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Investments in India: A Structural Strategy

By Vinita Bahri-Mehra

A U.S. company interested in expanding its business operations to India can form an agency, an association of persons, a liaison office, a project office, a joint venture and/or a subsidiary in India.

■ ***Agency***
An agency gives a U.S. company an indirect presence in India. Under it, the U.S. enterprise appoints an Indian entity as its agent and, depending on the agency agreement, the agent can buy or sell or provide any other service to the U.S. enterprise.

■ ***Association of Persons***
As association of persons is a collection of different entities (e.g., individuals or companies) that join together for a common purpose. An association of persons is formed by executing an agreement among the participants. The association need not register with authorities in India, but is a recognized entity for tax purposes.

■ ***Liaison Office***
The liaison office collects information about possible market opportunities and provides information about the U.S. company to prospective Indian customers. It can promote export/import transactions and facilitate technical collaborations between U.S. companies and Indian companies. The liaison office cannot undertake any commercial activity, and cannot, therefore, earn any income in India. Approval through an application process from the Reserve Bank of India (RBI) is required to open such an office.

■ ***Project Office***
U.S. enterprises planning to execute specific projects can set up temporary offices in India. The RBI grants general permission to foreign entities to establish project offices, subject to specified conditions. Such an office can only execute the project for which it was established.

■ ***Joint Venture***
In a joint venture (the most sought-after option for U.S. companies seeking to establish a presence in India), a U.S. company forms a limited liability company (LLC) in India. This LLC partners with another Indian company for its operations. To establish a joint venture in India, U.S. companies should consider:

1) Choosing a local partner: An appropriate local partner can play a

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National Labor Relations Board Addresses Employee Social Media Activity

By Kelly Schoening and Katie Cassidy

Society's ever-increasing use of social media platforms has created new problems for employers. Concerns include whether an employer can regulate the content an employee posts online if the posting is made while the employee is off-duty, whether the employer should implement a social media policy and what this policy should say.

Reports published by the National Labor Relations Board focus on employer-employee social media issues. They detail NLRB decisions involving employee social media activity. They also address whether employer policies

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significant role in overcoming various legal complexities and ensuring business synergy.

2) Identifying a location: Important factors to consider when searching for a location are availability of infrastructural services, financial and tax incentives.
3) Negotiating: Before negotiating, the parties should enter into confidentiality/non-disclosure agreements to protect strategic business information to be exchanged for the joint venture operations.

■ ***Subsidiary***

U.S. equity in Indian companies can be 100 percent, subject to any equity caps prescribed by RBI for specific sectors (e.g., agricultural). A subsidiary can be incorporated under the Indian Companies Act as a private limited company or a public limited company. Both options offer liability protection and have minimal capitalization requirements.

Structuring Issues

U.S. companies might also consider investing in an Indian company through an intermediate holding company in a tax-favorable jurisdiction. Also, India has favorable tax treaties with these countries: Mauritius, Singapore, Cyprus, Luxembourg and the Netherlands.

Every U.S. company planning to do business in India must develop a legal and tax strategy to support its business plans and objectives. This strategy should include due diligence concerning prospective partners and specific conditions that may affect the company's market prospects. It is wise to seek experienced counsel before entering the Indian market.

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limiting employee social media use are overly broad and could reasonably be interpreted as restricting employee communications protected under the National Labor Relations Act (NLRA).

Under the NLRA, employees may engage in protected, concerted activity. Such activity exists when two or more employees act together regarding the terms and conditions of their employment. Employers may not interfere with this kind of activity.

NLRB Social Media Cases

Most of the cases discussed in the NLRB reports involve situations where one or more employees used a social media site, such as Facebook or Twitter, to post comments about some aspect of their employment, and the employer subsequently took an adverse action. In some of the cases, other employees responded with comments of their own. Whether this type of online activity amounts to protected, concerted activity depends on the specific facts of each case.

Under the NLRA, employees may engage in protected, concerted activity. Employers may not interfere with this kind of activity.

If employees' online posts also involve comments from other co-workers and focus on job performance or working conditions, they may be protected activity. This is true even if the posts are made while an employee is off-duty. If, however, an employee's posts are more along the lines of gripes or harassment, and if no other employees respond, this activity may not be protected. In situations involving social media, employers should use care in gathering facts and consult an attorney before taking action against an employee.

NLRB Rulings on Social Media Policies

In devising a social media policy, employers should avoid using overly broad language and should clearly define key terms so that the policy is not construed as restricting lawful employee activity. In its decisions on the lawfulness of social media policies, the NLRB has focused on whether there are examples or contextual qualifiers that could be understood as placing limits on how the policy is applied.

In their social media policies, employers cannot:

■ prohibit employees from making comments about the employer online;

■ prohibit employees from identifying themselves as employed by the company; or

■ prohibit employees from making defamatory comments about the employer online.

Employers are permitted, however, to impose a policy that:

■ prohibits the disclosure of confidential information;

■ prohibits use of the company's trademarks; and

■ prohibits vulgar, obscene, threatening or harassing online comments that relate to race, religion, color, age, sex, ancestry, national origin, disability or any other characteristic protected by applicable federal, state and local law.

Overall, an employer's social media policy must provide the necessary context to clarify that only harassing or discriminatory communications are prohibited. Overbroad statements will be found unlawful if examined by the NLRB.

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