

NLRB ALJ Continues To Apply D.R. Horton, Despite Fifth Circuit Reversal

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In a decision issued last week, an NLRB ALJ continued to apply the Board's controversial *D.R. Horton* decision, despite the fact that the [Fifth Circuit explicitly reversed the NLRB's decision](#) last month. As we have [previously covered](#), *D.R. Horton* addresses the validity of arbitration clauses and class action waivers in employment agreements. The Board has taken the position that arbitration agreements which prohibit employees from filing collective or class actions violate Section 7 of the NLRA, which allows employees to act together for their mutual aid or protection in employment matters. However, the Board's position has been consistently rejected by federal courts across the country and the Board was reversed outright in the *D.R. Horton* appeal by the Fifth Circuit in December.

Yet, the NLRB continues to apply *D.R. Horton* in its administrative decisions, as evidenced by the ALJ decision in [Leslie's Poolmart Inc.](#) released last week. There, the ALJ determined that because the Supreme Court had not "expressly overruled" *D.R. Horton*, it continued to be established Board precedent that she was bound to follow, despite the reversal by the Fifth Circuit and [several recent Supreme Court cases](#) which have upheld arbitration agreements in employment cases.

Furthermore, not only did the ALJ in *Leslie's Poolmart Inc.* apply *D.R. Horton*, she applied it to an arbitration provision that did not expressly prohibit collective or class actions. The ALJ determined that the arbitration clause was invalid regardless under the NLRA because it "has the effect" of prohibiting such actions because the employer used it successfully to have a class action dismissed.

Employers should continue to monitor the law in this area as it appears that only a decision by the Supreme Court will move the Board on this issue. The NLRB's deadline to file a cert petition on the Fifth Circuit's *D.R. Horton* decision is March 3.

The ALJ's decision in *Leslie's Poolmart, Inc.* is available on the Board's website [here](#).

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