



STATE OF NEW MEXICO

Educational Retirement Board ATTORNEY INSTRUCTIONS FOR ORDER DIVIDING ERB BENEFITS

INTRODUCTION

ERB has prepared this package to assist you in drafting an acceptable Court Order to divide retirement benefits due to a divorce. We have attached a Model Order to these Attorney Instructions for your convenience.

ERB is a defined benefit plan, governed by the Educational Retirement Act, NMSA 1978, §§ 22-11-1, et seq., hereinafter "the Act." In a defined benefit plan, retirement benefits are paid when certain eligibility requirements (a combination of age and service credits) are met by the member and the member decides to retire. An employer affiliated with ERB must deduct employee contributions each pay period from each employee-member.

The primary ERB benefit is a monthly pension that may be paid to a member for normal or disability retirement. Another benefit is a pension that may be paid under certain circumstances to a beneficiary upon a member's death. In addition, upon termination with an ERB affiliated employer, a member **may** request a refund of contributions paid by the employee into the plan.

ERB is a "governmental plan" for the purposes of 29 USC § 1002, and is therefore exempt from the provisions of the federal Employees Retirement Income Security Act of 1974 (ERISA) and the Retirement Equity Act of 1984. Thus a "Qualified Domestic Relations Order" (QDRO) **is not appropriate** to divide the community interest in ERB benefits. Rather, the court order must be consistent with the Educational Retirement Act.

The attached Model Order and Attorney Instructions are designed to help you comply with the Act and can be used either pre- or post retirement. The order provides alternatives for the parties to select pre-retirement choices under the plan. In cases where the member has already retired and is receiving monthly benefits, NMSA 1978, § 22-11-29 and §22-11-30 control the choice of form of payment and any named pension

survivor beneficiary. §22-11-29 prohibits changing the form of payment or beneficiary after the effective date of retirement.

ERB can only divide the community interest in retirement benefits when the pension, refund or death benefits are otherwise payable according to the terms of the Act. If a member is not eligible to retire at the time of divorce, or has not terminated employment and requested a refund, ERB cannot pay the non-member spouse his or her interest in the retirement account at that time.

No benefits can be divided unless ERB is served with an appropriate court order. Upon receipt of such an order, and a written determination by ERB that the order complies with ERB statutes and rules and is administratively feasible, ERB will pay the ex-spouse his or her share **at such time as the benefits are otherwise distributed to the member under the plan.**

PLEASE BE AWARE THAT THE ALTERNATIVES PROVIDED IN THE MODEL ORDER, INCLUDING HOW THE COMMUNITY PROPERTY IS TO BE DEFINED AND DIVIDED ARE SIMPLY SUGGESTIONS. ERB IN NO WAY ENDORSES ONE ALTERNATIVE OVER ANOTHER, NOR DO THESE SUGGESTIONS PRECLUDE OTHER ARRANGEMENTS. HOWEVER, TO BE ACCEPTED, THE ORDER MUST COMPLY WITH ERB STATUTES AND RULES AND BE ADMINISTRATIVELY FEASIBLE.

Parties are encouraged to prepare a draft order dividing ERB benefits for informal pre-approval prior to submitting the order to the court for signature. ERB counsel is available to assist parties in preparing these orders prior to submission to the court. To inquire further about these instructions and the model order, please contact ERB's legal department at (505) 827-8030.

INSTRUCTIONS:

The following is an explanation of the various paragraphs presented in the Model Order. Not all paragraphs are necessary. However certain information **must** be included for an order to be acceptable. Such minimum requirements are set forth in the checklist that follows these instructions.

Paragraph 1 - informs ERB that this order divides retirement benefits under the Act. Parties must be divorced or legally separated for this order to be acceptable under ERB statutes.

Paragraph 2 - identifies the member spouse (hereinafter "the member") whose account is the subject of division by the court order. State warrants (checks) will generally not be issued without the payee's name, social security number, date of birth and address.

Paragraph 3 - identifies the non-member spouse (hereinafter “the co-payee”). As with the member, the order must include the co-payee’s name, social security number, date of birth and address.

Paragraph 4 - provides a means for updating the information without amending the order. A party **must** inform ERB of any address change so that they may receive their share of the benefits when paid. It is not possible, nor is it ERB’s responsibility to search for payees who have moved without notifying ERB. If the warrant is returned as undeliverable, the money will accumulate until claimed and a current address furnished. No member or co-payee will be entitled to interest on the payments if ERB was not properly informed of their address change.

Paragraph 5 - identifies the dates of marriage and divorce. This helps to determine the community interest in the ERB account.

Paragraph 6 - specifies the community interest in the member’s account. The most common determination of the community interest is defined as that portion of the benefits that was earned during the marriage as stated in this paragraph. PLEASE NOTE THAT ERB UNDERSTANDS THAT THERE ARE NUMEROUS CHOICES OR METHODS FOR DEFINING AND CALCULATING THE COMMUNITY INTEREST IN A MEMBER’S ACCOUNT. ERB is also aware that parties dividing marital property in a divorce may trade parts or all of one asset for another. Also, it is very important to understand that the property division methods included in this Model Order **do not** determine the actuarial present value of a member’s retirement account. If the parties require an actuarial present value of an ERB account, they may need to hire a private actuary. ERB can provide public information contained in its records, **but cannot provide actuarial evaluations.** **Alternative 1** is designed for use when the member ***has not yet retired*** and the community interest percentage of the gross benefits or contributions cannot be determined because the gross benefit is unknown at the time of divorce. **Alternative 2** can be used if the member ***has already retired***. Please note that if the member is in the process of retiring but has not yet received and deposited the first pension payment, **alternative 1** should still be used.

Paragraph 7 – divides the community interest in the retirement benefits or contributions as calculated by paragraph 6. “Benefits” refers to pensions paid at retirement and “contributions” refers to money paid into the fund by the member before retirement, plus applicable interest. If the parties decide that the member will keep their retirement benefits or contributions as their sole and separate property, the Order or Marital Settlement Agreement should **specifically state this** so ERB will know that there would likely be no claim on the member’s account. **Alternative 1** defines the parties’ percentage interest in the **community portion** of the gross benefits and awards the remainder to the member. **Alternative 2** divides the member’s gross benefits by percentage, **regardless of the community property portion of the benefits.** **Alternative 3** divides the benefits by assigning a fixed monthly amount to one spouse (usually the non-member) and the remainder to the other. Note that this method does

not allow the fixed monthly amount spouse to benefit from any cost of living increases that may occur over time.

Paragraph 8 – identifies the form of payment of retirement benefits. The forms of payment (e.g., normal or survivor benefits) are described in NMSA 1978, §22-11-29 and §22-11-30. This section offers seven alternatives regarding the selection of a retirement benefit form of payment. **It is strongly recommended that both parties and their attorneys consult with the ERB benefits office regarding the effects of each form of payment before choosing one of these alternatives. Once the member retires, his choice of retirement option and beneficiary will be irrevocable.** **Alternative 1** is for use if the member plans to choose the normal option, naming the co-payee as the refund beneficiary. **Alternative 2** is similar, except it allows the member to choose someone other than the co-payee as the refund beneficiary. **Alternative 3** is for use when the member has not yet retired and wishes to choose either option B or C under NMSA 1978, §22-11-29 and will choose the co-payee as the survivor beneficiary. **Alternative 4** is similar to alternative 3, except that it allows the member to choose someone other than the co-payee as the survivor beneficiary. **Alternative 5** is similar to alternative 3, except that instead of the entire survivor amount going to the co-payee who is the Option B beneficiary, the survivor benefit is divided between the co-payee and the member's estate. **Alternative 6** allows the member to choose any form of payment under the plan and name any survivor beneficiary, including a child or some person with a mental or physical handicap. **Alternative 7** allows the member to choose any form of payment under the plan, but requires the member to choose the co-payee as the refund or survivor beneficiary.

Paragraph 9 - determines what happens to the co-payee's share if they predecease the member and/or the member's refund beneficiary. **In Alternative 1**, the co-payee's share returns to the member or the member's designated refund beneficiary. **Alternative 2** provides that the co-payee's share will go to the co-payee's estate as long as benefits are still being paid on the account.

Paragraph 10 – **must be included if the parties want ERB to divide the benefits and pay each party separately.** ERA cannot do this without a direct court order.

Paragraph 11 – for use **only** if the parties stipulate that the member will choose the normal option upon retirement, or if the member has already retired under the normal option. This language is not appropriate for any form of payment that calls for a survivor pension beneficiary.

Paragraph 12 – prevents a member who has terminated ERB employment from withdrawing his or her contributions without the other party's receiving their portion of the contributions. If a refund of contributions is made, the service credit supported by those contributions is forfeited and may not later be included in retirement benefit calculations unless the member repays the contributions plus interest. This paragraph should always be included if the member has not yet retired at the time of the divorce. **ERB cannot divide a member's refund of contributions and pay the co-payee his**

or her share without a specific restraint in a court order. If the member has already retired, no refund is payable and this paragraph should not be used.

Paragraph 13 – protects the co-payee’s interest in the member’s retirement account in the event of the member’s death before retirement. NMSA 1978, Section 22-11-29 addresses provisions regarding survivor pension benefits for members who die before retirement. There is no provision ordering the co-payee to be considered the surviving spouse in case of the member’s death while still in the employ of an ERB affiliated employer. However, NMSA 1978, §22-11-29 allows a member to designate a survivor pension beneficiary if the member should die while in the employ of and ERB affiliated employer. Parties who have agreed that the member will elect a payment under Option B or C with the co-payee as the survivor beneficiary will probably also want to stipulate that the member will designate the co-payee as survivor beneficiary as defined in NMSA 1978 §22-11-29 (D).

Paragraph 14 – provides that the co-payee is to receive their portion of any disability benefits paid under the member’s account.

Paragraph 15 – provides that any taxes due on benefits or contributions paid by ERB will be paid by each party when the benefit or contribution is received according to the withholding information on file with ERB. ERB, upon receipt of a “tax deduction” form, will withhold federal and state income taxes from pension payments. If the parties agree that one or the other will be responsible for all taxes due, this paragraph must be modified accordingly. All members employed and contributing to ERB before 1983 have contributions that were taxed. The amounts of these contributions must be assigned. The language of the model order assigns them in accordance with the formula that defines the community property share.

Paragraphs 16 & 17 – are self-explanatory.

Paragraph 18 – reserves the court’s jurisdiction to amend that portion of the order relating to retirement benefits or contributions. It is not a general reservation of jurisdiction since such a reservation would affect the order’s finality and, therefore, its appealability.

Please note that the order uses the terms “the member” and “the co-payee” to identify the parties. You may use “Petitioner” and “Respondent” to identify the parties throughout the order as long as the parties are clearly and correctly identified.

Note that if both spouses are ERB members, a separate order should be prepared for each member regarding the division of their retirement benefits.

CHECKLIST

At a minimum, to be acceptable, the order MUST include the following:

- ❑ A statement that the Order divides retirement benefits under the Educational Retirement Act, NMSA 1978, §§ 22-11-1 et seq.;
- ❑ The name, social security number, date of birth, current address of each party;
- ❑ Instructions on ERB notification in case of either party's address or name change. ERB requires such notice, in writing and signed before a notary public;
- ❑ A declaration of a community interest in the member's retirement benefits and a clear, legal and administratively feasible method to divide the member's benefits;
- ❑ The percentage or dollar amount of each party's interest in the member's contributions;
- ❑ A direct order to ERB to issue separate warrants (checks) for each party
- ❑ A statement of each party's federal tax liabilities

Please call us at (505) 827- 8030 if you have any questions.

Thank you for your cooperation.

MODEL ORDER DIVIDING ERB RETIREMENT BENEFITS

1. Pursuant to NMSA 1978, §22-11-42, this Order adjudicates retirement benefits accrued under the Education Retirement Act, NMSA 1978, §22-11-1, et seq. Any payments pursuant to this order shall only be made when contributions are refunded or a pension is payable in accordance with the Educational Retirement Act.
2. _____, Social Security No. _____, is a member (hereinafter "the member") of the Educational Retirement Board (ERB). The member's current address is: _____. The member's date of birth is _____.
3. _____, Social Security No. _____, the non-member spouse is the co-payee (hereinafter "the co-payee") of the ERB retirement benefits. Co-payee's current address is: _____. Co-payee's date of birth is _____.
4. The information in paragraphs 2 and 3 above regarding the parties addresses or names may be modified if a party changes his or her address or name by that party notifying ERB in writing, with a notarized signature, of the change of address or name, or social security number, should that be necessary.
5. The parties were married on _____ and were divorced on _____.

6. **Alternative 1**

A certain percentage of the retirement benefits or contributions accrued in the member's name are community property. The percentage is to be derived from a fraction, the numerator of which is the number of quarters of the member's service during the marriage and the denominator of which is the total number of quarters of ERB service. The percentage of community interest in retirement benefits or contributions will be determined when the member spouse either retires, receives a disability retirement, terminates public employment and requests a refund of contributions, or dies prior to retirement. "Benefit" shall be described as the "gross benefit" and is defined as the total benefit before any deductions are made for taxes. "Total years of service" is defined as including actual time of employment, service time purchased for previous education experience and/or military service, or acquired by any other legal means.

Alternative 2

The member spouse, who has already retired, had _____ months of service during the marriage and _____ months of total service at retirement. _____ % of the retirement benefits or contributions accrued in member spouse's name are community property.

7. This Order determines and divides the parties' rights of the community interest in retirement benefits or contributions identified above as follows:

Alternative 1

Each party is entitled to 50% of the community interest in the benefits or contributions and the member spouse is entitled to the balance.

Alternative 2

The member is entitled to _____% and the co-payee is entitled to _____% of the benefits or contributions accrued in the member's name.

Alternative 3

_____ is entitled to \$_____ per month, and _____ is entitled to the balance.

8. **Alternative 1**

The member shall elect form of payment as specified in NMSA 1978, §22-11-30, at the time he/she retires, and shall designate the co-payee as the refund beneficiary in the event of member's death before the accumulated contributions are paid out.

Alternative 2

The member spouse shall elect form of payment as specified in NMSA 1978, §22-11-30, at the time he/she retires, and may designate anyone as refund beneficiary in the event of member's death before the accumulated contributions are paid out.

Alternative 3

The member shall elect form of payment under Option B or C as specified in NMSA 1978, § 22-11-29, at the time he/she retires, and shall name the co-payee as survivor pension beneficiary.

Alternative 4

The member shall elect form of payment under Option B or C as specified in NMSA 1978, § 22-11-29, at the time he/she retires, and may designate anyone as survivor pension beneficiary.

Alternative 5

The member shall elect form of payment under Option B or C as specified in NMSA 1978, § 22-11-29, at the time he/she retires, and shall name the co-payee as survivor pension beneficiary. In the event that the member dies prior to the co-payee, the survivor benefit shall be divided between the member's estate and the co-payee as calculated in paragraph 7.

Alternative 6

The member may choose any form of payment at the time he/she retires, and may name any person as the refund or survivor pension beneficiary.

Alternative 7

The member may choose any form of payment at the time he/she retires, and shall name the co-payee as the refund or survivor pension beneficiary.

9. **Alternative 1**

If the co-payee predeceases the member and/or the member's survivor pension beneficiary, the co-payee's interest in the retirement benefit shall cease.

Alternative 2

If the co-payee predeceases the member and/or the member's survivor pension beneficiary, the co-payee's interest in the retirement benefit shall be paid to the co-payee's estate. In all cases, payments made to the co-payee or any person designated by the co-payee to receive payments shall cease when benefits to the member or their survivor beneficiary cease.

10. ERB is hereby ordered to divide the member's retirement benefit according to the percentages stated in paragraph 7, and issue separate warrants for the proper amounts to each party using the information stated in paragraphs 2-3, or the information as modified according to paragraph 4.
11. If the member retires and dies before there is paid an aggregate amount equal to his or her accumulated contributions at the time of retirement, the difference between the amount of the accumulated contributions and the aggregate amount of pension paid shall be divided between the co-payee and the member's refund beneficiary or estate, according to paragraph 7.
12. ERB is hereby ordered to refrain from refunding the accumulated member contributions of the member, except according to the percentages stated in paragraph 7. Any such refund shall be made by issuing separate warrants for the proper amounts to each party using the information stated in paragraphs 2-3, or the information as modified according to paragraph 4.
13. If the member dies while in the employ of an ERB employer, the co-payee shall be entitled to the portion of any survivor pension benefit payable, or of the accumulated contributions in the member spouse's account if no survivor pension benefit is payable, as described in paragraph 7.
14. If the member should become eligible for any disability benefits under the Act, the co-payee shall be entitled to the portion of any such disability benefits as described in paragraph 7.
15. All retirement benefits or contributions except for non-taxable benefits or contributions paid to each party pursuant to this Order shall constitute individual gross income for taxation purposes and ERB shall withhold the appropriate amounts as permitted or required. (All pre-1983 contributions shall be assigned according to the formula as described in paragraphs 6 and 7).

16. Copies of this Order shall be transmitted by counsel for the (member) (co-payee) to the Plan Administrator for the ERB. ERB shall notify the parties within a reasonable time after receipt of the Order whether the Order conforms to the requirements of the applicable statutes and rules and is administratively feasible.
17. The co-payee shall be entitled to communicate with the ERB and receive information from the Plan Administrator that concerns the member's interest in the plan.
18. The court reserves jurisdiction on the issue of the final qualification of this Order in order to correct, amend or enforce this Order. There is no just reason for delay for entry of a final order and decree containing the terms stated in this section, and for the other provisions of the decree and settlement.