or the board" in Paragraph (5) of Subsection B; added Paragraph (8) of Subsection B; substituted "current" for "present" in Subsection T; substituted "22-11-47 through 22-11-52" for "22-11-46 through 22-11-51" in Subsection X; and made minor stylistic changes throughout the section.

The 1991 amendment, effective July 1, 1991, in Subsection A, inserted "except for a participant"; in Subsection B, divided former Paragraph (1) into Paragraphs (1) through (3) and designated its subsequent paragraphs accordingly, in Paragraph (1), added Subparagraph (a) and the designation for Subparagraph (b) and inserted "a person regularly employed as a teaching, nursing and administrative employee" in Paragraphs (2) and (3); in Subsection C, inserted "but who is"; in Subsections D to F, inserted references to participants; added Subsections V to X; and made minor stylistic changes throughout the section.

Retired legislator entitled to benefits from educational and public employees' retirement systems. — When a legislator is retired and no longer an employee, he is not, pursuant to this section, a "regular member" under the Educational Retirement Act and is not excluded from membership and participation in another state retirement program by Section **22-11-16** NMSA 1978; therefore he may receive benefits from both the educational retirement system and the public employees' retirement system. 1979 Op. Att'y Gen. No. **79-05**.

Public Employees Retirement Act (PERA) retiree who returns to employment with a governmental entity whose employees are covered exclusively under the provisions of the Educational Retirement Act (ERA) for retirement purposes may not continue to receive PERA benefits. Such retiree's benefits must be suspended. That retiree is employed by an affiliated public employer and his "membership," within the meaning of that term, is not provided for in the ERA. 1987 Op. Att'y Gen. No. **87-79**.

22-11-3. Educational retirement board; members; terms; vacancies.

A. The "educational retirement board" is created.

B. The board shall be composed of nine members, consisting of the following:

(1) the secretary of public education, or a designee of the secretary who:

(a) is a resident of New Mexico;

(b) is a current employee of the public education department; and

(c) possesses experience relevant to the financial or fiduciary aspects of pension or investment fund management;

(2) the state treasurer, or a designee of the treasurer who:

(a) is a resident of New Mexico;

(b) is a current employee of the state treasurer's office; and

(c) possesses experience relevant to the financial or fiduciary aspects of pension or investment fund management;

(3) one member to be elected for a term of four years by members of the New Mexico association of educational retirees;

(4) one member to be elected for a term of four years by the members of the national education association of New Mexico;

(5) one member to be elected for a term of four years by the New Mexico members of the American association of university professors;

(6) two members to be appointed by the governor for terms of four years each. Each member appointed pursuant to this paragraph shall have a background in investments, finance or pension fund administration;

(7) one member to be elected for a term of four years by the members of the American federation of teachers New Mexico; and

(8) the secretary of higher education, or a designee of the secretary who:

(a) is a resident of New Mexico;

(b) is a current employee of the higher education department; and

(c) possesses experience relevant to the financial or fiduciary aspects of pension or investment fund management.

C. A designee of a board member shall have the same responsibilities, duties, liabilities and immunities as the board member, including the indemnification provided by Subsection H of Section 22-11-13 NMSA 1978. The appointment of a designee does not relieve the board member of the member's responsibilities, duties, liabilities and immunities as a board member, and the board member shall be fully responsible and liable for the actions of the designee while serving on the board.

D. In the initial composition of the board, the member elected by the members of the American association of university professors shall serve for a term of three years; one member appointed by the governor shall serve for a term of two years; and the other member appointed by the governor shall serve for a term of one year. In electing or appointing new members after the enactment of this 2021 act, the member elected by the American federation of teachers New Mexico shall serve an initial term of three years; thereafter, the members shall serve a term of four years.

E. Vacancies occurring in the terms of office of those members appointed by the governor or elected by an association shall be filled either by the governor appointing or the association electing a new member to fill the unexpired term.

History: 1953 Comp., § 77-9-3, enacted by Laws 1967, ch. 16, § 127; 1977, ch. 246, § 65; 1988, ch. 64, § 40; 2011, ch. 160, § 1; 2021, ch. 78, § 1.

ANNOTATIONS

Cross references. — For references to the former superintendent of public instruction, see 9-24-15 NMSA 1978.

The 2021 amendment, effective June 18, 2021, revised the number and composition of the educational retirement board, and provided for staggered terms; in Subsection B, after "composed of", changed "seven" to "nine", and added Paragraphs B(7) and B(8); and in Subsection D, added the last sentence of the subsection.

The 2011 amendment, effective June 17, 2011, authorized the secretary of education and the state treasurer to appoint designees to serve on the board; specified the qualifications and authority of designees

appointed by the secretary of education and the state treasurer; and in Subsection B(6), specified the qualifications of the members appointed by the governor.

Temporary provisions. — [Laws 2011, ch. 160, § 3](#) provided that the provisions Section 22-11-3B(6) NMSA 1978 shall apply only to appointments made after June 17, 2011 (effective date of [Laws 2011, ch. 160, § 1](#)), and shall not affect the status of existing appointees to the educational retirement board.

Appropriations. — [Laws 2009, ch. 125, § 41](#), effective June 19, 2009, appropriated \$2,500,000 from the educational retirement fund to the educational retirement board for expenditure in fiscal years 2009 through 2013 to acquire land for and plan, design and construct a building or acquire and renovate an existing building for the educational retirement board in Santa Fe in Santa Fe county.

The 1988 amendment, effective May 18, 1988, deleted Subsection B(2) which read "the director of public school finance" and redesignated former Subsection B(3) as present Subsection B(2); added present Subsection B(3); and made a minor stylistic change in Subsection D.

The educational retirement board is an arm of the state rather than an independent political subdivision. *N.M. ex rel. National Educ. Ass'n of N.M. v. Austin Capital Mgmt. Ltd.*, 671 F. Supp. 2d 1248 (D.N.M. 2009).

Member of board has right to resign his office, and where no particular method of resigning is provided by law, no formal method is necessary or required. 1963 Op. Att'y Gen. No. [63-35](#).

22-11-4. Board; regular and special meetings.

A. The board shall hold regular meetings four times each year and may provide for additional regular meetings. Prior to each regular meeting, written notice shall be given to each member of the board specifying the time and place of the regular meeting.

B. Special meetings of the board may be called by the chair or by any three members of the board. Written notice of the special meeting shall be sent to each member of the board at least three days in advance of the special meeting.

C. If not in violation of Subsection A or B of this section, the rules of the board or the Open Meetings Act [Chapter [10](#), Article [15](#) NMSA 1978], the chair or any of three members of the board may cancel or reschedule a meeting.

History: 1953 Comp., § 77-9-4, enacted by Laws 1967, ch. 16, § 128; [2003, ch. 39, § 2](#); [2017, ch. 21, § 2](#).

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, in Subsection A, after "each year and may", deleted "by its bylaws"; in Subsection B, after "called by the", deleted "chairman" and added "chair"; and in Subsection C, after "Open Meetings Act, the", deleted "chairman" and added "chair".

The 2003 amendment, effective June 20, 2003, inserted "by" following "the chairman or" near the middle of Subsection B; and inserted Subsection C.

22-11-5. Board; record; quorum; compensation.

A. The board shall elect from its membership a chairman and a vice chairman.

B. A record shall be taken and preserved of all meetings of the board.

C. A quorum of the board shall be required for the transaction of any business. A majority of the members of the board constitute a quorum. Each member of the board shall have one vote and a proposal shall pass by the affirmative vote of a majority of the members present at the meeting.

D. While performing their duties, each member of the board shall be entitled to receive per diem and mileage as provided by the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], and shall receive no other compensation, perquisite or allowance.

History: 1953 Comp., § 77-9-5, enacted by Laws 1967, ch. 16, § 129.

22-11-5.1. Restrictions on receipt of gifts.

Except for gifts of food or beverage given in a place of public accommodation, consumed at the time of receipt, not exceeding fifty dollars (\$50.00) for a single gift and the aggregate value of which gifts may not exceed one hundred fifty dollars (\$150) in a calendar year, neither a board member nor an employee of the board shall receive or accept anything of value directly or indirectly from a person who:

A. has a current contract with the board;

B. is a potential bidder, offeror or contractor for the provision of services or personal property to the board;

C. is authorized to invest public funds pursuant to state or federal law or is an employee or agent of such a person; or

D. is an organization, association or other entity having a membership that includes persons described in Subsections A through C of this section.

History: Laws 1999, ch. 153, § 2; 2017, ch. 21, § 3.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, made technical changes; in the catchline, deleted "restriction on campaign contribution; required reporting"; redesignated former Paragraphs A(1) through A(4) as Subsections A through D, respectively; in Subsection A, after "with the", deleted "retirement", and deleted "or association"; in Subsection B, after "property to the", deleted "retirement", and deleted "or association"; and in Subsection D, after "described in", deleted "Paragraphs (1) through (3) of this subsection" and added "Subsections A through C of this section".

22-11-6. Board; powers; duties.

A. The board shall:

(1) properly and uniformly enforce the Educational Retirement Act;

- (2) hire employees and delegate administrative authority to these employees;
- (3) make an actuarial report on the financial operation of the Educational Retirement Act to the legislature at each regular session every odd-numbered year;
- (4) accept donations, gifts or bequests to the fund; and
- (5) adopt regulations pursuant to the Educational Retirement Act.

B. The board may:

(1) select and contract for the services of one or more custodial banks. For purposes of this subsection, "custodial bank" means a financial institution with the general fiduciary duties to manage, control and collect the assets of an investment fund, including receiving all deposits and paying all disbursements as directed by staff, safekeeping of assets, coordination of asset transfers, timely settlement of securities transactions and accurate and timely reporting by individual account and in total; and

(2) contract for legal services for litigation matters on a contingent fee basis, subject to the provisions of the Procurement Code [[13-1-28](#) to [13-1-199](#) NMSA 1978]; provided that:

(a) the board shall submit each proposed contract to the attorney general for review of the contingency fee. The attorney general shall review a proposed contract within thirty days after receiving the contract. The review shall take into account the complexity of the factual and legal issues presented by the claims to be pursued under the contract. If the attorney general advises the board that the proposed contingency fee is not reasonable, the board may nevertheless approve the contract and the contingency fee if no fewer than four members vote for approval;

(b) each prospective contractor seeking to represent the board on a contingency fee basis shall file with the board the disclosure required by Section [13-1-191.1](#) NMSA 1978 disclosing all campaign contributions made to the governor, attorney general, state treasurer or any member of the board, or to a political committee that is intended to aid or promote the nomination or election of any candidate to a state office if the committee is: 1) established by any of the foregoing persons or their agents; 2) established in consultation with or at the request of any of the foregoing persons or their agents; or 3) controlled by one of the foregoing persons or their agents; and

(c) nothing in this paragraph shall prejudice or impair the rights of a qui tam plaintiff pursuant to the Fraud Against Taxpayers Act [[44-9-1](#) to [44-9-14](#) NMSA 1978].

History: 1953 Comp., § 77-9-6, enacted by Laws 1967, ch. 16, § 130; [2011, ch. 157, § 1](#); [2017, ch. 21, § 4](#).

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, in Paragraph A(4), after "gifts or bequests", added "to the fund".

The 2011 amendment, effective June 17, 2011, authorized the board to select a custodial bank and to contract for legal services for contingent fee litigation, subject to the attorney general's review of the contingent fee and subject to the disclosure of campaign contributions by prospective contractors for contingent fee representation.

22-11-7. Educational retirement director; bond.

A. The board shall employ an educational retirement director. The director shall be the administrative officer for the board in carrying out the provisions of the Educational Retirement Act and shall have those additional duties provided in the rules of the board.

B. Before assuming the duties of office, the director shall obtain an official bond payable to the fund and conditioned upon the faithful performance of the director's duties during the director's term of office. The bond shall be executed by a corporate surety company authorized to do business in this state. The amount of the bond shall be not less than twenty-five thousand dollars (\$25,000). The board may elect to obtain a schedule or blanket corporate surety bond covering the director and employees of the board for any period not exceeding four years. The cost of a bond obtained pursuant to this section shall be paid from the fund. Any bond obtained shall be approved by the board and filed with the secretary of state.

History: 1953 Comp., § 77-9-7, enacted by Laws 1967, ch. 16, § 131; 2017, ch. 21, § 5.

ANNOTATIONS

Cross references. — For official bonds of state officers and employees, see the Surety Bond Act, 10-2-13 NMSA 1978.

The 2017 amendment, effective June 16, 2017, made technical changes; in Subsection A, after "provided in the", deleted "regulations" and added "rules"; and in Subsection B, substituted "the director's" for "his" throughout the subsection, and after "director and employees of the", deleted "division" and added "board".

22-11-8. Medical authority; fees.

A. The board shall employ the services of a medical authority. The medical authority may examine, make reports of and certify the medical condition of applicants for and recipients of disability benefits pursuant to the Educational Retirement Act.

B. The board shall pay the medical authority a reasonable fee for professional services.

History: 1953 Comp., § 77-9-8, enacted by Laws 1967, ch. 16, § 132; 2017, ch. 21, § 6.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, removed the provision regarding mandatory medical examinations of applicants for and recipients of disability benefits; in Subsection A, after "The medical authority", deleted "shall" and added "may", after "make reports", added "of", and after "certify the", deleted "physical" and added "medical"; and in Subsection B, after "reasonable fee for", deleted "his".

22-11-9. Actuary; fees.

A. The board shall employ the services of an actuary. The actuary shall prepare a table of actuarial equivalents for use of the board and the director in computing the value of advanced, deferred or optional payment of benefits pursuant to the Educational Retirement Act. The actuary shall also study the financial operations of the Educational Retirement Act and shall make written reports thereon to the board.

B. The board shall pay the actuary a reasonable fee for professional services.

C. Unless otherwise required by the governmental accounting standards board of the American institute of certified public accountants, an actuarial report shall be conducted at least once every three years.

History: 1953 Comp., § 77-9-9, enacted by Laws 1967, ch. 16, § 133; 2003, ch. 39, § 3; 2017, ch. 21, § 7.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, in Subsection B, after "reasonable fee for", deleted "his".

The 2003 amendment, effective June 20, 2003, added Subsection C.

22-11-10. Salaries; fees; expenditures.

A. The amount of salaries and fees to be paid by the board shall be fixed by the regulations of the board.

B. Salaries and fees paid, and all other necessary expenditures of the board, shall be paid out of the fund unless otherwise provided by law.

History: 1953 Comp., § 77-9-10, enacted by Laws 1967, ch. 16, § 134.

22-11-11. Educational retirement fund; suspense fund.

A. The "educational retirement fund" and the "educational retirement suspense fund" are created.

B. The state treasurer shall be the custodian of the funds, and the board shall be the trustee of the funds.

C. All membership fees, contributions from members and local administrative units, securities evidencing the investment of money from the fund, interest, gifts, grants or bequests shall be deposited in the educational retirement fund.

D. All amounts received in satisfaction of a claim brought by private attorneys on behalf of the board shall be deposited into the educational retirement suspense fund. The board shall disburse the compensation due the private attorneys, together with reimbursement for reasonable costs and expenses, in accordance with the terms of the contract with the attorneys. After the disbursements have been made, the balance of each deposit shall be distributed to the educational retirement fund.

History: 1953 Comp., § 77-9-11, enacted by Laws 1967, ch. 16, § 135; 2011, ch. 157, § 2.

ANNOTATIONS

The 2011 amendment, effective June 17, 2011, created the educational retirement suspense fund for deposit of funds received in satisfaction of claims brought by private attorneys and payment of attorney fees and cost.

22-11-12. Fund; suspense fund; disbursements.

The state treasurer shall make disbursements from the educational retirement fund or the educational retirement suspense fund only on warrants issued by the department of finance and administration or through any other process as approved by the department of finance and administration. Warrants for disbursements from the educational retirement fund or the educational retirement suspense fund shall be issued by the department of finance and administration only upon voucher of the director.

History: 1953 Comp., § 77-9-12, enacted by Laws 1967, ch. 16, § 136; **1993, ch. 69, § 2; 2011, ch. 157, § 3.**

ANNOTATIONS

The 2011 amendment, effective June 17, 2011, authorized the state treasurer to make disbursements from the educational retirement fund or the educational retirement suspense fund only on warrants or through another approved process.

The 1993 amendment, effective June 18, 1993, added the language beginning "or through any other process" at the end of the first sentence.

22-11-13. Board authority to invest the fund; prudent investor standard; indemnification of board.

A. The board is authorized to invest or reinvest the fund in accordance with the Uniform Prudent Investor Act [**45-7-601 to 45-7-612** NMSA 1978].

B. The board shall provide quarterly performance reports to the legislative finance committee and the department of finance and administration. Annually, the board shall ratify and provide its written investment policy, including any amendments, to the legislative finance committee and the department of finance and administration.

C. The board or its designated agent may enter into contracts for the temporary exchange of securities for the use by broker-dealers, banks or other recognized institutional investors, for periods not to exceed one year, for a specified fee or consideration. Such a contract shall not be entered into unless the contract is fully secured by a collateralized, irrevocable letter of credit running to the board, cash or equivalent collateral of at least one hundred two percent of the market value of the securities plus accrued interest temporarily exchanged. This collateral shall be delivered to the fiscal agent of New Mexico or its designee contemporaneously with the transfer of funds or delivery of the securities. Such contract may authorize the board to invest cash collateral in instruments or securities that are authorized fund investments and may authorize payment of a fee from the fund or from income generated by the investment of cash collateral to the

borrower of securities providing cash as collateral. The board may apportion income derived from the investment of cash collateral to pay its agent in securities lending transactions.

D. Commissions paid for the purchase or sale of any securities pursuant to the provisions of the Educational Retirement Act shall not exceed brokerage rates prescribed and approved by national stock exchanges or by industry practice.

E. Securities purchased for the fund shall be held in the custody of the state treasurer. At the direction of the board, the state treasurer shall deposit with a bank or trust company the securities for safekeeping or servicing.

F. The board may consult with the state investment council or the state investment officer; may request from the state investment council or the state investment officer any information, advice or recommendations with respect to investment of the fund; may utilize the services of the state investment council or the state investment officer; and may act upon any advice or recommendations of the state investment council or the state investment officer. The state investment council or the state investment officer shall render investment advisory services to the board upon request and without expense to the board. The board may also employ the investment management services and related management services of a trust company or national bank exercising trust powers or of an investment counseling firm or brokers for the purchase and sale of securities, commission recapture and transitioning services and may pay reasonable compensation for those services from funds administered by the board.

G. The board shall annually provide for its members no less than eight hours of training in pension fund investing, fiduciary obligations or ethics. A member elected or appointed to the board who fails to attend the training for two consecutive years shall be deemed to have resigned from the board.

H. Members of the board, including any designee authorized by Paragraph (1) or (2) of Subsection B of Section 22-11-3 NMSA 1978, jointly and individually, shall be indemnified from the fund by the state from all claims, demands, suits, actions, damages, judgments, costs, charges and expenses, including court costs and attorney fees, and against all liability, losses and damages of any nature whatsoever that members shall or may at any time sustain by reason of any decision made in the performance of their duties pursuant to this section.

History: 1953, Comp., § 77-9-13, enacted by Laws 1967, ch. 16, § 137; 1969, ch. 203, § 1; 1970, ch. 81, § 3; 1975, ch. 211, § 5; 1987, ch. 71, § 1; 1989, ch. 22, § 1; 1993, ch. 69, § 3; 2001, ch. 190, § 1; 2005, ch. 240, § 6; 2009, ch. 288, § 13; 2011, ch. 160, § 2.

ANNOTATIONS

Cross references. — For applicability of insurance or banking laws to administration of article, see 22-11-43 NMSA 1978.

For the federal Investment Company Act of 1940, see 15 U.S.C. § 80a-1 et seq.

For the legislative finance committee, see 2-5-1 NMSA 1978.

For the department of finance and administration, see 9-6-3 NMSA 1978.

The 2011 amendment, effective June 17, 2011, provided for the indemnification of designees appointed by the secretary of education and the state treasurer.

The 2009 amendment, effective July 1, 2009, added Subsection G.

The 2005 amendment, effective July 1, 2005, deleted former Subsections A(1) through (10), which provided the classes of securities and investments in which the retirement board could invest and reinvest funds; added Subsection A to authorize the board to invest and reinvest the fund in accordance with the Uniform Prudent Investor Act; added Subsection B which provided that the board shall provide reports and investment policies to the legislative finance committee and the department of finance and administration; deleted former Subsection D, which provided that the prudent man rule applies to investment of the fund; deleted the former provision of Subsection F, which provided that the board may employ investment advisory services and investment management services; and in Subsection F, provided that the board may employ the investment management services and related management services of a trust company or national bank exercising trust powers or an investment counseling firm or brokers for the purchase and sale of securities, commission recapture and transitioning services and may pay for the services from funds administered by the board.

The 2001 amendment, effective June 15, 2001, in Paragraphs A(5) and A(7), substituted "debentures, instruments, conditional sales agreements, securities or other evidence of indebtedness of any corporation, partnership or trust" for "or commercial paper of any corporation", inserted "or any security convertible to common stock" following "common stock", inserted "partnership or trust" preceding "organized", and deleted "that the corporation shall have a minimum net worth of twenty-five million dollars (\$25,000,000); and provided" preceding "that the fund shall not"; and in Paragraph A(10), deleted "and which has net assets of at least twenty-five million dollars (\$25,000,000)" following "United States".

The 1993 amendment, effective June 18, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

The 1989 amendment, effective March 10, 1989, in Subsection B, added "or consideration" at the end of the first sentence and added the fourth and fifth sentences.

Reimbursement for expenses of privately retained attorney. — The indemnification authorized by Subsection H of Section 22-11-13 NMSA 1978 applies only when legal representation is not available under the Tort Claims Act, Section 41-4-1 NMSA 1978 et seq., or by the attorney general's office. 2010 Op. Att'y Gen. No. 10-05.

Where a member of the educational retirement board retained an attorney to represent the board member personally in a lawsuit under the Fraud Against Taxpayers Act, Section 44-9-1 NMSA 1978 et seq., and in connection with a securities and exchange commission investigation and the risk management division of the general services department assigned or made counsel available to represent the board member, the state was not required to reimburse the board member for expenses resulting from retaining private counsel. 2010 Op. Att'y Gen. No. 10-05.

Reimbursement for expenses of public relations firm. — Where a member of the educational retirement board, who was a defendant in lawsuit under the Fraud Against Taxpayers Act, Section 44-9-1 NMSA 1978 et seq., and the subject of an investigation by the securities and exchange commission, personally incurred expenses for advice and consultation provided by a public relations firm; the board member did not incur the expense of hiring a public relations firm because of the board member's decisions as an educational retirement board member; and the board member incurred the expense as a result of the board member's independent, personal decision that the board member required the services of the public relations firm, the state was not required to reimburse the board member for the cost of hiring the public relations firm. 2010 Op. Att'y Gen. No. 10-05.

Indemnification of an entity owned by a board member. — Indemnification is not allowed under Subsection H of Section 22-11-13 NMSA 1978 where an entity in which an educational retirement board

member has an ownership interest is sued as a result of decisions made by the board member as a member of the educational retirement board. 2010 Op. Att'y Gen. No. 10-05.

Indemnification in criminal matters. — Indemnification is allowed under Subsection H of Section 22-11-13 NMSA 1978 where an educational retirement board member is charged with a crime provided that the charges result from a decision the member made in the performance of the board member's duties and the board member successfully defends against the charges. Indemnification for expenses incurred by a board member in a criminal defense should be strictly limited to reimbursement. 2010 Op. Att'y Gen. No. 10-05.

Authority to implement Subsection H. — The powers granted the educational retirement board by Subsections A and E of Section 22-11-6 NMSA 1978 and Subsection B of Section 22-11-14 NMSA 1978 provide sufficient authority to the educational retirement board to implement Subsection H of Section 22-11-13 NMSA 1978. 2010 Op. Att'y Gen. No. 10-05.

The educational retirement board has the right and duty to approve attorneys who represent board members under Subsection H of Section 22-11-13 NMSA 1978. 2010 Op. Att'y Gen. No. 10-05.

Fiduciary duty with regard to indemnification of board members. — The educational retirement board has the fiduciary duty to implement and apply Subsection H of Section 22-11-13 NMSA 1978 so that any expenditures made from the educational retirement fund to indemnify educational retirement board members are reasonable, necessary and appropriate. 2010 Op. Att'y Gen. No. 10-05.

22-11-14. Fund; restrictions.

A. No member of the board or employee of the board shall have any interest, directly or indirectly, in the gains or profits of any investments made by the board, except for regular salaries and per diem and mileage allowances authorized pursuant to the Educational Retirement Act.

B. No member of the board or employee of the board shall, directly or indirectly for himself or as an agent or partner for others, borrow from the fund or deposits of the board, or in any manner use the fund or deposits except to make current and necessary disbursements authorized by the board.

C. No member of the board or employee of the board shall become an endorser or surety or become in any manner an obligor for moneys loaned or borrowed by the board.

History: 1953 Comp., § 77-9-14, enacted by Laws 1967, ch. 16, § 138.

ANNOTATIONS

Cross references. — For compensation of members of board, see 22-11-5 NMSA 1978.

For payment of salaries and fees by board, see 22-11-10 NMSA 1978.

22-11-15. Fund; refunds; payments.

A. After filing written demand with the director, a member is entitled to a refund of the total amount of the member's contributions plus interest at a rate set by the board, reduced by the sum of any disability benefits previously received by the member, if:

- (1) the member terminates employment for reasons other than by retirement, disability or death;
- (2) the member has exempted himself from the Educational Retirement Act; or
- (3) the member was not reemployed following a period of disability during which he received disability benefits.

B. The director may, at the request of a member, make payment on behalf of the member for any or all of the refund to an individual retirement account or a qualified retirement plan that accepts rollovers.

C. If the amount of a deceased member's contribution or residual contribution does not exceed the sum of one thousand dollars (\$1,000) and no written claim is made to the board for it within one year from the date of the member's death, by his surviving beneficiary or the member's estate, payment thereof may be made to the named beneficiary or, if none is named, to the person the board determines to be entitled to the contribution under the laws of New Mexico. Any payment made by the board pursuant to this subsection shall be a bar to a claim by any other person.

D. The interest provided for in Subsection A of this section shall apply only to contributions paid to the fund after July 1, 1971 and on deposit in the fund for a period of at least one fiscal year; provided that no such interest shall be allowed on refunds of contributions that were paid into the fund prior to July 1, 1971.

History: 1953 Comp., § 77-9-15, enacted by Laws 1967, ch. 16, § 139; 1971, ch. 12, § 1; 1984, ch. 19, § 1; 1993, ch. 69, § 4; 2003, ch. 39, § 4.

ANNOTATIONS

Cross references. — For payment of benefits upon death during reemployment, see [22-11-26](#) NMSA 1978.

For retirement benefit options, see [22-11-29](#) NMSA 1978.

For disability benefits, see [22-11-35](#) to [22-11-40](#) NMSA 1978.

The 2003 amendment, effective June 20, 2003, substituted "set by the board" for "equal to seventy-five percent of the average rate earned by the fund during the five fiscal years preceding the fiscal year of refund" near the middle of Subsection A.

The 1993 amendment, effective June 18, 1993, added present Subsection B; redesignated former Subsections B and C as Subsections C and D; and made a minor stylistic change.

22-11-16. Regular membership.

Except as otherwise provided in the Educational Retirement Act, being a regular member shall be a condition of employment and shall exclude membership and participation in any other state retirement program.

History: 1953 Comp., § 77-9-16, enacted by Laws 1967, ch. 16, § 140.

ANNOTATIONS

Cross references. — For optional coverage of persons qualified to be regular members and covered by retirement program for federal civil service employees, see [22-11-19 NMSA 1978](#).

Retired legislator entitled to benefits from educational and public employees' retirement systems. — Since when a legislator is retired and no longer an employee he is not, pursuant to Section [22-11-2 NMSA 1978](#), a "regular member" under the Education Retirement Act and is not excluded from membership and participation in another state retirement program by this section, therefore he may receive benefits from both the educational retirement system and the public employees' retirement system. 1979 Op. Att'y Gen. No. [79-05](#).

Public employees retirement association. — Full-time city public school teacher who was a member of the educational retirement system, and who was simultaneously employed on a part-time basis by the city, was not required to be a member of the public employees retirement association. 1988 Op. Att'y Gen. No. [88-70](#).

22-11-16.1. Regular membership continuation of certain transferred employees.

Notwithstanding Subparagraph (b) of Paragraph (1) of Subsection B of Section [22-11-2 NMSA 1978](#), a regular member who is an employee of a local administrative unit that is a state educational institution named in Article 12, Section 11 of the constitution of New Mexico and who transfers to a general hospital or outpatient clinics of that hospital operated by the local administrative unit will have the option to continue his regular membership rather than become a member of a retirement plan offered by the general hospital or outpatient clinics of that hospital. The option shall be exercised by filing a written election with both the educational retirement director and the designated officer of the local administrative unit. This election shall be made within sixty days after the effective date of the regular member's transfer and shall be irrevocable as long as the employee is employed by the general hospital or outpatient clinics of that hospital operated by the local administrative unit.

History: 1978 Comp., § 22-11-16.1, enacted by [Laws 1999, ch. 290, § 1](#).

22-11-16.2. Substitutes; membership status.

An 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 a leave of absence of at least ninety days, shall not be considered a substitute and is subject to the requirements of the Educational Retirement Act.

History: [Laws 2019, ch. 258, § 7](#); repealed and reenacted by [Laws 2020, ch. 10, § 2](#).

ANNOTATIONS

Repeals and reenactments. — [Laws 2020, ch. 10, § 2](#) repealed former [22-11-16.2 NMSA 1978](#), and enacted a new section, effective May 20, 2020.

22-11-17. Provisional membership.

A provisional member is a person who is employed by the board, the department, the New Mexico school for the deaf, the northern New Mexico state school, the New Mexico school for the blind and visually impaired, the girls' welfare home, the New Mexico boys' school or the Los Lunas medical center and who has the option of qualifying for coverage under either the Educational Retirement Act or the public employees retirement association. This option shall be exercised by filing a written election with both the director and the executive secretary of the public employees retirement association. This election shall be made within six months after employment and shall be irrevocable regardless of subsequent employment or reemployment in any administrative unit enumerated in this section. Until this election is made, the provisional member shall be covered and shall be required to make contributions under the Educational Retirement Act.

History: 1953 Comp., § 77-9-17, enacted by Laws 1967, ch. 16, § 141; 1971, ch. 268, § 1; 1973, ch. 382, § 1; 1983, ch. 101, § 1; 1987, ch. 208, § 1; 1989, ch. 30, § 1; **1993, ch. 69, § 5; 2003, ch. 227, § 1; 2017, ch. 21, § 8.**

ANNOTATIONS

Cross references. — For the Social Security Act, see 42 U.S.C. § 301 et seq.

For the school for the deaf, see **21-6-1** NMSA 1978.

For the northern New Mexico state school, see **21-4-1** NMSA 1978.

For the New Mexico school for the blind and visually impaired, see **21-5-2** NMSA 1978.

For the New Mexico boys' school, see **N.M. Const. art. XIV, § 1.**

For the girls' welfare home, see **N.M. Const. art. XIV, § 1.**

The 2017 amendment, effective June 16, 2017, clarified the requirements for provisional membership; deleted Subsections A through D and removed the subsection designation for former Subsection E; in the undesignated paragraph, after "provisional member", added "is a person who is", after "the department", deleted "of education", after "New Mexico school for the", added "blind and", after "visually", deleted "handicapped" and added "impaired", after the next occurrence of "the", deleted "New Mexico", after "girls'", deleted "school" and added "welfare home", after "Los Lunas medical center", deleted "shall have" and added "and who has", after each occurrence of "public employees retirement association", deleted "of New Mexico", after "written election with both the", deleted "educational retirement", and after "enumerated in this", deleted "subsection" and added "section".

The 2003 amendment, effective June 20, 2003, inserted "by the local administrative unit" following "shall be informed" in Subsection C; added present Subsection D; redesignated former Subsection D as present Subsection E; in present Subsection E, substituted "medical center" for "mental hospital" following "the Los Lunas", and substituted "executive secretary" for "director" following "director and the".

The 1993 amendment, effective June 18, 1993, deleted a portion of Subsection C, pertaining to conditions governing the right of a provisional member to acquire earned service credit for periods of employment during which the exemption or exemptions were in force and, in Subsection D, substituted "New Mexico girls' school" for "girls' welfare home" and made minor stylistic changes.

The 1989 amendment, effective July 1, 1989, in Subsection C, substituted all of the present language of Paragraph (1) beginning with "board's" for "average rate earned by the fund during the five fiscal years preceding the fiscal year in which payment is made", and substituted "1992" for "1986" in Paragraph (4).

Suspension of benefits upon resumption of employment. — An employee of the department of finance and administration, retired pursuant to the provisions of the Public Employees Retirement Act, may not resume employment with the department of education without suspension of retirement benefits. 1987 Op. Att'y Gen. No. [87-37](#) (decided under former Section [10-11-22](#) NMSA 1978).

An employee of a public school system, retired pursuant to the provisions of the Educational Retirement Act, may not resume employment with the department of education without suspension of her educational retirement benefits. 1987 Op. Att'y Gen. No. [87-38](#) (decided under former Section [10-11-8](#) NMSA 1978).

Public Employees Retirement Act annuitants whom the department of education subsequently employs and who elect to participate in the educational retirement system by making contributions to that system do not "qualify for (retirement) coverage" under Paragraph D, since they are not considered as having acquired any service credit for purposes of educational retirement benefits. 1987 Op. Att'y Gen. No. [87-37](#) (decided under former Section [10-11-22](#) NMSA 1978).

"Double dipping" disallowed. — This section does not contemplate a useless act or a manipulative election of coverage under the Public Employees Retirement Act for the sole purpose of enabling the state employee to engage in "double dipping". 1987 Op. Att'y Gen. No. [87-38](#).

22-11-18. Repealed.

History: 1953 Comp., § 77-9-17.1, enacted by Laws 1971, ch. 73, § 1; repealed by [Laws 2017, ch. 21, § 20](#).

ANNOTATIONS

Repeals. — [Laws 2017, ch. 21, § 20](#) repealed [22-11-18](#) NMSA 1978, as enacted by Laws 1971, ch. 73, § 1, relating to provisional members employed after July 1, 1971, effective June 16, 2017. For provisions of former section, see the 2016 NMSA 1978 on *NMOneSource.com*.

22-11-19. Regular or provisional membership; optional coverage.

A. Any person qualified to be a regular or provisional member covered by a retirement program established for federal civil service employees shall have six months after the commencement of employment to file a written notice with the director of his election not to be covered by the Educational Retirement Act. If the person so elects, he may withdraw any contributions made pursuant to the Educational Retirement Act.

B. Any person qualified to be a regular or provisional member and who was employed by a regional education cooperative on July 1, 1993 shall have the right to exempt himself from Educational Retirement Act coverage within thirty days and such exemption shall be irrevocable as long as the person is employed by a regional cooperative.

History: 1953 Comp., § 77-9-18, enacted by Laws 1967, ch. 16, § 142; [1993, ch. 232, § 8](#).

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, designated the formerly undesignated provisions as Subsection A and added Subsection B.

22-11-19.1. [Exemption of certain participants covered under Comprehensive Employment and Training Act.]

All participants covered under the Comprehensive Employment and Training Act (Public Law 95-524) are exempt from coverage under the Educational Retirement Act, effective July 1, 1979, except for those employees who have vested in the plan by that date.

History: Laws 1979, ch. 316, § 1.

ANNOTATIONS

Compiler's notes. — The federal Comprehensive Employment and Training Act, referred to in this section, was found at 29 U.S.C. §§ 801 to 999 before it was repealed in 1982 by P.L. 97-300, Title I, § 184(a)(1).

22-11-19.2. Regular or provisional membership; regional education cooperatives.

Any person employed by a regional education cooperative and qualified to be a regular or provisional member shall have the right to acquire earned service credit for periods of employment with the regional education cooperative when the member was neither covered nor retired under the Educational Retirement Act, under the following conditions:

A. both the member and the administrative unit contributions, at the rates in effect during the periods of employment and applied to earnings of the member during such periods, are paid to the fund, together with interest, at a rate equal to the board's actuarial earnings assumption rate at the time of purchase;

B. both member and administrative unit contributions, together with interest, are paid by the member; or

C. the member tenders payment of his contributions, together with interest and the local administrative unit by which he was employed may, but shall not be obligated to, pay the administrative unit contributions, together with interest.

History: 1978 Comp., § 22-11-19.2, enacted by [Laws 1993, ch. 232, § 9](#).

22-11-20. Repealed.

ANNOTATIONS

Repeals. — [Laws 1993, ch. 69, § 11](#) repealed [22-11-20](#) NMSA 1978, as enacted by Laws 1967, ch. 16, § 143, relating to membership fees, effective June 18, 1993. For provisions of former section, see the 1992 NMSA 1978 on *NMOneSource.com*.

22-11-21. Contributions; members; local administrative units.

A. Except as provided in Subsection D of this section, for a member whose annual salary is greater than twenty-four thousand dollars (\$24,000), the member shall make contributions to the fund at the rate of ten and seven-tenths percent of the member's annual salary.

B. For a member whose annual salary is twenty-four thousand dollars (\$24,000) or less, the member shall make contributions to the fund at the rate of seven and nine-tenths percent of the member's annual salary.

C. Except as provided in Subsection D of this section, each local administrative unit shall make an annual contribution to the fund according to the following schedule:

(1) from July 1, 2021 through June 30, 2022, at the rate of fifteen and fifteen-hundredths percent of the annual salary of each member employed by the local administrative unit;

(2) from July 1, 2022 through June 30, 2023, at the rate of seventeen and fifteen-hundredths percent of the annual salary of each member employed by the local administrative unit; and

(3) on and after July 1, 2023, at the rate of eighteen and fifteen-hundredths percent of the annual salary of each member employed by the local administrative unit.

D. If, in a calendar year, the salary of a member, initially employed by a local administrative unit on or after July 1, 1996, equals the annual compensation limit set pursuant to Section 401(a)(17) of the Internal Revenue Code of 1986, as amended, then:

(1) for the remainder of that calendar year, no additional member contributions or local administrative unit contributions for that member shall be made pursuant to this section; provided that no member shall be denied service credit solely because contributions are not made by the member or on behalf of the member pursuant to this subsection; and

(2) the amount of the annual compensation limit shall be divided into four equal portions, and, for purposes of attributing contributory employment and crediting service credit, each portion shall be attributable to one of the four quarters of the calendar year.

History: 1953 Comp., § 77-9-20, enacted by Laws 1967, ch. 16, § 144; 1974, ch. 5, § 1; 1981, ch. 293, § 1; 1984, ch. 19, § 2; 1991, ch. 140, § 1; 1992, ch. 117, § 1; 2005, ch. 273, § 1; 2008, ch. 68, § 1; 2009, ch. 127, § 11; 2010, ch. 67, § 1; 2011, ch. 178, § 13; 2013, ch. 61, § 1; 2019, ch. 237, § 18; 2019, ch. 258, § 1; 2021, ch. 44, § 1; 2022, ch. 29, § 1.

ANNOTATIONS

Repeals. — Laws 2021, ch. 44, § 5 repealed Laws 2019, ch. 237, § 18, effective July 1, 2021.

Cross references. — For Section 401(a)(17) of the Internal Revenue Code of 1986, see 26 U.S.C. 401.

The 2022 amendment, effective May 18, 2022, increased employer contributions to the educational retirement fund; and in Subsection C, added a new Paragraph C(2) and redesignated former Paragraph C(2) as Paragraph C(3), and in Paragraph C(3), after "July 1", deleted "2022" and added "2023", and after "at the rate of", deleted "sixteen" and added "eighteen".

The 2021 amendment, effective July 1, 2021, increased certain contributions, and revised the schedule for contributions, to the educational retirement fund; and in Subsection C, after "annual contribution to the fund", deleted "on and after July 1, 2019, at the rate of fourteen and fifteen-hundredths percent of the annual salary of each member employed by the local administrative unit" and added "according to the following schedule", and added Paragraphs C(1) and C(2).

Temporary provisions. — **Laws 2021, ch. 44, § 4** provided that before July 1, 2022, the educational retirement board shall report to the department of finance and administration, any other affected agency, the legislative finance committee, legislative education study committee and any other appropriate interim legislative committees on fund status and options to improve pension plan solvency without additional contributions from public employers.

The 2019 amendment, effective July 1, 2019, raised the salary threshold for member contribution amounts; in Subsection A, in the introductory clause, after "greater than", deleted "twenty thousand dollars (\$20,000)" and added "twenty-four thousand dollars (\$24,000)", and after "fund", deleted "according to the following schedule", deleted Paragraph A(1), paragraph designation "(2)" and the language "On and after July 1, 2014"; in Subsection B, after the subsection designation, deleted "On and after July 1, 2008", after "annual salary is", deleted "twenty thousand dollars (\$20,000)" and added "twenty-four thousand dollars (\$24,000)", and after "member", deleted "contribution" and added "shall make contributions to the fund at the"; and in Subsection C, after "contribution to the fund", deleted "according to the following schedule:" and added "on and after July 1, 2019, at the rate of fourteen and fifteen-hundredths percent of the annual salary of each member employed by the local administrative unit", and deleted former Paragraphs C(1) and C(2).

The 2013 amendment, effective July 1, 2013, increased the contribution rate of members whose annual salary is greater than twenty thousand dollars; in Subsection A, in the introductory sentence, after "Subsection", deleted "C" and added "D", and after "section", deleted "each" and added "for a member whose annual salary is greater than twenty thousand dollars (\$20,000), the"; deleted former Paragraphs (1) through (5) of Subsection A, which provided the contribution rates for members for fiscal years beginning in 2005 and ending in 2013; added Paragraphs (1) through (2) of Subsection A; added Subsection B; in Subsection C, in the introductory sentence, after "Subsection", deleted "C" and added "D"; deleted former Paragraphs (1) through (8) of Subsection B, which provided the contribution rates for local administrative units for fiscal years beginning in 2005 and ending in 2013; renumbered former Paragraphs (9) and (10) of Subsection B as Paragraphs (1) and (2) of Subsection B respectively; and renumbered former Subsection C as Subsection D.

The 2011 amendment, effective July 1, 2011, for the period from July 1, 2011 through June 30, 2012, increased the member contribution rate for members whose annual salary is more than twenty thousand dollars; for the period July 1, 2011 through June 30, 2012, decreased the local administrative unit contribution rate by different percentages depending on whether the annual salary of members is more or less than twenty thousand dollars; for the period July 1, 2012 through June 30, 2013, increased the local administrative unit contribution rate for members whose annual salary is twenty thousand dollars or less; and increased the local administrative unit contribution rate for the period July 1, 2013 through June 30, 2014 and for periods beginning on and after July 1, 2014.

The 2010 amendment, effective July 1, 2010, in Subsection B(7), after "July 1", changed "2010" to "2011"; after "June 30", changed "2011" to "2012"; after "a sum equal to", deleted "eleven and sixty-five hundredths" and added "thirteen and fifteen-hundredths"; after "local administrative unit", deleted the former language, which provided that for members whose annual salary is \$20,000 or less, the local administrative unit would contribute thirteen and fifteen-hundredths percent of the member's annual salary; and in Subsection B(8), after "July 1", changed "2011" to "2012".

The 2009 amendment, effective July 1, 2009, in Paragraph (5) of Subsection A, added the exception at the end of the sentence; in Paragraph (6) of Subsection B, changed "twelve and four-tenths" to "ten and nine-tenths"; and added the exception at the end of the sentence; and in Paragraph (7) of Subsection B, changed "eleven and fifteen-hundredths" to "eleven and sixty-five hundredths" and added the exception at the end of the sentence.

The 2008 amendment, effective July 1, 2008, added Subsection C.

Temporary provision. — **Laws 2008, ch. 68, § 3**, provided for additional contributions to the educational retirement fund and restoration of service credit for employees whose member contributions and local administrative unit contributions were incorrectly capped prior to July 1, 2008, because the employee's salary exceeded the annual compensation limit set pursuant to Section 401(a)(17) of the Internal Revenue Code.

The 2005 amendment, effective June 17, 2005, deleted the former provision of Subsection A that each member shall contribute seven and six-tenths percent of his annual salary; provided in Subsections A(1) through (8) a schedule of annual contributions; deletes former provision of Subsection B which provided that each local administrative unit shall make an annual contribution of seven and six-tenths percent of the annual salary of each member employed by the administrative unit; provides in Subsections B(1) through (5) a schedule of annual contributions; and deleted former Subsection C, which provided that each administrative unit shall make an annual contribution of eight and sixty-five hundredths percent of the annual salary of each member employed by the administrative unit.

The 1992 amendment, effective March 10, 1992, substituted "1993" for "1992" near the beginning of Subsections B and C; and substituted "sixty-five hundredths" for "six-tenths" in Subsection C.

The 1991 amendment, effective June 14, 1991, added "Until July 1, 1992" at the beginning of Subsection B and added Subsection C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and effect of retroactive change in rate of employee's contribution to public pension fund, 78 A.L.R.2d 1197.

22-11-21.1. Member contributions; tax treatment.

Commencing on July 1, 1983, each local administrative unit shall, solely for the purpose of compliance with Section 414(h) of the Internal Revenue Code, pick up, for the purposes specified in that section, member contributions required by Subsection A of Section **22-11-21** NMSA 1978 for all annual salary earned by the member. Member contributions picked up under the provisions of this subsection shall be treated as local administrative unit contributions for purposes of determining income tax obligations under the Internal Revenue Code; however, such picked-up member contributions shall be included in the determination of the member's gross annual salary for all other purposes under federal and state laws. Members' contributions picked up under this section shall continue to be designated member contributions for all purposes of the Educational Retirement Act and shall be considered as part of the member's annual salary for purposes of determining the amount of the member's contribution. The provisions of this section are mandatory, and the member shall have no option concerning the pickup or to receive the contributed amounts directly instead of having them paid by the local administrative unit to the educational retirement system.

History: 1978 Comp., § 22-11-21.1, enacted by Laws 1983, ch. 91, § 1.

ANNOTATIONS

Cross references. — For the Internal Revenue Code, see 26 U.S.C. § 1 et seq. For Section 414(h) of the Internal Revenue Code, see 26 U.S.C. § 414(h).

Provisions are salary reductions subject to FICA tax. — "Pickup" provisions of this section and Section 10-11-125 NMSA 1978, whereby the state designated certain employee pension contributions as employer contributions, constituted salary reduction agreements, and, as such, were subject to FICA taxes under 26 U.S.C. § 3121(v)(1)(B), 42 U.S.C. § 409(i)(2), and 26 U.S.C. § 3306(r)(1)(B), following the 1984 amendments to those sections. *Pub. Employees' Ret. Bd. v. Shalala*, 153 F.3d 1160 (10th Cir. 1998).

Exemption from income tax permitted. — The legislature may grant a special income tax exemption to one kind of public employee, teachers, yet deny the same exemption to other public employees. *Vaughn v. State Taxation & Revenue Dep't*, 1982-NMCA-112, 98 N.M. 362, 648 P.2d 820, superseded by statute, *Pierce v. State*, 1996-NMSC-001, 121 N.M. 212, 910 P.2d 288.

Repeal of tax exemption. — Because no private contractual rights were granted by the retirement plan, there was no impairment or breach of contract resulting from the 1990 repeal of the tax exemption provision and, although the plan conferred property rights that vested upon accumulating minimum earned service credits, those rights did not include the right to receive pension benefits exempt from tax. *Pierce v. State*, 1996-NMSC-001, 121 N.M. 212, 910 P.2d 288.

Because the retirement plan provided no contractual or vested right to receive an irrevocable tax exemption, there was no constitutionally protected private interest in the tax exemption and there was no due process violation when the exemption was repealed. *Pierce v. State*, 1996-NMSC-001, 121 N.M. 212, 910 P.2d 288.

"Trading" tax exemptions for health care. — Repeal of the state income tax exemptions for teacher pensions and public employee pensions does not remedy constitutional defects of the proposed retiree health care act under a theory that those exemptions would be "traded" for retiree health care. Those exemptions are not property rights, irrevocable contractual entitlements, or pension benefits. Hence, elimination of the favorable tax treatment for current retirees is not consideration for a multi-million dollar health care plan that the state proposes to provide them. 1990 Op. Att'y Gen. No. 90-03.

22-11-21.2. Salary calculation; limitations.

In establishing a member's average annual salary for determination of retirement benefits, salary in excess of limitations set forth in Section 401(a)(17) of the Internal Revenue Code of 1986, as amended, shall be disregarded. The limitation on compensation for eligible employees shall not be less than the amount allowed pursuant to the Educational Retirement Act in effect on July 1, 1993. For purposes of this section, "eligible employee" means an individual who was a member or participant of the educational retirement plan or alternative retirement plan prior to the first plan year beginning after December 31, 1995. For a member who first becomes a clinical faculty member of the university of New Mexico health sciences center on or after July 1, 1999, the limitation on compensation shall not be in excess of the member's base salary as specified in the member's annual faculty contract or the limitations set forth in Section 401(a)(17) of the Internal Revenue Code of 1986, as amended, whichever is less.

History: 1978 Comp., § 22-11-21.2, enacted by [Laws 1995, ch. 148, § 2](#); [1999, ch. 274, § 2](#).

ANNOTATIONS

Cross references. — For Section 401 of the Internal Revenue Code of 1986, see 26 U.S.C. § 401.

The 1999 amendment, effective June 18, 1999, added the last sentence.

22-11-21.3. Pick up; rollover.

A. Commencing on July 1, 1998, each local administrative unit may, solely for the purpose of compliance with Section 414(h) of the Internal Revenue Code of 1986, pick up, for the purposes specified in that section, member contributions permitted by Section 22-11-17 NMSA 1978; Subsection C of Section 22-11-33 NMSA 1978; or Paragraph (4) of Subsection A of Section 22-11-34 NMSA 1978. Member contributions picked up under the provisions of this subsection shall be treated as local administrative unit contributions for purposes of determining income tax obligations under the Internal Revenue Code of 1986; however, such picked-up member contributions shall be included in the determination of the member's gross annual salary for all other purposes under federal and state laws. Member contributions picked up under this section shall continue to be designated member contributions for all purposes of the Educational Retirement Act and shall be considered as part of the member's annual salary for purposes of determining the amount of the member's contribution. The provisions of this section are voluntary, and the member shall have no option concerning the pick up to receive the contributed amounts directly instead of having them paid by the local administrative unit to the fund. The contribution may be paid through the local administrative unit's payroll deduction.

B. Commencing July 1, 1998, the board may accept rollover contributions from other retirement funds solely for and subject to the restrictions set forth in Section 22-11-17 NMSA 1978 and Subsection B of Section 22-11-34 NMSA 1978 and the applicable restrictions set forth in the Internal Revenue Code of 1986 for pension plan qualification.

History: Laws 1998, ch. 38, § 1; 2003, ch. 227, § 2; 2017, ch. 21, § 9.

ANNOTATIONS

Cross references. — For the Internal Revenue Code of 1986, see 26 U.S.C.

The 2017 amendment, effective June 16, 2017, in Subsection A, after "member contributions permitted by", deleted "Subsection D of".

The 2003 amendment, effective June 20, 2003, inserted "of 1986" following "Internal Revenue Code" throughout the section, in Subsection A inserted "Subsection D of Section 22-11-17 NMSA 1978; Subsection C of Section 22-11-33 NMSA 1978; or" following "member contributions permitted by," added the last sentence; in Subsection B, deleted "educational retirement" near the beginning, inserted "Section 22-11-17 NMSA 1978 and" following "set forth in."

22-11-22. Payment; records; audits.

A. Contributions shall be deducted from the salaries of members by the local administrative units as the salaries are paid. These contributions shall be forwarded monthly to the director for deposit in the fund.

B. Contributions of local administrative units shall be derived from revenue available to the local administrative unit and shall be forwarded monthly to the director for deposit in the fund. The board may

assess an interest charge and a penalty charge on any remittance not made by its due date.

C. Each local administrative unit shall record and certify quarterly to the director an itemized account of the contributions paid by each member and the local administrative unit. The director shall keep a record of these itemized accounts.

D. The director or the director's authorized representative may audit the financial affairs, books and records, and may interview employees, of any local administrative unit at any time to ensure compliance with the Educational Retirement Act and rules adopted by the board. The local administrative unit shall cooperate with the director or the authorized representative and shall provide access to records, information and employees during regular business hours. If, during the course of the audit, the director or the director's designee finds discrepancies or violations of the Educational Retirement Act or rules adopted by the board, or if the director or the director's designee finds that a local administrative unit does not have adequate financial controls or procedures in place to allow the local administrative unit to properly account for and pay required contributions to the board:

(1) the director shall order the local administrative unit to implement measures to remedy those matters, including payment to the fund of any contributions not properly calculated or paid, together with interest thereon at a rate to be established by the board. The local administrative unit shall promptly comply with that order; and

(2) the director shall submit a report describing the discrepancy, violation or failure to maintain adequate financial controls or procedures to the board, the state auditor and the public education department or the higher education department as may be appropriate.

E. If the director or the director's designee finds or has reason to suspect criminal activity with respect to contributions, payments or the management of the funds of a local administrative unit, the director shall notify the attorney general, the state auditor and the appropriate law enforcement agency.

History: 1953 Comp., § 77-9-21, enacted by Laws 1967, ch. 16, § 145; 1984, ch. 19, § 3; 1993, ch. 69, § 6; 2009, ch. 209, § 1.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, added Subsections D and E.

The 1993 amendment, effective June 18, 1993, deleted "Membership fees and" at the beginning of Subsection A; added the second sentence of Subsection B; and deleted "and fees" following "contributions" in the first sentence of Subsection C.

22-11-23. Retirement eligibility; initial membership prior to July 1, 2010.

A. A member who was a member on June 30, 2010, or was a member at any time prior to that date and had not, on that date, been refunded all member contributions pursuant to Subsection A of Section 22-11-15 NMSA 1978, shall be eligible for retirement benefits when:

(1) the member is any age and has twenty-five or more years of earned and allowed service credit;

(2) the member is at least sixty-five years of age and has five or more years of earned service credit; or

(3) the sum of the member's age and years of earned service credit equals at least seventy-five; provided that a member who retires pursuant to this paragraph shall be subject to the benefit reductions provided in Subsection G of Section 22-11-30 NMSA 1978.

B. A member shall be subject to the provisions of Subsection A of this section as they existed at the beginning of the member's last cumulated four quarters of earned service credit, regardless of later amendment.

History: 1953 Comp., § 77-9-22, enacted by Laws 1967, ch. 16, § 146; 1971, ch. 12, § 2; 1974, ch. 5, § 2; reenacted by 1981, ch. 293, § 2; 1984, ch. 19, § 4; 1993, ch. 69, § 7; 2009, ch. 286, § 1; 2009, ch. 288, § 14; 2013, ch. 61, § 2.

ANNOTATIONS

Cross references. — For deferred retirement, see 22-11-27 NMSA 1978.

For earned service-credit generally, see 22-11-33 NMSA 1978.

For allowed service-credit generally, see 22-11-34 NMSA 1978.

For reciprocal service credit under Public Employees Retirement Reciprocity Act, see 10-13A-4 NMSA 1978.

The 2013 amendment, effective July 1, 2013, increased age and service retirement requirements; in Subsection A, in the introductory sentence, at the beginning of the sentence, deleted "The retirement eligibility for", after "A member who", deleted "either", and after "NMSA 1978", deleted "is as follows" and added "shall be eligible for retirement benefits when"; deleted former Paragraphs (1) through (3) of Subsection A, which provided age and service eligibility requirements for retirement benefits; added Paragraphs (1) through (3) of Subsection A; and in Subsection B, after "provisions of", deleted "Paragraphs (2) and (3) of".

The 2009 amendment, effective July 1, 2011, in Subsection A, deleted the introductory phrase "On or before July 1, 1984" and added the new introductory paragraph.

Temporary provisions. — Laws 2009, ch. 288, § 19, effective April 10, 2009, created a retirement systems solvency task force to study the actuarial soundness and solvency of the retirement plans of the public employees retirement association, the educational retirement association and the health care plan of the retiree health care authority, and prepare a solvency plan for each entity.

The 1993 amendment, effective June 18, 1993, substituted "cumulated four quarters" for "cumulated years" in Subsection B and made a minor stylistic change in Subsection A.

Nature of retirement rights. — Benefits under the Educational Retirement Act of this state are retirement allowances and not mere gratuities inasmuch as the employees themselves maintain in part the fund. When an employee meets all of the requirements for retirement - that is to say, when the contingency occurs on which payments are to be made - he or she acquires a vested right in his retirement benefits under the act and any subsequent discharge or other happenings cannot defeat this right. 1960 Op. Att'y Gen. No. 60-217.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Services included in computing period of services for purpose of teachers' retirement benefits, 2 A.L.R.2d 1033.

Disciplinary suspension of public employee as affecting computation of length of service for retirement or pension purposes, 6 A.L.R.2d 506.

Validity of repeal or modification of pension statute provisions, 52 A.L.R.2d 437.

Misconduct as affecting right to pension or retention of position in retirement system, 76 A.L.R.2d 566.

22-11-23.1. Retirement eligibility; initial membership on or after July 1, 2010.

A. A member who initially became a member on or after July 1, 2010, or a member who was a member at any time prior to that date and had, before that date, been refunded all member contributions pursuant to Subsection A of Section **22-11-15** NMSA 1978, shall be eligible for retirement benefits pursuant to the Educational Retirement Act when:

- (1) the member is any age and has thirty or more years of earned service credit;
- (2) the member is at least sixty-seven years of age and has five or more years of earned service credit; or
- (3) the sum of the member's age and years of earned service credit equals at least eighty; provided that a member who retires pursuant to this paragraph shall be subject to the benefit reductions provided in Subsection H of Section **22-11-30** NMSA 1978.

B. A member shall be subject to the provisions of this section as they existed at the beginning of the member's last cumulated four quarters of earned service credit, regardless of later amendment.

History: 1978 Comp., § 22-11-23.1, as enacted by **Laws 2009, ch. 286, § 2; 2009, ch. 288, § 15; 2013, ch. 61, § 3.**

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, modified references to amended sections that provide for reduced benefits; in Subsection A, in the introductory sentence, after "Educational Retirement Act when", deleted "one of the following conditions occurs"; and in Paragraph (3) of Subsection A, after "benefit reductions provided in", deleted "Paragraphs (1) and (2) of".

22-11-23.2. Retirement eligibility membership on or after July 1, 2013.

A. A member who initially became a member on or after July 1, 2013 or a member who was a member at any time prior to July 1, 2013 and had, before that date, been refunded all member contributions pursuant to Subsection A of Section **22-11-15** NMSA 1978, and had not restored all refunded contributions and interest before July 1, 2013, shall be eligible for retirement benefits when:

(1) the member is any age and has thirty or more years of earned service credit; provided that the benefits of a member who retires pursuant to this paragraph prior to attaining the age of fifty-five years shall be reduced to an amount equal to the actuarial equivalent of the benefit the member would receive if the member had retired at the age of fifty-five years. The board shall recalculate the actuarial factors on which benefits are reduced no less frequently than every ten years beginning July 1, 2013. The benefits of a retired member that have been reduced at the time of retirement pursuant to this paragraph shall not be subject to further change based upon the board's recalculation of the actuarial factors;

(2) the member is at least sixty-seven years of age and has five or more years of earned service credit; or

(3) the sum of the member's age and years of earned service credit equals at least eighty; provided that a member who retires pursuant to this paragraph shall be subject to the benefit reductions provided in Subsection I of Section [22-11-30](#) NMSA 1978.

B. A member shall be subject to the provisions of this section as they existed at the beginning of the member's last cumulated four quarters of earned service credit, regardless of later amendment.

History: 1978 Comp., § 22-11-23.2, enacted by [Laws 2013, ch. 61, § 4](#).

ANNOTATIONS

Effective dates. — [Laws 2013, ch. 61, § 8](#) made [Laws 2013, ch. , § 3](#) effective July 1, 2013.

22-11-23.3. Retirement eligibility; initial membership on or after July 1, 2019.

A member who initially became a member on or after July 1, 2019 or a member who was a member before July 1, 2019 and had, before that date, been refunded all member contributions in accordance with Subsection A of Section [22-11-15](#) NMSA 1978 and had not restored all refunded contributions and interest before July 1, 2019, is eligible for retirement benefits when:

A. the member is any age and has thirty or more years of earned service credit;

B. the member is at least sixty-seven years of age and has five or more years of earned service credit; or

C. the sum of the member's age and years of earned service credit equals at least eighty.

History: 1978 Comp., § 22-11-23.3, enacted by [Laws 2019, ch. 258, § 2](#).

ANNOTATIONS

Effective dates. — [Laws 2019, ch. 258, § 8](#) made [Laws 2019, ch. 258, § 2](#) effective July 1, 2019.

22-11-24. Retirement benefits; minimum contributory employment.

A. A member must have acquired not less than five years of contributory employment to be eligible for retirement benefits pursuant to the Educational Retirement Act.

B. A member desiring to retire before having completed five years of contributory employment shall be limited to the maximum benefit he would have been entitled to receive under any statute repealed by the Educational Retirement Act. A member may acquire five years or less of contributory employment by contributing to the fund, for each year of contributory employment desired, a sum equal to the prevailing combined contributions of the member and the local administrative unit in effect at the time the contributory employment is acquired. This contribution shall be computed on the member's average annual salary for the last five years of employment plus an additional sum as interest from the effective date of the Educational Retirement Act as fixed by the board, but not to exceed three percent a year.

C. Years of contributory employment purchased pursuant to this section shall not be considered as an addition to service actually performed in computing the sum of the member's retirement benefit.

D. The retirement benefits of members retired pursuant to the Educational Retirement Act prior to July 1, 1959 and who have acquired contributory employment years by purchase, shall be computed upon the basis of the amount paid therefor.

History: 1953 Comp., § 77-9-23, enacted by Laws 1967, ch. 16, § 147.

ANNOTATIONS

Effective dates. — The Educational Retirement Act, enacted as part of the Public School Code (Laws 1967, ch. 16), contains no effective date. However, Laws 1967, ch. 16, § 303, made the Public School Code effective on July 1, 1967.

22-11-25. Retirement; reemployment.

A. A member retired pursuant to the provisions of the Educational Retirement Act may be removed from retirement status by returning to employment. A reemployed member shall make regular contributions pursuant to the Educational Retirement Act. Upon termination of reemployment, the member shall be eligible for retirement benefits again based upon all service credit acquired. In no case shall the retirement benefits be less than the member was receiving prior to the member's reemployment.

B. At the time of retirement following a period of reemployment, the member's retirement benefits shall be paid in accordance with the terms of the option selected at the time of the first retirement.

History: 1953 Comp., § 77-9-24, enacted by Laws 1967, ch. 16, § 148; 2017, ch. 21, § 10.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, removed outdated provisions in the section regarding retirement benefits following reemployment; in Subsection A, after "Education Retirement Act may", deleted "remove himself" and added "be removed", after "based upon all", deleted "service-credit" and added "service credit", after "receiving prior to", deleted "his" and added "the member's", and after the next occurrence of "reemployment", deleted the remainder of the subsection, which related to the amount of

retirement benefits following reemployment; deleted former Subsection B and redesignated former Subsection C as Subsection B; and in Subsection B, after "first retirement.", deleted the remainder of the subsection.

Suspension of benefits upon resumption of employment. — An employee of a public school system, retired pursuant to the provisions of the Educational Retirement Act, may not resume employment with the department of education without suspension of her educational retirement benefits. 1987 Op. Att'y Gen. No. 87-38 (decided under former Section 10-11-8 NMSA 1978).

The suspension provisions of the disbursing system apply to the benefits granted pursuant to the [Public Employees Retirement] Reciprocity Act to a member retired under the public employee retirement association and the educational retirement system who resumes employment. 1988 Op. Att'y Gen. No. 88-22.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity of legislation providing for additional retirement or disability allowances for public employees previously retired or disabled, 27 A.L.R.2d 1442.

22-11-25.1. Return to employment; benefits; contributions.

A. Except as otherwise provided in Subsections B, F, H and I of this section, until January 1, 2024, a retired member who begins employment with a local administrative unit at a level greater than one-quarter full-time employee, regardless of salary level, is required to suspend the member's retirement benefits until the end of that employment unless the member has not rendered service to a local administrative unit for at least twelve consecutive months after the date of retirement.

B. Until January 1, 2024, a retired member who retired on or before January 1, 2001, has not suspended or been required to suspend retirement benefits pursuant to the Educational Retirement Act and returns to employment with a local administrative unit is not required to suspend the member's retirement benefits.

C. A retired member who returns to employment with a local administrative unit in accordance with this section is entitled to receive retirement benefits during that employment but is not entitled to acquire or purchase service credit for that employment.

D. A retired member may return to employment with a local administrative unit only if the member submits an application to return to work, on a form prescribed by the board, the board approves the application and the applicant complies with other application rules promulgated by the board.

E. A retired member who returns to employment pursuant to Subsection A, B, F or I of this section shall make nonrefundable contributions to the fund as would be required by Section 22-11-21 NMSA 1978 if the retired member were a non-retired employee. The local administrative unit employing the retired member shall likewise make contributions as would be required by that section.

F. Until January 1, 2024, a retired member who retired on or before January 1, 2001, who suspended or was required to suspend retirement benefits under the Educational Retirement Act is not required to suspend the member's retirement benefits if the retired member has not rendered service to a local administrative unit for an additional twelve or more consecutive months, not including any part of a summer or other scheduled break or vacation period, after the initial date of retirement.

G. A retired member who returns to employment with a local administrative unit shall make contributions to the retiree health care fund during the period of that employment and in the amount specified in Section 10-

7C-15 NMSA 1978. The local administrative unit employing the retired member shall likewise make contributions during the period of that employment and in the amount specified in that section.

H. A retired member may return to employment with a local administrative unit without a suspension of the member's retirement benefits; provided that:

(1) the retired member has not rendered service to a local administrative unit for at least ninety days after the date of retirement;

(2) prior to the date of retirement, or within ninety days after the date of retirement, the retired member did not enter into any formal or informal agreement with a local administrative unit or with any contractor providing services to a local administrative unit to return to employment; and

(3) the retired member earns a salary of less than fifteen thousand dollars (\$15,000) per year.

I. A retired member may return to employment with a local administrative unit without a suspension of the member's retirement benefits; provided that:

(1) the retired member has not rendered service to a local administrative unit for at least ninety days after the date of retirement; and

(2) the retired member returns to employment for a period of no more than thirty-six consecutive or nonconsecutive months pursuant to this subsection.

J. As used in this section:

(1) "rendered service" includes employment, whether full or part time; substitute teaching; voluntarily performing duties that would otherwise be, or in the past have been, performed by a paid employee or independent contractor; and performing duties as an independent contractor or an employee of an independent contractor; and

(2) "local administrative unit" includes any entity incorporated, formed or otherwise organized by, or subject to the control of, a local administrative unit, regardless of whether the entity is created for profit or nonprofit purposes.

History: Laws 2001, ch. 283, § 2; 2003, ch. 80, § 1; 2003, ch. 145, § 1; 2009, ch. 288, § 16; 2011, ch. 6, § 1; 2019, ch. 258, § 3; 2020, ch. 10, § 1; 2021, ch. 44, § 2; 2022, ch. 20, § 1.

ANNOTATIONS

The 2022 amendment, effective May 18, 2022, permitted certain retirees to return to work without a suspension of retirement benefits; in Subsection A, after "H", added "and I"; in Subsection E, after "pursuant to Subsection A, B", deleted "or F" and added "F or I"; and added a new Subsection I and redesignated former Subsection I as Subsection J.

The 2021 amendment, effective July 1, 2021, extended the sunset for return-to-work provisions from January 1, 2022 to January 1, 2024; in Subsection A, changed "2022" to "2024" throughout.

The 2020 amendment, effective May 20, 2020, removed the requirement for employees and employers to make nonrefundable contributions for certain retired members who have returned to part-time employment, and allowed retirees earning less than \$15,000 a year to return to work without a suspension of retirement benefits; in Subsection A, after "F", added "and H"; in Subsection E, deleted "In addition, on and after July 1,

2020, a retired member who has returned to employment at a level of one-fourth or less full-time employee, regardless of salary level, shall make nonrefundable contributions to the fund as would be required by Section 22-11-21 NMSA 1978 if the retired member were a non-retired employee. The local administrative unit employing the retired member shall likewise make contributions as would be required by that section."; and added a new Subsection H and redesignated the succeeding subsection accordingly.

The 2019 amendment, effective July 1, 2019, revised provisions related to retired members who return to work, and required employee and employer contributions from individuals who return to work; in the section heading, deleted "continued administrative unit"; in Subsection A, after "this section", deleted "beginning January 1, 2002 and continuing", after "local administrative unit", deleted "and shall not be" and added "at a level greater than one-quarter full-time employee, regardless of salary level, is", after "retirement benefits", deleted "if" and added "until the end of that employment unless", and deleted the last sentence of the subsection, which related to retired members who return to work but have not completed twelve consecutive months of retirement; in Subsection B, added "Until January 1, 2022", after "Educational Retirement Act", deleted "may, at any time prior to January 1, 2022, return" and added "and returns"; in Subsection C, after "returns to employment", deleted "during retirement pursuant to Subsection A, B or F of" and added "with a local administrative unit in accordance with", and after "service credit", deleted "or to acquire or purchase service credit in the future for the period of the retired member's reemployment with a local administrative unit" and added "for that employment"; in Subsection D, after "A retired member", deleted "shall not be eligible to" and added "may", after "return to employment", deleted "pursuant to Subsection A, B or F of this section unless" and added "with a local administrative unit only if the member submits"; in Subsection E, after "section shall", deleted "pay" and added "make nonrefundable contributions", after "member shall", deleted "pay to the fund an amount equal to the local administrative unit" and added "likewise make", and added the last sentence; in Subsection F, deleted "Beginning July 1 2003 and continuing", and after "suspend retirement benefits", deleted "and who has not rendered service to a local administrative unit for at least ninety days, may begin employment at a local administrative unit without suspending" and added "under the Educational Retirement Act is not required to suspend the member's"; in Subsection G, deleted "Both the" and added "A", after "retiree health care fund", added "during the period of that employment and", after "specified in", deleted "Subsections A and B of", and added the last sentence; and in Subsection H, in the introductory clause, after "used in", deleted "Subsections A and F of", and in Paragraph H(1), included "local administrative unit" to the definition of "rendered service".

The 2011 amendment, effective July 1, 2011, in Subsection E, required retired members who return to employment to pay the educational retirement fund a nonrefundable amount equal to the contributions the member would be required to pay if the member were a non-retired employee; and reduced the amount of the local administrative unit contribution by eliminating the requirement that the local administrative unit contribute an amount equal to the total of the member contribution in addition to the local administrative unit contribution specified in Section 22-11-21 NMSA 1978.

The 2009 amendment, effective July 1, 2009, in Subsection A, deleted "continuing until January 1, 2012"; deleted "been employed as an employer or independent contractor by" and added "rendered service to"; deleted "to the commencement of employment or reemployment with a local administrative unit"; in Subsection B, deleted "and is reemployed by a local administrative unit may continue employment at the" and added "may, at any time prior to January 1, 2022, return to employment for a"; in Subsection C, added the reference to Subsection F; added Subsection D; in Subsection E, added the reference to Subsection F; deleted "unit's contributions as specified in that act shall be paid to the fund as" and added new language; in Subsection F, deleted "continuing until January 1, 2012"; deleted "and who has not been employed as an employee or independent contractor" and added new language; and added Subsections G and H.

The 2003 amendment, effective June 20, 2003, inserted "Except as provided in Subsections B and E of this section" near the beginning of Subsection A, inserted present Subsections B and E; renumbered former Subsections B and C as Subsections C and D, inserted "or B" following "Subsection A" in present

Subsection C; and in Subsection D, inserted "pursuant to Subsections A or B of this section" following "employment" and "local" preceding "administrative."

22-11-25.2. Persons receiving retirement benefits pursuant to the Public Employees Retirement Act.

A. An employee who is retired pursuant to the Public Employees Retirement Act [Chapter 10, Article 11 NMSA 1978] and who has not suspended retirement benefits received pursuant to that act shall not make contributions to the fund as otherwise required by the Educational Retirement Act. A local administrative unit that employs such a retiree shall make contributions to the fund as required by that act.

B. An employee who receives retirement benefits pursuant to the Public Employees Retirement Act is not entitled to acquire or purchase service credit for the period of employment with a local administrative unit.

History: Laws 2003, ch. 248, § 1; 2019, ch. 258, § 4; 2020, ch. 10, § 3.

ANNOTATIONS

The 2020 amendment, effective May 20, 2020, exempted retirees under the Public Employees Retirement Act from contribution requirements under the Educational Retirement Act if they have not suspended retirement benefits; in Subsection A, after "shall", added "not"; and deleted former Subsection B, which related to certain employees exempted from contribution requirements, and redesignated the succeeding subsection accordingly.

The 2019 amendment, effective July 1, 2019, provided that an employee hired prior to July 1, 2019 by a local administrative unit as a police officer, who is retired and who has not suspended retirement benefits, shall not make contributions to the fund so long as the employee remains working as a certified police officer, and provided that the local administrative unit that hired the certified police officer shall make contributions to the fund; in Subsection A, after "that act shall", deleted "not", and added the last sentence; added a new Subsection B and redesignated former Subsection B as Subsection C; in Subsection C, after "Retirement Act", deleted "and who does not make contributions to the fund", and after "service credit", deleted "or to acquire or purchase service credit in the future"; and deleted former Subsection C.

22-11-26. Death during reemployment.

If a member dies during a period of reemployment following retirement pursuant to the Educational Retirement Act, the benefits to be paid shall be determined according to the following:

A. if the member did not elect to exercise Option B or C pursuant to Subsection A of Section 22-11-29 NMSA 1978 at the time of first retirement, the member's beneficiary or estate shall receive an amount equal to the sum of the member's contributions, including contributions made by the member during the period of last reemployment, plus accumulated interest at the rate set by the board, less the total benefits received prior to the last reemployment; or

B. if a retirement benefit has been paid to the member pursuant to either Option B or Option C of Subsection A of Section 22-11-29 NMSA 1978 prior to reemployment, the reemployed member shall be

considered as retiring on the day preceding the date of death, and the benefits due the surviving beneficiary, computed as of that date, shall be commenced effective on the date of death in accordance with the terms of the option elected.

History: 1953 Comp., § 77-9-25, enacted by Laws 1967, ch. 16, § 149; 1981, ch. 294, § 1; 1993, ch. 69, § 8; 1999, ch. 93, § 1; 2003, ch. 39, § 5.

ANNOTATIONS

The 2003 amendment, effective June 20, 2003, in Subsection A inserted "Subsection A of" following "pursuant to" near the beginning and substituted "rate set by the board," for "average rate earned by the fund during the preceding five fiscal years," near the end; and inserted "of Subsection A" following "Option C" near the beginning of Subsection B.

The 1999 amendment, effective June 18, 1999, in Subsection A substituted the language beginning "an amount" to the end for "the difference, if any, between the member's total contribution and total benefits received prior to last reemployment, plus contributions made by the member during the period of last reemployment".

The 1993 amendment, effective June 18, 1993, substituted "retirement" for "retiring" in the introductory paragraph and substituted the language beginning "last reemployment" for "death" at the end of Subsection A.

22-11-27. Deferred retirement; restriction.

A. A member who is eligible for retirement may continue in employment and shall continue to pay contributions as provided by the Educational Retirement Act.

B. Provided that the contributions that the member has made are left in the fund, a member eligible for retirement benefits pursuant to the provisions of Section 22-11-23, 22-11-23.1 or 22-11-23.2 NMSA 1978 may terminate employment and retire at any time upon satisfying the applicable age and earned service requirements for retirement.

C. 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.

History: 1953 Comp., § 77-9-26, enacted by Laws 1967, ch. 16, § 150; 1971, ch. 12, § 3; 1974, ch. 5, § 3; 2003, ch. 39, § 6; 2013, ch. 61, § 5.

ANNOTATIONS

Cross references. — For retirement eligibility generally, see 22-11-23 NMSA 1978.

The 2013 amendment, effective July 1, 2013, permitted a member who is eligible for retirement benefits to retire upon satisfaction of the applicable age and earned service requirements; in Subsection A, after "A member", added "who is"; in Subsection B, at the beginning to the sentence, deleted "A member" and added "Provided that the contributions that the member has made are left in the fund, a member eligible for retirement benefits pursuant to the provisions of Section 22-11-23, 22-11-23.1 or 22-11.23.2 NMSA 1978" and after "at any time", deleted "after his age and his earned service credit equal the sum of seventy-five if

the contributions he has made are left in the fund" and added "upon satisfying the applicable age and earned service requirements for retirement"; deleted former Subsection C, which provided for the retirement of a member who has five years or more of earned service credit; and in Subsection C, after "A member shall", added "not" and after "employment falls within", deleted "exceptions" and added "an exception".

The 2003 amendment, effective June 20, 2003, added "unless the employment falls within exceptions established by statute or rule of the board" at the end of Subsection D.

22-11-28. Applications for retirement; effective date.

A. Application for retirement shall be made by a member on forms provided by the board.

B. Retirement pursuant to the Educational Retirement Act shall become effective on July 1 following approval of the application for retirement by the board. With approval of the board and the local administrative unit employing the member, retirement pursuant to the Educational Retirement Act may become effective on the first day of any month during the year.

History: 1953 Comp., § 77-9-27, enacted by Laws 1967, ch. 16, § 151; 1975, ch. 191, § 2.

22-11-29. Retirement benefit options.

A. Upon retirement pursuant to the Educational Retirement Act, a member may elect, and, except as provided in Subsection D or E of this section, such election shall be irrevocable, to receive the actuarial equivalent of the member's retirement benefit, as provided in Section 22-11-30 NMSA 1978, to be effective on the member's retirement in any one of the following optional forms:

(1) OPTION A. An unreduced retirement benefit pursuant to Section 22-11-30 NMSA 1978;

(2) OPTION B. A reduced annuity payable during the member's life with provision that upon the member's death the same annuity shall be continued during the life of and paid to the beneficiary designated by the member in writing at the time of electing this option; or

(3) OPTION C. A reduced annuity payable during the member's life with provision that upon the member's death one-half of this same annuity shall be continued during the life of and paid to the beneficiary designated by the member in writing at the time of electing this option.

B. In the case of Options B and C of Subsection A of this section, the actuarial equivalent of the member's retirement benefit shall be computed on the basis of the lives of both the member and the beneficiary.

C. In the event that the named beneficiary of a retired member who elected Option B or C of Subsection A of this section at the time of retirement predeceases the retired member, the annuity of the retired member shall be adjusted by adding an amount equal to the amount by which the annuity of the retired member was reduced at retirement as a result of the election of Option B or C. The adjustment authorized in this subsection shall be made as follows:

(1) beginning on the first month following the month in which the named beneficiary of a retiree dies applicable to an annuity received by a retiree who retires after June 30, 1987; or

(2) beginning on July 1, 1987 applicable to an annuity received by a retiree who retired prior to July 1, 1987 and otherwise qualifies for the adjustment; provided, however, no adjustment shall be made retroactively.

D. A retired member who is being paid an adjusted annuity pursuant to Subsection C of this section because of the death of the named beneficiary may exercise a one-time irrevocable option to designate another individual as the beneficiary and may select either Option B or Option C of Subsection A of this section; provided that:

(1) the amount of the annuity under the option selected shall be recalculated and have the same actuarial present value, computed on the effective date of the designation, as the annuity being paid to the retired member prior to the designation;

(2) the designation and the amount of the annuity shall be subject to a court order as provided for in Subsection B of Section 22-11-42 NMSA 1978; and

(3) the retired member shall pay one hundred dollars (\$100) to the board to defray the cost of determining the new annuity amount.

E. A retired member who is being paid an annuity under Option B or C of Subsection A of this section with a living designated beneficiary other than the retired member's spouse or former spouse may exercise a one-time irrevocable option to deselect the designated beneficiary and elect to:

(1) designate another beneficiary; provided that:

(a) the retired member shall not have an option to change from the current form of payment;

(b) the amount of the annuity under the form of payment shall be recalculated and shall have the same actuarial present value, computed as of the effective date of the designation, as the amount of annuity paid prior to the designation; and

(c) the retired member shall pay one hundred dollars (\$100) to the board to defray the cost of determining the new annuity amount; or

(2) have future annuity payments made without a reduction as a result of Option B or C.

F. In the event of the death of the member who has not retired and who has completed at least five years' earned service credit, the member shall be considered as retiring on the first day of the month following the date of death, and the benefits due the surviving beneficiary, computed as of that date, shall, except as provided in Subsection J of this section, be commenced effective on the first day of such month in accordance with the terms of Option B of Subsection A of this section. In lieu of the provisions of Option B, the surviving beneficiary may elect to receive payment of all the contributions made by the member, plus interest at the rate set by the board reduced by the sum of any disability benefits previously received by the member, or the surviving beneficiary may choose to defer receipt of the survivor's benefit to whatever age the beneficiary chooses up to the time the member would have attained age sixty. If the benefit is thus deferred, it shall be calculated as though the member had retired on the first day of the month in which the beneficiary elects to receive the benefit. In the event of the death of the beneficiary after the death of the member and prior to the date on which the beneficiary has elected to receive the beneficiary's benefit, the estate of the beneficiary shall be entitled to a refund of the member's contributions plus interest at the rate earned by the fund during the preceding fiscal year, reduced by the sum of any disability benefits previously received by the member.

G. In the event of the death of a member who has not retired and who has completed at least five years' earned service credit, but who has not designated a beneficiary in writing pursuant to the Educational Retirement Act, the eligible surviving spouse or surviving domestic partner shall be the surviving beneficiary eligible for benefits in accordance with the provisions of Subsection F of this section.

H. In the case of death of a retired member who did not elect either Option B or C of Subsection A of this section and before the benefits paid to the member have equaled the sum of the member's accumulated contributions to the fund plus accumulated interest at the rate set by the board, the balance shall be paid to the beneficiary designated in writing to the director by the member or, if no beneficiary was designated, to the eligible surviving spouse or surviving domestic partner of the member or, if there is no eligible surviving spouse or domestic partner of the member, to the estate of the member.

I. No benefit shall be paid pursuant to this section if the member's contributions have been refunded pursuant to Section [22-11-15](#) NMSA 1978.

J. In the case of death of a member with less than five years' earned service credit or death of a member who has filed with the director a notice rejecting the provisions of Subsection F of this section, which notice shall be revocable by the member at any time prior to retirement, the member's contributions to the fund plus interest at the rate set by the board shall be paid to the beneficiary designated in writing to the director by the member or, if no beneficiary was designated, to the eligible surviving spouse or surviving domestic partner of the member or, if there is no eligible surviving spouse or domestic partner of the member, to the estate of the member.

History: 1953 Comp., § 77-9-28, enacted by Laws 1967, ch. 16, § 152; 1977, ch. 314, § 1; 1981, ch. 294, § 2; 1984, ch. 19, § 5; 1987, ch. 86, § 1; [1999, ch. 93, § 2](#); [2003, ch. 39, § 7](#); [2011, ch. 122, § 2](#); [2017, ch. 21, § 11](#); [2019, ch. 173, § 1](#).

ANNOTATIONS

Cross references. — For payment of benefits upon death during reemployment, see [22-11-26](#) NMSA 1978.

For disability benefits, see [22-11-35](#) to [22-11-40](#) NMSA 1978.

The 2019 amendment, effective June 14, 2019, provided that a surviving spouse, or surviving domestic partner, of a deceased member of the educational retirement plan be considered the beneficiary of the deceased member if the deceased member has not designated a beneficiary; added a new Subsection G and redesignated former Subsections G through I as Subsections H through J, respectively; in Subsection H, added "eligible surviving spouse or surviving domestic partner of the member or, if there is no eligible surviving spouse or domestic partner of the member, to the"; and in Subsection J, added "eligible surviving spouse or surviving domestic partner of the member or, if there is no eligible surviving spouse or domestic partner of the member, to the".

The 2017 amendment, effective June 16, 2017, added a new retirement benefits option; added new Paragraph A(1) and redesignated former Paragraphs A(1) and A(2) as Paragraphs A(2) and A(3), respectively; and deleted Subsection J, which related to certain void elections of benefit options.

The 2011 amendment, effective July 1, 2011, added Subsection D to permit a retired member who, because of the death of a designated beneficiary, is being paid an adjusted annuity pursuant to Subsection C to designate another beneficiary upon the death of the initial designated beneficiary and to be paid under either option B or C, subject to recalculation of the amount of the pension, court-ordered divisions of community property and payment of child support obligations, and payment of the prescribed fee; added Subsection E to permit a retired member to deselect a living designated beneficiary and designate another

beneficiary, subject to recalculation of the amount of the annuity and payment of the prescribed fee; and in Subsection J, provided that elections of payment options on file with the director on June 30, 1984 by members who have not retired prior to June 30, 1984 are void.

The 2003 amendment, effective June 20, 2003, inserted "of Subsection A of this section" following "Option B or C" near the beginning of Subsection C; in Subsection D, inserted "of Subsection A of this section" following "Option B" and substituted "set by the board" for "earned by the fund during the preceding fiscal year" following "plus interest at the rate" near the middle; in Subsection E, inserted "of Subsection A of this section" following "Option B or C" near the beginning and substituted "rate set by the board" for "average rate earned by the fund during the preceding five fiscal years" following "interest at the" near the middle; and substituted "rate set by the board" for "rate earned by the fund during the preceding fiscal year" following "interest at the rate" near the middle of Subsection G.

The 1999 amendment, effective June 18, 1999, inserted the language beginning "plus accumulated" and ending "fiscal years" in Subsection E, and made a minor stylistic change.

Amendment is not retroactive. — The 1999 amendment ([Laws 1999, ch. 93, § 2](#)) to Subsection E of Section [22-11-29 NMSA 1978](#), which provided for the payment of interest on refunds of accumulated contributions, applies prospectively only. *Wood v. N.M. Educ. Ret. Bd.*, [2011-NMCA-020](#), [149 N.M. 455](#), [250 P.3d 881](#), cert. denied, 2011-NMCERT-001.

Where decedent elected to receive a single life annuity when decedent retired in 1998 and decedent died in 1998, the 1999 amendment ([Laws 1999, ch. 93, § 2](#)) to Subsection E of Section [22-11-29 NMSA 1978](#) did not apply, and decedent's beneficiary was not entitled to receive interest on the amount of decedent's accumulated contribution that was paid to the beneficiary. *Wood v. N.M. Educ. Ret. Bd.*, [2011-NMCA-020](#), [149 N.M. 455](#), [250 P.3d 881](#), cert. denied, 2011-NMCERT-001.

22-11-30. Retirement benefits; reductions.

A. Retirement benefits for a member retired pursuant to the Educational Retirement Act on or before June 30, 1967 shall be paid monthly and shall be one-twelfth of a sum equal to one and one-half percent of the first four thousand dollars (\$4,000) of the member's average annual salary and one percent of the remainder of the member's average annual salary multiplied by the number of years of the member's total service credit.

B. Retirement benefits for a member retired pursuant to the Educational Retirement Act on or after July 1, 1967 but on or before June 30, 1971 shall be paid monthly and shall be one-twelfth of a sum equal to one and one-half percent of the first six thousand six hundred dollars (\$6,600) of the member's average annual salary and one percent of the remainder of the member's average annual salary multiplied by the number of years of the member's total service credit.

C. Retirement benefits for a member retired pursuant to the Educational Retirement Act on or after July 1, 1971 but on or before June 30, 1974 shall be paid monthly and shall be one-twelfth of a sum equal to one and one-half percent of the member's average annual salary multiplied by the number of years of the member's total service credit.

D. Retirement benefits for a member retired pursuant to the Educational Retirement Act on or before June 30, 1974 but returning to employment on or after July 1, 1974 for a cumulation of one or more years shall be computed pursuant to Subsection E of this section. Retirement benefits for a member retired pursuant to the Educational Retirement Act on or before June 30, 1974 but returning to employment on or after July 1, 1974 for a cumulation of less than one year shall be computed pursuant to Subsection A of this section if the

member's date of last retirement was on or before June 30, 1967 or pursuant to Subsection B of this section if the member's date of last retirement was on or after July 1, 1967 but not later than June 30, 1971 or pursuant to Subsection C of this section if the member's date of last retirement was on or after July 1, 1971 but not later than June 30, 1974.

E. Retirement benefits for a member age sixty or over, retired pursuant to the Educational Retirement Act on or after July 1, 1974 but not later than June 30, 1987, shall be paid monthly and shall be one-twelfth of a sum equal to:

(1) one and one-half percent of the member's average annual salary multiplied by the number of years of service credit for:

(a) prior employment; and

(b) allowed service credit for service performed prior to July 1, 1957, except United States military service credit purchased pursuant to Paragraph (3) of Subsection A of Section 22-11-34 NMSA 1978; plus

(2) two percent of the member's average annual salary multiplied by the number of years of service credit for:

(a) contributory employment;

(b) allowed service credit for service performed after July 1, 1957; and

(c) United States military service credit for service performed prior to July 1, 1957 and purchased pursuant to Paragraph (3) of Subsection A of Section 22-11-34 NMSA 1978.

F. Retirement benefits for a member age sixty or over, retired pursuant to the Educational Retirement Act on or after July 1, 1987 but not later than June 30, 1991, shall be paid monthly and shall be one-twelfth of a sum equal to two and fifteen-hundredths percent of the member's average annual salary multiplied by the number of years of the member's total service credit; provided that this subsection shall not apply to any member who was retired in any of the four quarters ending on June 30, 1987 without having accumulated not less than 1.0 years earned service credit after June 30, 1987.

G. Retirement benefits for a member who retires pursuant to Section 22-11-23 NMSA 1978 on or after July 1, 1991 shall be paid monthly and shall be one-twelfth of a sum equal to two and thirty-five hundredths percent of the member's average annual salary multiplied by the number of years of the member's total service credit; provided that:

(1) the benefit for a member who retires pursuant to Paragraph (3) of Subsection A of Section 22-11-23 NMSA 1978 shall be reduced by:

(a) six-tenths percent for each one-fourth, or portion thereof, year that retirement occurs prior to the member attaining the age of sixty years but after the member attains the age of fifty-five years; and

(b) one and eight-tenths percent for each one-fourth, or portion thereof, year that retirement occurs prior to the member attaining the age of fifty-five years;

(2) the benefit formula provided in this subsection shall not apply to any member who was retired in any of the four consecutive quarters ending on June 30, 1991 without having accumulated at least one year of earned service credit beginning on or after July 1, 1991; and

(3) a member shall be subject to the provisions of Paragraph (1) of this subsection as they existed at the beginning of the member's last cumulated four quarters of earned service credit, regardless of later amendment.

H. Retirement benefits for a member who retires pursuant to Section 22-11-23.1 NMSA 1978 shall be paid monthly and shall be one-twelfth of a sum equal to two and thirty-five hundredths percent of the member's average annual salary multiplied by the number of years of the member's total service credit; provided that:

(1) the benefit for a member who retires pursuant to Paragraph (3) of Subsection A of Section 22-11-23.1 NMSA 1978 shall be reduced by:

(a) six-tenths percent for each one-fourth, or portion thereof, year that retirement occurs prior to the member attaining the age of sixty-five years but after the member attains the age of sixty years; and

(b) one and eight-tenths percent for each one-fourth, or portion thereof, year that retirement occurs prior to the member attaining the age of sixty years; and

(2) a member shall be subject to the provisions of Paragraph (1) of this subsection as they existed at the beginning of the member's last cumulated four quarters of earned service credit, regardless of later amendment.

I. Retirement benefits for a member who retires pursuant to Section 22-11-23.2 NMSA 1978 shall be paid monthly and shall be one-twelfth of a sum equal to two and thirty-five hundredths percent of the member's average annual salary multiplied by the number of years of the member's total service credit; provided that:

(1) the benefit for a member retiring pursuant to Paragraph (3) of Subsection A of Section 22-11-23.2 NMSA 1978 shall be reduced by:

(a) six-tenths percent for each one-fourth, or portion thereof, year that retirement occurs prior to the member attaining the age of sixty-five years but after the member attains the age of sixty years; and

(b) one and eight-tenths percent for each one-fourth, or portion thereof, year that retirement occurs prior to the member attaining the age of sixty years; and

(2) a member shall be subject to the provisions of Paragraph (1) of this subsection as they existed at the beginning of the member's last cumulated four quarters of earned service credit, regardless of later amendment.

J. Retirement benefits for a member who retires in accordance with Section 22-11-23.3 NMSA 1978 shall be paid monthly and:

(1) in an amount equal to one-twelfth of the sum of the following:

(a) for the first ten years of the member's service credit, one and thirty-five hundredths percent of the member's average annual salary multiplied by the member's years of service credit between one-fourth of a year and ten years;

(b) for that portion of the member's service credit earned after ten years of service credit and through twenty years of service credit, two and thirty-five hundredths percent of the member's average annual salary multiplied by the member's years of service credit between ten and twenty years;

(c) for that portion of the member's service credit earned after twenty years of service credit and through thirty years of service credit, three and thirty-five hundredths percent of the member's average annual

salary multiplied by the member's years of service credit between twenty and thirty years; and

(d) for that portion of the member's service credit earned after thirty years of service credit, two and four-tenths percent of the member's average annual salary multiplied by the member's years of service credit over thirty years; or

(2) if the member retires in accordance with:

(a) Subsection A of Section 22-11-23.3 NMSA 1978 and is under fifty-eight years of age, in an amount equal to the result determined under Paragraph (1) of this subsection, but reduced to the actuarial equivalent, based on what is at the time of the member's retirement the most current set of actuarial factors determined by the board, of the benefit the member would receive if the member had retired at fifty-eight years of age;

(b) Subsection C of Section 22-11-23.3 NMSA 1978 and is sixty years of age or older and under sixty-five, in an amount equal to the result determined under Paragraph (1) of this subsection, but reduced by six-tenths percent for each one-fourth, or portion thereof, year before the member reaches age sixty-five; or

(c) Subsection C of Section 22-11-23.3 NMSA 1978 and is younger than sixty years of age, in an amount equal to one and eight-tenths percent for each one-fourth, or portion thereof, year before the member reaches sixty years of age.

K. In determining a member's average annual salary for purposes of this section:

(1) the data set shall consist of the annual salary of each of the last five years, or any consecutive five years, for which contribution was made by the member, whichever produces a higher result; and

(2) lump-sum payments made after July 1, 2010 of accrued sick leave or annual leave shall be excluded from the calculation.

L. On and after July 1, 2019, if the member's average annual salary is greater than sixty thousand dollars (\$60,000):

(1) the salary in a first twelve-month interval that occurs beginning July 1, 2019 or thereafter of the five-year period used to determine the average annual salary shall be adjusted to exclude any increase in salary in excess of thirty percent of the salary in the twelve consecutive months of service credit preceding the five-year period; and

(2) the salary in each of the four succeeding twelve-month intervals that occur beginning July 1, 2019 or thereafter of the five-year period, as adjusted to exclude any increase in salary in the twelve months preceding each such succeeding twelve-month interval that is in excess of the thirty-percent limitation provided in this subsection, shall be used to determine if the salary in that succeeding twelve-month interval exceeds the thirty-percent limitation and to adjust the salary to exclude any increase in excess of that limitation in determining the average annual salary.

M. On July 1, 2020 and on each July 1 thereafter, the salary threshold for applying the thirty-percent limitation provided for in Subsection L of this section shall be adjusted by applying an adjustment factor equal to the change in the consumer price index between the next preceding calendar year and the preceding calendar year if there is an increase in the consumer price index between the next preceding calendar year and the preceding calendar year.

N. Unless otherwise required by the Internal Revenue Code of 1986, a member shall begin receiving retirement benefits by age seventy years and six months, or upon termination of employment, whichever

occurs later.

History: 1953 Comp., § 77-9-29, enacted by Laws 1967, ch. 16, § 153; 1971, ch. 12, § 4; 1974, ch. 5, § 4; 1985, ch. 170, § 1; 1987, ch. 86, § 2; 1991, ch. 140, § 2; 1993, ch. 69, § 9; 2003, ch. 39, § 8; 2009, ch. 286, § 3; 2009, ch. 288, § 17; 2013, ch. 61, § 6; 2019, ch. 258, § 5.

ANNOTATIONS

Cross references. — For the Internal Revenue Code of 1986, see 26 U.S.C.

The 2019 amendment, effective July 1, 2019, added retirement eligibility provisions for employees who begin employment on or after July 1, 2019; added a new Subsection J and redesignated former Subsection J as Subsection K; in Subsection K, added new paragraph designations "(1)" and "(2)", in Paragraph K(1), after "shall", deleted "be computed on the basis" and added "consist of the annual salary of each", and in Paragraph K(2), after "calculation", deleted "of salary"; and added Subsections L and M and redesignated former Subsection K as Subsection N.

The 2013 amendment, effective July 1, 2013, provided for the reduction of retirement benefits; in the title of the section, added "reductions"; in Subsection G, in the introductory sentence, after "benefits for a member", deleted "age sixty or over, retired" and added "who retires"; added Paragraphs (1) and (3) of Subsection G; in Paragraph (2) of Subsection G, at the beginning of the sentence, added "the benefit formula provided in"; in Subparagraph (a) of Paragraph (1) of Subsection H, after the word "six-tenths", deleted "of one", after "retirement occurs prior to the", deleted "member's sixty-fifth birthday" and added "member attaining the age of sixty-five years", and after "but after the", deleted "sixtieth birthday" and added "member attains the age of sixty years"; in Subparagraph (b) of Paragraph (1) of Subsection H, after "retirement occurs prior to the", deleted "member's sixtieth birthday" and added "member attaining the age of sixty years; and"; added Paragraph (2) of Subsection H; and added Subsection I.

The 2009 amendment, effective July 1, 2011, in Subsection D, replaced each occurrence of "his" with "the member's"; in Subsection G, after "retired pursuant to", deleted "the Educational Retirement Act" and added "Section 22-11-23 NMSA 1978"; added Subsection H; and in Subsection I, after "whichever is higher", added the remainder of the sentence.

The 2003 amendment, effective June 20, 2003, inserted "credit" following "years earned service" near the end of Subsection F; and inserted "Unless otherwise required by the provisions of the Internal Revenue Code of 1986," at the beginning of the second sentence of Subsection H.

The 1993 amendment, effective June 18, 1993, added the second sentence of Subsection H.

The 1991 amendment, effective June 14, 1991, inserted "but not later than June 30, 1991" near the beginning of Subsection F; added Subsection G; redesignated former Subsection G as Subsection H; and made a minor stylistic change in Subsection D.

Exemption from income tax permitted. — The legislature may grant a special income tax exemption to one kind of public employee, teachers, yet deny the same exemption to other public employees. *Vaughn v. State Taxation & Revenue Dep't*, 1982-NMCA-112, 98 N.M. 362, 648 P.2d 820, superseded by statute, *Pierce v. State*, 1996-NMSC-001, 121 N.M. 212, 910 P.2d 288.

Repeal of tax exemption. — Because no private contractual rights were granted by the retirement plan, there was no impairment or breach of contract resulting from the 1990 repeal of the tax exemption provision and, although the plan conferred property rights that vested upon accumulating minimum earned service

credits, those rights did not include the right to receive pension benefits exempt from tax. *Pierce v. State*, 1996-NMSC-001, 121 N.M. 212, 910 P.2d 288.

Because the retirement plan provided no contractual or vested right to receive an irrevocable tax exemption, there was no constitutionally protected private interest in the tax exemption and there was no due process violation when the exemption was repealed. *Pierce v. State*, 1996-NMSC-001, 121 N.M. 212, 910 P.2d 288.

"Trading" tax exemptions for health care. — Repeal of the state income tax exemptions for teacher pensions and public employee pensions does not remedy constitutional defects of the proposed retiree health care act under a theory that those exemptions would be "traded" for retiree health care. Those exemptions are not property rights, irrevocable contractual entitlements, or pension benefits. Hence, elimination of the favorable tax treatment for current retirees is not consideration for a multi-million dollar health care plan that the state proposes to provide them. 1990 Op. Att'y Gen. No. 90-03.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes "salary," "wages," "pay," or the like, within pension law basing benefits thereon, 14 A.L.R.2d 634.

22-11-30.1. Educational retirement; qualified excess benefit.

The educational retirement board, by rule, may establish and maintain a qualified excess benefit arrangement under Section 415(m) of the United States Internal Revenue Code of 1986 for employees hired before July 1, 1999. The amount of annual benefit that would be payable but for the limitation imposed by Section 415 of the United States Internal Revenue Code of 1986 to an employee hired before July 1, 1999 shall be paid from a qualified excess benefit arrangement established and maintained pursuant to this section.

History: Laws 1999, ch. 274, § 1.

ANNOTATIONS

Cross references. — For Section 415 of the Internal Revenue Code, see 26 U.S.C. § 415.

22-11-31. Cost-of-living adjustment; eligibility; based on funded ratio; additional contributions.

A. For the purposes of this section:

(1) "adjustment factor" means a multiplicative factor computed to provide an annuity adjustment pursuant to the provisions of Subsection B of this section;

(2) "annuity" means any benefit payable under the Educational Retirement Act or the Public Employees Retirement Reciprocity Act [Chapter 10, Article 13A NMSA 1978] as a retirement benefit, disability benefit or survivor benefit;

(3) "calendar year" means the full twelve months beginning January 1 and ending December 31;

(4) "consumer price index" means the average of the monthly consumer price indexes for a calendar year for the entire United States for all items as published by the United States department of labor;

(5) "funded ratio" means the ratio of the actuarial value of the assets of the fund to the actuarial accrued liability of the educational retirement system;

(6) "median adjusted annuity" means the median value of all annuities and retirement benefits paid pursuant to Section 22-11-29 or 22-11-30 NMSA 1978, as calculated each fiscal year; provided, however, that the benefits paid to a member pursuant to Section 22-11-38 NMSA 1978 shall not be included in the median adjusted annuity calculation;

(7) "next preceding calendar year" means the full calendar year immediately prior to the preceding calendar year; and

(8) "preceding calendar year" means the full calendar year preceding the July 1 on which a benefit is to be adjusted.

B. On or after July 1, 1984:

(1) the annuity of a member who retires pursuant to Subsection A of Section 22-11-23 NMSA 1978 or Subsection A of Section 22-11-23.1 NMSA 1978 shall be adjusted annually and cumulatively commencing on July 1 of the year in which a member attains the age of sixty-five years or on July 1 following the year a member retires, whichever is later; and

(2) the annuity of a member who retires pursuant to Subsection A of Section 22-11-23.2 NMSA 1978 shall be adjusted annually and cumulatively commencing on July 1 of the year in which the member attains the age of sixty-seven years or on July 1 following the year the member retires, whichever is later.

C. Beginning on July 1, 2013 and on each July 1 thereafter:

(1) if the funded ratio of the fund as reported by the board's actuary in the actuarial valuation report for the next preceding fiscal year is one hundred percent or greater, the annuity adjustments provided for under Subsection B of this section shall be adjusted by applying an adjustment factor based on the percentage increase of the consumer price index between the next preceding calendar year and the preceding calendar year. The adjustment factor shall be applied as follows:

(a) if the percentage increase of the consumer price index is less than two percent in absolute value, the adjustment factor shall be the same amount as the percentage increase of the consumer price index; and

(b) if the percentage increase of the consumer price index is two percent or greater in absolute value, the adjustment factor shall be one-half of the percentage increase; except that the adjustment shall not exceed four percent in absolute value nor be less than two percent in absolute value;

(2) if the funded ratio of the fund as reported by the board's actuary in the actuarial report for the next preceding fiscal year is greater than ninety percent but less than one hundred percent, except for a member who is on disability status in accordance with Section 22-11-35 NMSA 1978 and whose benefit is adjusted as provided in Subsection G of this section or a member who is retired pursuant to Section 22-11-38 NMSA 1978, the adjustment factor provided for in Subsection B of this section shall be applied as follows:

(a) if the percentage increase in the consumer price index is less than two percent in absolute value, for a member who has twenty-five or more years of service credit at retirement and whose annuity is less than or equal to the median adjusted annuity for the fiscal year next preceding the adjustment date, the adjustment factor shall be ninety-five percent of the adjustment factor determined pursuant to Subparagraph (a) of Paragraph (1) of this subsection;

(b) if the percentage increase in the consumer price index is less than two percent in absolute value, for a member who has less than twenty-five years of service credit at retirement and whose annuity is less than or equal to the median adjusted annuity for the fiscal year next preceding the adjustment date, and for a member whose annuity is greater than the median adjusted annuity for the fiscal year next preceding the adjustment date, the adjustment factor shall be ninety percent of the adjustment factor determined pursuant to Subparagraph (a) of Paragraph (1) of this subsection;

(c) if the percentage increase in the consumer price index is greater than or equal to two percent in absolute value for a member who has twenty-five or more years of service credit at retirement and whose annuity is less than or equal to the median adjusted annuity for the fiscal year next preceding the adjustment date, the adjustment factor shall be ninety-five percent of the adjustment factor determined under Subparagraph (b) of Paragraph (1) of this subsection; and

(d) if the percentage increase in the consumer price index is greater than or equal to two percent in absolute value, for a member who has less than twenty-five years of service credit at retirement and whose annuity is less than or equal to the median adjusted annuity for the fiscal year next preceding the adjustment date, and for a member whose annuity is greater than the median adjusted annuity for the fiscal year next preceding the adjustment date, the adjustment factor shall be ninety percent of the adjustment factor determined under Subparagraph (b) of Paragraph (1) of this subsection;

(3) if the funded ratio of the fund as reported by the board's actuary in the actuarial valuation report for the next preceding fiscal year is ninety percent or less, except for a member who is on disability status in accordance with Section 22-11-35 NMSA 1978 and whose benefit is adjusted as provided in Subsection G of this section or a member who is retired pursuant to Section 22-11-38 NMSA 1978, the adjustment factor provided for in Subsection B of this section shall be applied as follows:

(a) if the percentage increase in the consumer price index is less than two percent in absolute value, for a member who has twenty-five or more years of service credit at retirement and whose annuity is less than or equal to the median adjusted annuity for the fiscal year next preceding the adjustment date, the adjustment factor shall be ninety percent of the adjustment factor determined pursuant to Subparagraph (a) of Paragraph (1) of this subsection;

(b) if the percentage increase in the consumer price index is less than two percent in absolute value, for a member who has less than twenty-five years of service credit at retirement and whose annuity is less than or equal to the median adjusted annuity for the fiscal year next preceding the adjustment date, and for a member whose annuity is greater than the median adjusted annuity for the fiscal year next preceding the adjustment date, the adjustment factor shall be eighty percent of the adjustment factor determined pursuant to Subparagraph (a) of Paragraph (1) of this subsection;

(c) if the percentage increase in the consumer price index is greater than or equal to two percent in absolute value for a member who has twenty-five or more years of service credit at retirement and whose annuity is less than or equal to the median adjusted annuity for the fiscal year next preceding the adjustment date, the adjustment factor shall be ninety percent of the adjustment factor determined under Subparagraph (b) of Paragraph (1) of this subsection; and

(d) if the percentage increase in the consumer price index is greater than or equal to two percent in absolute value, for a member who has less than twenty-five years of service credit at retirement and whose annuity is less than or equal to the median adjusted annuity for the fiscal year next preceding the adjustment date, and for a member whose annuity is greater than the median adjusted annuity for the fiscal year next preceding the adjustment date, the adjustment factor shall be eighty percent of the adjustment factor determined under Subparagraph (b) of Paragraph (1) of this subsection; and

(4) an annuity shall not be decreased if there is a decrease in the consumer price index between the next preceding calendar year and the preceding calendar year.

D. A retired member whose benefit is subject to adjustment under the provisions of the Educational Retirement Act in effect prior to July 1, 1984 shall have the member's annuity readjusted annually and cumulatively under the provisions of that act in effect prior to July 1, 1984 until July 1 of the year in which the member attains the age of sixty-five years, when the member shall have the annuity readjusted annually and cumulatively under the provisions of this section.

E. A member who:

(1) retires pursuant to Subsection A of Section 22-11-23 NMSA 1978 or Subsection A of Section 22-11-23.1 NMSA 1978 after attaining the age of sixty-five years shall have the member's annuity adjusted as provided in Subsections B and C of this section commencing on July 1 of the year following the member's retirement; or

(2) retires pursuant to Subsection A of Section 22-11-23.2 NMSA 1978 after attaining the age of sixty-seven years shall have the member's annuity adjusted as provided in Subsections B and C of this section commencing on July 1 of the year following the member's retirement.

F. A retired member who returns to work and suspends retirement shall be subject to the provisions of this section as they exist at the time of the member's latest retirement.

G. Benefits of a member who is on a disability status in accordance with Section 22-11-35 NMSA 1978 or a member who is certified by the board as disabled at regular retirement shall be adjusted in accordance with Subsections B and C of this section, except that the benefits shall be adjusted annually and cumulatively commencing on July 1 of the third full year following the year in which the member was approved by the board for disability or retirement.

History: 1953 Comp., § 77-9-30, enacted by Laws 1967, ch. 16, § 154; 1971, ch. 12, § 5; 1974, ch. 5, § 5; reenacted by Laws 1979, ch. 333, § 2; 1981, ch. 293, § 3; 1984, ch. 19, § 6; 1987, ch. 86, § 3; 1991, ch. 140, § 3; 1999, ch. 9, § 1; 2010, ch. 81, § 1; 2013, ch. 61, § 7; 2017, ch. 21, § 12.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, removed outdated provisions and made technical changes to the section; in Subsection D, after "the age of sixty-five", added "years"; in Subsection F, after "returns to work", added "and suspends retirement", and after "time of the member's", deleted "final" and added "latest"; and deleted Subsection H, which related to 1999 adjustments to benefits.

The 2013 amendment, effective July 1, 2013, delays cost of living adjustments; in the title of the section, added "eligibility; based on funded ratio"; added Paragraphs (5) and (6) of Subsection A; in Subsection B, in the introductory sentence, after "1984", deleted "each annuity shall"; in Paragraph (1) of Subsection B, at the beginning of the sentence, added "the annuity of a member who retires pursuant to Subsection A of Section 22-11-23 NMSA 1978 or Subsection A of Section 22-11-23.1 NMSA 1978 shall"; added Paragraph (2) of Subsection B; in Subsection C, added "Beginning on July 1, 2013 and on each July 1 thereafter"; in Paragraph (1) of Subsection C, at the beginning of the sentence, added "if the funded ratio of the fund as reported by the board's actuary in the actuarial valuation report for the next preceding fiscal year is one hundred percent or greater, the", after "greater, the annuity", added "adjustments provided for under Subsection B of this section", after "adjustment factor", deleted former language which provided for an

adjustment factor of between two and four percent based on the increase in the consumer price index, and added "based on the percentage increase of the consumer price index between the next preceding calendar year and the preceding calendar year. The adjustment factor shall be applied as follows"; added Subparagraphs (a) and (b) of Paragraph (1) of Subsection C; added Paragraphs (2), (3) and, (4) of Subsection C; in Subsection E, in the introductory sentence, after "who", deleted "retires", in Paragraph (1) of Subsection E, at the beginning of the sentence, added "retires pursuant to Subsection A of Section 22-11-23 NMSA 1978 or Subsection A of Section 22-11-23.1 NMSA 1978" and after "member's annuity adjusted", deleted "annually and cumulatively" and added "as provided in Subsections B and C of this section"; added Paragraph (2) of Subsection E; and in Subsection G, after "a member who", added "is certified by", and after "certified by the board", deleted "certifies was".

The 2010 amendment, effective July 1, 2010, in Subsection B, in the second sentence, after "adjustment factor that results in", deleted "either", and after "one-half of the percentage increase", deleted "or decrease"; in the third sentence, after "that the percentage increase", deleted "or decrease" and after "same as the percentage increase", deleted "or decrease"; deleted the former fourth sentence, which provided that no negative adjustment in the retirement benefit shall reduce the member's benefit below that which the member received on the date of retirement; and added the last sentence.

The 1999 amendment, effective June 18, 1999, inserted "Public Employees" in Paragraph A(2), substituted "who" for "whom" in Subsection E, and in Subsection F substituted "1999" for "1991" and inserted "the last".

The 1991 amendment, effective June 14, 1991, designated formerly undesignated provisions as Subsections C and D; deleted former Subsection C, relating to adjustment of benefits of persons receiving an annuity as of June 30, 1987; added Subsections E and F; and made a minor stylistic change in Subsection B.

Property right in cost-of-living adjustments. — Any future cost-of-living adjustment to a retirement benefit is merely a year-to-year expectation that, until paid, does not, under the New Mexico constitution, create a vested property right in an annual cost-of-living adjustment calculated according to the statutory formula in effect on the date of the retiree's eligibility for retirement. Once paid, the cost-of-living adjustment becomes a part of the retirement benefit and a property right subject to constitutional protections. *Bartlett v. Cameron*, 2014-NMSC-002.

Where the legislature amended Section 22-11-31 NMSA 1978 in 2013 to reduce future amounts educational retirees might receive as a cost-of-living adjustment; and retirees sought to compel the education retirement board to pay them an annual cost-of-living adjustment, for the entirety of their retirement, calculated according to the cost-of-living adjustment formula in effect on the date of their retirement on the grounds that under [Article XX, Section 22 of the New Mexico constitution](#), the retirees had a vested property interest in future cost-of-living adjustments based on the formula in effect on the date of their retirement, a cost-of-living adjustment to a retirement benefit is provided independently from the obligation and payment of a retirement benefit and retirees do not have a vested property interest in an annual cost-of-living adjustment calculated in accordance with the formula in effect at the time they were eligible for retirement. *Bartlett v. Cameron*, 2014-NMSC-002.

22-11-32. Adjustment of benefits.

A. If retirement or disability benefits cause a decrease in the amount of monetary payments due to a member or beneficiary from any public agency, the retirement or disability benefits shall be reduced to result in the maximum total benefits to the member or beneficiary.

B. If there is a change in the effect of retirement or disability benefits on any monetary payments due to a member or beneficiary from any public agency, the retirement or disability benefits shall be adjusted to result in the maximum total benefits to the member or beneficiary. In no event shall the retirement or disability benefits be increased in an amount greater than that authorized by the Educational Retirement Act.

C. The provisions of this section are mandatory and are not subject to option or election by any member or beneficiary. Each member or beneficiary shall inform the director of all facts necessary for the director to carry out the provisions of this section.

D. If the director, in good faith, seeks to ascertain all facts necessary to comply with provisions of this section, but payment of retirement or disability benefits is made without making an adjustment as provided by this section, neither the board, the director or any public officer or employee shall be liable because of the payment.

E. As used in this section:

(1) "retirement or disability benefits" means retirement or disability benefits payable to a member or beneficiary pursuant to the Educational Retirement Act ;

(2) "public agency" includes the federal government, any department or agency of the federal government, any state and any department, agency and political subdivision of a state; and

(3) "total benefits" means retirement or disability benefits plus any other monetary payments due to the member or beneficiary from any public agency.

History: 1953 Comp., § 77-9-31, enacted by Laws 1967, ch. 16, § 155.

ANNOTATIONS

Cross references. — For effect of article upon benefits being paid under laws repealed by article or under laws establishing public employees retirement association, see [22-11-44](#) NMSA 1978.

22-11-33. Earned service credit.

A. Upon a member filing an application for retirement or disability benefits, earned service credit for the time of contributory employment shall be certified by the director and subject to the review of the board.

B. A member shall be certified to have earned service credit for that period of time when the member was engaged in prior employment. Earned service credit shall not be certified for that period of employment for which the contributions have been withdrawn from the fund by the member.

C. Earned service credit shall be certified for periods of employment interrupted for some cause other than retirement or disability. This shall be done if a member withdrawing contributions from the fund for this period returns to the fund, for each year of earned service credit desired, a sum equal to the member's contribution to the fund during this period and an additional sum as interest compounded annually from the date the contributions were withdrawn to the date of payment of the amount of returned contributions at the rate of interest set by the board.

History: 1953 Comp., § 77-9-33, enacted by Laws 1967, ch. 16, § 156; 2003, ch. 39, § 9; 2017, ch. 21, § 13.

ANNOTATIONS

Cross references. — For reciprocal service credits under Public Employees Retirement Reciprocity Act, see 10-13A-4 NMSA 1978.

The 2017 amendment, effective June 16, 2017, removed the provision that allowed the educational retirement board to accept installment payments for allowed service credit; in Subsection B, after "period of time when", deleted "he" and added "the member"; and in Subsection C, deleted the last sentence of the section which provided "These payments may be made in installments, and, if the payments made to the fund are insufficient for the restoration of any full year of earned service credit, the member shall be certified to have acquired earned service credit for that period of time which is proportionate to the payments made."

The 2003 amendment, effective June 20, 2003, substituted "set by the board" for "earned by the fund during the five-year period immediately preceding the application for the earned service-credit" following "rate of interest" near the middle of Subsection C.

22-11-34. Allowed service credit.

A. A member shall be certified to have acquired allowed service credit pursuant to the Internal Revenue Code of 1986 for those periods of time when the member was:

(1) employed prior to July 1, 1967 in a federal educational program within New Mexico, including United States Indian schools and civilian conservation corps camps. This service credit shall be allowed without contribution;

(2) engaged in military service that interrupted the member's employment in New Mexico if the member returned to employment within eighteen months following honorable discharge. This service credit shall be allowed without contribution;

(3) engaged in United States military service or the commissioned corps of the public health service from which the member was honorably discharged; provided that:

(a) the member shall have five years or more of contributory employment to be eligible to purchase allowed service credit pursuant to this paragraph;

(b) the member shall contribute to the fund, for each year of service credit the member elects to purchase, a sum equal to the member's average annual actual salary for the five years preceding the date of the contribution multiplied by the sum of the member contribution rate and the employer contribution rate in effect at the time of the member's written election to purchase, subject to the federal Uniformed Services Employment and Reemployment Rights Act of 1994;

(c) full payment shall be made in a single lump sum within sixty days of the date that the member is informed of the amount of the payment; and

(d) the portion of the purchase cost derived from the employer's contribution rate shall be credited to the fund and, in the event that a member requests a refund of contributions pursuant to Section 22-11-15

NMSA 1978, the member shall not be entitled to a refund of that portion of the purchase cost derived from the employer contribution rate; or

(4) employed:

(a) in a public school or public institution of higher learning in another state, territory or possession of the United States;

(b) in a United States military dependents' school operated by a branch of the armed forces of the United States;

(c) as provided in Paragraph (1) of this subsection after July 1, 1967; or

(d) in a private school or institution of higher learning in New Mexico whose education program is accredited or approved by the department at the time of employment.

B. Effective July 1, 2001, the member or employer under Paragraph (4) of Subsection A of this section shall contribute to the fund for each year of allowed service credit desired an amount equal to the actuarial value of the service purchased as defined by the board. No allowed service credit shall be purchased pursuant to Paragraph (4) of Subsection A of this section unless the member is currently employed by a local administrative unit.

C. No member shall be certified to have acquired allowed service credit:

(1) under any single paragraph or the combination of only Paragraphs (1) and (4) or only Paragraphs (2) and (3) of Subsection A of this section in excess of five years; or

(2) in excess of ten years for any other combination of Paragraphs (1) through (4) of Subsection A of this section.

D. A member receiving service credit under Paragraph (3) or (4) of Subsection A of this section who enrolls in the retiree health care authority shall make contributions pursuant to Subsection C of Section 10-7C-15 NMSA 1978.

History: 1953 Comp., § 77-9-34, enacted by Laws 1967, ch. 16, § 157; 1975, ch. 321, § 1; 1977, ch. 331, § 2; 1981, ch. 291, § 1; 1986, ch. 48, § 1; 1989, ch. 30, § 2; 1993, ch. 69, § 10; 1997, ch. 103, § 1; 1998, ch. 38, § 3; 2003, ch. 39, § 10; 2009, ch. 288, § 18; 2017, ch. 21, § 14.

ANNOTATIONS

Cross references. — For reciprocal service credits under Public Employees Retirement Reciprocity Act, see 10-13A-4 NMSA 1978.

For the federal Uniformed Services Employment and Reemployment Rights Act, see 38 U.S.C.S. § 4301 et seq.

For the Internal Revenue Code of 1986, see 26 U.S.C.

The 2017 amendment, effective June 16, 2017, removed the provision that allowed the educational retirement board to accept installment payments for allowed service credit; in Subsection B, after the first sentence, deleted the next two sentences which related to the purchase of allowed service credit by

installments; and deleted Subsection E, which related to the applicability dates of the provisions of this section.

The 2009 amendment, effective July 1, 2009, in Paragraph (3) of Subsection A, deleted the former language of the paragraph which provided for credit if the member contributed a sum equal to ten and one half percent of average annual salary for the time the member acquired earned service credit; added Subparagraphs (a) through (d) of Paragraph (3) of Subsection A; and added Subsection D.

The 2003 amendment, effective June 20, 2003, substituted "July 1, 1967" for "the effective date of the Educational Retirement Act" following "employed prior to" near the beginning of Paragraph A(1); substituted "July 1, 1967" for "the effective date of the Educational Retirement Act" near the end of Subparagraph A(4) (c); in Subsection B deleted "The member or employer under Paragraph (4) of Subsection A of this section shall contribute to the fund for each year of allowed service credit desired an amount equal to twelve percent of the member's annual salary at the time payment is made if the member is employed or twelve percent times the member's annual salary during the member's last year of employment if the member is not employed at the time of payment. Contributions paid for the member who is not employed shall bear interest at the average rate earned by the fund during the five-fiscal-year period immediately preceding the date of payment. Such interest shall run from the date the member last terminated employment to the date of payment." at the beginning, and substituted "by that act. No allowed service credit shall be purchased pursuant to Paragraph (4) of Subsection A of this section unless the member is currently employed by a local administrative unit." for "thereby" at the end.

The 1998 amendment, effective May 20, 1998, inserted "pursuant to the Internal Revenue Code of 1986" near the middle of Subsection A; substituted "a" for "any" throughout the section; in Paragraph A(3), substituted "pursuant to" for "under" and inserted "and subject to the federal Uniformed Services Employment and Reemployment Rights Act of 1994" near the end of the first sentence, and substituted "on" for "upon" in the second sentence; and in Subsection B, deleted "of" following "over a period" and substituted "that" for "which" in the fifth sentence.

The 1997 amendment, effective June 20, 1997, in the last sentence of Paragraph A(3), deleted "prior to July 1 1992 or" preceding "three years" and deleted "whichever is later" following "service", and added the fourth sentence in Subsection B.

The 1993 amendment, effective June 18, 1993, rewrote Subparagraph (4)(d) of Subsection A which read "in any private school in New Mexico accredited by the state board of education"; inserted "or employer" in the first sentence and substituted "paid for the member" for "paid by the member" in the second sentence of Subsection B; substituted "Paragraphs (1) through (4) of Subsection A of this section" for "those Paragraphs" in Paragraph (2) of Subsection C; and made a minor stylistic change in Subsection A.

The 1989 amendment, effective July 1, 1989, in Subsection A(1) substituted "employed" for "serving as a teacher or administrator" in the first sentence; in Subsection A(3) inserted "or the commissioned corps of the public health service" in the first sentence, substituted "1992" for "1987" in the last sentence, and deleted "military" preceding "service" throughout the subsection; in Subsection A(4) deleted "a teacher or administrator" at the beginning of Subparagraphs (a) through (c) and deleted "a certified teacher or certified administrator" at the beginning of Subparagraph (d); and in Subsection B substituted all of the present language of the first sentence following "equal to" for "the prevailing combined percentage of contributions of members and local administrative units in effect at the time of application for allowed service-credit times the member's annual salary if the member is employed, or time the member's annual salary during the member's last year of employment if the member is not employed at the time of the application" and inserted "at the discretion of the board" in the fourth sentence.

Public health service officers. — Active duty as a uniformed commissioned officer in the United States public health service qualifies as "military service" pursuant to Subsection (A)(3) in the following situations:

(1) When the service was performed while the commissioned corps was declared to be a military service pursuant to 42 U.S.C. § 217, or (2) when the officer was detailed to a branch of the armed services, as 10 U.S.C. § 101(4) defines that term. 1987 Op. Att'y Gen. No. [87-73](#).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Services included in computing period of service for purpose of teachers' seniority, 2 A.L.R.2d 1033.

22-11-34.1. Sick leave service credit.

A. Beginning on July 1, 2020, a member who has acquired the minimum number of years of contributory employment to be eligible for retirement benefits under the Educational Retirement Act may pay to have unused sick leave, earned from the member's contributory employment and for which the member has otherwise not received payment, converted to earned service credit, up to a maximum of:

- (1) six days of unused sick leave per year of contributory employment; and
- (2) four calendar quarters of earned service credit.

B. The following standards apply to the conversion of unused sick leave to earned service credit under this section:

- (1) eight hours of sick leave equals one day of sick leave;
- (2) thirty-eight to eighty-two days of sick leave equals one quarter of earned service credit;
- (3) eighty-three to one hundred twenty-seven days of sick leave equals two quarters of earned service credit;
- (4) one hundred twenty-eight to one hundred seventy-two days of sick leave equals three quarters of earned service credit; and
- (5) one hundred seventy-three or more days of sick leave equals four quarters of service credit.

C. A member who elects to convert unused sick leave to earned service credit under this section shall, in accordance with rules that the board shall establish, submit to the board verification from local administrative units of the member's unused sick leave.

D. The cost to a member of converting unused sick leave to earned service credit is the actuarial present value, as determined by the board, of the benefit attributable to the conversion. The board shall establish rules pertaining to payments for converting unused sick leave to earned service credit.

History: [Laws 2019, ch. 31, § 1](#).

ANNOTATIONS

Effective dates. — [Laws 2019, ch. 31, § 2](#) made Laws 2019, ch. 31 effective July 1, 2020.

22-11-35. Disability benefit; eligibility; medical examination.

A. A member shall be eligible for disability benefits if the member has acquired ten years or more of earned service credit and if the board certifies the member to be totally disabled to continue the member's employment and unable to obtain and retain other gainful employment commensurate with the member's background, education and experience.

B. Prior to any certification of disability by the board, the board shall require each applicant for disability benefits to submit medical records as required by the board in support of the applicant's disability claim.

History: 1953 Comp., § 77-9-35, enacted by Laws 1967, ch. 16, § 158; 2017, ch. 21, § 15.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, removed the provision that required applicants for disability benefits to submit to a medical examination by a doctor approved by the educational retirement board, and required applicants for disability benefits to submit his or her medical records in support of the applicant's disability claim; in Subsection A, substituted "the member" for "he" or "his" throughout the subsection, and after "earned", changed "service-credit" to "service credit"; and in Subsection B, after "submit", deleted "himself to a medical examination by the medical authority" and added "medical records as required by the board in support of the applicant's disability claim".

Scope of board's authority. — The legislature, through this section has granted the board the authority to award disability benefits if certain requirements are met. If the board certifies the eligible member to be totally disabled, the board must award benefits. Once the determination of total disability is made, it is the duty of the board to certify the member as disabled. There is nothing in this grant of authority which authorizes the board to refuse to accept an application for disability if the applicant continues to hold a property interest in a bus contract. *Gonzales v. N.M. Educ. Retirement Bd.*, 1990-NMSC-024, 109 N.M. 592, 788 P.2d 348, cert. denied, 498 U.S. 818, 111 S. Ct. 61, 112 L. Ed. 2d 36 (1990).

22-11-36. Disability benefit; continued eligibility; re-examinations.

A. Unless designated by the board as being permanently disabled, to continue to receive disability benefits, a member shall, on the anniversary date in each year of the member's being placed on a disability status, present current medical records to the medical authority in support of the applicant's continuing disability claim. The medical authority shall recommend to the board that the member either be placed on continuing annual disability or permanent disability or removed from disability status due to a substantial betterment of the member's condition. In the event a substantial betterment of the disability is reported, the board shall determine whether the member is totally disabled for employment and unable to obtain and retain other gainful employment commensurate with the member's background, education and experience. If the board determines that the member is no longer disabled, the payment of the disability benefits shall cease.

B. Payment of disability benefits to a member shall be suspended if the member fails to submit medical records to the medical authority within thirty days after the date upon which the member should have submitted the medical records and where the failure to submit the medical records was due to the unexcused failure or the refusal of the member to do so. Payment of disability benefits shall be resumed only after the member has submitted current medical records to the board and the board has determined that the member is totally disabled. A member shall have no right or claim for benefits withheld during a period of suspension.

C. The board may, in its discretion, require that the member obtain an independent medical examination; provided that the examination is performed at the board's expense.

D. Upon a determination by the board, a member's status may be changed from permanently disabled to temporarily disabled or no longer disabled.

History: 1953 Comp., § 77-9-36, enacted by Laws 1967, ch. 16, § 159; 2003, ch. 39, § 11; 2017, ch. 21, § 16.

ANNOTATIONS

Cross references. — For reports of improved health by members receiving disability benefits, see 22-11-39 NMSA 1978.

For suspension of payments for failure to make reports, see 22-11-40 NMSA 1978.

The 2017 amendment, effective June 16, 2017, required members who are receiving disability benefits to annually submit current medical records in support of the member's continuing disability claim, required the medical authority to make recommendations regarding the member's continuing disability claim, and provided for the suspension of disability benefits if the member fails to submit medical records; in Subsection A, after "designated by the", deleted "medical authority" and added "board", after "in each year of", deleted "his" and added "the member's", after "present", deleted "himself" and added "current medical records", after "the medical authority", deleted "for a medical re-examination" and added "in support of the applicant's continuing disability claim", and after "The medical authority shall", deleted "certify to the director after each medical examination whether there is a substantial betterment of the member's disability" and added "recommend to the board that the member either be placed on continuing annual disability or permanent disability or removed from disability status due to a substantial betterment of the member's condition", and after "commensurate with", deleted "his" and added "the member's"; in Subsection B, after "shall be suspended if", deleted "a certificate of medical re-examination by the medical authority is not filed with the director" and added "the member fails to submit medical records to the medical authority", after "member should have", deleted "been re-examined" and added "submitted the medical records and", after "failure to", deleted "file the certificate" and added "submit the medical records", after "refusal of the member to", deleted "report for the medical re-examination" and added "do so", and after "only after the member has", deleted "complied with the requirements of the Educational Retirement Act" and added "submitted current medical records to the board and the board has determined that the member is totally disabled"; in Subsection C, after "require", deleted "further or more frequent medical examinations of members having a disability status" and added "that the member obtain an independent medical examination; provided that the examination is performed at the board's expense"; and deleted former Subsection D, which related to a member's inability to report for a medical examination, and redesignated former Subsection E as new Subsection D.

The 2003 amendment, effective June 20, 2003, in Subsection A added "Unless designated by the medical authority as being permanently disabled," at the beginning and deleted "or is not" following "whether there is" near the middle; inserted "who is" following "disability benefits" near the beginning of Subsection D; and added Subsection E.

22-11-37. Disability benefit.

A. The annual disability benefit shall be equal to two percent of the member's average annual salary multiplied by the number of years of the member's total service-credit if the result is greater than one-third of the member's average annual salary. If the result of that formula is less than one-third of the member's average annual salary, the annual disability benefit shall be equal to the lesser of the following amounts:

(1) two percent of the member's average annual salary multiplied by the sum of the member's total service-credit plus the number of years, calculated to the nearest completed quarter, from the effective date of the member's disability to the member's sixtieth birthday; or

(2) one-third of the member's average annual salary.

B. A member's average annual salary for the purpose of computing disability benefits shall be the average salary for the last five years of employment or for any other consecutive five-year period for which contribution was made by the member, whichever is higher.

C. The annual disability benefit shall be paid in equal monthly installments.

History: 1953 Comp., § 77-9-37, enacted by Laws 1967, ch. 16, § 160; 1973, ch. 350, § 1; 1991, ch. 140, § 4.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, in Subsection A, substituted "two percent" for "one and one-half percent" in the first sentence and in Paragraph (1); inserted "annual" preceding "salary" in Subsection B; and made minor stylistic changes in Subsections A and B.

22-11-38. Disability retirement.

A member receiving disability benefits upon attaining the age of sixty years shall be considered as retiring pursuant to the Educational Retirement Act at the rate of benefits received for the disability.

History: 1953 Comp., § 77-9-38, enacted by Laws 1967, ch. 16, § 161.

22-11-39. Report of improved health; penalty.

A. A member receiving disability benefits shall report to the director in writing any substantial improvement in the member's disability within thirty days after the member has or reasonably should have knowledge of the improvement.

B. A member failing to report to the director as required by this section is guilty of a petty misdemeanor.

History: 1953 Comp., § 77-9-39, enacted by Laws 1967, ch. 16, § 162; 2017, ch. 21, § 17.

ANNOTATIONS

Cross references. — For requirement of reports and examinations of members receiving disability benefits

generally, see [22-11-36](#) NMSA 1978.

The 2017 amendment, effective June 16, 2017, in Subsection A, after "improvement in", deleted "his" and added "the member's", after "thirty days after", deleted "he" and added "the member"; and in Subsection B, after "petty", changed "misdeameanor" to "misdemeanor".

22-11-40. Restoration to fund.

If a member is obligated to restore any sum of money to the fund and fails or refuses to do so for a period of three months after written demand is made by the director, the member shall forfeit membership and receive no further benefits pursuant to the Educational Retirement Act. The director shall determine whether the former member's contributions to the fund exceed the total amount of disability or retirement benefits the member has received and shall withdraw from any such balance of contributions the amount of money the member is obligated to restore to the fund. Any balance of the contribution remaining in the fund shall be paid to the former member or the former member's beneficiary. In the event the money the former member is obligated to restore to the fund is not restored to the fund, the former member shall be subject to civil action by the board for its recovery.

History: 1953 Comp., § 77-9-40, enacted by Laws 1967, ch. 16, § 163; [2017, ch. 21, § 18](#).

ANNOTATIONS

Cross references. — For suspension of benefits upon failure to file certificate of reexamination, see [22-11-36](#) NMSA 1978.

The 2017 amendment, effective June 16, 2017, removed the provision related to the suspension of disability benefits for the failure of a member to make a required report; in the catchline, deleted "Reports"; deleted Subsection A, which related to the suspension of disability benefits for the failure of a member to make a required report, and deleted the subsection designation "B."; in the undesignated paragraph, after "director", deleted "he" and added "the member", after "forfeit", deleted "his", after "disability or retirement benefits", deleted "he" and added "the member", and after "former member or", deleted "his" and added "the former member's".

22-11-41. Repealed.

ANNOTATIONS

Repeals. — [Laws 1993, ch. 69, § 11](#) repealed [22-11-41](#) NMSA 1978, as enacted by Laws 1967, ch. 16, § 164, relating to prohibitions on insurance and continued eligibility after retirement, effective June 18, 1993. For provisions of former section, see the 1992 NMSA 1978 on *NMOneSource.com*.

22-11-42. Nonassignability; division of funds as community property; child support obligations.

A. Except as specifically provided in the Educational Retirement Act and the provisions of Subsections B and C of this section, contributions or benefits mentioned in the Educational Retirement Act shall not be assignable either in law or in equity or be subject to execution, levy, attachment, garnishment, guarantee fund or similar assessment or any other legal process.

B. A court of competent jurisdiction, solely for the purposes of effecting a division of community property, may provide by appropriate order for a determination and division of a community interest in the pensions or other benefits provided for in the Educational Retirement Act. In so doing, the court shall fix the manner in which the warrants shall be issued, may order direct payments by the board to a person with a community interest in the pensions or benefits and may restrain the refund of member or participant contributions. The court shall not alter the manner in which the amount of pensions or other benefits is calculated by the board or a carrier or contractor for the alternative retirement plan, nor shall the court cause any increase in the actuarial present value of the pensions or other benefits to be paid by the board or a carrier or contractor for the alternative retirement plan. A payment, ordered by a court pursuant to this subsection, shall only be made when the member or participant terminates employment and requests a refund or when the member or participant retires or is otherwise entitled to receive benefits pursuant to the Educational Retirement Act. In no case shall a court order pursuant to this subsection result in more money being paid from the fund or from an alternative retirement plan, whether in a lump sum or in monthly benefits, than would otherwise be payable.

C. A court of competent jurisdiction, solely for the purposes of enforcing current or delinquent child support obligations, may provide by appropriate order for withholding amounts due in satisfaction of current or delinquent child support obligations from the pensions or other benefits provided for in the Educational Retirement Act and for payment of such amounts to third parties. The court shall not alter the manner in which the amount of pensions or other benefits is calculated by the board or a carrier or contractor for the alternative retirement plan. The court shall not cause any increase in the actuarial present value of the pensions or other benefits to be paid by the board or a carrier or contractor for the alternative retirement plan. Payments made pursuant to such orders shall only be made when the member or participant terminates employment and requests a refund of contributions or when the member or participant retires; in no case shall more money be paid out, either in a lump sum or in monthly benefits, of the fund or alternative retirement plan in enforcement of current or delinquent child support obligations than would otherwise be payable. In no case shall a court order pursuant to this subsection result in more money being paid from the fund or from an alternative retirement plan, whether in a lump sum or in monthly benefits, than would otherwise be payable.

History: 1953 Comp., § 77-9-42, enacted by Laws 1967, ch. 16, § 165; 1987, ch. 242, § 1; 1989, ch. 125, § 3; 1990, ch. 49, § 17; 1991, ch. 118, § 4; 2003, ch. 39, § 12.

ANNOTATIONS

Cross references. — For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, see Rules 1-065.1, 2-801, and 3-801 NMRA, respectively.

For form for claim of exemptions on executions, see Rule 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, see Rule 4-804 NMRA.

For form for application for writ of garnishment and affidavit, see Rule 4-805 NMRA.

For form for notice of right to claim exemptions from execution, see Rule 4-808A NMRA.

For form for claim of exemption from garnishment, see Rule 4-809 NMRA.

The 2003 amendment, effective June 20, 2003, added "A payment, ordered by a court pursuant to this subsection, shall only be made when the member or participant terminates employment and requests a refund or when the member or participant retires or is otherwise entitled to receive benefits pursuant to the Educational Retirement Act. In no case shall a court order pursuant to this subsection result in more money being paid from the fund or from an alternative retirement plan, whether in a lump sum or in monthly benefits, than would otherwise be payable." at the end of Subsection B; and added "In no case shall a court order pursuant to this subsection result in more money being paid from the fund or from an alternative retirement plan, whether in a lump sum or in monthly benefits, than would otherwise be payable." at the end of Subsection C.

The 1991 amendment, effective July 1, 1991, in Subsection A, inserted "guarantee fund or similar assessment"; in Subsection B, in the second sentence, inserted "or participant" and in two locations in the third sentence inserted "or a carrier or contractor for the alternative retirement plan"; in Subsection C, in the second and third sentences, inserted "or a carrier or contractor for the alternative retirement plan" and, in the fourth sentence, inserted "or participant" twice and "or alternative retirement plan".

The 1990 amendment, effective May 16, 1990, deleted "Tax exemption" in the catchline, deleted "and shall also be exempt from any state income tax" at the end of Subsection A and substituted "board" for "association" at the end of the second sentence of Subsection C.

The 1989 amendment, effective June 16, 1989, added "child support obligations" to the catchline; substituted "Subsections B and C" for "Subsection B" in Subsection A; substituted "Educational" for "Education" in the first sentence of Subsection B; and added Subsection C.

22-11-43. Insurance or banking laws inapplicable.

In the absence of specific provisions to the contrary, no law of this state regulating insurance policies, insurance companies or banking institutions shall apply to the administration of the Educational Retirement Act.

History: 1953 Comp., § 77-9-43, enacted by Laws 1967, ch. 16, § 166.

22-11-44. Saving clause; retirement benefits; disability benefits.

A. Any person retired pursuant to the provisions of any laws repealed by the Educational Retirement Act shall be considered to have retired pursuant to the Educational Retirement Act and shall continue to receive retirement benefits in the same amount as received prior to the enactment of the Educational Retirement Act.

B. Any person receiving disability benefits pursuant to any laws repealed by the Educational Retirement Act shall continue to receive disability benefits in the same amount as received prior to the enactment of the Educational Retirement Act and shall be considered to have been granted disability benefits pursuant to and be subject to the provisions of the Educational Retirement Act.

C. Nothing in the Educational Retirement Act shall be construed to adversely affect any benefits being paid pursuant to any laws repealed by the Educational Retirement Act or any laws establishing the public employees retirement association.

D. No person who was covered under the provisions of any statute repealed by the Educational Retirement Act shall be retired at a monthly benefit that is less than the person would have received had the person's employment continued to be performed under such repealed provisions.

History: 1953 Comp., § 77-9-44, enacted by Laws 1967, ch. 16, § 167; 2017, ch. 21, § 19.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, made technical changes; in Subsection C, after "public employees retirement association", deleted "of New Mexico"; and in Subsection D, after "No person who was", deleted "heretofore", after "monthly benefit", deleted "which" and added "that", after "less than", deleted "he" and added "the person", and after "received had", deleted "his" and added "the person's".

22-11-44.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 69, § 11 repealed 22-11-44.1 NMSA 1978, as enacted by Laws 1982, ch. 37, § 2, relating to the transfer of assets of the New Mexico activities association, effective June 18, 1993. For provisions of former section, see the 1992 NMSA 1978 on *NMOneSource.com*.

22-11-45. Repealed.

History: 1953 Comp., § 77-9-45, enacted by Laws 1967, ch. 16, § 168; repealed by Laws 2017, ch. 21, § 20.

ANNOTATIONS

Repeals. — Laws 2017, ch. 21, § 20 repealed 22-11-45 NMSA 1978, as enacted by Laws 1967, ch. 16, § 168, relating to elections of the public employees retirement association, payment of contributions, effective June 16, 2017. For provisions of former section, see the 2016 NMSA 1978 on *NMOneSource.com*.

22-11-46. Reserved.

22-11-47. Alternative retirement plan; election of coverage.

A. Beginning October 1, 1991, any employee of the university of New Mexico, New Mexico state university, New Mexico institute of mining and technology, New Mexico highlands university, eastern New Mexico university or western New Mexico university who is eligible to become a participant may make within ninety days of that date an election to participate in the alternative retirement plan. Beginning October 1, 1999, an employee of central New Mexico community college, Clovis community college, Luna community

college, Mesalands community college, New Mexico junior college, northern New Mexico college, San Juan college or Santa Fe community college who is eligible to become a participant may make an election to participate in the alternative retirement plan within ninety days of the initial date. Thereafter, any employee who is eligible to become a participant may make within the first ninety days of employment with a qualifying state educational institution an election to participate in the alternative retirement plan. Any employee who makes the election shall become a participant the first day of the first pay period following the election. Any employee who fails to make the election within ninety days of October 1, 1991 or October 1, 1999, whichever is applicable, or within the first ninety days of employment with a qualifying state educational institution shall become or remain a regular member if that employee is eligible to be a regular member and shall not later be eligible to elect to be a participant, regardless of whether the employee subsequently is employed in another position that is eligible for participation in the alternative retirement plan. Except as provided in Subsection D of this section, an election to become a participant is irrevocable.

B. Until the time an employee who is eligible to become a participant elects to participate in the alternative retirement plan, that employee shall be a regular member.

C. When an employee elects to become a participant, any employer and employee contributions made as a regular member shall be withdrawn from the fund and applied instead toward the alternative retirement plan as if the participant had been participating in the alternative retirement plan from the commencement of employment with the qualifying state educational institution.

D. On July 1, 2009, any participant who has made contributions to the alternative retirement plan for a cumulative total of seven years or more shall have a one-time option of electing to become a regular member. Thereafter, once a participant has made contributions to the alternative retirement plan for a cumulative total of seven years, a participant shall have a one-time option of electing to become a regular member. Participants electing to become regular members shall exercise that option within one hundred twenty days of the date of becoming eligible to elect to become a regular member. Any amounts on deposit in an employee's alternative retirement plan account when a participant becomes a regular member shall remain on deposit with the contractor or carrier subject to that plan's provisions, unless otherwise provided by law. An employee who elects to become a regular member under this subsection shall use the date on which the employee was first employed with a qualifying state educational institution for purposes of determining any retirement eligibility requirement, provided that the employee:

(1) may not purchase service credit for periods of employment during which the employee participated in the alternative retirement plan; and

(2) shall acquire not less than five years of contributory employment as a regular member as provided for in Section 22-11-24 NMSA 1978 to be eligible for retirement benefits pursuant to the Educational Retirement Act.

E. The board shall approve the positions at each qualifying state educational institution that are eligible for participation in the alternative retirement plan.

History: 1978 Comp., § 22-11-47, enacted by Laws 1991, ch. 118, § 5; 1999, ch. 261, § 2; 1999, ch. 274, § 3; 2008, ch. 68, § 2; 2009, ch. 9, § 1.

ANNOTATIONS

Cross references. — For Section 401 of the Internal Revenue Code, see 26 U.S.C.S. § 401.

The 2009 amendment, effective March 18, 2009, in Subsection A, provided that an employee who fails to make the election shall not later be eligible to be a participant even if the employee is subsequently employed in a position that is eligible for participation and provided that except as provided in Subsection D, an election to become a participant is irrevocable; and added Subsections D and E.

The 2008 amendment, effective July 1, 2008, deleted former Subsection D that provided for participation of clinical faculty members of the university of New Mexico health sciences center in the alternative retirement plan.

The 1999 amendment, effective June 18, 1999, added Subsection D.

22-11-48. Alternative retirement plan; contributory employment.

A. Contributions made by a qualifying state educational institution on behalf of a participant together with any interest accrued on those contributions shall be credited to the benefit of the participant and shall be distributed or treated as agreed upon between the contractor or carrier providing the alternative retirement plan benefits and the board.

B. Contributions of a participant who terminates employment together with any applicable interest accrued on those contributions shall remain the property of the participant and the contributions, interest and any benefits based on them shall be treated as agreed upon between the contractor or carrier providing the alternative retirement plan benefits and the board.

History: 1978 Comp., § 22-11-48, enacted by Laws 1991, ch. 118, § 6.

22-11-49. Alternative retirement plan; contributions.

A. A participant shall contribute an amount equal to the percentage of the participant's salary that the participant would be required to contribute if the participant were, instead, a regular member. The contribution shall be made as provided by the board.

B. A qualifying state educational institution shall contribute on behalf of each participant an amount of the participant's salary equal to the contribution that would be required of the employer if the participant were, instead, a regular member. Of that contribution, a sum equal to the following percentage of the annual salary of each participant shall be paid to the fund, and the remainder of the contribution shall be paid to the alternative retirement plan as provided by the board:

- (1) from July 1, 2021 through June 30, 2022, four and one-fourth percent;
- (2) from July 1, 2022 through June 30, 2023, six and one-fourth percent; and
- (3) on and after July 1, 2023, seven and one-fourth percent; or

(4) if, on July 1 following any report by the actuary to the board that concludes that less than that percentage is required to satisfy the unfunded actuarial liability attributable to the participation of the participants in the alternative retirement plan, then the percentage the actuary determines is the minimum required to satisfy that liability.

C. Contributions required by this section may be made by a reduction in salary or by a public employer pick-up as provided in the Internal Revenue Code of 1986, as amended.

History: 1978 Comp., § 22-11-49, enacted by Laws 1991, ch. 118, § 7; 1999, ch. 261, § 3; 2019, ch. 258, § 6; 2021, ch. 44, § 3; 2022, ch. 29, § 2.

ANNOTATIONS

Cross references. — For the Internal Revenue Code of 1986, see 26 U.S.C.

The 2022 amendment, effective May 18, 2022, increased employer contributions to the educational retirement fund; and in Subsection B, added a new Paragraph B(2) and redesignated former Paragraphs B(2) and B(3) as Paragraphs B(3) and B(4), respectively, and in Paragraph B(3), after "July 1", deleted "2022, five" and added "2023, seven".

The 2021 amendment, effective July 1, 2021, increased certain contributions, and revised the schedule for contributions, to the educational retirement fund; and in Subsection B, after "sum equal to", deleted "three and one-fourth percent" and added "the following percentage", and added new Paragraphs B(1) and B(2), and in Paragraph B(3), after "concludes that less than", deleted "three and one-fourth percent" and added "that percentage".

Temporary provisions. — Laws 2021, ch. 44, § 4 provided that before July 1, 2022, the educational retirement board shall report to the department of finance and administration, any other affected agency, the legislative finance committee, legislative education study committee and any other appropriate interim legislative committees on fund status and options to improve pension plan solvency without additional contributions from public employers.

The 2019 amendment, effective July 1, 2019, increased employer contribution rates; in Subsection B, after "Of that contribution", deleted "made by a qualifying state educational institution on behalf of a participant beginning October 1, 1991, or October 1, 1999, whichever is applicable", after "sum equal to", deleted "three percent" and added "three and one-fourth percent", after "concludes that less than", deleted "three percent of the contributions made by a qualifying state educational institution on behalf of its participants" and added "three and one-fourth percent", after "retirement plan", deleted "the three percent shall be reduced" and added "then", and after "actuary", added "determines is the minimum required to satisfy that liability".

The 1999 amendment, effective June 18, 1999, inserted "or October 1, 1999, whichever is applicable" in the second sentence of Subsection B.

22-11-50. Alternative retirement plan; tax treatment.

The board shall have the authority to determine whether the alternative retirement plan shall be qualified under Section 401(a) or 403(a) of the Internal Revenue Code of 1986, as amended, and shall make that determination based upon which choice is most advantageous to the participants as a whole.

History: 1978 Comp., § 22-11-50, enacted by Laws 1991, ch. 118, § 8.

ANNOTATIONS

Cross references. — For Sections 401(a) and 403(a) of the Internal Revenue Code, see 26 U.S.C. §§ 401(a) and 403(a), respectively.

22-11-51. Alternative retirement plans; benefits; transfer upon unemployment.

A. No retirement, death or other benefit shall be paid by the board from the fund for services credited under the alternative retirement plan. Such benefits are payable to participants or their beneficiaries only by the appropriate alternative retirement plan contractor or carrier in accordance with the terms of the applicable contracts or certificates; provided, however, that retirement benefits shall, at the option of the participant, be paid in the form of a lifetime income, if held in an annuity contract; payments for a term of years; or a single-sum cash payment.

B. Upon termination of employment with a qualifying state educational institution, a participant may transfer or roll over the account balance to another eligible retirement plan or may withdraw the balance as permitted for a plan qualified under Section 401(a) of the Internal Revenue Code of 1986.

History: 1978 Comp., § 22-11-51, enacted by Laws 1991, ch. 118, § 9; 1999, ch. 261, § 4; 2009, ch. 9, § 2.

ANNOTATIONS

Cross references. — For Section 401(a)(17) of the federal Internal Revenue Code, see 26 U.S.C. § 401(a).

The 2009 amendment, effective March 18, 2009, in Subsection A, gives a participant the option to have benefits paid in the form of a lifetime income if the benefit is held in an annuity contract, payments for a term of years, or a single-sum cash payment; and added Subsection B.

The 1999 amendment, effective June 18, 1999, purported to amend this section but made no change.

22-11-52. Alternative retirement plan; selection of contractor or carrier; administration.

A. The board shall solicit and review proposals for providing retirement, death and any other benefits deemed desirable by the board for participants in the alternative retirement plan. The board shall solicit proposals for providing the benefits through contracts or investments held in trust or a custodial account that meets the requirements of Section 401(a) or 403(a) of the Internal Revenue Code of 1986, including, without limitation, annuity contracts or certificates that are fixed or variable in nature or some combination thereof.

B. The board, after consultation with the qualifying state educational institutions, shall select no less than two nor more than five contractors or carriers to provide the contracts or certificates. In making its selection, the board shall consider, among other things, the following criteria:

(1) the portability of the benefits offered, based upon the number of states and institutions of higher education in which the offeror provides similar benefits;

(2) the nature and extent of the rights and benefits that would be provided to the participants, including the right to maintain their accounts or to transfer the balance to another eligible retirement plan upon

termination of employment with the qualifying educational institution, to the extent permitted for a plan qualified under Section 401(a) of the Internal Revenue Code of 1986;

(3) the relation of the rights and benefits to the contributions that would be made by the participants and the qualifying state educational institutions;

(4) the ability of the offeror to provide the rights and benefits;

(5) the suitability of the rights and benefits for recruitment and retention of employees by the qualifying state educational institutions; and

(6) compliance with the requirements of the Educational Retirement Act and Section 401(a) or 403(a) of the Internal Revenue Code of 1986.

C. The board shall provide for the administration and maintenance of the alternative retirement plan and may adopt rules and regulations for that purpose.

History: 1978 Comp., § 22-11-52, enacted by Laws 1991, ch. 118, § 10; 2009, ch. 9, § 3.

ANNOTATIONS

Cross references. — For Sections 401(a)(17) and 403(a) of the federal Internal Revenue Code, see 26 U.S.C. §§ 401(a)(17) and 403(a), respectively.

The 2009 amendment, effective March 18, 2009, in Subsection A, required the board to solicit proposals for providing benefits through contracts or investments held in trust or a custodial account that meets the requirements of Section 401(a) or 403(a) of the Internal Revenue Code; in Paragraph (2) of Subsection B, provided that the rights of participants include the right to maintain an account or to transfer the balance of an account to another eligible retirement plan upon termination of employment to the extent permitted under Section 401(a) of the Internal Revenue Code; and in Paragraph (6) of Subsection B, added compliance with Section 401(a) or 403(a) of the Internal Revenue Code as a criteria.

22-11-53. Correction of errors and omissions; estoppel.

A. If an error or omission in an application for retirement or its supporting documents results in an overpayment to a member or the beneficiary of a member, the board shall correct the error or omission and adjust all future payments accordingly. The board shall recover all overpayments that are made.

B. A member or the beneficiary of a member who is paid more than the amount he is owed because he provided fraudulent information on his application for retirement shall be liable for the repayment of that amount to the fund, interest on that amount at the rate set by the board and costs of collection, including attorney fees. Recovery of overpayments shall extend back to the date of the first payment that was made based on fraudulent information.

C. The board shall not be estopped from acting in accordance with applicable statutes because of statements of fact or law made by the board or its employees.

History: Laws 1998, ch. 38, § 2.

22-11-54. Disclosure of third-party marketers; penalty.

A. The board shall not make any investment, other than investments in publicly traded equities or publicly traded fixed-income securities, unless the recipient of the investment discloses the identity of any third-party marketer who rendered services on behalf of the recipient in obtaining the investment and also discloses the amount of any fee, commission or retainer paid to the third-party marketer for the services rendered.

B. Information disclosed pursuant to Subsection A of this section shall be included in the quarterly performance reports of the board.

C. Any person who knowingly withholds information required by Subsection A of this section is guilty of a fourth degree felony and shall be punished by a fine of not more than twenty thousand dollars (\$20,000) or by imprisonment for a definite term not to exceed eighteen months or both.

D. As used in this section, "third-party marketer" means a person who, on behalf of an investment fund manager or other person seeking an investment from the fund and under a written or implied agreement, receives a fee, commission or retainer for such services from the person seeking an investment from the fund.

History: [Laws 2009, ch. 152, § 3.](#)

ANNOTATIONS

Effective dates. — Laws 2009, ch. 152 contained no effective date provision, but, pursuant to [N.M. Const., art. IV, § 23](#), was effective June 19, 2009, 90 days after the adjournment of the legislature.

22-11-55. Disclosure of member or retired member information; penalty.

A. Other than names of members and local administrative units by which a member was employed; dates of employment, retirement and reported death; service credit; reported salary; retirement and disability benefits; and amounts of contributions made by members and local administrative units, neither the board nor its employees or contractors shall allow public inspection or disclosure of any information regarding a member or retired member to anyone except:

(1) the member, retired member or the spouse or authorized representative of the member or retired member;

(2) other persons specifically identified in a prior release and consent, in the form prescribed by the board, executed by the member, retired member, spouse or authorized representative; or

(3) the attorney general, appropriate law enforcement agencies, the state auditor or the public education department or higher education department, if the information provided relates to contributions, payments or management of money received by, or the financial controls or procedures of, a local administrative unit.

B. No person receiving information disclosed by a violation of Subsection A of this section shall disclose that information to any other person unless authorized by an applicable confidentiality agreement, board rule or state law.

C. Whoever knowingly violates a provision of Subsection A or B of this section is guilty of a petty misdemeanor and shall be sentenced in accordance with Section 31-19-1 NMSA 1978.

History: Laws 2009, ch. 240, § 1; 2009, ch. 248, § 1; 2010, ch. 60, § 1.

ANNOTATIONS

The 2010 amendment, effective May 19, 2010, in Subsection A, after "reported salary", added "retirement and disability benefits".