

Sample Valid Reasons for Voluntary Unpaid Leave

I have practiced immigration law for over two decades now. One topic which seems to pop up time and again is the issue of H-1B visas and voluntary administrative leave. So I selected this as my *Topic of the Week*.

Let's face it, just like U.S. citizen employees, H-1B employees are very busy people with very busy lives. They are ambitious professionals, moving forward not only professionally, but personally as well. Their lives often include many life-changing milestones-- getting married, the birth of a child, raising families, visiting with excited grandparents, scheduling vacations, and celebrating important family events. These are all welcomed diversions from life's day-to-day routines. On the other hand, nonimmigrants may also have to deal with the unexpected (and unwanted): the sudden death of a beloved family member, a difficult or risky pregnancy, a seriously ill child, or an unforeseen accident or injury. In short, life may be unpredictable. For this reason, both USCIS and the U.S. Department of Labor recognize an employee's need for *voluntary administrative leave*.

The [Fair Labor Standards Act \(FLSA\)](#) does not require payment for time not worked, such as personal leave, vacations, sick leave, or federal or other holidays. These benefits are generally a matter of agreement between an employer and an employee. But we need to carefully distinguish *voluntary administrative leave* from that of *non-productive time*. The key to voluntary administrative leave is the word "voluntary." In the past, I have discussed this matter with several different officers during DOL Wage & Hour audits. Unpaid voluntary administrative leave must "make sense," and "be well documented." An officer once provided me with this example:

Say an employee has been assigned to the same end client project for an extended period of time. He/She is about to successfully end that project and start a new one. Now let's say that same H-1B employee has several family members coming to the U.S. for the first time to visit and stay with the H-1B employee. They haven't seen each other for years, and of course, the family wants to visit Disney, maybe see Niagara Falls, or possibly travel the United States and visit other extended family members. This is going to take weeks!

In this scenario, it would make perfect sense that this employee might approach his/her employer and request voluntary administrative leave. Voluntary administrative leave



may be paid or unpaid - depending on company policy and compliance with the **Family Medical Leave Act (FMLA)**. Unpaid voluntary administrative leave might be the right solution for an H-1B employee who has been assigned to a demanding project for an extended period of time, has saved enough money to cover his/her bills, and just needs a break and some extended personal/family time.

On the other hand, let's say an H-1B employee is a relatively new employee, assigned to a project for about three months. The employee requests voluntary administrative leave for a four (4) month period because they want to travel or "need a break." It doesn't make sense and certainly doesn't appear "on its face" voluntary. USCIS and DOL Officers view these types of leaves as suspect, and more consistent with H-1B non-productive time. Unlike voluntary administrative leave, non-productive time must be paid in accordance with the proffered salary amount.

Just remember, voluntary administrative leave, in the H-1B audit context, must always be initiated by the employee and must always be based on common-sense reasoning. Lastly, the common-sense reason for the leave must be well documented. This includes a letter from the H-1B employee requesting voluntary administrative leave that cites the basis for that requested leave. This letter should be added to the employee's human resource records for safekeeping.

As an immigration attorney, I am familiar with RFEs requesting pay stubs which establish maintenance of status, I-140 ability to pay, and H-1B wage compliance. When I have a W-2 which reflects a salary amount less than the proffered salary amount, I am immediately alerted to the fact that some life event has occurred, and I am searching for that administrative leave documentation. I receive newborn photos (which I absolutely love seeing!), birth certificates, marriage photos (love those as well!), all documenting important life events that substantiate an employee's request for voluntary administrative leave. Sadly, I may also receive documentation from doctors, hospitals, death certificates, all confirming an H-1B employee's need for voluntary administrative leave due to an unforeseen personal misfortune. Whatever the reason, remember... documentation, documentation, documentation.

If you have any additional questions regarding this subject, please do not hesitate to reach out directly to our office, Hallett McCann Law Group. Meanwhile, keep the baby pictures and wedding pictures coming, and please stay safe!