



STATE OF NEW MEXICO

Educational Retirement Board

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**EXECUTIVE DIRECTOR'S POLICY
REGARDING CONTRIBUTIONS BY RETIREES WORKING
PURSUANT TO THE RETURN TO WORK PROGRAM**

Effective July 1, 2011, Section 22-11-25.1 (E) NMSA 1978, as amended by HB 129 (2011 Regular Legislative Session), requires retired members who return to employment with a local administrative unit ("LAU") pursuant to Subsections A, B or F of Section 22-11-25.1 (the "Return to Work Program") to make non-refundable contributions to the Educational Retirement Fund (the "Fund") in an amount equal to the member contributions that non-retired employees make pursuant to Section 22-11-21. *See*, Attachment 'A' (HB 129 (2011 Regular Legislative Session)). LAUs will continue to make the employer contributions as specified by statute. The text of Section 22-11-25.1 (E) as amended is set forth below:

A retired member who returns to employment pursuant to Subsection A, B or F of this section shall pay to the fund an amount equal to the member contributions that would be required pursuant to Section 22-11-21 NMSA 1978 if the retired member was a non-retired employee and the local administrative unit employing the retired member shall pay to the fund an amount equal to the local administrative unit contributions that would be required pursuant to that section. Payments made by a retired member pursuant to this subsection shall not be refunded.

A. Contributions Required Under the Return to Work Program Are Non-Refundable.

Pursuant to Section 22-11-25.1 (E) as amended, the contributions to the Fund made by retirees who are employed under the Return to Work program are non-refundable.

B. Beneficiaries Not Entitled to Refund of Contributions Made While Working under the Return to Work Program.

In accordance with Section 22-11-25.1 (E), the beneficiary of a retiree receiving benefits under Option A (Straight Life, No Survivor Benefit) shall not be entitled to a refund of member contributions made during the period of employment under the Return to Work program. This is in contrast to the beneficiary or the estate of a retiree receiving benefits under Option A who has

suspended retirement benefits and is reemployed pursuant to Section 22-11-25. Pursuant to Section 22-11-26, the beneficiary or the estate of a retiree who suspended benefits and died during a period of reemployment shall receive a refund of the sum of the member's contributions, including those made during the last period of reemployment, plus accumulated interest, less the total benefits received prior to the last reemployment. A beneficiary or the estate of a retiree under Section 22-11-26 is distinguishable from the beneficiary or the estate of a retiree who continued to receive retirement benefits while employed under the Return to Work Program pursuant to Section 22-11-25.1.

C. Contributions Will Be Treated as Pre-Tax Contributions.

Solely for the purpose of compliance with Section 414 (H) of the Internal Revenue Code of 1986, Section 22-11-21.1 requires each LAU to 'pick up' member contributions required by Section 22-11-21 (A) for all annual salary earned by the member. Member contributions 'picked up' pursuant to Section 22-11-21.1 are treated as LAU contributions for purposes of determining income tax obligations under the Internal Revenue Code. Nothing in Section 22-11-21.1 or Section 22-11-25.1 excludes contributions made by retirees employed under the Return to Work Program from application of the 'pick up' provision nor has the Legislature expressly indicated that it intended to exclude such contributions from the 'pick up' provision.

Section 12-2A-18 (A) provides in material part that a statute shall be construed, if possible, to: (1) give effect to its objective and purpose, and to (2) give effect to its entire text. Absent an express indication of legislative intent to exclude contributions made by retirees working under the Return to Work Program from the 'pick up' provided by Section 22-11-21.1, Section 22-11-21.1 shall apply to all contributions made by retirees during employment under the Return to Work Program. Such contributions shall be made on a pre-tax basis.

D. Section 22-11-25.1 (E) is Applicable to Retirees from the ARP.

Neither Section 22-11-25.1 nor Rule 2.82.5.15 NMAC exclude retirees under the Alternative Retirement Program ("ARP") from the requirements of the Return to Work Program. Further, there is no indication that the Legislature intended to exclude retirees under the ARP from the requirements of Section 22-11-25.1. Generally, administrative agencies are to treat similarly situated individuals in the same manner. Although the ARP is a defined contribution retirement plan, retirees from the ARP are similarly situated to members retiring from the defined benefit plan in terms of the Return to Work Program. It is therefore the policy of the ERB that retirees under the ARP returning to employment under the Return to Work Program shall be subject to Section 22-11-25.1 (E) and be required to make non-refundable contributions to the Fund. In addition, LAUs employing such retirees will be required to make contributions for them pursuant to Section 22-11-21 (B).

E. Effective Date of Policy; Application.

This policy shall be effective July 1, 2011 and shall be applicable to all retirees working under the Return to Work Program.



Jan Goodwin, Executive Director

Date June 9, 2011

ERB POLICY REGARDING RETIRED MEMBER CONTRIBUTIONS
UNDER RETURN TO WORK PROGRAM
Attachment 'A'

AN ACT

RELATING TO EDUCATIONAL RETIREMENT; REQUIRING RETIRED MEMBERS WHO RETURN TO WORK TO MAKE CERTAIN NONREFUNDABLE PAYMENTS TO THE EDUCATIONAL RETIREMENT FUND; REDUCING THE PAYMENTS MADE TO THE FUND BY THE LOCAL ADMINISTRATIVE UNITS THAT EMPLOY RETIRED MEMBERS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 22-11-25.1 NMSA 1978 (being Laws 2001, Chapter 283, Section 2, as amended) is amended to read:

"22-11-25.1. RETURN TO EMPLOYMENT--BENEFITS CONTINUED--ADMINISTRATIVE UNIT CONTRIBUTIONS.--

A. Except as provided in Subsections B and F of this section, beginning January 1, 2002 and continuing until January 1, 2022, a retired member may begin employment at a local administrative unit and shall not be required to suspend retirement benefits if the member has not rendered service to a local administrative unit for at least twelve consecutive months after the date of retirement. If the retired member returns to employment without first completing twelve consecutive months of retirement, the retired member shall remove himself or herself from retirement.

B. A retired member who was retired on or before January 1, 2001 and has not since suspended or been required to suspend retirement benefits pursuant to the Educational

Retirement Act may, at any time prior to January 1, 2022, return to employment for a local administrative unit and shall not be required to suspend retirement benefits.

C. A retired member who returns to employment during retirement pursuant to Subsection A, B or F of this section is entitled to continue to receive retirement benefits but is not entitled to acquire service credit or to acquire or purchase service credit in the future for the period of the retired member's reemployment with a local administrative unit.

D. A retired member shall not be eligible to return to employment pursuant to Subsection A, B or F of this section unless an application to return to work, on a form prescribed by the board, has been submitted to, and approved by, the board and the applicant has complied with such other rules as promulgated by the board.

E. A retired member who returns to employment pursuant to Subsection A, B or F of this section shall pay to the fund an amount equal to the member contributions that would be required pursuant to Section 22-11-21 NMSA 1978 if the retired member was a non-retired employee and the local administrative unit employing the retired member shall pay to the fund an amount equal to the local administrative unit contributions that would be required pursuant to that section. Payments made by a retired member pursuant to this subsection

shall not be refunded.

F. Beginning July 1, 2003 and continuing until January 1, 2022, a retired member who retired on or before January 1, 2001, who subsequently voluntarily suspended or was required to suspend retirement benefits 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 retirement benefits if the retired member was not employed by a local administrative unit for an additional twelve or more consecutive months after the initial date of the retirement; provided that the ninety-day period shall not include any part of a summer or other scheduled break or vacation period.

G. Both the retired member who returns to employment and the local administrative unit that employs the retired member shall make contributions to the retiree health care fund in the amount specified in Subsections A and B of Section 10-7C-15 NMSA 1978.

H. As used in Subsections A and F of this section:

(1) "rendered service to a local administrative unit" includes employment by a local administrative unit, whether full or part time; substitute teaching; voluntarily performing duties for a local administrative unit that would otherwise be, or in the past have been, performed by a paid employee or independent

contractor; or performing duties for a local administrative unit 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, whether or not the entity is created for profit or nonprofit purposes."

SECTION 2. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2011. _____

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