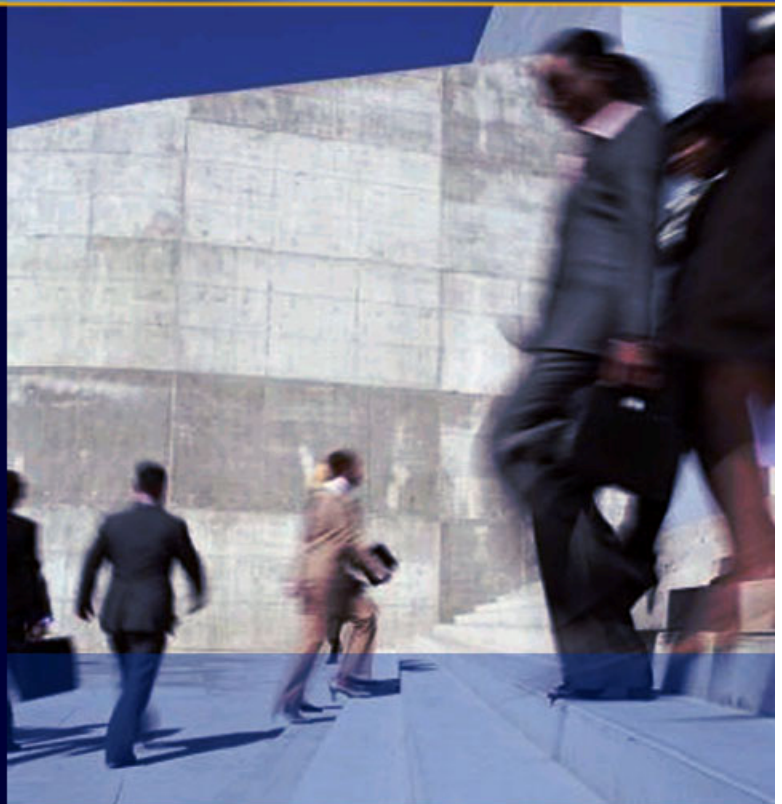




**Employee Handbooks/
Document Retention
Investigations**

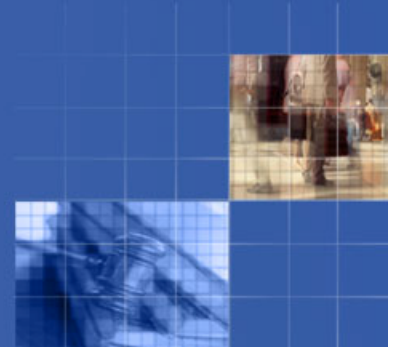
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**SEYFARTH
ATTORNEYS SHAW
LLP**

Employee handbooks are important

- Evidence of at-will employment
- Defense to harassment allegations
- Defense to certain wage/hour claims
- Compliance with federal and state notice requirements
- Explanation of policies
- Set expectations for employees
- Uniformity / Consistency



Common handbook pitfalls

- Inadvertent contract creation
- Illegal/outdated policies
- Critical policies missing
- Handbook not followed / distributed
- Handbook not reviewed / revised / updated
- Handbook fails to follow the plain English rule
- Handbook conflicts with other employment policies



Necessary policies

- ✓ Anti-harassment policy
- ✓ EEO policy
- ✓ FMLA policy (if 50 or more employees)
- ✓ Employment at-will statement
- ✓ Overtime
- ✓ Code of Ethics



Triggers for necessary policies

Number of
Employees

1

NLRA, FLSA, EPA, ERISA, OSHA, USERRA

15

TITLE VII, PDA, ADA

20

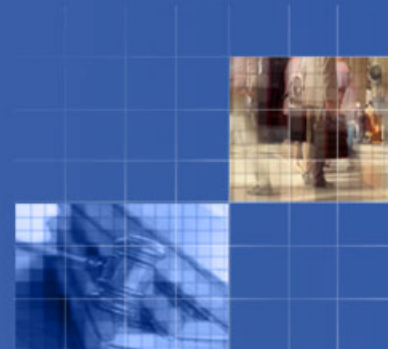
ADEA, COBRA

50

FMLA, Executive Order 11246 (AAPs)

100

WARN



Recommended policies

➤ Policies That Tell Employees About Limits and Penalties

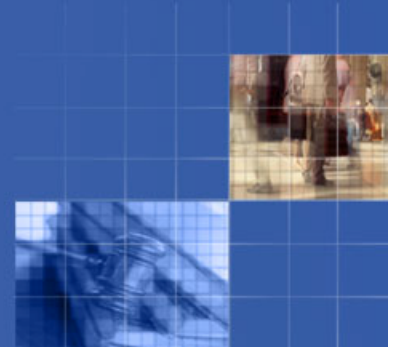
For example:

- ✓ Electronic Monitoring Policies
- ✓ Work Rules
- ✓ Attendance
- ✓ Drug Testing
- ✓ Searches/Privacy



Optional policies

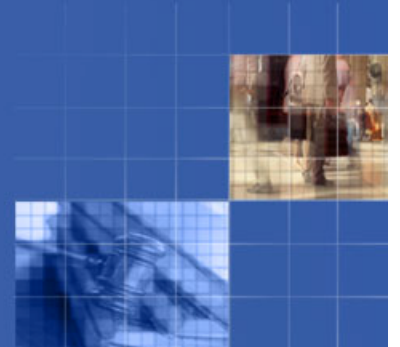
- ✓ Vacations, holidays, and other paid-time off
- ✓ Work hours
- ✓ Rest and meal periods
- ✓ Jury/Witness duty
- ✓ Voting Time-off
- ✓ School visitation
- ✓ Promotions
- ✓ Layoffs and recalls



Acknowledgments are important

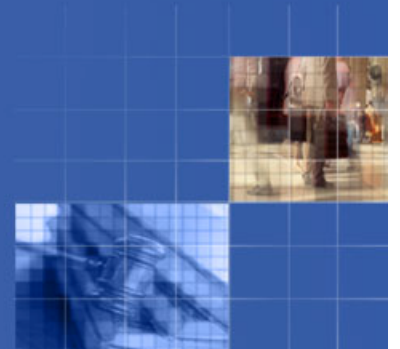
Policies should be acknowledged because:

- Proves that they got it
- Provides important disclaimers
- Separate policy acknowledgement
 - Anti-harassment policy
 - Business Ethics / Standards of Conduct
 - Electronic Communications Policy / Privacy Policies
 - Drug & Alcohol testing policies



Document retention

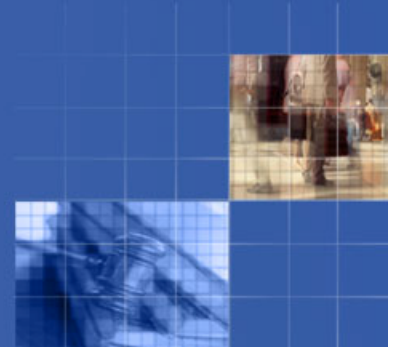
HOW LONG DO I HAVE TO KEEP THESE
FORMS IN MY FILING CABINET?



What records are retained?

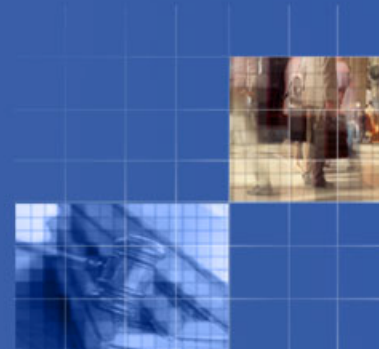
- Must retain records with
 - legal value or as required by specific federal and/or state statute
 - organizational value
 - litigation value

- Should retain records with
 - fiscal value
 - operational value
 - historical value



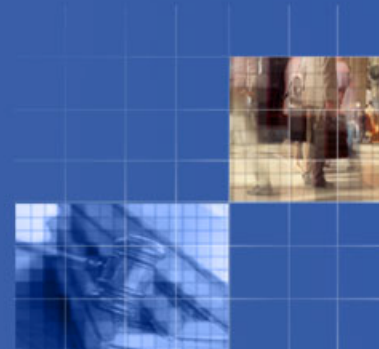
Liability issues

- Federal and State statutes and laws include penalties for failing to properly maintain documents
- For example: Sarbanes-Oxley Act of 2002
 - illegal for any person to alter or destroy records with intent to impede, obstruct or influence the investigation or proper administration of any matter under any department or agency of the U.S.
 - criminal penalty – up to 20 years and fine



Approach to document retention

- Make it comprehensive – make sure that the policy covers all forms of data used within your organization (i.e., hardcopy, electronic, microfilm, etc.)
- Make it easy – create standardized forms
- Make it visible – post the policy
- Identify the appropriate records custodian(s)
- Explain seriousness of policy to managers



Overall structure of document retention policy

Consider designing a policy around these major components:

- Principles related to record creation and circulation
- Principles governing record retention (overall purpose, methods for retention, retention times, decision making, governmental inquiries and investigations, litigation, confidentiality, drafts, and copies)
- Directives regarding the placement and storage of records
- Mechanisms for document destruction
- Miscellaneous matters (i.e., exemptions, contractual requirements)



Electronic data

- 99.97% of corporate documentation is created electronically
- Most e-documents are never printed
- In 2010, approximately 290 billion email messages were sent each day
- Almost all new information is stored electronically



The Federal Rules changed to address electronic data

The Federal Rules changed December 1, 2006

- The rules created a new category of “Electronically Stored Information” (ESI)
- “Accessible” ESI is presumptively discoverable, and “inaccessible” ESI is discoverable upon showing of good cause
- A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost



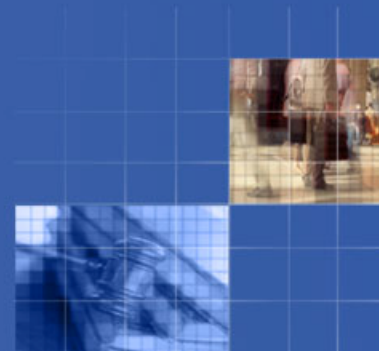
Disasters in documentation

- Desk files
- No documentation to support the employee's termination
- No (or bad) documentation of a harassment investigation and resolution
- Padded performance reviews
- Mean-spirited memos
- EEOC position papers/TWC hearings
- Sloppy documents – say what you mean
- E-mails



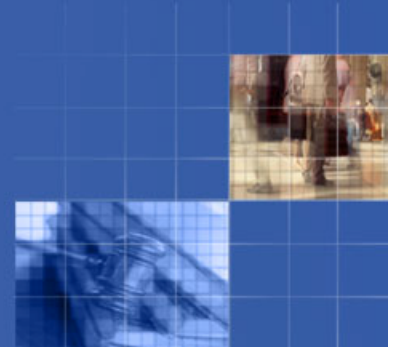
Documenting tips

- Instruct managers on proper documentation
- Maintain uniform forms for documentation, reducing the risk of inappropriate documentation
- Review documentation
- Require employee signature on documentation
- Develop, communicate and enforce an e-mail policy



Why is it important to investigate?

- ▶ Identify employee misconduct, violations of company policy, and/or violations of law
- ▶ Improve the factual bases for employment decisions
- ▶ Mitigate the potential for morale and productivity problems
- ▶ May limit company liability



The legal duty to investigate

A. Statutes and Regulations

- Title VII, OSHA, The Federal Drug-Free Workplace Act

B. Common Law

- Negligent hiring, supervision and retention claims
- However, an employer has no duty to investigate at all before terminating an at-will employee. See *Texas Farm Mutual Ins. Co. v. Sears*, 84 S.W.3d 604 ((Tex. 2002).



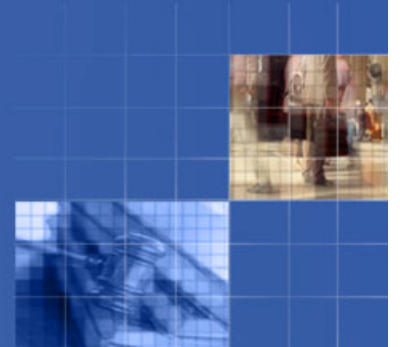
Choosing an appropriate investigator

- ▶ The wrong investigator may discourage candid interaction
- ▶ A good investigator is neutral, objective, and trained
- ▶ Consider using more than one investigator
- ▶ Consider using an outsider
- ▶ Consider using an attorney



Conducting the investigation

- ▶ Conduct the investigation in a timely manner
- ▶ Determine the scope of the investigation
- ▶ Identify documents to be reviewed
- ▶ Identify potential interviewees and their relationship to the matter under investigation
- ▶ Decide the order of interviews
- ▶ Determine the format for recording information from witnesses



Avoiding mistakes

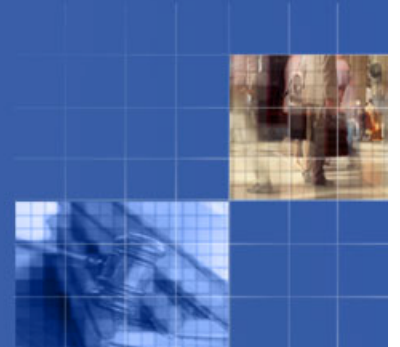
- ▶ Do not search employees' desks, work spaces, papers, emails, voicemails, or lockers without consulting with counsel
- ▶ Do not secretly tape record interviews, telephone calls or intercept emails without consulting with counsel
- ▶ Do not try to use polygraph testing without consulting with counsel
- ▶ Do not attempt to keep interviewees at an interview site



Conducting witness interviews

Advise interviewees of:

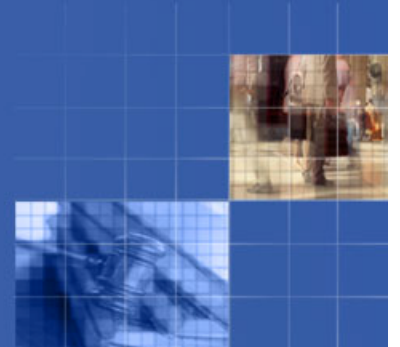
- ▶ Purpose of interview
- ▶ Expectation of truthful cooperation
- ▶ No retaliation for participation in investigation
- ▶ Right and duty to report perceived retaliation
- ▶ Limits on confidentiality of interview



Conducting witness interviews

Do:

- ▶ Determine extent of personal knowledge
- ▶ Ask open-ended questions
- ▶ Ask follow-up questions to ensure sufficient detail
- ▶ Note if the witness refuses to review/sign statement
- ▶ Ascertain the basis for concern of any witness that “doesn’t want to get involved”



Conducting witness interviews

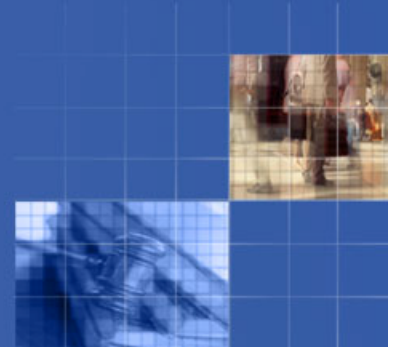
Don't:

- ▶ Intimidate the witness
- ▶ Promise absolute confidentiality
- ▶ Use leading questions
- ▶ Provide unnecessary information
- ▶ Allow witness to review investigator's notes



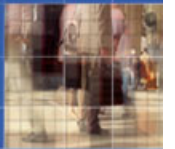
Interviewing complainant

- ▶ Description of each incident of misconduct
- ▶ Response to each incident
- ▶ Witness(es) to incident(s)
- ▶ Documents or evidence of incidents
- ▶ Determine cooperation of complainant
- ▶ Reason for delay, if any, of reporting alleged misconduct
- ▶ What complainant wants
- ▶ Effects, if any, of alleged misconduct



Interviewing complainant

- ▶ Determine the type of relationship she/he had with accused
- ▶ Explore the need for any interim action while the investigation is pending
- ▶ Consider whether to prepare and have the complainant review, correct, and sign a written account of allegations
- ▶ Consider whether to document the procedural aspects of the interview
- ▶ Provide complainant with a record of the interview upon request



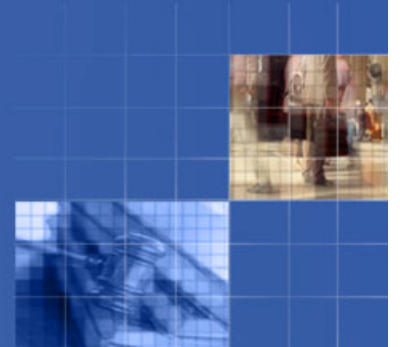
Interviewing the alleged wrongdoer

- ▶ Begin with a general description of the allegations and ask open-ended questions
- ▶ Identify each alleged improper statement or action in detail and get a denial, admission, or explanation as to each detail
- ▶ Explore any working or personal relationship between the complainant and the alleged wrongdoer



Interviewing the alleged wrongdoer

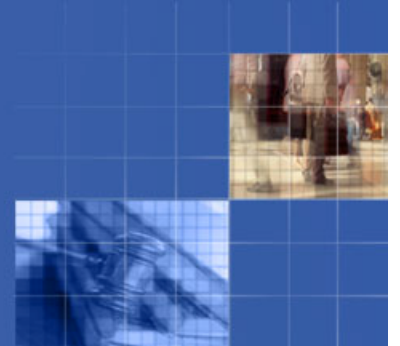
- ▶ Ascertain the extent and nature of the interactions the accused has had with the alleged victim
- ▶ Inquire about documents/potential witnesses
- ▶ Explore any reasons the complainant has to lie
- ▶ Give accused the opportunity to provide alibis or mitigating circumstances
- ▶ Note if the alleged wrongdoer refuses to provide or sign a written statement and reasons for the denial





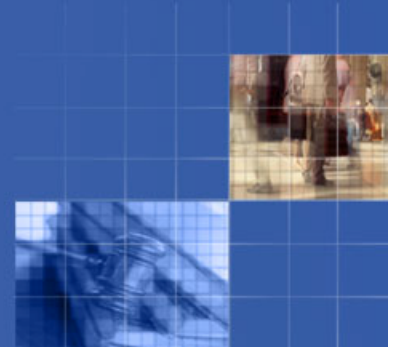
***Farragher/Ellerth* can provide a defense**

- ▶ Locate and preserve the company's sexual harassment policy (and any acknowledgement signed by complainant/accused)
- ▶ Was the policy followed?
- ▶ Document exactly when and to whom the complainant first complained about harassment



Two types of privilege relevant to internal investigations

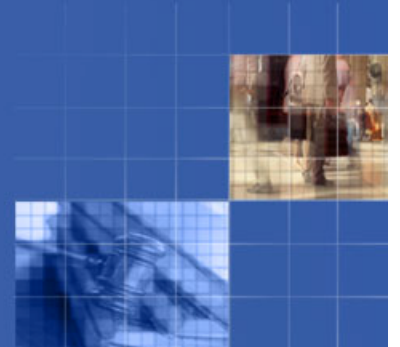
- ▶ Attorney client privilege/ attorney work product doctrine
- ▶ Defamation privilege



Attorney client privilege

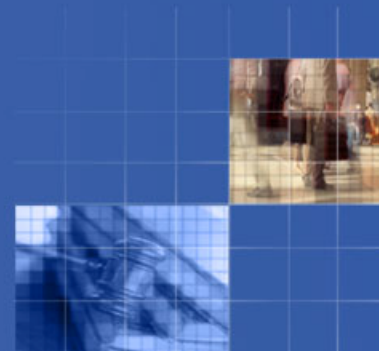
The privilege exists where:

- ▶ a communication
- ▶ is made in confidence
- ▶ to an attorney
- ▶ by a client
- ▶ for the purpose of seeking or obtaining legal advice



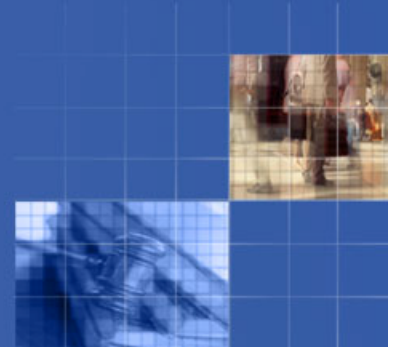
Attorney client privilege

- ▶ The privilege generally applies to in-house counsel when communications are made for the purpose of securing legal advice
- ▶ It protects the written statements, private memoranda and personal recollections prepared or formed by a party's counsel
- ▶ The privilege protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney
- ▶ A communication must generally be confidential when made and counsel must keep it confidential in order to preserve the privilege



Defamation privilege

A qualified privilege exists in defamation cases brought by accused wrongdoers where the employer can show that the potential defamatory statements were made in good faith in the course of investigative reports or communications



Waiving the privilege

- ▶ Voluntary disclosure of the content of the communication (or a substantial part of the communication) to third parties
- ▶ In defamation, actual malice will defeat an employer's conditional privilege to make defamatory statements in the course of an investigation



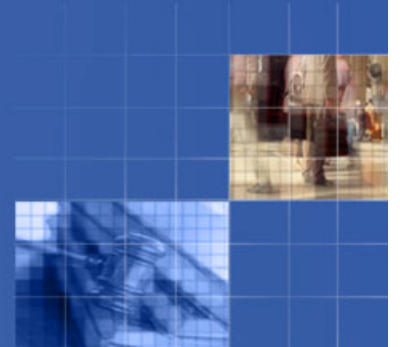
Avoiding problems with privilege

- ▶ Take steps in advance to preserve the privilege
- ▶ Limit access to information
- ▶ Proper labeling



Concluding the investigation

- ▶ Always refer to the investigation and the allegations in terms of violation of “company policy” and not violations of law
- ▶ Do not document the conclusion that unlawful harassment occurred
- ▶ Decide whether there was a violation of company policy or other misconduct
- ▶ Ultimate decision maker(s) should be someone other than investigator
- ▶ Take prompt corrective action, if appropriate



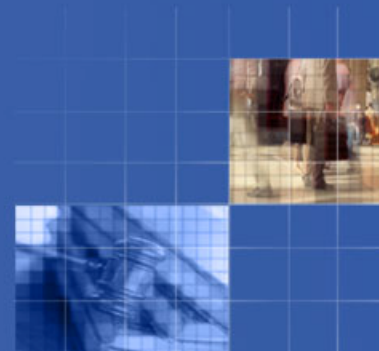
Affirmative Follow Up

- ▶ Periodically check with complainant to confirm no recurrence and no retaliation
- ▶ If there was discipline for the alleged wrongdoer, review compliance with action plan



Remember

- ▶ A complaint does not need to be in writing
- ▶ A good written policy addressing harassment, discipline and complaint procedures is important
- ▶ Communication of that policy and training is also critical





The End



SEYFARTH
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