

NLRB *DR Horton* Rehearing Denied

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The National Labor Relations Board (NLRB) is likely weighing an appeal to the U.S. Supreme Court after the Fifth Circuit Court of Appeals [denied the NLRB's request for an en banc rehearing](#) in *DR Horton Inc.* **The Decision** The Fifth Circuit's original ruling struck down the National Labor Relations Board's finding that Section 7 of the National Labor Relations Act prevents employers as a condition of employment from putting in place arbitration agreements that waive employees' right to pursue class claims in an arbitration forum. As discussed in our [prior blog posts](#) regarding the Fifth Circuit's decision, the court determined that the Board's conclusion was not supported by the National Labor Relations Act's language, legislative history or purpose. As such, the court found that there was nothing in the NLRA that would override the application of the Federal Arbitration Act, and therefore the Board's decision was in error because the NLRA simply does not prevent the enforcement of arbitration agreements by the terms set forth in such agreements. **Next Steps** The Fifth Circuit's April 16th decision to not allow a rehearing sets this matter up for further appeal by the NLRB to the U.S. Supreme Court, but that is not necessarily a certain result. In part, the Board may not want to pursue this case to the Supreme Court because the Board has traditionally taken the position that it will adhere to its previous holding until the Supreme Court has ruled otherwise, even if lower appellate courts have issued contrary decisions. That tact by the Board would allow the Board, as a matter of its policy, to continue to pursue violations in other Circuits where a Court of Appeals has not spoken on the issue. And even if the Board files a petition for appeal to the Supreme Court, it is not certain that the petition would be granted. Notwithstanding any of this, the Fifth Circuit's most recent rebuke of the Board's *DR Horton* decision joins a long line of cases that have challenged the Board's position, as we have [previously covered](#). **An Additional Consideration for Employers** Despite the Fifth Circuit's rebuke, it is still important to remember that an employer's arbitration clause could violate the NLRA in other ways. For example, in the *DR Horton* case the Fifth Circuit did find that the employer's arbitration provision was too broad by its terms such that employees would read it to prevent them from filing unfair labor practice charges with the Board. This part of the Court's decision upholding the Board has been a common theme among NLRB decisions that have reviewed a litany of employer policies and found them to be too broad because they quash section 7 rights. Just this month we have covered two such actions by the Board, see our posts [here](#) and [here](#). Stay tuned for further updates on *DR Horton*, should the NLRB appeal the decision to the Supreme Court.