

## NLRB ALJ Finds Employee Arbitration Policy Unlawful

November 9, 2012 | [Labor And Employment](#)



**John T.L.  
Koenig**  
Partner

The NLRB has continued to chip away at employer efforts to implement alternative dispute resolution programs in the workplace. In a decision issued on election day, an NLRB ALJ found that 24 Hour Fitness USA, Inc.'s arbitration policy violated the National Labor Relations Act even though employees could opt out of the program and even though it specifically informed employees of their right to file a separate NLRB charge.

This follows an earlier decision by the full Board in *D.R. Horton*, 357 NLRB No. 184 (2012) where the Board likewise struck down an employee arbitration program because they deemed it violative of employees' Section 7 rights to engage in protected concerted activity to resolve wage and other disputes with their employer. 24 Hour Fitness' program gave employees 30 days to opt out of the mandatory arbitration process. The ALJ called this opt out feature " *an illusion*" and found that employers cannot require employees to affirmatively act (sign and return an opt out form to the company) in order to preserve rights otherwise guaranteed by law.

The ALJ also found that even if a small number of employees opted out, their right and ability to work collectively with co-workers to advance employment claims would still be thwarted because most employees would not opt out. The Judge highlighted this point in a colorful footnote:

"Charging Party and its amicus ally suggested that I essentially conclude the Respondent deliberately designed its initial employment documents in order to, among other things, dupe new employees into being bound by its arbitration policy. Although I am not willing to reach that conclusion based on the limited evidence in this case, I would be startled to learn that the number of employees who made a conscious, fully-informed decision to be bound by Respondent's highly self-serving arbitration policy even came close to the infinitesimal number of employees who actually opted out."

A copy of the full decision can be [found here](#).

### RELATED PRACTICE AREAS

Labor and Employment  
Labor Relations