

**Annual List of Rule-Making Activity**  
**Rules Adopted January 1, 2023 to December 31, 2023**  
*Prepared by the Secretary of State, pursuant to 5 MRSA, §8053-A(5)*

**Agency name:** Maine Public Employees Retirement System (MainePERS)  
**Umbrella-Unit:** 94-411  
**Statutory authority:** 5 MRS § 17103(4)  
**Chapter number/title:** Ch. 506, Eligibility for Disability Retirement Benefits  
**Filing number:** 2023-030  
**Effective date:** 3/1/2023  
**Type of rule:** Routine Technical  
**Emergency rule:** No

**Principal reason or purpose for rule:**

This proposed new rule sets forth the standards and processes for determining eligibility for disability retirement benefits.

**Basis statement:**

This proposal for rule-making was noticed on December 21, 2022. A public hearing was held on January 12, 2023. One member of the public provided oral comments at the public hearing, and the same member of the public submitted written comments prior to the January 23, 2023 comment deadline. No other comments were received.

MainePERS has not previously had a single rule that addresses eligibility for disability retirement benefits. There are existing rules that address certain aspects of eligibility, and otherwise the System has followed the statutes as interpreted by court and Board decisions as well as System policies and practices. The proposed rule sets forth the standards and processes for determining eligibility pursuant to statutory law at both the initial application stage and upon review for continued eligibility. The proposed rule also addresses the determinations of whether a disability retirement recipient is unable to engage in any substantially gainful activity, and whether a disability applicant is unable to perform the essential functions of the employment position with reasonable accommodation. Those matters are currently addressed in Rule Chapter 507 and Rule Chapter 509, respectively. Staff believes including these aspects of the disability retirement program in the new rule addressing disability retirement benefits provides a more comprehensive rule. Rule Chapter 507 and Rule Chapter 509 are proposed for repeal with the adoption of this new disability retirement benefits rule.

One member of the public<sup>1</sup> made several recommendations regarding the proposed new rule. First, the commenter opined that the last sentence in the definition of “(c)onsistent with the persons’ training, education, or experience” should be deleted. Part of the continued eligibility determination when a disability retirement benefit recipient is reviewed is whether they can perform substantially gainful activity that would generate annual income in excess of the substantially gainful activity amount. The definition provided in the rule acknowledges that, although the individual has training, education or experience in a specific area, some additional training may be necessary to perform the activity. This is consistent with existing Rule Chapter 507 and the Superior Court’s decision in *Davidson vs. Maine State Retirement System*, 2000 Me. Super. LEXIS 115, which provide that transferrable skills and knowledge can make a position “(c)onsistent with the persons’ training, education, or experience” notwithstanding the need for additional position-specific training. For this reason, staff does

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<sup>1</sup> Sarah Walton, Esq., Winthrop

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not believe that any additional change to this section of the proposed rule is necessary in response to this comment, and the Board concurs.

Second, the commenter opined that the definition of “earnings” should be clarified to include only income generated by “...the retiree’s own productive work activity.” Further, that assuming that net rental income from real estate derives from work activity performed by the retiree is unfair. In oral comments, the commenter also opined that “income received in return for...goods...” should not be considered income. In response to these comments, staff agrees that the reference to goods and the suggestion of a presumption on real estate income should be removed. Staff recommends that these changes be made to the proposed definition of earnings, and the Board concurs.

Third, the commenter opined that the definition of “substantially gainful activity” is too broad and that MainePERS should consider “medical and vocational evidence in determining whether the beneficiary has the physical, mental, and vocational capabilities to perform substantially gainful activity.” Staff believes the proposed definition is consistent with statute and closely aligns with current Rule Chapter 507 and notes that evidence of the sort identified by the commenter may be considered by MainePERS under the proposed rule. Staff does not recommend any changes to the proposed rule based on this comment, and the Board concurs.

Fourth, the commenter opined that the term “whole-person approach” as used in the proposed rule should be defined. Staff believes that the proposed language in the rule is clear in that it requires that conditions and resulting functional limitations be considered “in totality” and no change is recommended to address this comment. The Board concurs.

Fifth, the commenter opined that the proposed rule should include additional information about the application of the disabled veteran presumption. In response to this comment, staff notes that the presumption is adequately set forth in statute and recommends amending the rule language to include the applicable statutory cites. The Board concurs with this change.

Sixth, the commenter suggests reconsideration of the definition of “earnings” as it relates to review for continuing eligibility. Changes to the definition of “earnings” are discussed above. The commenter also suggests a review of MainePERS’ practices regarding earnings review. This is outside of the scope of the current rulemaking. Staff recommends no changes to the proposed rule based on this comment, and the Board concurs.

Seventh, the commenter requests that the proposed rule be expanded to include additional sections regarding termination of benefits and the actively seeking work program. These topics are beyond the scope of the subject of this rule, eligibility for disability retirement. Staff recommends no changes in response to this comment, and the Board concurs.

In summary, based on consideration of the comments received, staff recommends changes to Section 1(4) to amend the definition of “earnings,” and Section 2(4) to insert statutory cites. The Board concurs with these recommendations.

At the Board’s regular meeting held on February 9, 2023, Henry Beck made the motion, seconded by Ken Williams to adopt the amended rule and its basis statement. Voted unanimously by those trustees present.

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**Fiscal impact of rule:**

None.

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**Agency name:** **Maine Public Employees Retirement System (MainePERS)**  
**Umbrella-Unit:** **94-411**  
**Statutory authority:** 5 MRS § 17103(4)  
**Chapter number/title:** **Ch. 507**, Determination of Inability to Engage in Substantially Gainful Activity  
**Filing number:** **2023-031**  
**Effective date:** 3/1/2023  
**Type of rule:** Routine Technical  
**Emergency rule:** No

**Principal reason or purpose for rule:**

This rule specifies that standards and definitions to be applied in determining under 5 MRS §§ 17907(2)(B), 17929(2)(B)(1), 18507(2)(B) and 18529(2)(B)(1) whether a disability retirement recipient is unable to engage in any substantially gainful activity.

**Basis statement:**

This proposal for rule-making was developed through a consensus-based process in accordance with 5 M.R.S. § 8051-B and noticed on December 21, 2022. A public hearing was held on January 12, 2023. No members of the public provided oral comments at the public hearing, and no members of the public submitted written comments prior to the January 23, 2023 comment deadline.

The proposal was to repeal the rule. The rule addresses the determination of whether a disability retirement recipient is unable to engage in any substantially gainful activity. This subject is addressed in new Rule Chapter 506, so this rule is no longer necessary.

At the Board's regular meeting held on February 9, 2023, Shirrin Blaisdell made the motion, seconded by Henry Beck to repeal the rule and to adopt the basis statement. Voted unanimously by those trustees present.

**Fiscal impact of rule:**

None.

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**Agency name:** **Maine Public Employees Retirement System (MainePERS)**  
**Umbrella-Unit:** **94-411**  
**Statutory authority:** 5 MRS § 17103(4)  
**Chapter number/title:** **Ch. 509**, Determination of Inability to Perform the Essential Functions of the Employment Position  
**Filing number:** **2023-032**  
**Effective date:** 3/1/2023  
**Type of rule:** Routine Technical  
**Emergency rule:** No

**Principal reason or purpose for rule:**

This rule specifies that standards and definitions to be applied in determining under 5 MRS §§ 17921 and 18251 in determining whether a disability applicant is unable to perform the functions of the employment position with reasonable accommodation.

**Basis statement:**

This proposal for rule-making was developed through a consensus-based process in accordance with 5 M.R.S. § 8051-B and noticed on December 21, 2022. A public hearing was held on January 12, 2023. No members of the public provided oral comments at the public hearing, and no members of the public submitted written comments prior to the January 23, 2023 comment deadline.

The proposal was to repeal the rule. This rule addresses the determination of whether a disability applicant is unable to perform the essential functions of the employment position with reasonable accommodation. This subject is addressed in new Rule Chapter 506, so this rule is no longer necessary.

At the Board's regular meeting held on February 9, 2023, Shirrin Blaisdell made the motion, seconded by Henry Beck to repeal the rule and to adopt the basis statement. Voted unanimously by those trustees present.

**Fiscal impact of rule:**

None.

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**Agency name:** **Maine Public Employees Retirement System (MainePERS)**  
**Umbrella-Unit:** **94-411**  
**Statutory authority:** 5 MRS § 17103(4)  
**Chapter number/title:** **Ch. 510**, Reduction of Disability Retirement Benefits because of Lump-Sum Settlements of Benefits payable under the Workers' Compensation of Similar Law or the United State Social Security Act  
**Filing number:** **2023-033**  
**Effective date:** 3/1/2023  
**Type of rule:** Routine Technical  
**Emergency rule:** No

**Principal reason or purpose for rule:**

This rule sets forth the methodology by which disability retirement benefits are reduced when a recipient receives a lump-sum settlement of benefits under the workers' compensation or similar law or the United State Social Security Act.

**Basis statement:**

This proposal for rule-making was developed through a consensus-based process in accordance with 5 M.R.S. § 8051-B and noticed on December 21, 2022. A public hearing was held on January 12, 2023. No members of the public provided oral comments at the public hearing, and no members of the public submitted written comments prior to the January 23, 2023 comment deadline.

This rule sets forth the methodology for determining the offset to disability retirement benefits when a recipient receives a lump-sum settlement of benefits under the workers' compensation or similar law or the United States Social Security Act. The proposed amendments align the rule with statute, where there is a distinction in methodology between the State-funded and PLD plans that is not reflected in the current rule. MainePERS has been applying the statutory distinction in its operations.

At the Board's regular meeting held on February 9, 2023, Mark Brunton made the motion, seconded by Dick Metivier to adopt the amended rule and its basis statement. Voted unanimously by those trustees present.

**Fiscal impact of rule:**

None.

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**Agency name:** Maine Public Employees Retirement System (MainePERS)  
**Umbrella-Unit:** 94-411  
**Statutory authority:** 5 MRS § 17103(4)  
**Chapter number/title:** Ch. 511, Standards for Actively Seeking Work  
**Filing number:** 2023-034  
**Effective date:** 3/1/2023  
**Type of rule:** Routine Technical  
**Emergency rule:** No

**Principal reason or purpose for rule:**

This rule sets out the standards and definitions to be applied in determining under 5 MRS §§ 1729(2)(B)(1) and 18529(2)(B)(1) whether a disability retirement benefit recipient is actively seeking work.

**Basis statement:**

This proposal for rule-making was developed through a consensus-based process in accordance with 5 M.R.S. § 8051-B and noticed on December 21, 2022. A public hearing was held on January 12, 2023. No members of the public provided oral comments at the public hearing, and no members of the public submitted written comments prior to the January 23, 2023 comment deadline.

This rule sets out the standards and process governing the actively seeking work program. When a recipient of disability retirement benefits is determined to no longer be disabled, the benefits continue as long as the recipient is actively seeking work. The proposed amendment establishes a rebuttable presumption that the recipient has not been actively seeking work if no work has been secured within five years. This presumption may be rebutted by a showing that the inability to secure work was out of the recipient's control. For current participants in the program, the five-year period would run from December 31, 2022.

At the Board's regular meeting held on February 9, 2023, Mark Brunton made the motion, seconded by Dick Metivier to adopt the amended rule and its basis statement. Voted unanimously by those trustees present.

**Fiscal impact of rule:**

None.

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**Agency name:** Maine Public Employees Retirement System (MainePERS)  
**Umbrella-Unit:** 94-411  
**Statutory authority:** 5 MRS §§ 9051-9064, 17103(4), 17106-A, 17106-B and 17451  
**Chapter number/title:** Ch. 702, Appeals of Decisions of the Executive Officer  
**Filing number:** 2023-035  
**Effective date:** 3/1/2023  
**Type of rule:** Routine Technical  
**Emergency rule:** No

**Principal reason or purpose for rule:**

This rule sets out the process for appeals of decisions of the Chief Executive Officer to the Board of Trustees. It provides for the appointment of a hearing officer to conduct the appeal and to prepare a recommended decision for action by the Board.

**Basis statement:**

This proposal for rule-making was developed through a consensus-based process in accordance with 5 M.R.S. § 8051-B and noticed on December 21, 2022. A public hearing was held on January 12, 2023. One member of the public provided oral comments at the public hearing, and the same member of the public submitted written comments prior to the January 23, 2023 comment deadline. No other comments were received.

This rule sets out the process for appeals of decisions of the Chief Executive Officer to the Board of Trustees. The proposed amendments update and clarify the appeals process, including: (1) how an appeal can be filed; (2) how employers can participate in an appeal; (3) when an appellant is entitled to receive the appeals packet; (4) when an appellant is entitled to an independent medical examination; (5) how appellants must be notified that their appeal may be considered abandoned; (6) how testimony may be provided; and (7) how much time the Chief Executive Officer has to reconsider decisions.

One member of the public<sup>2</sup> recommended that Section 8(3)(J) of the rule not be deleted as proposed. The commenter opined that leaving this section in place would permit the hearing officer to serve as a “neutral and independent decision maker” as required by statute and that the hearing officer “should not be limited to receiving only the medical information that MainePERS staff chooses to obtain and include” in the records that go to the hearing officer for consideration. The commenter suggested that the medical review service provider could assist the hearing officer in framing a referral for an independent medical examination.

Staff believes that the removal of Section 8(3)(J) as proposed does not impede the ability of hearing officers to be independent decision makers. Hearing officers are not limited to information that MainePERS staff provides. Appellants also have the opportunity to submit evidence, and the proposed amended rule provides the hearing officer with authority to order an independent medical examination if one has not already been obtained.

The medical review service provider’s role in the disability eligibility process is to provide recommendations and opinions to the Chief Executive Officer. 5 M.R.S. § 17106-B. Hearing officers in practice have not used their authority in the existing rule to refer cases to the

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<sup>2</sup> Sarah Walton, Esq., Winthrop



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medical review service provider or previously to the medical board, at least for many years. Neither hearing officers nor the Chief Executive Officer use the medical review service provider to frame referrals for independent medical examinations.

Based on the above, staff does not believe that any additional changes to the proposed rule are necessary in response to the comments received, and the Board concurs.

At the Board's regular meeting held on February 9, 2023, Mark Brunton made the motion, seconded by Dick Metivier to adopt the amended rule and its basis statement. Voted unanimously by those trustees present.

**Fiscal impact of rule:**

None.

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**Agency name:** Maine Public Employees Retirement System (MainePERS)  
**Umbrella-Unit:** 94-411  
**Statutory authority:** 5 MRS §§ 17103(4), 18801  
**Chapter number/title:** Ch. 803, Participating Local District Consolidated Retirement Plan  
**Filing number:** 2023-011  
**Effective date:** 1/24/2023  
**Type of rule:** Routine Technical  
**Emergency rule:** No

**Principal reason or purpose for rule:**

This rule governs the Consolidated Plan for Participating Local Districts.

**Basis statement:**

Under the current rule, cost-of-living adjustments (COLA) are paid to eligible retirees based on the Consumer Price Index for All Urban Consumers (CPI-U), up to a maximum of 2.5%. The CPI-U for the twelve-month period ending June 30, 2022 was 9.1%. The proposed amendment to the rule authorizes the payment of an additional 1.0% cost-of-living adjustment effective September 2022 to eligible retirees.

The PLD Advisory Committee was provided with information about the cost-of-living adjustment provision and discussed various options to address the unusually high inflation. By a vote of 6-3, Committee members voted to recommend an additional 1.0% COLA to eligible retirees, and MainePERS staff brought this recommendation to the Board of Trustees for consideration through the proposed rule amendment.

No members of the public provided comments at the public hearing. One individual submitted written comments prior to the December 19, 2022 comment deadline. The individual<sup>3</sup> commented in favor of the proposal and also opined that the increase should mirror that provided for Social Security benefits.

After considering the comment, the Board adopts the proposed change without modification, except to correct the end date of the period covered by the additional COLA, which was incorrectly stated as August 31, 2022 rather than August 31, 2023. The Board declined to change the basis on which cost-of-living adjustments are established to mirror that of Social Security without a recommendation of the PLD Advisory Committee because of cost and funding implications. Federal law provides for an un-capped Social Security COLA equal to the Consumer Price Index for All Urban Wage Earners and Clerical Workers (CPI-W). The Social Security Administration has announced an 8.7% COLA for the year beginning January 1, 2023. An additional COLA beyond the proposed change would adversely affect plan funding and require increased contributions.

At the Board's regular meeting held on January 12, 2023, Ken Williams made the motion, seconded by Dick Metivier to adopt the amended rule. Voted unanimously by all trustees present.

**Fiscal impact of rule:**

None.

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<sup>3</sup> Bette Thibeault, Lewiston