



## Interpretive Memorandum No. 2016-2

**DATE:** **REVISED July 20, 2022** (Originally published September 8, 2016)

**TOPIC:** **NHRS Membership Rules for Elected Officials and Officials Appointed for Fixed Terms**

**PURPOSE:** The purpose of this Interpretive Memorandum is to discuss the membership eligibility for elected officials (Elected Officials) and officials appointed to fixed terms (Fixed Term Officials) (collectively, Officials, as the context may require).

### **SUMMARY:**

**A.** Membership in NHRS is optional for Elected Officials in full-time positions if they meet the four criteria detailed below relating to employment terms. The participation of Elected Officials is not common. Each case can be fact specific; and, the underlying circumstances may vary over time. Employers<sup>1</sup> are encouraged to contact NHRS in advance if an Elected Official wishes to enroll as an active Member, or if circumstances change such that a participating Elected Official who is enrolled may no longer meet all the four of the criteria listed in A below.

**B.** Membership is optional for Fixed Term Officials in unclassified and nonclassified positions created on or before July 1, 2011, if the Member meets the four criteria detailed below relating to employment terms. Membership is mandatory for Fixed Term Officials in unclassified positions that are newly created after July 1, 2011. For political subdivision Employers, Group II Members cannot be Fixed Term Officials.

**C.** Employers are required to give employees notice of their right to optional membership. Once an Elected or Fixed Term Official elects membership while in an optional position, he must remain a Member until termination of service in that position. Retirees in optional positions are not subject to the annual limits on part-time work hours if they do not elect membership.

### **ANALYSIS:**

#### **A. Membership Eligibility for Elected Officials.**

RSA 100-A:3, I provides that Elected Officials may elect to enroll in NHRS if four criteria relating to employment conditions are met:

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<sup>1</sup> Capitalized terms shall have the meanings as provided in the Interpretive Memoranda Glossary of Terms.

1. Full-Time With Benefits. The office held must be a full-time position with eligibility for the same fringe benefits as other full-time Employees. Full-time means that the Elected Official works the minimum number of hours described in paragraph A.3. below. Eligibility for fringe benefits is determined by any applicable law, personnel policy, collective bargaining agreement, or employment contract.
2. Primary Occupation. The elected office held must be the primary occupation of the person holding the office. In making such a determination, NHRS will apply the standards under NHRS Administrative Rule Ret 302.06 which provides that, *“if a person has more than one occupation, his or her ‘primary occupation’ shall be determined based on his or her tenure in each position, the compensation paid and the work hours required.”* If the Elected Official has, or acquires, another occupation in addition to the elected office, Employers are encouraged to contact NHRS to determine which occupation is primary.
3. Minimum Compensation and Hours. The position must have a base rate of annual compensation for the office held of at least \$15,000 and it must require at least 1,700 hours of annual employment.

Many Elected Officials are highly independent in the performance of their responsibilities. They are not subordinate to, or monitored by, other government officials or management personnel, and they are not required to keep regular office hours. In addition, most Elected Officials are paid an annual salary or stipend, not an hourly wage. For these reasons, the Employer often does not record actual work hours. NHRS takes the position that the Elected Official and the Employer have the burden of proving that he or she works the minimum 1,700 hours annually, which may include any paid time off. NHRS uses the Elected Official's term in office to establish the annual period for determining whether the minimum annual hours and compensation conditions have been met.

NHRS recommends that both the Elected Official and Employer maintain a contemporaneous record of the hours worked and paid time off; and; that the record be reviewed and confirmed by the Employer on a regular basis, such as weekly or monthly. In certain cases, NHRS may require the Elected Official and the Employer to sign an attestation form certifying that the minimum hours have been worked annually.

4. Single Office. Generally, the Elected Official must satisfy the conditions under subparagraphs (1)-(3) by using only one elected office to qualify, except as provided in A.5 below.
5. Town Clerks/Tax Collectors. Pursuant to RSA 100-A:3, I(a)(5), an Elected Official who concurrently holds the offices of Town Clerk and Tax Collector for the same Employer may combine those positions for the purposes of meeting the 4 criteria. Recordkeeping is especially critical in this regard.

**B. Membership for Fixed Term Officials.** RSA 100-A:3, I provides that membership is optional for Fixed Term Officials. A Member in a fixed term position may elect membership if he or she meets the requirements in paragraph A.1-4 above.

NHRS applies the following guidelines in making a determination whether any particular position is held by a Fixed Term Official who is exempt from mandatory membership.

1. State of New Hampshire. The State of New Hampshire has many positions that qualify as Fixed Term Positions. These include unclassified and nonclassified positions, including division and department directors and Members of governing bodies such as commissions, boards, committees, and authorities. NHRS policy is that a position is a Fixed Term Position if the statutory authorization for such position states that (a) there is a fixed term of years; and (b) appointment and removal by the Executive Council is required. Positions not expressly provided for by statute, or not requiring Executive Council approval, may be fixed terms if there is a position description or employment contract that specifies the term and provides that the individual can only be terminated for cause. Positions that provide that the individual “serves at the pleasure” of another person or governing body, are never Fixed Term Positions.
2. Political Subdivisions. A political subdivision position is a Fixed Term Position based on an individual evaluation of the record of appointment with regard to the fixed term and conditions of termination as dictated by statute, rule, policy, or contract, or by vote of a governing body. A person who can be terminated without cause or who “serves at the pleasure” of the Employer is not generally considered a Fixed Term Official.
3. Group II Positions. The New Hampshire Supreme Court has opined<sup>2</sup> that the phrase “officials appointed for fixed terms” does not apply to Group II Members employed by political subdivisions, other than Elected Officials. Thus, membership is mandatory for individuals appointed for a fixed term to a Group II position by a political subdivision, such as a fire or police chief who has a contract for a fixed term. For individuals appointed to a Group II State position that is a Fixed Term Position, membership is optional unless it is a newly created position as described in item B.4 below.
4. Officials Appointed for a Fixed Term in Newly Created Appointed Positions. RSA 100-A:3, I(d) provides that, for Fixed Term Officials appointed to unclassified positions that are newly created after July 1, 2011, optional membership is not applicable. Employees in such newly created unclassified positions must be enrolled, and if they are receiving an NHRS pension, they are restored to service pursuant to RSA 100-A:7, I and their pension shall cease. Membership remains optional for Fixed Term Officials who are nonclassified Employees regardless of when the position was created.

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<sup>2</sup> PETITION OF MICHAEL CARRIER, No. 2012-334

## C. Special Considerations

1. Notice of Membership Option/Employer Oversight. Pursuant to RSA 100-A:3, I-a, Employers are required to give each Official notice of his or her option to join NHRS “within a reasonable time after election or appointment”. NHRS has no particular form for this purpose and advises Employers to follow reasonable personnel policies in complying with this requirement. Pursuant to RSA 100-A:3, VI(d)(1), a Member may retroactively purchase service credit, with an Employer contribution toward the cost, in certain circumstances where the Employer fails to enroll an Employee when he or she was first eligible and the failure is not due to the consent or fault of the Employee (aka “employer oversight”). A failure to notify an employee of his or her option to enroll may create a presumption that there is no such consent or fault on the part of the employee. See RSA 100-A:3, VI(d).
2. Permanent Membership. Pursuant to NHRS Administrative Rule 302.06, once an Official elects to enroll as a Member of NHRS for a certain position, he or she must remain a Member until termination of service from such position. An Official cannot later opt out of membership upon re-election or re-appointment.<sup>3</sup>
3. Retiree Work Hour Limits. Pursuant to RSA 100-A:1, XXXIV, NHRS Retirees working for a participating Employer are limited in the number of hours they can work in part-time positions for NHRS participating Employers. NHRS has taken the position that the limits on retiree work hours do not apply to Retirees working in part-time positions that, if the position were full-time, membership would be optional. Thus, Officials in full-time positions for whom membership is optional, as described above, are not subject to the annual limits on work hours.
4. Retiree Reporting. Pursuant to RSA 100-A:16, VII(a), Employers are required to report annually to NHRS the hours worked and compensation paid to all NHRS Retirees except for Elected Officials. The work hours and compensation for Fixed Term Officials who are NHRS Retirees must be reported even though they are not subject to the annual limits on retiree work hours.

*Mark F. Cavanaugh, Esq.*

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**Approved by Mark F. Cavanaugh, Esq.  
Associate Counsel and Compliance Officer**

July 20, 2022

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**Approval Date**

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<sup>3</sup> If the Official fails to be re-elected or is not re-appointed, and there is a “termination from service” as provided in Ret 301.02(1), membership would be optional again if that person is later re-elected or re-appointed to the same or different office.