

2019 Litigation Trends Annual Survey

Perspectives from corporate counsel



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Litigation Trends 2019
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Toronto, Mexico City, Hong Kong, Sydney and Johannesburg.

Attorney advertising.

Executive summary

The 15th annual Litigation Trends Survey has identified two major trends that began impacting the industry more intensively in 2019 and are predicted to accelerate in 2020. More organizations than ever before anticipate dispute volume to rise in the year ahead, and they are putting in place more preventative measures in order to manage the increased risk. Despite the increase in proactive risk mitigation, the findings show that companies are still underutilizing one of the most effective measures available—embedding lawyers in business operations.

Significant rise in dispute volume forecast for 2020

Significantly more organizations than ever before are anticipating an uptick in disputes moving forward. For organizations with stakes in international trade, the current trade wars are creating significant anxiety and fear around business damage and dispute activity that could result. There is also fear that buoyant times may come to an end and that an economic downturn is on the horizon. The majority of respondents are in agreement that poor economic conditions would cause an increase in the volume of litigation. This sharp rise in the forecast should be received by businesses as a major red flag, signaling the need to prepare for potentially turbulent times ahead.

This year's results show a continuation of trends established in previous years including:

- The most commonly experienced and concerning disputes being in the areas of Labor and Contracts. These core areas are likely to be further impacted if the economy declines
- Cybersecurity remaining top of mind as an increasing risk exposure but not yet realized as a most common or concerning dispute
- Regulatory intervention continuing to increase
- Growth in the number of organizations needing to balance data protection regulations in one jurisdiction with discovery obligations in another

Increased use of preventative measures in 2019 but room to increase adoption

Some key preventative measures have seen a moderate rise in usage in 2019, and we expect this trend to continue as legal departments respond to this valuable early warning of an increasingly litigious environment. As noted in previous years, some of the most effective preventative measures—specifically embedding lawyers within business operations and early case evaluation/resolution—have yet to gain real traction and present a real opportunity for proactive legal departments seeking to mitigate risk.

Some industries lean toward contesting disputes while others lean toward settlement

Approaches to contesting versus settling is another area we have begun to explore in 2019, with more aggressive organizations naturally emerging as the higher spenders on disputes, and higher relative to their revenue. Whether this results in a net-positive gain once judgments and settlement figures are accounted for is an area we hope to unpack further in 2020. Overall, however, a balanced approach is most common.

As always, we hope that this data-driven report provides you with valuable insights to feed into your legal department's strategy. We look forward to the opportunity to discuss its implications in person; please reach out to either myself or your Norton Rose Fulbright contact partner to share your thoughts.

Key statistics

\$1.5m*

spend on disputes per
US\$1bn of revenue

2.5*

Disputes lawyers per
US\$1bn of revenue

17%

expect to increase their
in-house team sizes, only
2% predict a decrease

66%

are using AFAs, but
generally only for a
minority of spend

28%

spent more time dealing
with tax controversy
issues, only 7% spent
less time

62%

now have to balance
cross-border discovery
with jurisdictional data
protection regulations

>50%

feel more exposed to
cybersecurity and data
protection issues, 11%
feel less exposed

38%

feel regulators are
becoming more
interventionist, 17%
felt they were less
interventionist

35%

expect volume of
disputes to rise moving
forward, only 9% expect
volume to decrease

**Median average*

Unless otherwise noted, all currency values are stated in US dollars.

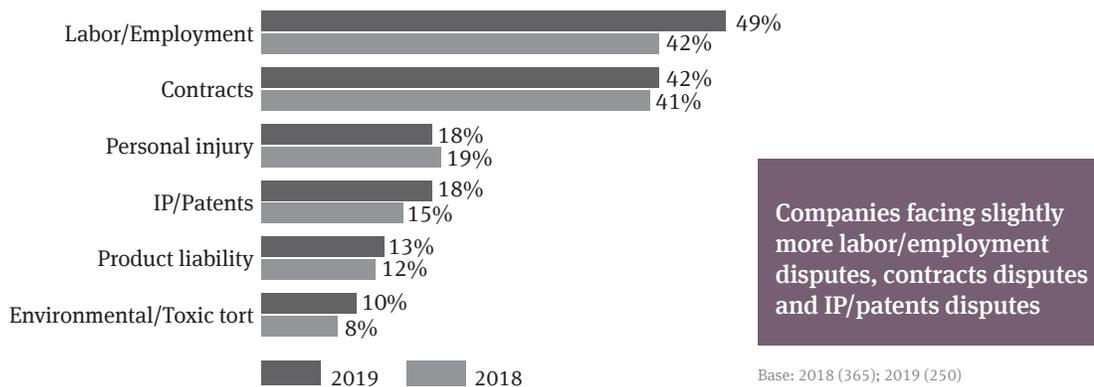
Major trends

Existing portfolio of disputes—most numerous and most concerning

Labor and employment disputes remain the most common dispute brought against companies and have shown a marked increase in volume from 2018 to 2019, with half of respondents considering them to be in the top three most common disputes they face. The volume of IP and Patents disputes has increased slightly in 2019, alongside professional malpractice disputes. Class actions, regulatory disputes, business torts and insurance disputes have dropped in prevalence since 2018.

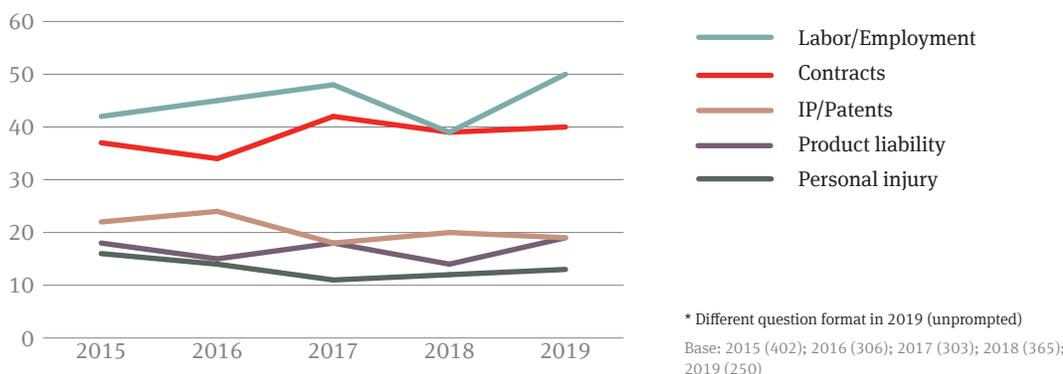
Most common disputes

Identify the three most common types of litigation that were pending against your company in the last 12 months.



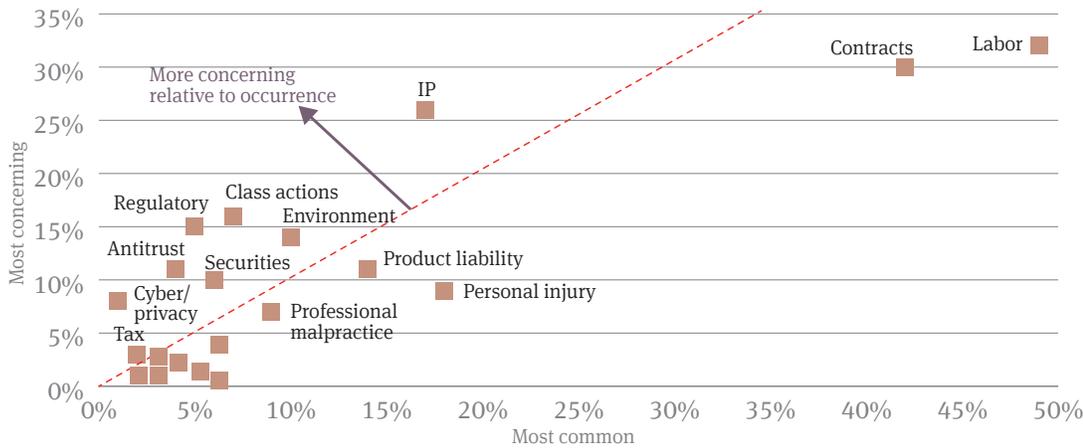
Longer term, results have shown a steady increase in the prevalence of labor/employment disputes since 2015, with a similar pattern observed for contracts:

Identify the three most common types of litigation that were pending against your company in the last 12 months.



Although labor and contract disputes are the most numerous by far, organizations find other types of disputes more concerning relative to their occurrence. The scatter chart below shows a group of dispute types falling above the line where the level of concern outweighs the occurrence. These include cyber, antitrust, regulation and class actions. IP stands out as one of the more common types of dispute that is very concerning.

Most common v most concerning disputes



Industry view

	Financial Institutions	Energy	IMC	Life Sciences and Healthcare	Technology and innovation	Transport
Most numerous disputes	Labor 48% Contracts 26% Securities 26%	Contracts 71% Labor 36% Pers. injury 33% ²	Pers. injury 44% Contracts 39% Labor 39%	Labor 48% Malpractice 33% Contracts 29% Product Liability 29%	Labor 47% Contracts 40% IP/Patent 30%	Labor 53% Pers. injury 33% Contracts 27%
Most concerning	Labor 39% Class actions 33% Contracts 24% Regulatory 24% Securities 24%	Contracts 46% Environmental 34% Labor 24%	Contracts 47% Labor 42% Pers. injury 21% IP/Patents 21%	IP/Patents 36% Malpractice 34% Labor 25%	IP/Patent 30% Contracts 26% Labor 22%	Labor 39% Contracts 26% IP/Patent 30% Class actions 33%
Top trends facing them in litigation	Increase in litigation and disputes Cybersecurity Labor Regulation	Environmental Cybersecurity	Cost of defense Increase in litigation and disputes Cybersecurity Increased regulation	Increase in litigation and disputes Regulation Labor Oversight by regulators	Cybersecurity IP/Patents Increase in litigation and disputes Increased regulation	Labor Increase in litigation and disputes Class actions Cost of damages/ cost of defense/ environmental

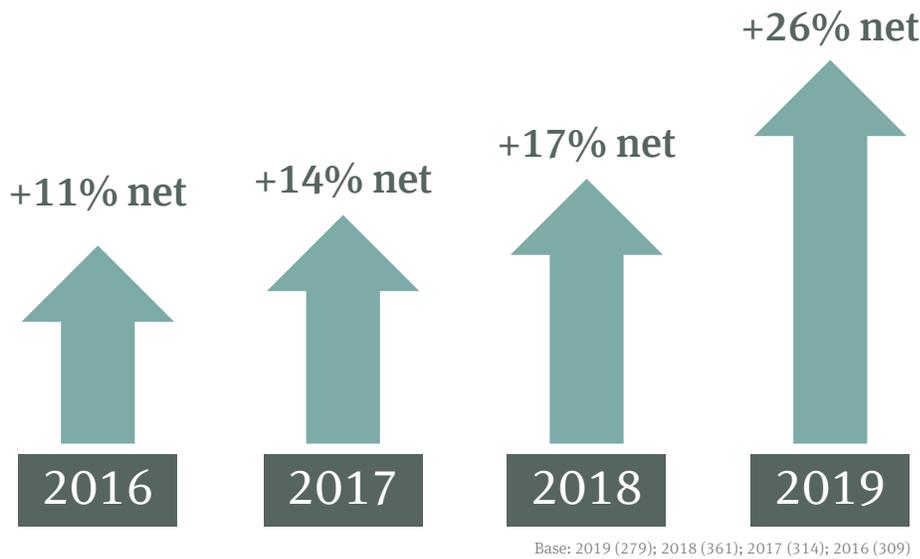
Base: (15-67) LOW BASE

Norton Rose Fulbright view

IP disputes can be very complex with enormous consequences. It is essential that organizations with significant IP dispute exposure have access to sufficient resources to be prepared to manage IP risk and handle disputes proficiently as they arise. This may involve increasing the IP expertise on the in-house team and/or building a relationship with an international law firm that can take a holistic review of your IP exposure.

What lies ahead? Predicted trends in litigation

A sharp rise in the proportion of organizations predicting an increase in disputes: 35 percent of responding organizations foresee an increase with only nine percent expecting a decrease, an on-balance increase of 26 percent compared to only 17 percent in 2018 and 12 percent in 2016.



2016	2017	2018	2019
24% expected increases in disputes	25% expected increases in disputes	27% expected increases in disputes	35% expected increases in disputes
13% expected decreases in disputes	11% expected decreases in disputes	10% expected decreases in disputes	9% expected decreases in disputes

Norton Rose Fulbright view

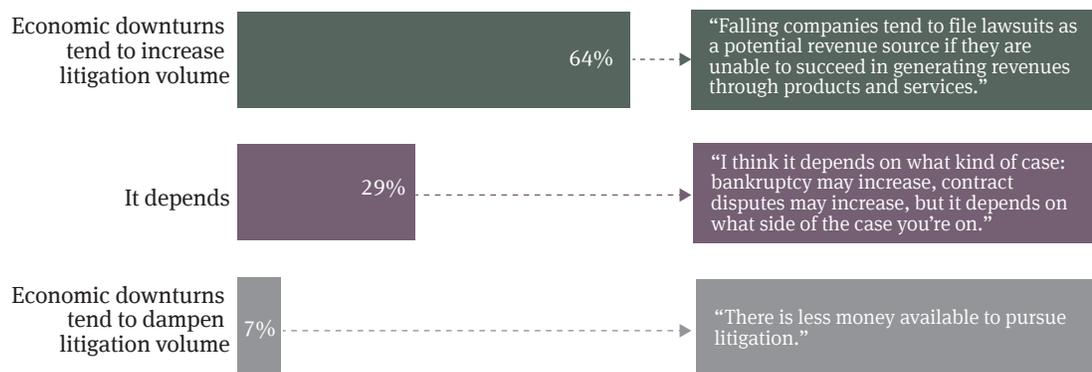
The world is in a period of uncertainty where the full effects of trade wars and economic cycles remain unknown. Uncertainty breeds fear and we are seeing the results of that fear in organizations' predictions for increasing dispute activity.

Economic downturns

Most respondents agree economic downturns tend to increase the volume of litigation. There are a number of factors driving this, that when combined, can create an environment in which disputes are preferable, or sometimes even essential, for businesses and individuals to pursue.

First, more failing deals directly result in more litigation, with customers and businesses disputing poor outcomes. Second, failing deals and a poor economy result in declining revenue, so businesses may look to litigation to recoup their losses by chasing businesses that owe them money, while also disputing contractual obligations. Third, with the economic turmoil comes bankruptcy and layoffs: employees may blame their dismissals on economic hardship and, facing a market with potentially poor job prospects, may dispute their dismissals, in an attempt to supplement their income. And while all these factors are at play, some businesses and plaintiffs' lawyers see opportunities to benefit from the newly litigious environment, encouraging further disputes.

In your experience, what is the relationship between economic downturns and litigation volume?



Base: 245

Norton Rose Fulbright view

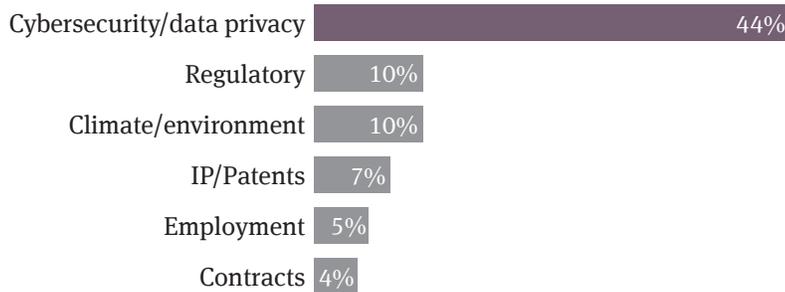
The threat of an economic downturn, at the same time as international trade disruption (tariffs, Brexit, changing policies), can place an enormous strain on trade relationships. Taking proactive steps to look at relationships that might be impacted will put you on the front foot as relationships may start to turn sour.

New sources of disputes on the horizon

There was a clear message from the organizations that cybersecurity and data privacy was where they foresee more dispute activity—and potentially more concerning activity. Forty-four percent of those who identified new forms of disputes in the coming two to three years mentioned cybersecurity, the highest new area mentioned.

Further regulatory exposure was anticipated along with the climate/environment, which is a relatively new concern not raised before in past editions of this survey and one that is likely to play an increasingly prominent role in the future.

Looking forward to the next 2-3 years, do you foresee any new sources of dispute for your business on the horizon?



Base: 103

Key disputes

Cybersecurity



The 2017 and 2018 editions of the Litigation Trends research saw cybersecurity coming to the fore as a key trend and challenge in managing disputes, so the 2019 research sought to deep-dive into the issue.

Key factors driving perceived exposure:

- Increased awareness of risk—“It’s more that people are aware of what a big issue this is; just that increased awareness by others, to me, heightens the importance of making sure that we’re doing everything we can to protect people’s private information.”
- Regulatory changes—“There are more stringent laws that we have to comply with, that we may not be aware of or prepared for.”
- Increasing likelihood to hold sensitive data/content—“Electronic medical records are a common target for cybercrime.”
- Scope of threat expanding in volume and sophistication—“Cyber criminals are getting so much more creative; we’re finding ourselves needing to be more and more diligent in our efforts to prevent these things from happening.”
- Growth in size of organization—“We’re growing at such a fast rate, in terms of the number of companies and the volume of work in the insurance industries, we have a large number of consumer-facing data points, so our consumer data retention is probably tripling yearly.”

Norton Rose Fulbright view

Organizations in regulated industries, such as financial services, healthcare and life sciences are collecting types of data that they haven’t held before, which creates new exposure to consumer privacy risk. This risk is dynamic and complex as consumer privacy protection evolves. Even the unregulated industries are now affected as business evolves and data becomes a rich asset for all types of companies. Privacy laws are now universal and all companies need to keep abreast of where and how they might be impacted.

When in-house counsel were asked about the most important issue or trend in litigation that is impacting their companies, they said cybersecurity and data privacy was the largest specific trend. This concern more than doubled in frequency compared to the 2018 results and emerged as a top concern across most key industry headlines.

How are in-house teams responding?

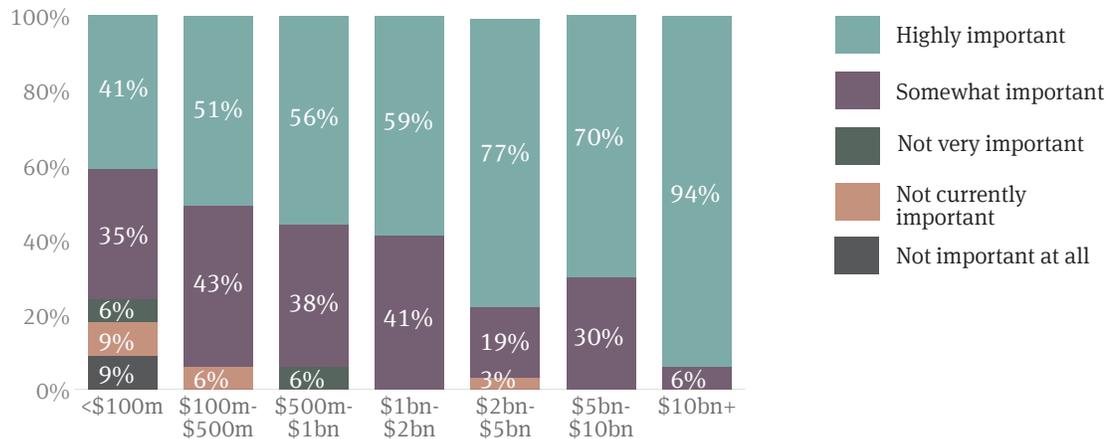
Clearly cybersecurity is top of mind for many, and the research has shown a relatively high degree of preparedness across in-house teams. Over two-thirds classify cybersecurity risk assessment as “highly important” and state that risk assessments are “planned and undertaken regularly,” with most of the remainder at least undertaking risk assessments occasionally, rating them as “somewhat important.”

Three out of four organizations in the financial institutions and life sciences/healthcare industries are undertaking regular risk assessments. As might be expected, the effort that goes into these exercises is closely correlated with the size of the organization and the sophistication of the legal function. Risk assessments generally increase in regularity and importance as revenue and headcount rise. Having said that, even smaller organizations (<\$100m) see risk assessment as important, with the majority (76 percent) citing risk assessments as highly or somewhat important.

Which of these statements best reflects the importance your organization places on privacy and cybersecurity risk assessments, so that litigation risks are identified proactively and remediated?

By revenue

Trends show a steady increase in the relative importance placed on cybersecurity risk assessments as the size of the organization grows.

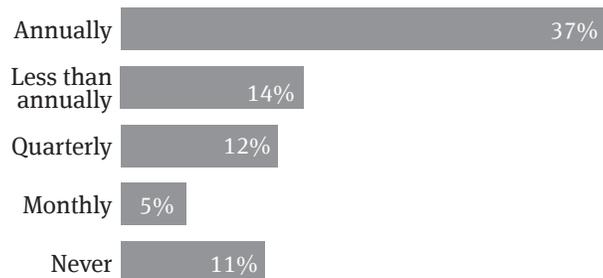


Practical steps to limiting cyber exposure

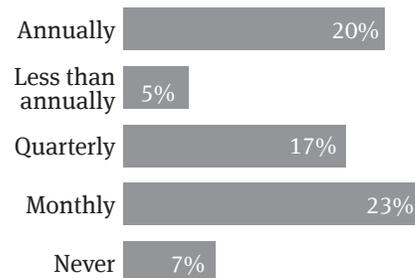
Most are using a combination of in-house assessments alongside an independent third-party audit, generally annually, with in-house audits taking place with greater regularity—especially among energy sector organizations and also among financial institutions and life sciences and healthcare organizations. A major benefit of using a law firm is that information shared in the exercise may be subject to attorney-client privilege, which can play an extremely valuable role in an assessment of this nature, depending on the exposure that arises.

How often does your organization conduct privacy and cybersecurity risk assessments?

By a third party:



In-house:

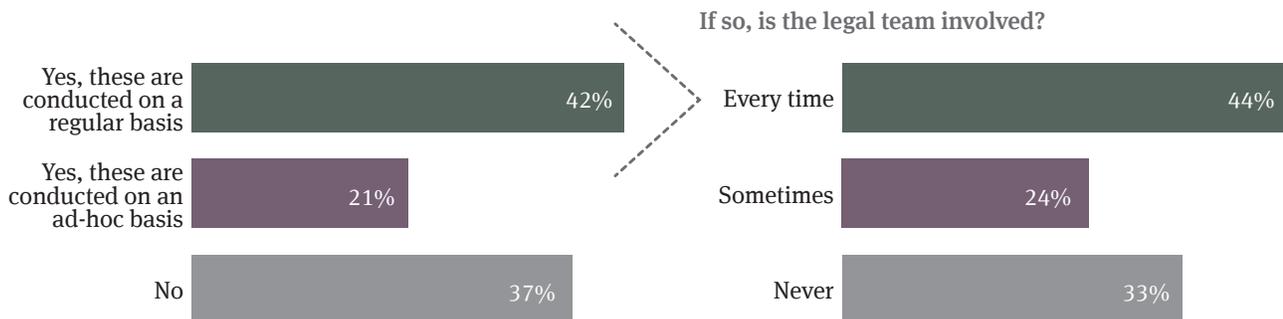


Base: Importance (280); Third party (194); In-house (213)

A substantial number of organizations are taking preparations to a higher level, undertaking data breach tabletop exercises to map out and test their protocols and processes for responding to a related risk. Just under two-thirds are doing tabletop exercises to some extent, with 42 percent going through such exercises on a regular basis.

Many organizations that conduct these exercises, however, do not invite their legal teams to participate. Only 44 percent of those conducting tabletop exercises are bringing the legal team in every time, with a third never involving the legal department. However, participation by legal teams is likely to increase.

Does your organization conduct tabletop exercises for data breaches?



Base: Exercises (210); Legal involvement (174)

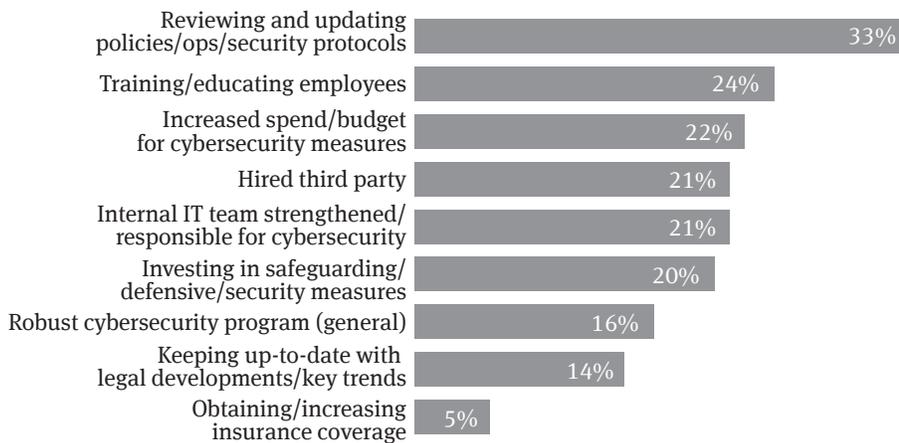
What we can't assess from this data is the relative status of in-house legal departments within their organizations, the degree to which these departments can influence leadership and their ability to proactively feed their assessments into the overall risk register. A key challenge for many legal departments—especially those facing resourcing challenges—is being recognized as go-to participants that add value to such exercises, both in terms of managing the exposure to disputes and working toward their prevention. Exposure can include contractual requirements with customers, for example, and regulatory issues arising from a data breach. As we will see elsewhere in this report, embedding lawyers in “business” operations emerges as one of the most effective (if underused) strategies for the prevention of disputes.

Norton Rose Fulbright view—Limiting cyber exposure

Preparation is predominantly threefold: paper exercises updating or reviewing policies, procedures and protocols in an attempt to mitigate risk; building up resilience on the front line of organizations' people through training and educating staff, strengthening internal IT teams or bringing in third-party experts; and monetary investment in key cybersecurity measures/systems.

What steps are you taking to mitigate this risk?

52% felt more exposed to cyber risk



Perhaps not surprisingly, financial institutions appear to be taking the most holistic approach to prevention, and are more likely to take a multifaceted approach as opposed to relying on one or two approaches to reduce their exposure.

Regulatory intervention

Regulatory intervention is still a key area of concern for in-house counsel, appearing in the top five most concerning types of disputes even though it is not among the most common. The 2019 survey data reveals that respondents' concern that regulatory intervention is increasing continues to be high.

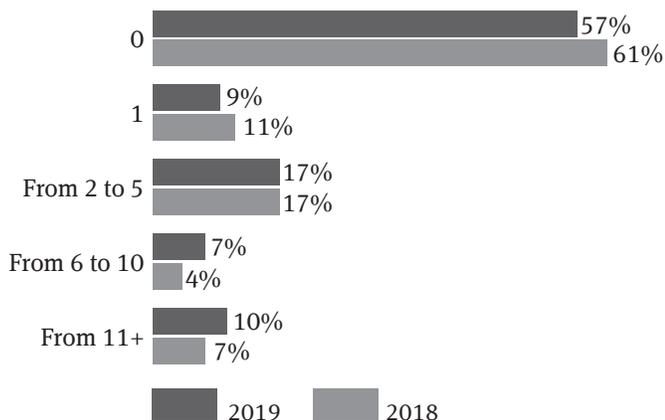
Over the last 12 months, on balance do you feel the regulatory bodies which are involved in your industry have become more interventionist, less interventionist or have remained about the same?

2016	2017	2018	2019
98% more interventionist	74% more interventionist	67% more interventionist	70%* more interventionist

*NB 2019 results were collected differently; figure is a like-for-like calculation on previous years

Despite this perception, well over half of the survey respondents' organizations were not engaged in a legal proceeding over the last year. But for those organizations that were engaged in legal proceedings, the average number of proceedings that they were involved in increased by 50 percent on average, rising from four legal proceedings in 2018 to six in 2019.

How many of the following types of legal disputes were commenced against your company in the last 12 months?



Regulatory proceedings

	2019	2018	2017	2016
Median	0	0	0	0
Mean	6	4*	4	3

*Excluding 1 large outlier, mean = 20 otherwise

Base: 2018 (263); 2019 (248)

Although many are not facing proceedings themselves, concerns about the complexity of requests—especially in terms of the volume of data required and the challenge of multi-jurisdictional requirements—are common refrains about the added strain such legal proceedings place on in-house departments:

“Larger document requests from regulators. Many regulators have increased their capacity to intake, process and review large amounts of data. This means that they are no longer as willing to negotiate the scope of enormous requests.”

“My company is heavily regulated in multiple global jurisdictions. A regulatory enforcement action would cause significant reputational damage with other regulators, clients and market participants.”

“...there are so many regulations. Many of the regulations are increasing in number and scope. In some areas the federal government here in the US, the government is looking at areas more directly and specifically.”

Norton Rose Fulbright view – Limiting cyber exposure

Regulators are becoming more sophisticated users of technology, which means they can deal with considerably more information than before. This creates a greater burden for organizations as they have to respond to the regulators’ increasingly expansive information requests, whereas, historically, regulators would just ask for essential information that they could manage. To ensure that legal departments are fully prepared, they need to be in control of their own information in a sense that they can analyze the data themselves and not be at the mercy of the regulator who may then be one step ahead. Working proactively with technology departments before information requests arrive will help to reduce the pressure when regulators demand large amounts of information.

Different approaches to dealing with disputes

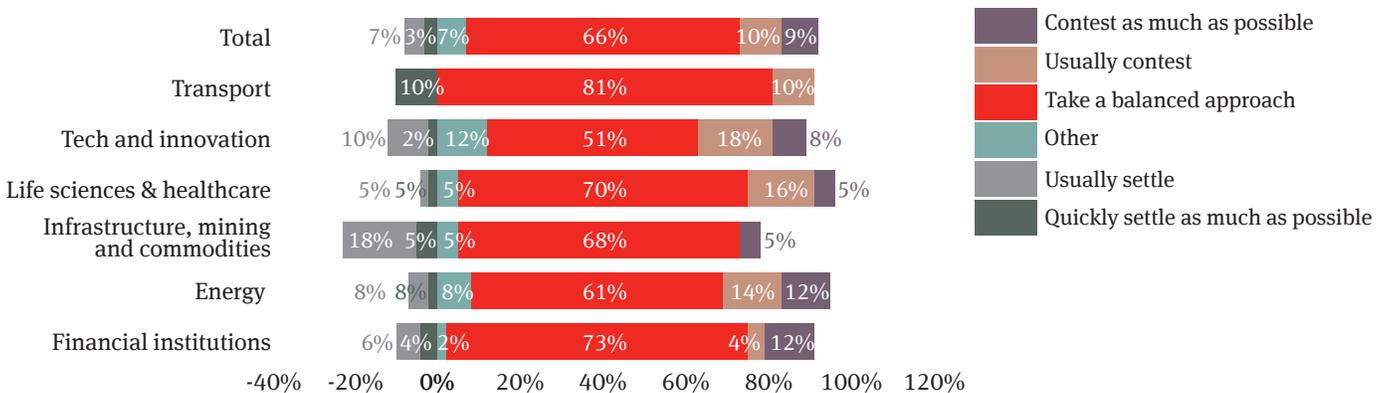
Aside from 2016–2017 our results have shown a relatively steady picture in terms of the actual spending on disputes as a proportion of an organization’s revenue over recent years.



Law firms continue to make up the lion’s share of expenditure when it comes to disputes, holding steady from 2019 at 73 percent of overall budget, with in-house expenses also remaining static year-on-year at 14 percent. The remaining budget is split between consultants and other vendors/costs.

Dispute strategies

This spending is excluding costs of settlements and judgments; however, this year’s results have shown that less than one in ten have an appetite for early or quick settlements, around half the number that usually or always contests their disputes. Unsurprisingly, choosing to contest as a matter of course may bring a financial burden with average disputes spending for these organizations well above those who generally settle—and spending as a proportion of revenue also tracks higher.



Base: Overall (281); Financial institutions (52); Energy (66); IMC (22); Tech & Innovation (51); Transport (21); Life Sciences & Healthcare (43) **LOW BASE**

While two-thirds tend to take a “balanced” approach to litigation, the picture does vary substantially by industry. Those operating in Energy, Tech and Innovation, and Life Sciences and Healthcare organizations tend to take a much more aggressive approach to disputes, with around a quarter of these organizations generally contesting, compared to 5 percent of infrastructure, mining and commodities respondents and 10 percent of those in transport.

Norton Rose Fulbright view

Some industries have a greater appetite for risk and are then usually equipped with greater experience when it comes to analyzing risks and anticipating the chances of success. These industries include, for example, energy and technology and innovation. Therefore, organizations in those industries are more likely to contest disputes. Conversely, industries that have a more risk-averse approach, such as Financial Institutions and Transport companies, are more likely to settle. The organization’s appetite for risk should play an important role in determining the best route to resolution.

Preventative measures

In recent years we have focused key areas of the research on prevention strategies, developing checklists to support organizations in mitigating against the risks of disputes. Drawing on popular and successful measures identified by the market in past years, we once again asked respondents whether they had implemented these preventative measures and which measures had the most impact in reducing the volume of disputes.

In the last 12 months, have you used any of the following preventative measures with a view to reducing the volume of litigation your organization faces?

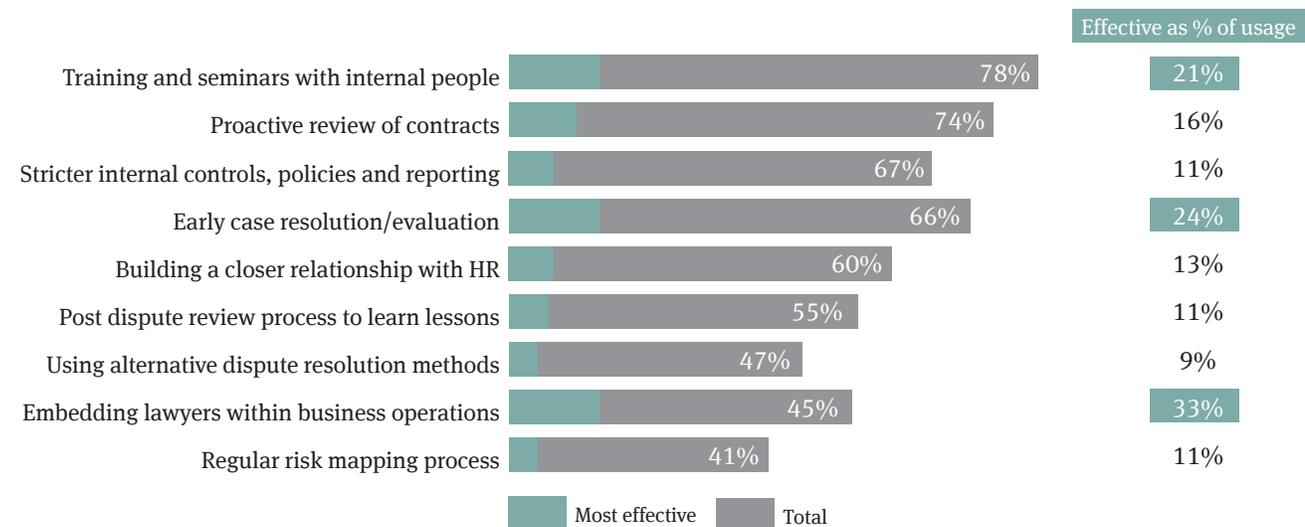


Base: 2018 (351); 2019 (282)

Some key measures have shown a slight upturn in usage since 2018—notably post-dispute reviews increasing by seven percentage points—with several other areas increasing slightly, albeit within the statistical margin of error. Reassuringly, one of the more successful strategies we have identified over the last two years (training and seminars with internal people) continues to be widely implemented. (For instance, 94 percent of financial institutions relied on such training.)

As with our 2018 results, however, the most commonly implemented measures don't always bring the highest success rates. Embedding lawyers within business operations is one of the least used tools—likely impacted by resource and implementation challenges. But for the last two years, embedding has emerged as the most effective prevention measure relative to the proportion using it. Similarly, early case resolution and evaluation—a prevention technique that showed a slight drop from 2018—is another area which year-on-year has returned a high level of success for those adopting the strategy.

Which of these measures has been most effective in reducing the volume of litigation your company faces? (Please select one option)



Base: Preventative measures (282); Most effective (250)

The survey reveals that key industry sectors do not choose dispute prevention strategies solely on the basis of effectiveness. When asked about their most used measures versus the most effective ones, in most cases two of the top three most used measures were not deemed to be the ones having the greatest impact on reducing the volume of disputes, with other key tools taking precedence.

Preventative measures by industry

	Financial Institutions	Energy	IMC	Life Sciences and Healthcare	Technology and innovation	Transport
Most used measures	Internal training & seminars	Proactive contract review	Internal training & seminars	Internal training & seminars	Internal training & seminars	Proactive review of contracts
	Stricter internal controls	Internal training & seminars	Proactive contract review	Proactive contract review	Proactive contract review	Early case resolution
	Proactive contract review	Stricter internal controls	Early case resolution	Stricter internal controls	Early case resolution	Internal training & seminars
Most effective measures	Early case resolution	Embedding lawyers within business	Internal training & seminars	Embedding lawyers within business	Internal training & seminars	Internal training & seminars
	Internal training & seminars	Proactive review of contracts	Proactive review of contracts	Early case resolution	Early case resolution	Post dispute review to learn lessons
	Regular risk mapping	Early case resolution	Embedding lawyers within business	Internal training & seminars	Proactive contract review	Embedding lawyers within business
			Post dispute review to learn lessons			

 = not in top three most used measures

Norton Rose Fulbright view

It is surprising to see less than half of organizations embedding lawyers in business operations. These lawyers can be the eyes and ears of the General Counsel, not only providing businesses with on-the-spot guidance to avoid problematic decisions, but also serving to raise a red flag when intervention is required. Embedded lawyers will know when to advise that further preventative measures are needed to limit exposure and mitigate risk as much as possible.

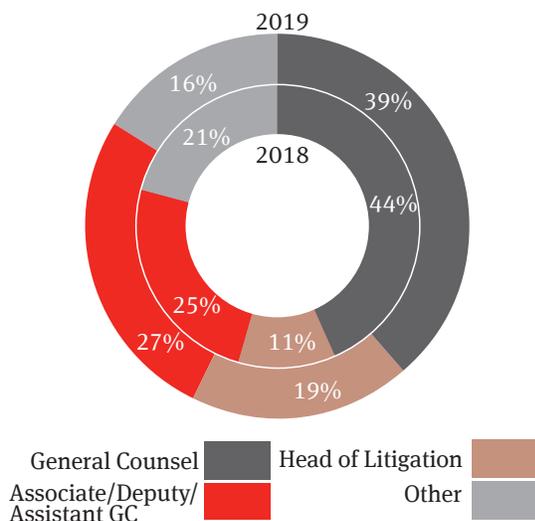
Methodology and demographics

287 corporate counsel contributed to Norton Rose Fulbright’s 15th Annual Litigation Trends survey; respondents were all US-based or represent US-based organizations.

As in previous years, corporate counsel had the opportunity to participate using a web-based survey with a telephone interview campaign following during September and October 2019.

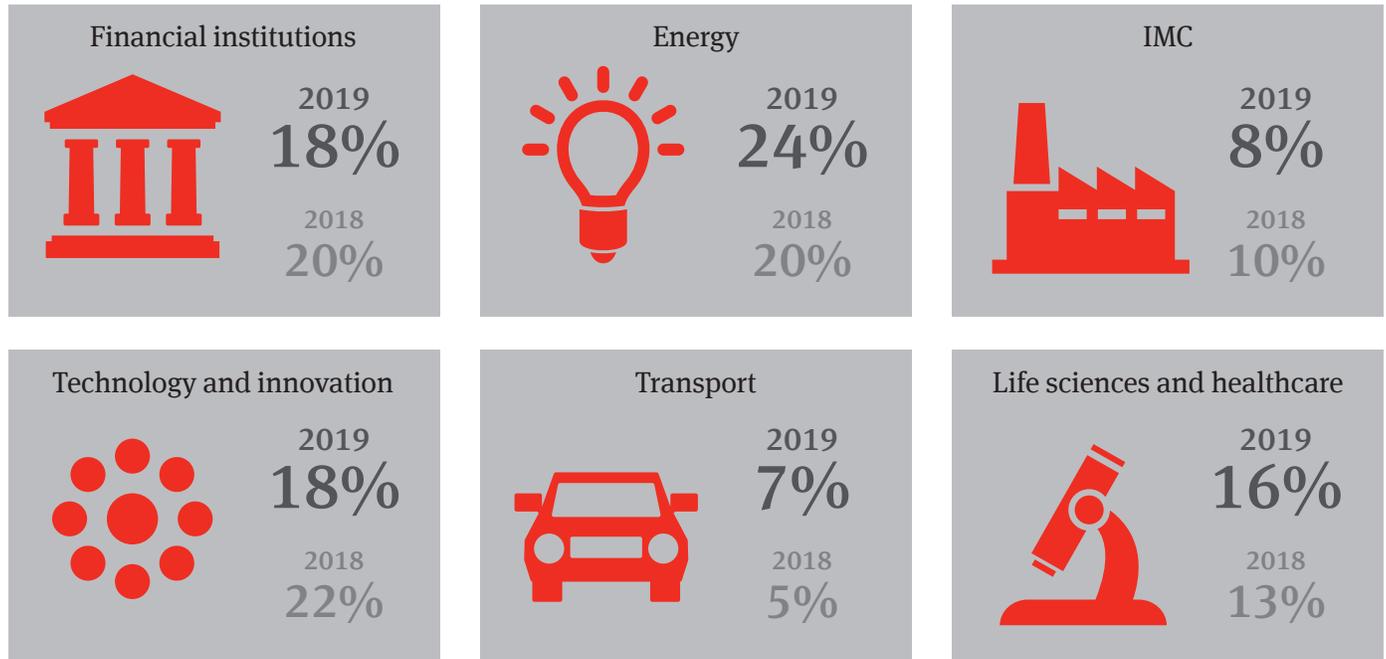


Survey respondents were a combination of Norton Rose Fulbright’s clients and independently sourced legal department leaders.

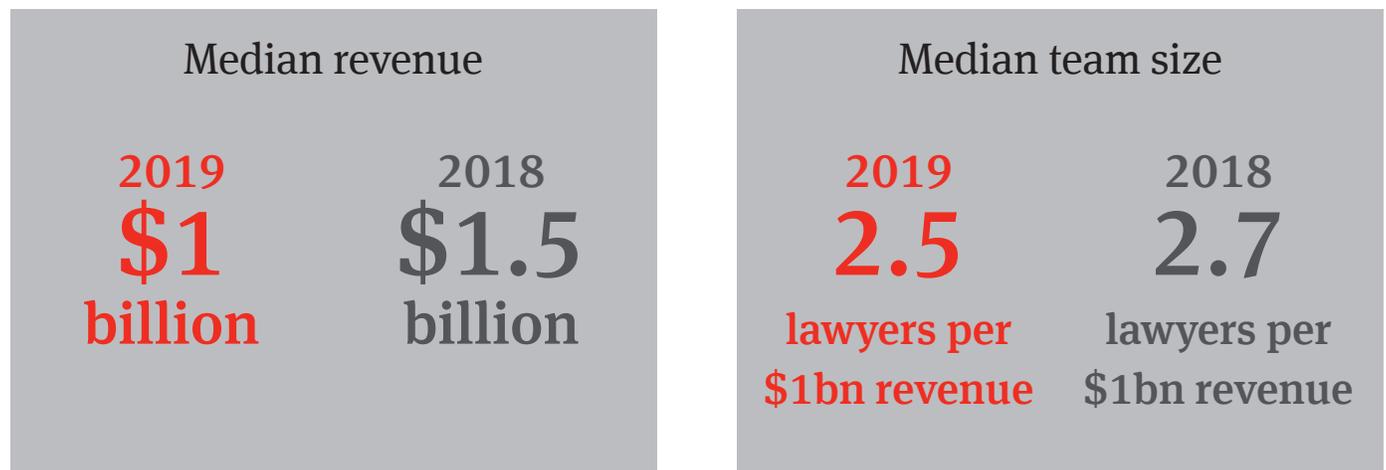


Industry representation in 2019 proved highly comparable with the 2018 US survey response, with only small differences in breakdown.

Slight decrease in Finance, Tech and IMC; increase in Energy, Transport and Life Sciences & Healthcare.



The median (mid-point) size of the participating organization in 2019 was slightly lower than in 2018 at \$1 billion, with a slight drop in disputes team size at an average of 2.5 disputes lawyers per \$1 billion revenue.



Unless otherwise noted, all currency values are stated in US dollars.

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Our global dispute resolution and litigation lawyers advise many of the world's largest corporations and financial institutions on complex, high-value and sensitive multijurisdictional disputes. With more than 50 offices across the globe, we have one of the largest disputes legal practices in the world, with significant experience resolving domestic and cross-border mandates, international arbitrations and investigations and enforcement for clients across all the key industry sectors including financial institutions, energy, infrastructure, mining and commodities, transport, technology and innovation and life sciences and healthcare.

Our lawyers both prevent and resolve disputes by providing clients with practical, creative legal advice that focuses on their strategic and commercial objectives. Our experience includes the full spectrum of dispute resolution and litigation mechanisms ranging from negotiation, mediation, conciliation and conflict resolution to vigorous courtroom strategy, multi-party and class action lawsuits and appellate proceedings. We have acted on some of the world's highest profile domestic and multijurisdictional investigations, including high-profile regulatory inquiries, regulatory enforcement, criminal investigations and prosecutions, and related civil disputes and litigation. We are experienced in advising on risk and public relations issues in the context of legal disputes.

We have a unique offering of our 'on the ground' strength, advising clients on disputes issues across emerging markets including Africa, the Middle East, Asia and Latin America, together with deep experience in the mature markets of the United States, Europe, Australia and Canada. Members of our team offer fluent capabilities in more than 20 languages across the globe.

As a key component of our disputes practice, our global practice support team provides clients consistent and proven methodology for complying with document preservation and production requirements throughout the course of disputes, assisting in developing case strategies and priorities while managing and reducing costs for clients.

If you have any questions or would like to be considered for inclusion in next year's survey, please email litigationtrends@nortonrosefulbright.com

Norton Rose Fulbright

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Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare. Through our global risk advisory group, we leverage our industry experience with our knowledge of legal, regulatory, compliance and governance issues to provide our clients with practical solutions to the legal and regulatory risks facing their businesses.

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