

The logo for Norton Rose Fulbright, featuring a stylized white arrowhead pointing upwards and to the right, followed by the text "NORTON ROSE FULBRIGHT" in a white, uppercase, sans-serif font.

NORTON ROSE FULBRIGHT

2021 Annual Litigation Trends Survey

PERSPECTIVES FROM CORPORATE COUNSEL

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2021 Annual Litigation Trends Survey
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More than 50 locations, including Houston, New York, London, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg.

Attorney advertising.

For almost two decades, Norton Rose Fulbright has conducted annual research to assess the litigation landscape by measuring key indicators year to year. We have surveyed thousands of legal professionals, including general counsel from global corporations as well as those from boutique startups.

Over the past two years, challenges associated with the COVID-19 pandemic required us to adapt our approach. We added in-depth discussions to better explore emerging trends and offer our perspective. We liked what we uncovered and our readers appreciated it too, so we decided to continue with the hybrid quantitative-qualitative method this year.

To mark our 17th annual survey, we gathered responses from more than 250 general counsel and in-house litigation leaders across the United States. We found that most participants felt their teams had largely come to grips with the new normal of remote and hybrid working, but feared a host of evolving trends could pose financial and reputational risks to their organizations. Highlights include:

Environmental, social and governance (ESG) issues and related disputes are top of mind.

Companies in the energy and finance sectors specifically expressed a strong interest in ESG topics, with carbon neutrality being frequently mentioned.

Cybersecurity and data protection were cited as main drivers of emerging dispute concerns.

A remote workforce and increased reliance on technology exacerbated the impact of cybersecurity and data protection issues for a great majority of respondents.

Diversity, equity and inclusion (DEI) was identified as the largest non-legal factor influencing dispute trends.

The impact of DEI issues on employment and labor litigation has increased, with nearly half of respondents reporting that employment disputes were among their highest volume matters.

There is a consistent rise in concern over regulatory proceedings and investigations.

Regulatory changes and the challenge of dealing with regulations across jurisdictions and international borders were increasingly cited as a source of concern.

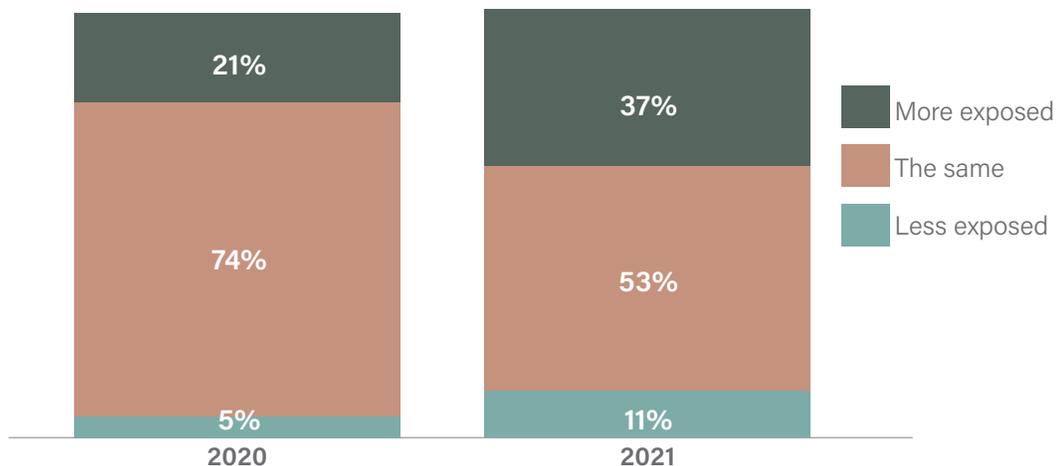
Class action risk is related to traditional product liability disputes, but also increasingly connected with data protection and ESG matters.

Respondents reported an increased concern over class action disputes, largely driven by litigation related to cybersecurity and the environment.

Environmental, social and governance (ESG) trends

In 2021, concern over ESG issues grew significantly. Of those surveyed, 37% said they were more concerned compared to 21% who said so in 2020. Companies in the energy and finance sectors expressed the strongest interest in ESG topics, with climate change and carbon neutrality being frequently mentioned. Legal departments are highly engaged with ESG issues; most respondents said their group is highly or at least moderately involved, with only a small minority feeling this was outside their purview.

Over the last 12 months do you feel your business has become more or less exposed to ESG/environmental disputes?



“We’re trying to get out front and part of that is driven by our European friends who are further down the curve on ESG issues than some of our American counterparts. We’re doing it because it’s the right thing to do and our business mandates it. Our customers expect it, and it’s a commercial imperative, but it’s also who we are anyway.”

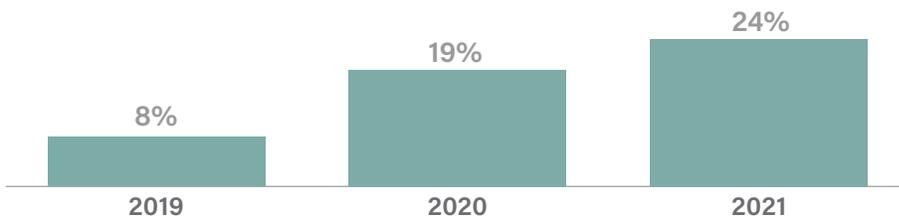
General counsel of energy company

Cybersecurity and data protection trends

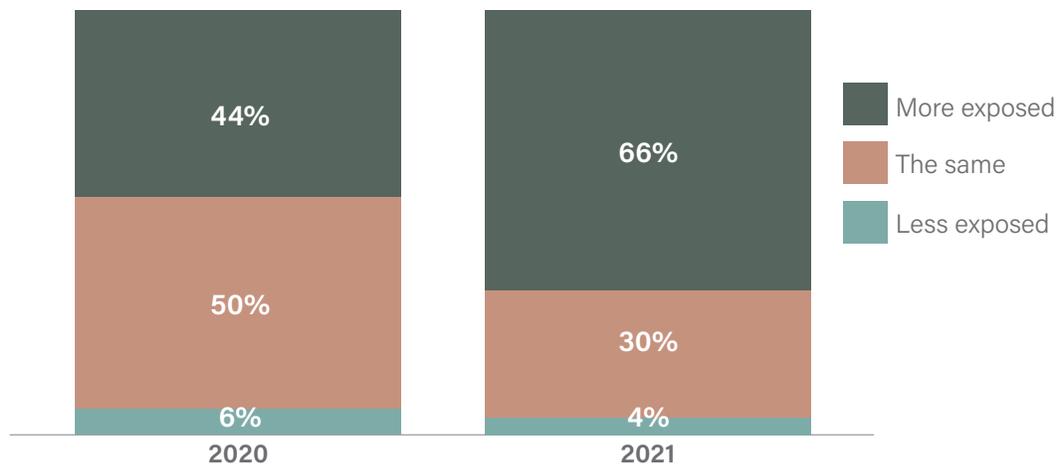
Respondents anticipate that cybersecurity and data protection will be a top driver of new disputes in the next several years. Recent Litigation Trends reports have illuminated growing concern over cybersecurity and data protection disputes across sectors. In 2021, two-thirds (66%) of respondents said they felt more exposed to these types of disputes, up from less than half (44%) in 2020.

Most of the respondents who felt that their exposure was increasing cited more sophisticated attacks, less oversight of employees or contractors in remote environments and worry about the sheer amount of client data they are responsible for managing. Respondents whose concern about cybersecurity stayed the same or decreased in 2021 said they trust their organization's IT security and other internal controls.

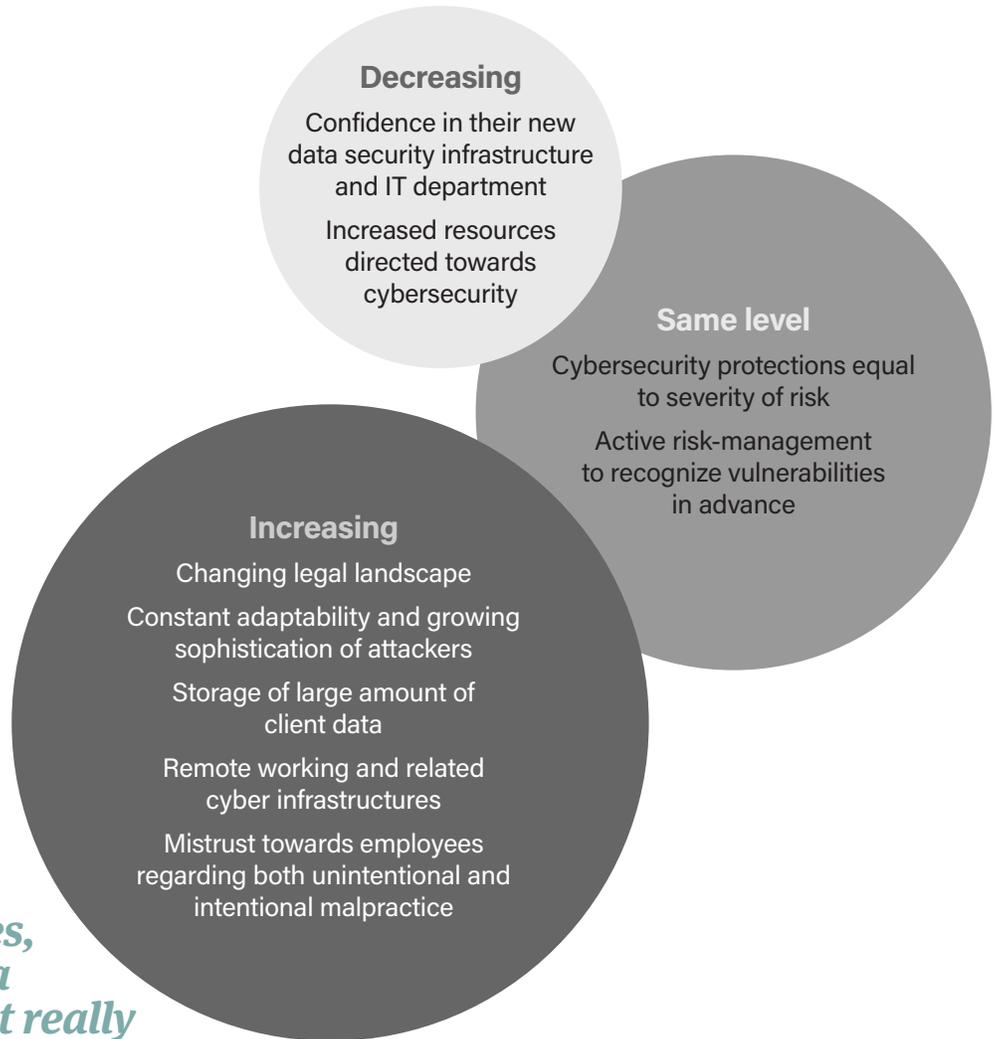
Cybersecurity and data protection among legal disputes of most concern



Over the last 12 months do you feel your business has become more or less exposed to cybersecurity/data protection disputes?



Respondents cited the following factors influencing their exposure to cybersecurity/data protection disputes.



“We spent a lot of time in 2021, and will do so again in 2022, upgrading our cybersecurity defenses, establishing new data recovery sites and just really beefing up all of our layers of authentication and security. It’s been a big focus of the company and the legal department’s been involved in those efforts.”

General counsel of energy company

Exposure to risks around phishing, ransomware, and social engineering, as well as contingencies for data loss and recovery also drove cybersecurity and data protection concerns. Although only 3% of respondents cited these disputes as among the most common, four times that number listed these disputes as the single most concerning type of dispute. The level of concern compared to the quantity of disputes suggests that cybersecurity and data protection are by far the most concerning type of pending dispute. (refer to *Most common disputes versus single most concerning disputes* chart on page 23).

We asked respondents about actions they had taken to mitigate cyber risk. Their answers fell into roughly three categories: training, encryption and internal reviews.

What steps are you taking (or have you taken) to mitigate cybersecurity and data protection risk?

Training employees

Across industries and especially among respondents that felt the risk is increasing, **employee training was considered the most useful tool** to reduce risk.

This strongly related to **fear of phishing and social engineering attacks.**

Encryption

Implementing various encryption tools **regulating, restricting and monitoring access** was the most common step taken.

This precaution related to **concerns regarding employee oversight** as well as access by **third parties.**

Internal reviews

Respondents conducted internal reviews, including:

Monitoring changing regulations regarding data protection

Updating software as new threats emerge

“External intrusion and external actors gaining access, probably through phishing attacks, is probably our highest concern. The second would be inadvertent or intentional hacking of a vendor or service provider.”

Associate GC for financial services company

We also asked litigation leaders about cybersecurity standards they impose on vendors. Most do impose such requirements on companies they work with.

Have you imposed any cybersecurity standards on outside vendors?

“We’ve just had to go to new levels of encryption and password care and where we store data. We have to be pretty vigilant about access to our servers and who’s got it.”

Litigation and dispute counsel of engineering company

Yes

The **majority** have **high standards** regarding cybersecurity precautions.

There is a split between **those who review the cybersecurity** of outside vendors and those who are **content with having a signed agreement without auditing** them.

No

Where vendors have **no or highly restricted access** to sensitive data, no standards are enforced on outside vendors.

Those dealing with large vendors felt their leverage to impose standards is limited.

NRF Insight

It is not surprising that data privacy and cybersecurity continue to be among the most significant legal risks that businesses face, as it increasingly leads to data breach litigation and regulatory enforcement actions. As technology advances, more and more jurisdictions are trying to address the looming threat of cybercrimes with new laws and regulations. For this reason, I anticipate cybersecurity issues will continue to drive litigation and regulatory investigations both in the United States and abroad.



Andrea D'Ambra

US Head of Technology and US Head of eDiscovery and Information Governance

NT Analyzer

An NRF Transform product

Companies are buried in digital privacy risk. NT Analyzer empowers you to manage that risk at every level.

Existing Legal Obligations

All companies exchange or work with data in some form. Companies are legally obligated to know all of the data that they collect from the data subject and disclose to third parties. For example, laws such as the GDPR and CCPA require companies to provide the nature of the personally identifiable information (PII) they collect and share to the data subject. The failure to adhere to these laws can result in excessive fines, brand-damaging publicity, and litigation.

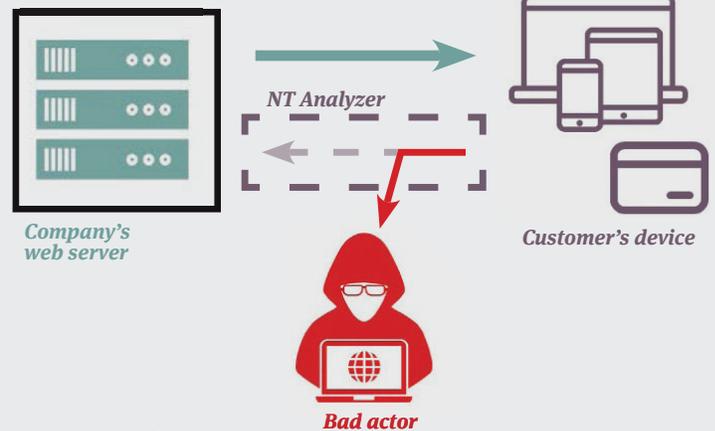
Problem

Almost 100% of all cybersecurity solutions are installed on company assets or act within the enterprise data center or enterprise cloud. Until now, there have been no data protection solutions that extend to companies' customer-facing interfaces—the real-time environment where customers and data subjects access company services, and where most data disclosure to third parties occurs. This is where NT Analyzer provides 360-degree visibility and direct line of sight. We address that risk using network traffic analysis and similar testing methods.

Solution

NT Analyzer steps into the shoes of a customer or data subject and removes that blind spot, allowing a company to catalog all of the collected and disclosed data and identify relevant risk. This bridges the gap for the legal and technology teams within a company, identifying the objective risk through the lens of a relevant law. This provides the technology or development team a more objective picture, empowering companies to mitigate their most glaring data protection issues.

Traditional cybersecurity model



Top Prize

2019 New Products and Services Award
The Financial Times Innovative Lawyer Awards

For more information, please contact:

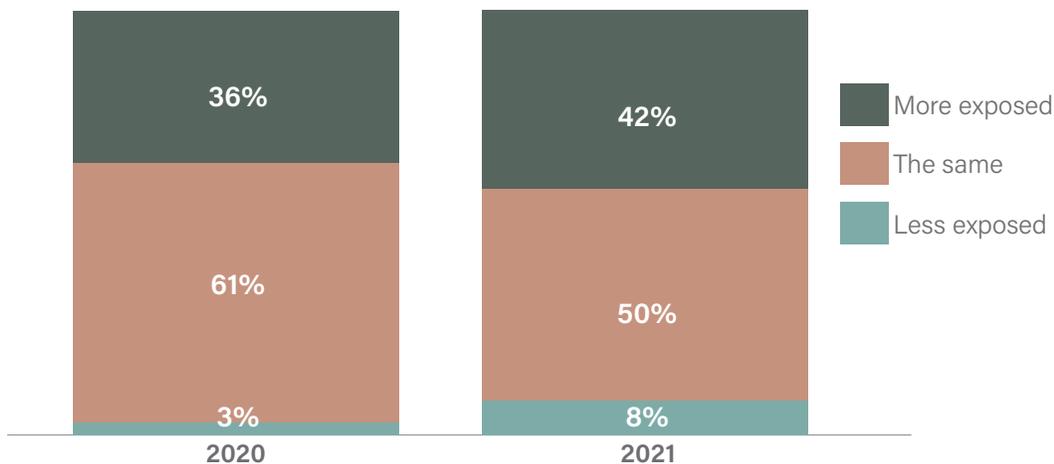
Steven Roosa
Head of NRF Digital Analytics and
Technology Assessment Platform
Tel +1 212 318 3222
steven.roosa@nortonrosefulbright.com

Daniel Rosenzweig
Associate
Tel +1 202 662 4740
daniel.rosenzweig@nortonrosefulbright.com

Diversity, equity and inclusion (DEI) trends

Diving into an important subset of ESG issues, we talked with in-house counsel about their experiences with DEI issues and disputes related to allegations of discrimination in employment or in relation to other stakeholders. While most do not foresee an increase in disputes linked to discrimination or social justice impacting their organization in the near future, many detailed their organization's emphasis on DEI, including culture, and more focus on balancing the needs of the many stakeholders impacted.

Over the last 12 months do you feel your business has become more or less exposed to discrimination/social justice disputes?



About half (49%) indicated that employment cases were among their highest volume matters, compared to 39% in 2020. This increase in frequency has come with higher concern, with 27% of respondents listing employment disputes among their top concerns, compared to 19% in 2020. With 17%, DEI and discrimination were identified as the largest top-of-mind non-legal factor influencing new dispute trends.

Diversity and risk exposure

“I think we’ve got a pretty progressive and robust diversity and inclusion culture that we very actively promote.”

- Companies have **increased their efforts in the area of DEI over the last year** to minimize risk.
- Many hired **DEI specialists and leaders** to ensure they stay **compliant as well as proactive**, with the latter being regarded as key to avoid litigation.

“That being said, you can never rest on your laurels.”

- Despite these efforts, many feel **litigation in this area is unavoidable and difficult to predict**.
- Respondents expressed concern about becoming the **target of social justice activists or their own employees**, even when they felt their overall risk of DEI-related lawsuits was low.

“We think we are market leaders with respect to environmental, social and governance issues.”

- Many respondents considered their company to be leading in the area of DEI and ESG initiatives and hence perceived themselves as less vulnerable.
- Despite this, most interviewees said DEI is not a formal consideration when hiring outside legal counsel, with some stating that it is considered on an informal and even personal level.

NRF Insight

Environmental, social and governance (ESG) issues are unique in that they encompass several other topics such as cybersecurity, DEI and climate change. Together, these trends are significantly affecting the number of class action disputes and regulatory investigations.



Steven Jansma
Head of Litigation and Disputes, United States

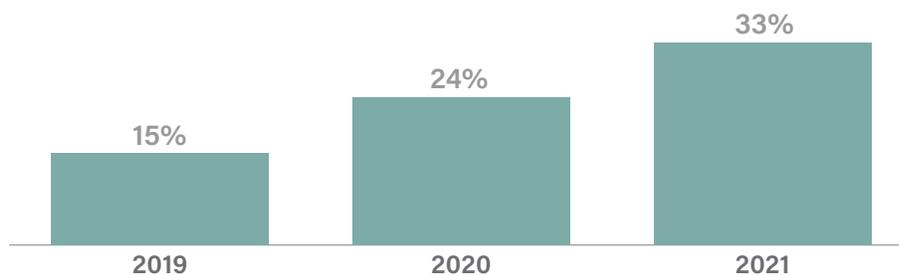
Regulatory investigations trends

Many of the above concerns are not just making waves on the litigation front. Legal leaders also opine that these issues could lead to more regulatory investigations.

Over the past three years, we have seen growing concern over regulatory proceedings and investigations. Data protection, ESG, multi-jurisdictional issues and regulatory changes were all listed by respondents as factors.

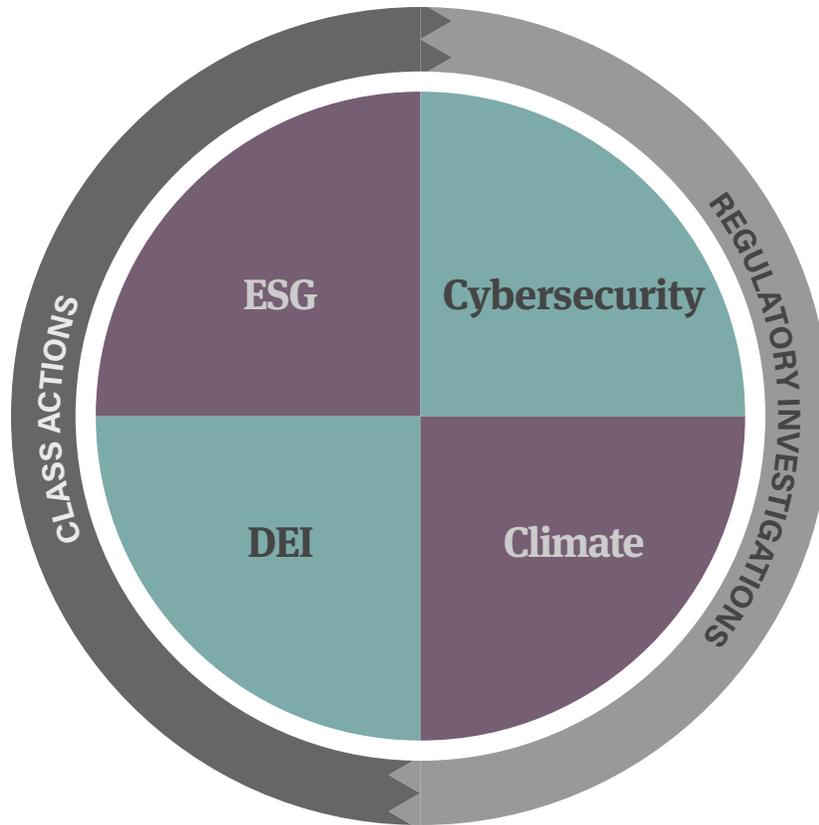
Financial institutions and energy respondents were among the sectors most concerned with regulatory issues, with both groups ranking regulatory investigations as their single greatest dispute-related concern.

Regulatory/investigations among disputes of greatest concern to your company



“We do business in Canada, the US and Mexico, and yet we are banked by European banks, which impose certain European data restrictions on us that we wouldn’t otherwise be thinking about. It’s been interesting that sometimes we have to make sure we comply not just with our US-based laws, but even some in Europe that we wouldn’t otherwise be focused on.”

General counsel of energy company



NRF Insight

The regulatory environment in the United States, and in the countries where global companies operate, is ever-changing, complex, and challenging. The fact that most respondents reported regulation and investigations to be among their top three concerns for legal disputes in 2021 reflects the difficulties of that environment.



Christopher Pelham
Partner

Changes in concerns regarding regulatory/investigation matters

“There will be more uncertainty, more regulation, more challenges, more breach of contract claims on an ESG basis that will be drawn into those disputes.”

General counsel of energy company

Clients cite **regulatory changes** as a driving reason for concern

Data protection regulations are an increasing cause of concern among respondents, with many citing the consequences of non-compliance, reputational harm, financial loss and class actions.

Respondents are increasingly concerned with regulatory/investigation matters, with **33%** citing these among their top concerns, versus **24% in 2020**.

19% said that regulatory/investigation matters were their single greatest concern in 2021, versus **11%** in 2020.

Regulations across jurisdictions and international borders are also increasingly cited as a source of concern, with a number of respondents citing difficulties in dealing with foreign governments and regulatory authorities.

ESG-related regulations are also a concern, particularly in regard to environmental matters in the energy sector, but concerns regarding ESG compliance issues have gained traction across industries.

Cross-border and jurisdictional issues are also a major concern, even among respondents who do not have operations outside the US.

“Within the United States we do have differing [data protection] standards: California, in particular is more like the European standard. We have a deletion responsibility and then we have a regulatory record keeping responsibility.”

Associate general counsel of financial services company

Class action trends

The proportion of respondents citing class actions as among their most common dispute types has doubled since 2020. While the major driver appears to be cybersecurity and data protection incidents, there is also a rising concern over ESG-related class actions.

“Regardless of what the issues are, if it’s significant, it’s a concern, but class actions are of top concern.”

Cybersecurity

“Once you have a data breach, you have to send out notification. Once you do that, the plaintiff’s bar circles.”

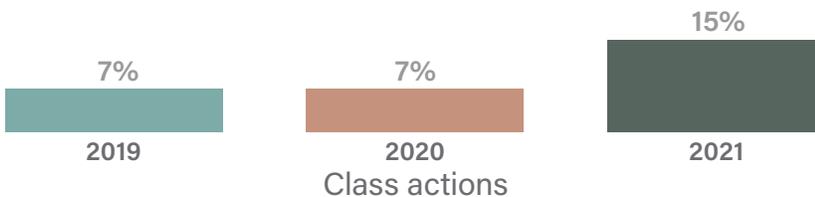
Data Protection-related litigation dominates this area with **concerns being fed by changing government regulations** across jurisdictions and data breaches.

ESG

“More false advertising class action litigation focused on companies’ environmental and social governance statement.”

Environmental litigations initiated by a **multitude of stakeholders** (NGOs, domestic and foreign governments as well as consumers).

Most common types of litigation pending against your company in the last 12 months: class actions



“Class actions are becoming very popular and common in any type of security breach.”

Deputy general counsel of healthcare company

Among the industries represented in our survey, consumer and retail respondents once again list class actions as the most frequent dispute type (36%). More than half of respondents in the field said class actions are a concern, but 29% said it is the greatest concern facing their department.

“The biggest concern would be with changes in the regulatory environment that could give rise to new punitive class-action lawsuits. We are a highly-regulated industry and if you have a regulatory change, this empowers consumer litigation that is akin to regulatory issues.”

Chief litigation officer of banking and finance company

NRF Insight

Environmental, social and governance (ESG) issues have taken center stage as various stakeholders challenge companies to improve their ESG performance. We are seeing many companies establish ESG goals and communicate their progress, but making public statements related to ESG can put companies at risk for litigation if the statements are perceived as false or misleading.



Rachel Roosth
Partner

Mitigating disputes

In-house litigation leaders emphasized strategies focused on risk management, tightening internal controls and working closely with counsel in their efforts to proactively mitigate disputes.

More proactive/
Risk management

21%

“I think we’ve learned about trying to write clearer policies and trying to have clearer communication strategies, so we’re trying to be more proactive up front to prevent the litigation.”

“Monitoring court decisions to determine the changes in and interpretations of the law.”

Trend spotting/Horizon
scanning/Precedents

18%

Internal controls/
Policies/Reporting

15%

“We have internal procedures to provide notices when applicable, and also good record keeping.”

“We have engaged a national law firm to monitor ongoing litigation, arguments that are being made in terms of defenses, jurisdictions, standing arguments — we are monitoring that.”

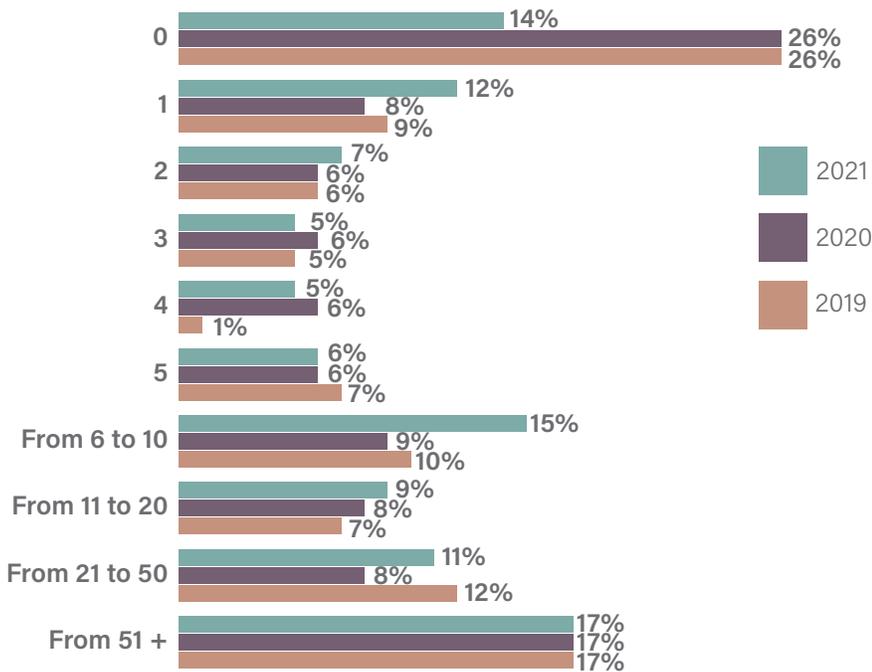
Engaging outside
counsel

14%



Resourcing disputes

According to our research, the number of lawsuits facing our respondents has increased significantly, with the median number of suits against them rising to six from four in 2020. This move was driven by a decline in respondents with no litigation pending against them, falling to 14% in 2021 from 26% in the previous two years.

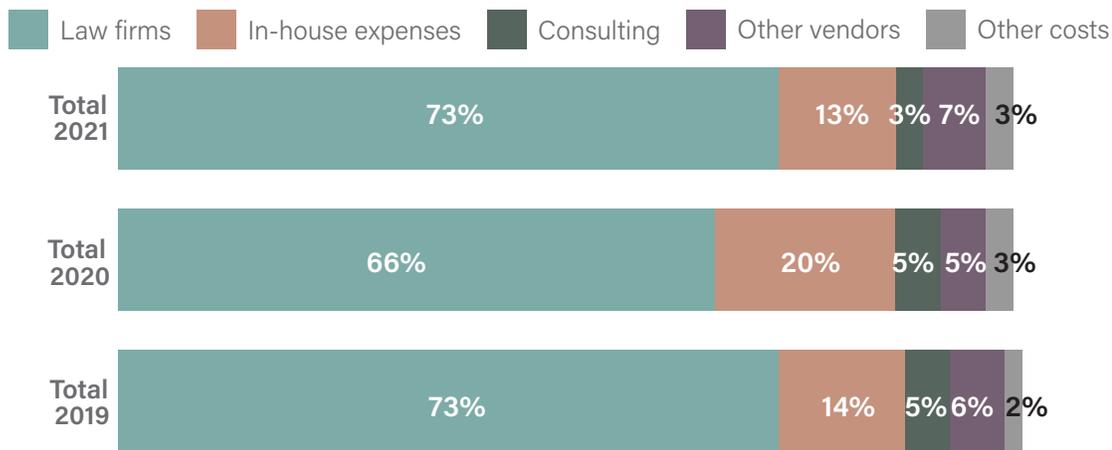


Lawsuits against

	2021	2020	2019
Median	6	4	5
Mean	103	92	90

Participants also indicated that litigation spending is shifting back to outside counsel after a push inward the previous year, which is due to the increase in lawsuits.

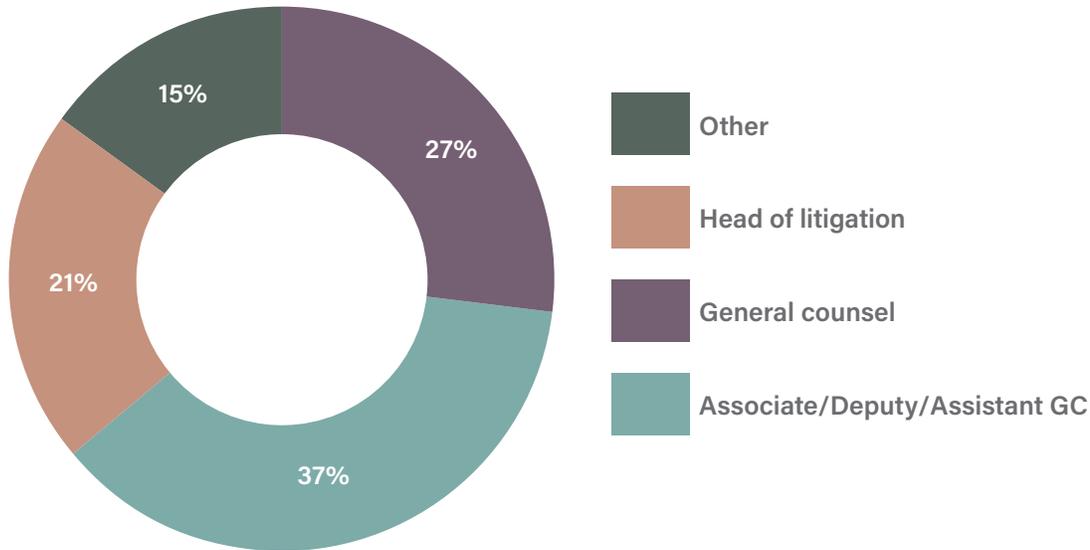
Approximately what percentage of your annual litigation spend (excluding cost of settlements and judgments) is allocated to the following areas:



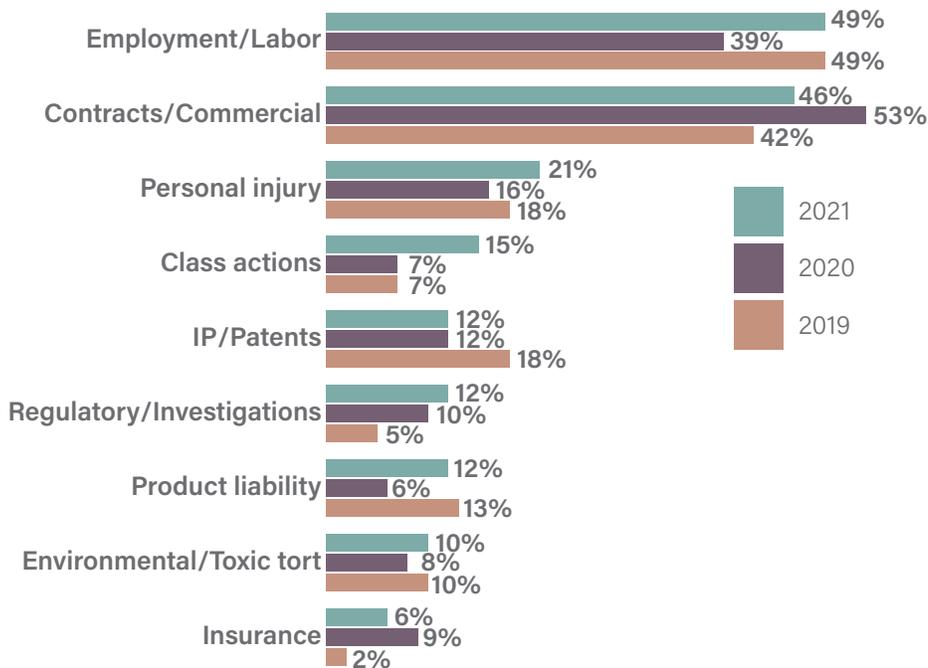
More than three-quarters (76%) of respondents say they expect the number of in-house lawyers in their organization who manage and/or conduct disputes to stay the same over the next 12 months. The 21% who see their team growing cite acquisitions and organic growth, post-COVID judicial reopenings and increasing dispute volume. The 3% who anticipate a decrease in headcount largely cite budgetary constraints and natural attrition.

Demographics and tables

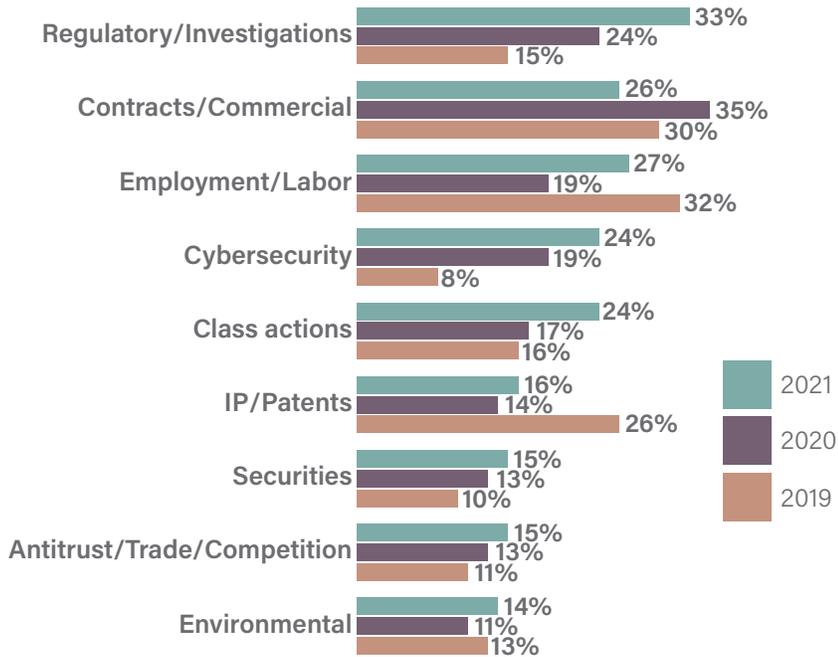
Respondents by title



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



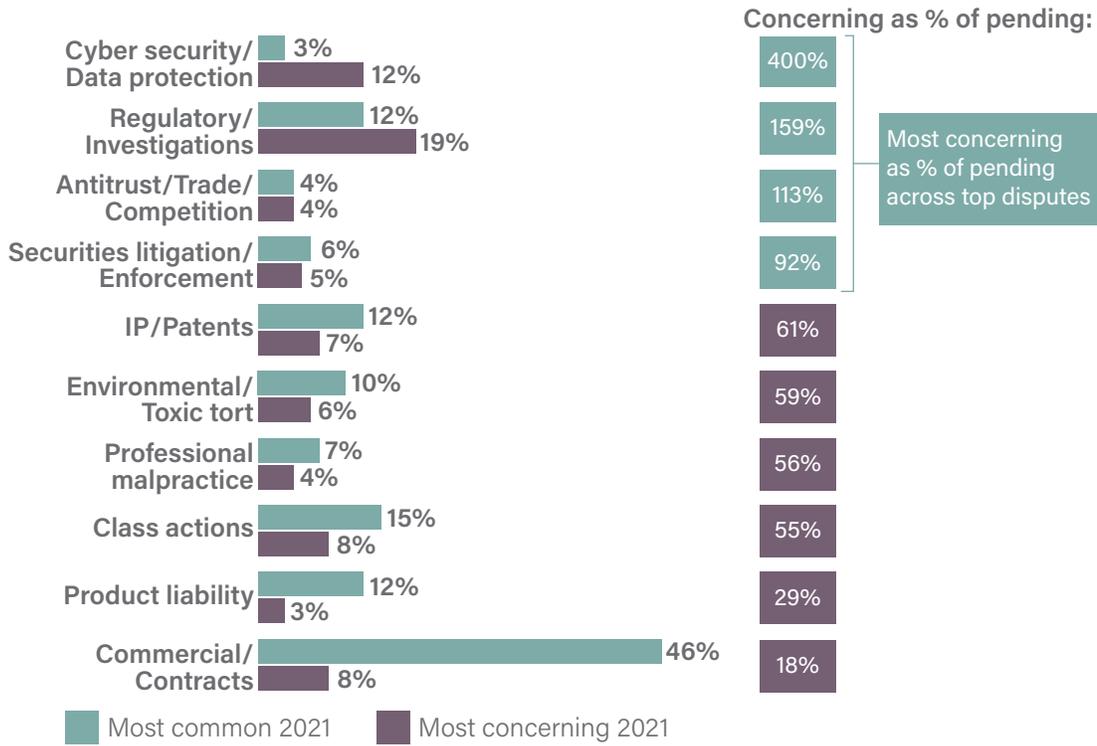
What would be the top three types of legal dispute which would be of most concern to your company?



Dispute trends impacting industries

	Consumer markets	Energy, infrastructure and resources	Financial institutions	Life sciences and healthcare	Technology	Transport
Most numerous disputes	Employment/Labor = Commercial/Contracts	Commercial/Contracts	Employment/Labor	Employment/Labor	Employment/Labor	Commercial/Contracts
Most concerning (single)	Class actions	Regulatory/Investigations	Regulatory/Investigations	Professional Malpractice	Cybersecurity/Data protection	Employment/Labor
Top trends facing them in litigation	Employment/Labor and IP	Environmental/Climate change/ESG	Cybersecurity/Data protection	Cybersecurity/Data protection	IP/ Patents and Technology/ AI	Cybersecurity/Data protection and Environmental/Climate change/ ESG

Most common disputes vs. single most concerning disputes



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