

## EEOC Critical Of NLRB's Investigation Confidentiality Concerns

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An Equal Employment Opportunity Commission (EEOC) task force has released a comprehensive report on its 18-month study on the issue of harassment in the workplace. The Select Task Force on the Study of Harassment in the Workplace consisted of a select group of outside experts impaneled to examine harassment in the workplace and was co-chaired by two current EEOC Commissioners, Chai Feldblum and Victoria Lipnic. They recently published the "*Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace*." There is much useful information in the [95-page report](#), including detailed recommendations for employers of all sizes on compliance, training and internal complaint mechanisms. Of particular note, however, was reference to the National Labor Relations Board's (NLRB) position critical of employer policies that seek to promote confidentiality of workplace harassment investigations. For example, see the board's *Banner Health System* case, 358 NLRB No. 93 (July 30, 2012), and the NLRB general counsel's Advice Memorandum dated Jan. 29, 2013. Generally speaking, the board takes the position that employer blanket policies seeking to promote confidentiality of investigations infringe on employee Section 7 rights. Employers must determine on a case by case basis whether in a given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up. A copy of the GC's Advice Memorandum can be found [here](#). The EEOC's Joint Task Force noted in the report the strong comments it received about the NLRB's position: "We heard strong support for the proposition that workplace investigations should be kept as confidential as is possible, consistent with conducting a thorough and effective investigation. We heard also, however, that an employer's ability to maintain confidentiality – specifically, to request that witnesses and others involved in a harassment investigation keep all information confidential – has been limited in some instances by decisions of the National Labor Relations Board ("NLRB") relating to the rights of employees to engage in concerted, protected activity under the National Labor Relations Act ("NLRA"). In light of the concerns we have heard, we recommend that EEOC and NLRB confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA." It bears watching to see if EEOC follows through on its own recommendation to start a dialogue with NLRB in an effort to solve the tension between the two agencies' positions on this issue.

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