

1) Is it possible to exhaust all sick leave prior to annual leave?

Whether you can exhaust sick leave prior to exhausting annual leave depends on the circumstances of the leave that you will be taking. Under the [University's Board of Governors Rule 3.5 – Employee Leave](#), sick leave may only be used under certain circumstances, whereas annual leave may be used for approved absences. The Rule states as follows:

Sick Leave Usage

Sick leave may be used by the leave eligible employee when ill or injured or when in need of medical attention or when death occurs in the immediate family per Section 6 of this Rule.

A leave eligible employee may use sick leave for a member of the immediate family who is ill, injured, or in need of medical attention. Immediate family for this purpose is defined as: father, mother, son, daughter, brother, sister, husband, wife, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandmother, grandfather, granddaughter, grandson, stepmother, stepfather, step children, or others considered to be members of the household and living under the same roof.

Let's look at the three scenarios where the ACGME provides up to 6 weeks of paid time off in turn and evaluate how sick or annual leave may be used under these scenarios.

Parental Leave

First, both the birthing parent and the non-birth parent may use sick leave for their time spent in the hospital before and after the birth. Additionally, the birthing parent may use up to 6 weeks of sick leave after delivery, for a healthy delivery with no complications. The birthing parent may use up to 8 weeks of sick leave after delivery for a C-section. In the case of a healthy birth where there are no complications to either the birthing parent or child, the spouse must use annual leave upon returning home from the hospital. However, if there are complications related to the birth and the non-birthing spouse would be required to provide care to either the birthing parent or child beyond discharge from the hospital, the non-birth parent may use sick leave for these absences. If this exceeds five consecutive workdays, medical documentation must be provided. At the point where the additional care is no longer required, then the non-birth parent would be required to use annual leave for the remaining extent of the leave period. Regardless of the type of leave used, both the birthing parent and the non-birth parent are eligible for six-weeks of paid leave.

For adoption

The manner in which sick leave and annual leave is used in a parental leave scenario is very fact specific, and the University, through its medical management office, reviews each request on a case-by-case to identify which type of leave is appropriate under the circumstances.

Medical Leave

Employees may use sick leave for an approved medical leave or to care for an immediate family member who is ill, injured, or in need of medical attention.

Caregiver Leave

Unfortunately, what the ACGME means by “caregiver leave” is not defined. Nonetheless, a reasonable inference would be that caregiver leave means any leave in which you are caring for an immediate family member. Thus, if the leave falls within the scope of the University’s sick leave definition, that is, you are providing care to an immediate family member who is ill, injured, or in need of medical attention, then you may charge sick leave instead of annual leave for this time off. If the caregiver leave does not fall within this definition, then annual leave must be used.

Let’s take two examples. In the first, your mother has major surgery and will require 5 weeks of direct care while recovering. In this example, because it is an immediate family member who needs medical attention, you could use sick leave for this 5-week absence.

In the second, your mother is leaving on a work trip for 3 weeks, and you want to help your father while she’s gone. While it’s unclear whether this meets the ACGME’s definition of “caregiver leave,” let’s assume it does for the purposes of this hypothetical. Because your father doesn’t require medical attention and is not ill or injured, this would not fit within the parameters of sick leave. Thus, annual leave would be charged for this leave period.

2. What does “going into a negative leave balance” mean?

Before we dive into what “going into a negative leave balance” means, let’s layout why it is necessary. Per the ACGME Institutional Requirements, the University must provide up to 6 weeks of paid parental, medical, or caregiver leave and one additional week of paid leave at the start of a resident’s employment. However, state employees do not begin work with annual or sick leave balances. Instead, they accrue those balances at the rate of 2 annual leave days and 1.5 sick leave days per month. So, a resident who has only worked for a month or two at the University would not have sufficient annual and sick leave to cover an ACGME mandated leave period.

The ACGME does make clear in the [Institutional Requirement Frequently Asked Questions](#) that institutions may use vacation and other pay sources to support a resident/fellow salary during leaves of absence. From page 10 of the FAQs:

Sponsoring Institutions may use vacation and other pay sources to provide paid time off during leaves of absence, provided that doing so is consistent with institutional policy and applicable laws, and that one week of paid time off is reserved for use outside of the first six weeks of leave.

This results in a contradiction between the University’s rules and state law and what the ACGME requires. To resolve this contradiction, the University developed the solution to credit leave to

residents or fellows and allow them to use the credited annual or sick leave prior to accrual. The leave credit would then be earned back at the regular rate of accrual as the resident or fellow continues working. In other words, residents are permitted to go into a negative leave balance and then replace the negative balance with future accrued leave. This is only permitted if the leave period is of the type identified by the ACGME.

Generally, there is very little downside or impact to the resident for going into a negative leave balance. The primary limitation is that additional leave beyond what the ACGME requires will not be available until the negative leave balance is earned back and the resident has accrued a positive leave balance. If a resident or fellow leaves the institution with a negative annual leave balance, the University will review the situation and proceed consistent with ACGME requirements and state law.

3) Regarding the reserved week of leave, how will it be reserved and when can the week be used?

The ACGME policy is very clear that the one week of reserved leave be provided outside of the 6 weeks of parental, medical, or caregiver leave. From the policy:

[P]rovide residents/fellows with a minimum of one week of paid time off reserved for use outside of the first six weeks of the first approved medical, parental, or caregiver leave(s) of absence taken.

The ACGME also provides that this one additional week must only be reserved in the same academic year in which the resident or fellow takes their ACGME required parental, medical, or caregiver leave. From the FAQs:

The reserved one week of paid time off (outside the first six weeks of approved medical, parental, and caregiver leaves of absence) is to be available within the appointment year(s) in which the leave is taken. It is not required that this reserved week carry over into subsequent years of an individual's educational program.

Just like with the parental, medical, or caregiver leave, residents and fellows will be permitted to go into a negative leave balance in order to accommodate this reserved week of leave. The reserved week may be used in the same manner as annual leave or sick leave, and those leave balances will be charged depending on the circumstances. The reserved week may be used as an additional week of paid leave at the end of any ACGME provided parental, medical, or caregiver leave. In essence, a resident or fellow would be permitted to have 7 weeks of paid leave for a parental, medical, or caregiver leave if they so choose, and the circumstances support the additional time off.

4) If I have already taken a week of vacation prior to taking parental, medical, or caregiver leave, is that my week of reserved leave?

If a resident or fellow takes a week of paid vacation during the same academic year as the ACGME required parental, medical, or caregiver leave, then the University's responsibility to provide an

additional week of leave has been met. That means that if the resident or fellow wanted to take any time off after the parental, medical, or caregiver leave, and they've already taken an additional week of leave in that academic year, any new leave period would need to be covered by annual or sick leave balances. The resident or fellow would not be permitted to go into a negative balance for any new leave period.

Let's look at an example. A resident has 6 days of annual leave and 15 days of sick leave. The resident takes a week off in July, which leaves them with 1 day of annual leave and 15 days of sick leave. The next week, they must go on a 4-week (in other words, 20 day) medical leave. 3 of those weeks will be covered and paid by the 15 days of sick leave, and 1 day of the 4th week by the 1 day of annual leave. That means for the remaining 4 days, the resident's sick leave balance would go into the negatives.

At this point, both the ACGME required leaves have been provided. The resident has received a paid medical leave of up to 6 weeks and has used the 1 reserved week. *But that does not mean the resident is incapable of taking any more time off during that academic year.* As the resident continues to work, they will accrue annual leave, which could be used later in the academic year to take time off. They just would no longer be permitted to go into negative leave balances to support those new leave periods.

Drafted in spring 2023
By Michael Spooner, JD
Senior Associate General Counsel
West Virginia University

Reviewed and approved by the GMEC Taskforce:
Reviewed and approved by the GMEC: