

Whither Thou Goeth D.R. Horton?

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**Gerald F.
Lutkus**

Of Counsel
(Retired)

Even the administrative law judges for the NLRB can't agree on the viability of the Board's holding in *D.R. Horton*. As reported in this morning's *Employment Law 360*, two ALJ decisions handed down last week went different directions on *D.R. Horton*. One Board ALJ decided that *D.R. Horton* was not viable in light of the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*. On the very same day, however, a different ALJ in a separate case rejected similar arguments and held that the Board's *D.R. Horton* decision had not been overruled by the *American Express* decision.

In [Chesapeake Energy Corp.](#), Administrative Law Judge Bruce D. Rosenstein determined that the Board's decision in *D.R. Horton* that class and collective action waivers violate the National Labor Relations Act "cannot be sustained" in light of the *American Express* decision.

At the same time, Judge Gerald A. Wacknov in the [Securitas Security Services USA](#) case distinguished the *American Express* decision on the grounds that it did not deal directly with the interplay between the Federal Arbitration Act and the National Labor Relations Act and, therefore, the Board's decision in *D.R. Horton* was not implicitly overruled by the Supreme Court's decision. Judge Wacknov, as a result, found that the arbitration policy was illegal under *D.R. Horton*.

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