

## Despite Potential Confusion, NLRB Declined to Change Representation Case Contract Bar Doctrine

Article By:

Brian P. Lundgren

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Despite concerns over potential employee confusion about when they must exercise their right to petition for an election to decertify their union representative, in an [April 21, 2021, decision](#), the National Labor Relations Board (NLRB) chose to retain the contract bar doctrine as it exists.

Under the existing contract bar doctrine, employees cannot file an NLRB petition for an election to decertify their union representative during the first three years of a collective bargaining agreement, unless the employees do so during a specified “window period” before the expiration of the agreement (or, if the contract is longer than three years, prior to the third anniversary). During this contract bar period, the NLRB will dismiss all representation petitions, unless the employees file the petition during the 30-day period that begins 90 days and ends 60 days before expiration of the existing collective bargaining agreement. The healthcare industry has a different window period, requiring the petition be filed during the 30-day period that begins 120 days and ends 90 days prior to expiration of the agreement.

In addition, the NLRB has a “certification bar” for newly unionized workplaces. This bar bans petitions even without an executed collective bargaining agreement during the first year following union certification, to allow the parties time to attempt to reach an agreement. If the union and the employer then reach a collective bargaining agreement, the employees cannot ask for an election during the first three years, except during the specific window period. After the collective bargaining agreement reaches the three-year mark or expires, the employees may ask for an election to decertify their union as their representative.

While the NLRB shared concern that the “window period” can be confusing and may not allow employees to readily ascertain the date on which the window opens and closes for filing of a representational petition, it declined to disturb existing law. Rather, the NLRB opted to retain the current contract bar doctrine because, in its estimation, a sufficiently compelling case had not been made for a particular alternative formulation of the doctrine.

Under the Biden Administration, one should not expect any changes to the contract bar doctrine. Peter Robb, the General Counsel under the previous administration, had filed a brief with the NLRB arguing that the current version of the contract bar doctrine interfered with employee free choice because it could deny employees the chance to vote. But the Biden Administration’s new Acting

General Counsel, Peter Sung Ohr, withdrew the brief prior to the NLRB decision. The NLRB did not consider the withdrawn brief in reaching its decision.

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