

Fulbright's 6th Annual Litigation Trends Survey Report



This year marks the sixth consecutive year that Fulbright & Jaworski has commissioned an independent research firm to survey senior corporate counsel on their experiences and opinions regarding various aspects of litigation and related matters. There were over 400 participants in the Litigation Trends Survey in 2009, the second highest number in the survey's six-year history. There were 276 in the U.S. and 125 in the U.K. (a record high). As in the past, it is a statistically significant sample.

The data are again analyzed by industry; by company headquarters location (country of residence and U.S. region); by company size in annual gross revenues (U.S.\$); and by publicly/privately held companies. As in any survey, not all participants answered every question.

While there are core questions from previous surveys repeated this year to track trends, there are also new questions designed to gather more detailed information in areas such as alternative fee arrangements, effects of the economic downturn, cross-border cooperation in regulatory/enforcement agency investigations, reasons for using litigation or arbitration, and average costs of resolving labor and employment disputes.

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Highlights of the 6th Annual Litigation Trends Survey

- For the third year in a row, there is an increase in respondents expecting more disputes over the next 12 months.
- Bankruptcy, class actions and regulatory actions are all up this year. The financial services sector, in particular, had a jump in regulatory actions.
- More than a third of respondents have increased their use of alternative fee arrangements because of the economic downturn.
- One-third of the U.S. companies conducting internal investigations requiring assistance of outside counsel reported the matter to a regulatory agency.
- Almost a quarter of companies with \$1 billion or more in revenues expect more internal investigations over the next 12 months.
- The incidence of companies reporting corruption/bribery investigations over the past 12 months has nearly doubled from last year.
- Among U.S. companies, 13% report having an import/export sanctions investigation requiring outside counsel in the past year.
- About four in 10 of all respondents have seen increases in wage and hour, multi-plaintiff labor and employment cases over the past year.
- Almost a quarter of the public companies and those with \$1 billion or more in revenues expect more international arbitrations in the next 12 months.
- Anywhere from a third to more than 40% of companies surveyed block internal network users from various social media Web sites.

Fulbright's Litigation Trends Survey Report is designed to provide data revealing ongoing trends and insights into the thinking of senior corporate counsel regarding the near-term future prospects for dispute resolution and related matters.

As always, we welcome your suggestions for topics or questions to include in future surveys.

RESPONDENT PROFILE

4 - 8

“Looking at the financial landscape globally, I anticipate an increase in litigation because companies and people are more protective of their assets.” U.K. Financial Services respondent

2009 Respondent Profile

- ✦ Total Participants: 408, a statistically significant sample.
- ✦ Headquarters Location: United States (276), United Kingdom (125), Other (7).
- ✦ Participants' Titles: General Counsel (61%, up from 41% in 2008), Head of Litigation (15%), Other (24%).
- ✦ Titles such as Associate General Counsel, Senior Counsel and Deputy General Counsel are included in "Other."

Industries Represented

- ✦ Participation by the financial services and retail/wholesale sectors is up significantly from last year, while manufacturing is down. Financial services account for 27% of the U.K. sample.
- ✦ Retail/wholesale and energy have the heaviest representation among the largest companies surveyed (19% and 18%, respectively).

Industries Represented

Industry	Total
Education	1%
Energy	16%
Engineering/Construction	5%
Financial Services	16%
Health Care	8%
Technical/Communications	9%
Manufacturing	11%
Real Estate	4%
Retail/Wholesale	13%
Insurance	8%
Other	9%

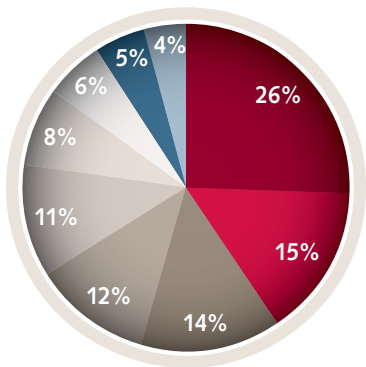
Number of Countries Where Respondent Companies Have Facilities

Number of Countries	Total	United States	United Kingdom
1	44%	52%	25%
2	8%	8%	9%
3 - 5	8%	8%	10%
6 - 10	12%	11%	16%
11 - 20	9%	5%	18%
21 - 50	10%	9%	10%
51 or more	9%	7%	12%

Sum of percentages may total less than 100% due to rounding.

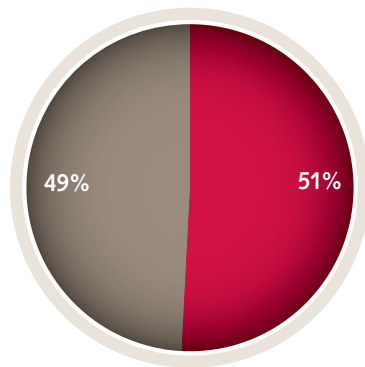
- These figures are very similar to last year's. As would be expected, the largest companies surveyed are the most international in scope, with half reporting facilities in more than 10 countries and just 22% limited to one country.
- One in eight mid-sized companies have facilities in more than 10 countries.
- Among public companies, 40% have facilities in more than 10 countries.

Respondents' Headquarter Locations



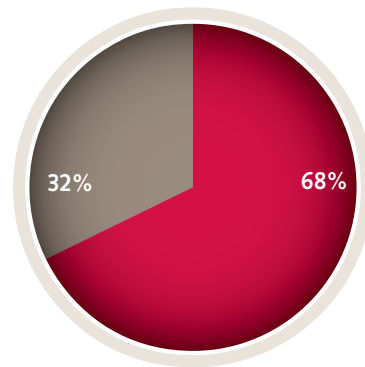
- WEST (4%)
- ATLANTIC (5%)
- CALIFORNIA (6%)
- SOUTH (8%)
- EAST COAST/NEW ENGLAND (11%)
- OTHER U.K. (12%)
- MIDWEST (14%)
- LONDON (15%)
- TEXAS (26%)

U.S. Respondents Public v. Private



- PRIVATELY HELD (49%)
- PUBLICLY HELD (51%)

U.K. Respondents Public v. Private



- PRIVATELY HELD (32%)
- PUBLICLY HELD (68%)

- ✦ Nearly 80% of the largest companies responding and almost half of the mid-sized companies are publicly held. Fewer than two in 10 of the smallest companies are publicly held.
- ✦ The U.K. is home to one-third of the largest and one-third of the smallest respondent companies.
- ✦ The U.K. is also where more than half of the financial services companies and about 40% of the technology/communications and wholesale/retail companies are headquartered.

Company Gross Revenues in the Last Fiscal Year (U.S.\$)

Gross Revenues	Total	United States	United Kingdom
Under \$100 Million	16%	16%	18%
\$100 Million - \$999 Million	31%	33%	26%
Over \$1 Billion	53%	51%	56%

Throughout this report, companies with revenues under \$100 million are referred to as the “smaller companies” in the overall survey respondent profile; companies with revenues of \$100 million to \$999 million in revenues are referred to as the “mid-sized companies”; and companies with \$1 billion or more in revenues are referred to as the “largest companies.”

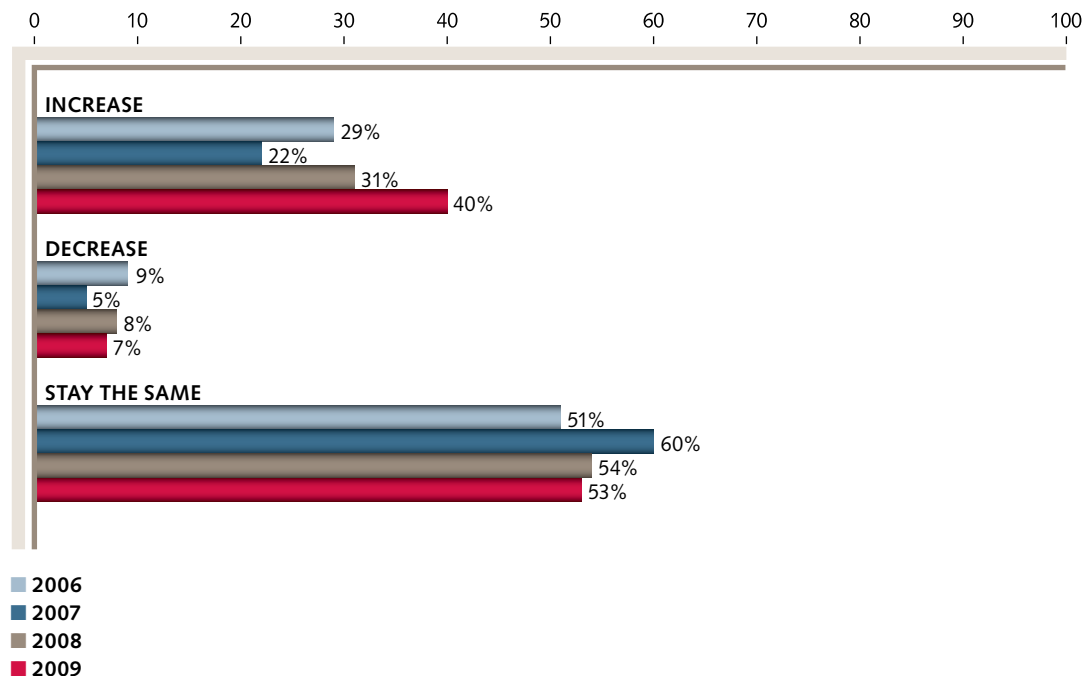
- ✦ The shift toward a larger proportion of respondent companies with \$1 billion or more in gross revenues has continued over the last two surveys. In 2008, 40% were in that category, compared with 53% this year.
- ✦ The increase in large U.K. participants from 38% last year to 56% this year is also reflected in a jump in U.K. publicly held respondents—from 56% to 68%.

LITIGATION OVERVIEW

9 - 24

“Legal disputes increase when economic times are tough.” U.S. Insurance respondent

General Litigation/Litigation Exposure: Do You Expect the Number of Legal Disputes Your Company Will Face in the Next Year to Increase, Decrease or Stay the Same?



For the second consecutive year, expectations of an increase in disputes across the entire sample has have risen, from 22% in 2007 to 31% in 2008 to 40% this year.

- ✦ A majority of the largest companies surveyed expect an increase (52%), compared with 43% last year and just over a third the previous two years.
- ✦ A dramatic rise in expected increases has also occurred among the smaller companies—from just 5% in 2007 to 22% last year to 30% this year. Predictions of a decrease in this category have dropped from 16% last year to 11% this year.
- ✦ About a third of mid-sized companies expect more disputes, a slight increase over last year.

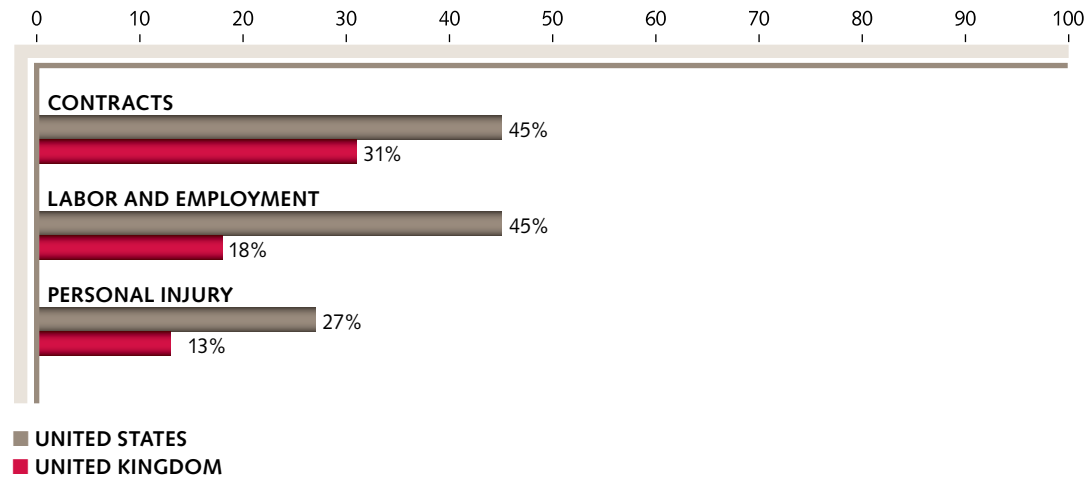
- ✦ Nearly half of the public companies foresee more disputes, compared with just over a third last year.
- ✦ Technology/communications companies have doubled their expectations of increases this year over last (47% v. 24%). The insurance industry rose to 56% this year from 36% last year.
- ✦ The financial services sector has remained steady over the last two surveys with half of respondents expecting more disputes.
- ✦ Repercussions from the economic downturn are chief among the reasons given for expecting more litigation (respondents' verbatims):
 - ☺ "It's the economy—more issues with suppliers, dealers and customers." U.K. manufacturer respondent
 - ☺ "Primarily driven by poor economy. Causing the insureds to push issues that would otherwise not have been claims or been more easily resolved." U.S. insurance respondent
 - ☺ "Increased insolvency claims." U.S. manufacturer respondent
 - ☺ "HR downsizing." U.S. retail/wholesale respondent
 - ☺ "Looking at the financial landscape globally, I anticipate an increase in litigation, because companies and people are more protective of their assets." U.K. financial services respondent
- ✦ Some of the reasons for expecting less litigation are:
 - ☺ "Because it's as high as ever now. Historical data. We are involved in more litigation." U.S. energy respondent
 - ☺ "Bad economy leads to less people litigating because no one has money." U.S. financial services respondent
 - ☺ "We expect to resolve and emerge from bankruptcy proceedings." U.S. manufacturer respondent
 - ☺ "Economy is about to turn around." U.K. retail/wholesale respondent

Most Numerous Types of Litigation Pending

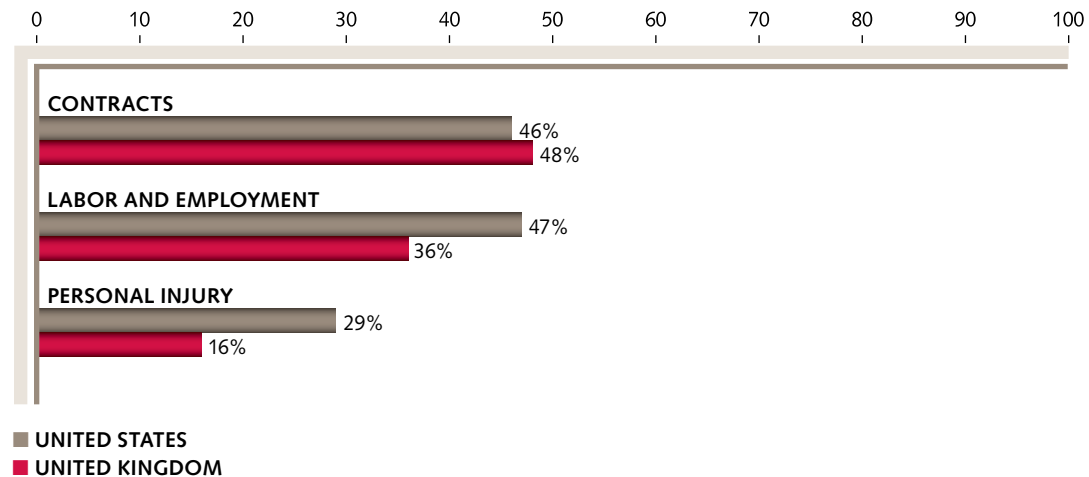
Respondents chose the three most numerous types of litigation pending against their companies in the past year from a list of more than 15 categories. The total respondent sample shows a slightly more diverse weighting of litigation types, compared with last year. Although the three perennial leaders (Contracts, Labor and Employment and Personal Injury) retain the top three positions in the total sample representation, all are down somewhat from last year.

- Regulatory actions against financial services companies are up sharply from 18% last year to 31% this year. The other two sectors most frequently listing Regulatory among their top three areas are energy and insurance.
- Noticeable increases across the total sample are Bankruptcy/Reorganization, up from 5% last year to 9% this year, and Regulatory, increasing from 9% to 13%.
- While the U.S. figures follow the total sample numbers fairly closely, the U.K. data are even more broadly dispersed, with significant drops from last year in Contracts and Labor and Employment. Product Liability and IP/Patents edge out Personal Injury (13%) for the U.K.'s third position this year.

Most Numerous Types of Litigation Pending in 2009 (By Country of Residence)



Most Numerous Types of Litigation Pending in 2008 (By Country of Residence)



Types of Litigation of Greatest Concern

Concerns echo the current trends in litigation pending, with the big three (Contracts, Labor and Employment and Personal Injury) all showing significant declines from last year among the total sample of respondents. The U.S. and U.K. data show similar reductions. Areas of increased concern among U.S. and U.K. respondents vary somewhat.

- 🦋 Regulatory concerns in the U.S. sample have nearly doubled from last year (28% v. 15%) but remained stable in the U.K. at 13%.
- 🦋 Bankruptcy/Reorganization concerns in the U.K. tripled from 3% last year to 10% this year. In the U.S., they rose from 5% to 7%.
- 🦋 Class Action concerns in the U.S. are up significantly, from 19% to 24% while Group Actions are dropping in the U.K.

The cost of disputes has risen on the radar screen of companies with \$1 billion or more in revenues since last year. Financial exposure has also increased as a reason for concern for the largest companies, from a third last year to 40% this year.

General Litigation/Litigation Exposure: Why Do Those Types of Legal Disputes Most Concern Your Company?

Reason	Total	United States	United Kingdom
Cost to Handle	16%	15%	15%
Financial Exposure	28%	32%	18%
Most Common Type	58%	56%	63%
Economic Crisis	5%	6%	2%
Other	8%	7%	7%

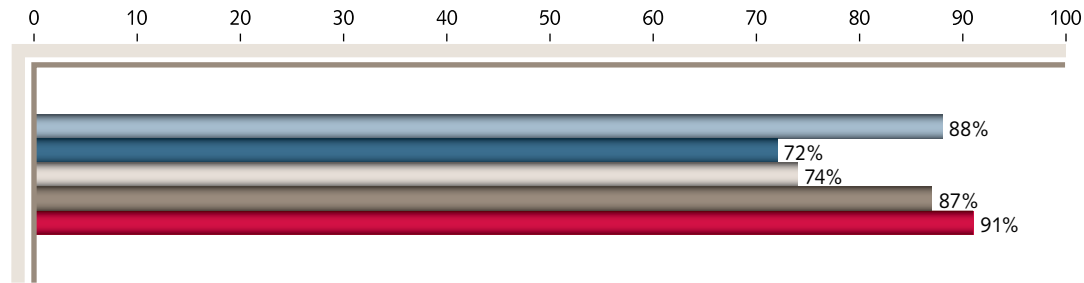
Reason	Under \$100 Million	\$100 - \$999 Million	\$1 Billion or More
Cost to Handle	10%	17%	19%
Financial Exposure	14%	18%	40%
Most Common Type	76%	67%	45%
Economic Crisis	2%	2%	6%
Other	6%	7%	8%

Sum of percentages exceeds 100% because respondents were permitted to name more than one reason.

- 🦋 The economic crisis is a stronger factor in the U.S., particularly in the West (15%) and East Coast/New England (13%), yet remains in single digits in California (5%), which is broken out separately in the data from the West, and in all other regions of the country.
- 🦋 Among industry sectors, the economic crisis is cited most frequently in financial services (13%) and engineering/construction (10%).
- 🦋 The manufacturing sector worries far more about financial exposure (43%) than any other sector.

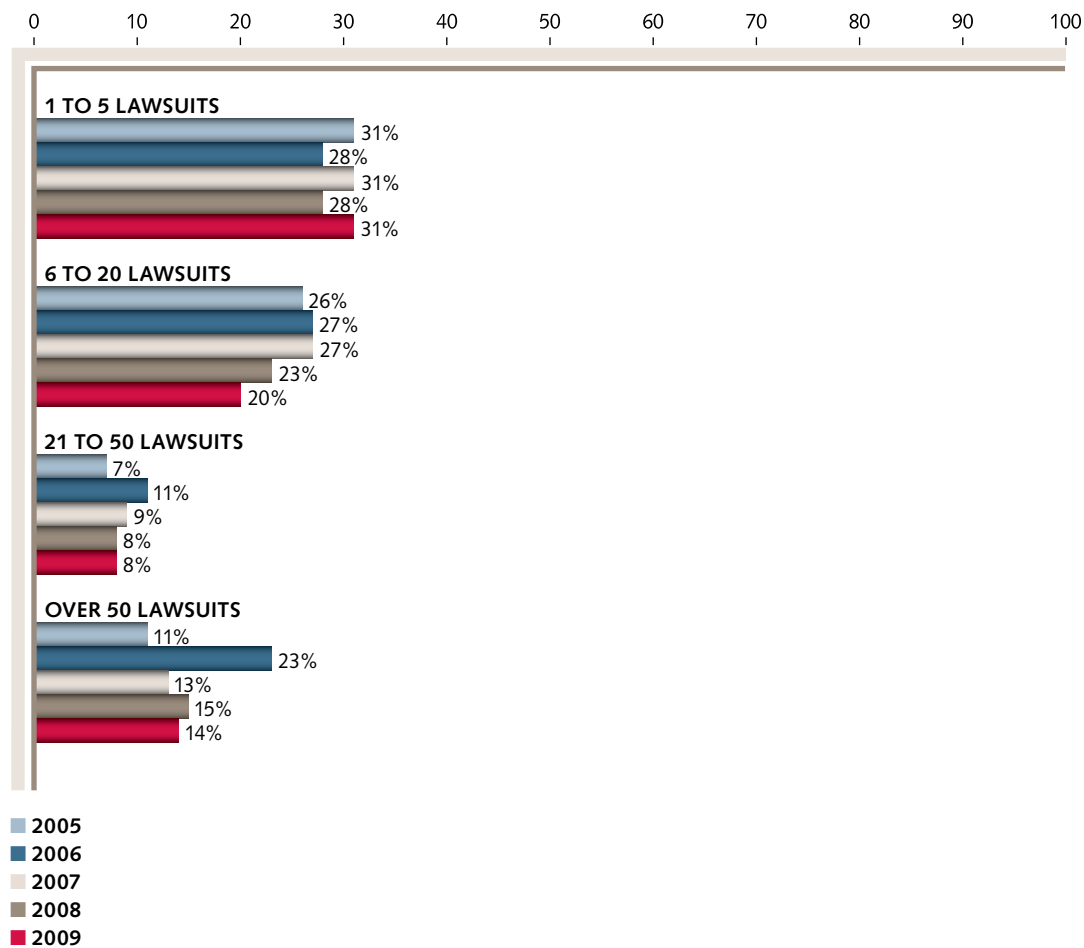
Respondents were asked to indicate their level of satisfaction/dissatisfaction with how well outside counsel meets their litigation needs in five areas. Two of the areas were explored in last year's survey (Electronic Discovery and Cost Management) and both show marked increases in satisfaction.

Satisfaction With Outside Counsel *(All Respondents)*



- ELECTRONIC DISCOVERY (88%)
- BUDGET FORECASTS (72%)
- COST MANAGEMENT (74%)
- MATTER STAFFING (No. of lawyers assigned) (87%)
- PARTNER/ASSOCIATE RATIO (91%)

Lawsuits Commenced Against Companies (All Respondents)

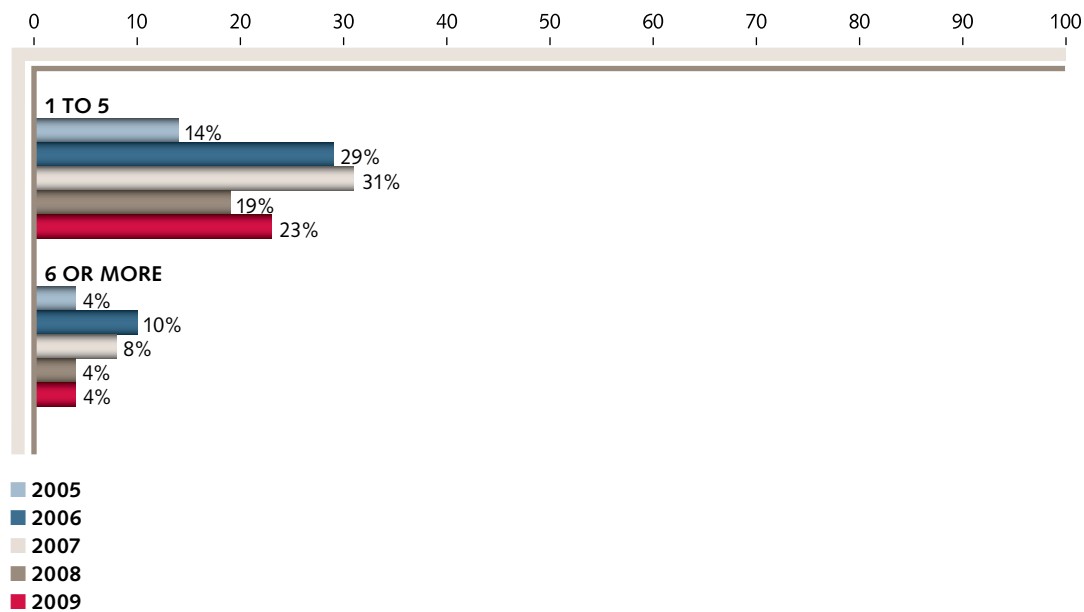


Those reporting no lawsuits commenced account for the difference between 100% and the total of the percentages shown in the chart.

Across the total respondent sample, lawsuits commenced against companies this year show a slight decline from last year, continuing a general decline from the litigious year of 2006. However, U.S. companies with at least one lawsuit commenced against them show a slight uptick from last year (79% in 2008; 83% in 2009).

- Among companies with \$1 billion or more in revenues, 36% this year have more than 20 cases commenced against them, compared with 45% last year.
- Most industry sectors, including even financial services and insurance, have declines in those reporting more than 20 cases this year, compared with last. However, the health care sector bucks the trend (up from 28% last year to 38% this year reporting more than 20 cases).
- Other sectors with increases in the plus-20 range are energy, engineering/construction and real estate.

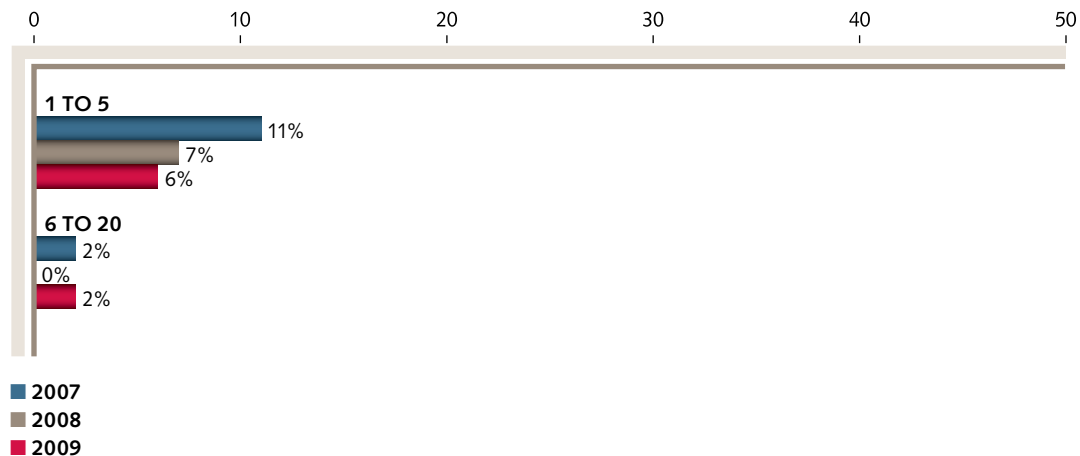
Lawsuits With More Than \$20 Million at Issue *(All Respondents)*



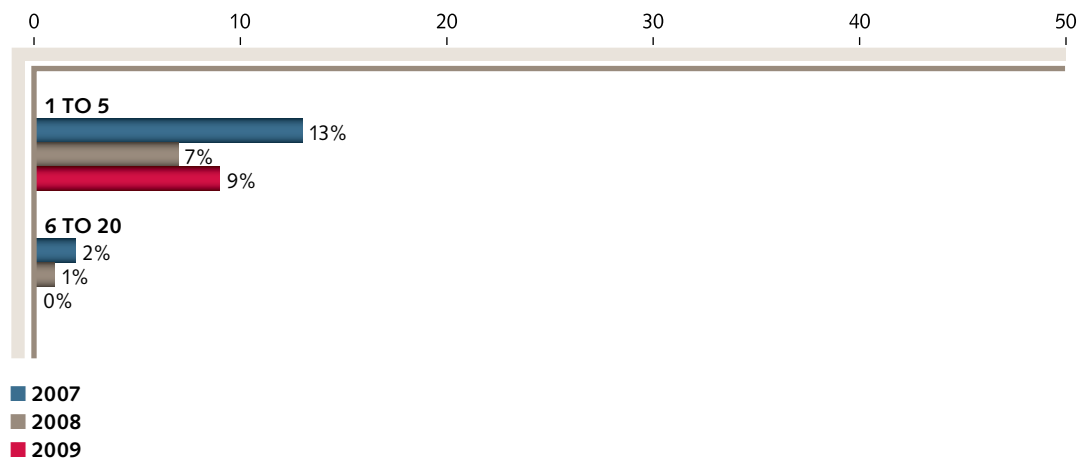
High-dollar lawsuits are up slightly from 2008 when 24% of all respondent companies faced one such suit; this year it is 27%, which is still below the 2007 total of 39%.

- 📌 Companies with revenues of less than \$100 million show a surprising uptick with 16% facing at least one case of this magnitude v. just 8% last year.
- 📌 Companies with \$1 billion or more in revenues with at least one \$20 million-plus case are up slightly. Mid-sized companies with lawsuits of this size have decreased slightly.
- 📌 The insurance sector reports the highest frequency of these large cases—nearly half those companies have at least one, followed by a third of the energy and wholesale/retail sectors, then health care and manufacturing with almost as many.

Arbitrations With More Than \$20 Million at Issue (U.S.)



Arbitrations With More Than \$20 Million at Issue (U.K.)



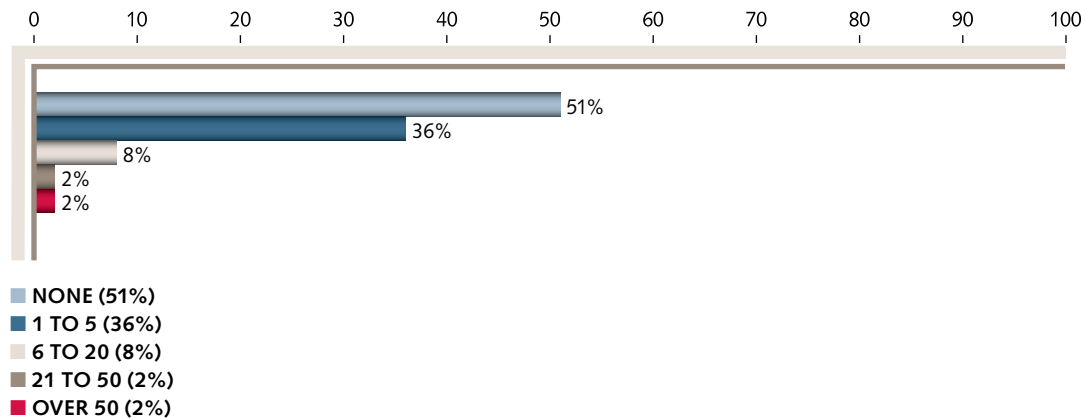
Among the total sample of respondents, arbitrations of all sizes have declined, from 46% having at least one proceeding commenced against them in 2008, to 38% this year.

- Half of the U.S. companies had at least one arbitration last year; this year the figure is 43%. The U.K. sample declined from 31% with at least one arbitration last year to 23% this year.
- The percentage of U.S. companies with at least one \$20 million-plus arbitration is up slightly at 8% in 2009 v. 7% in 2008. The percentage of U.K. companies is also up 1% this year, from 8% in 2008 to 9% in 2009. These are below the 2007 figures of 13% in the U.S. and 15% in the U.K.

Disputes Initiated by Respondent Companies

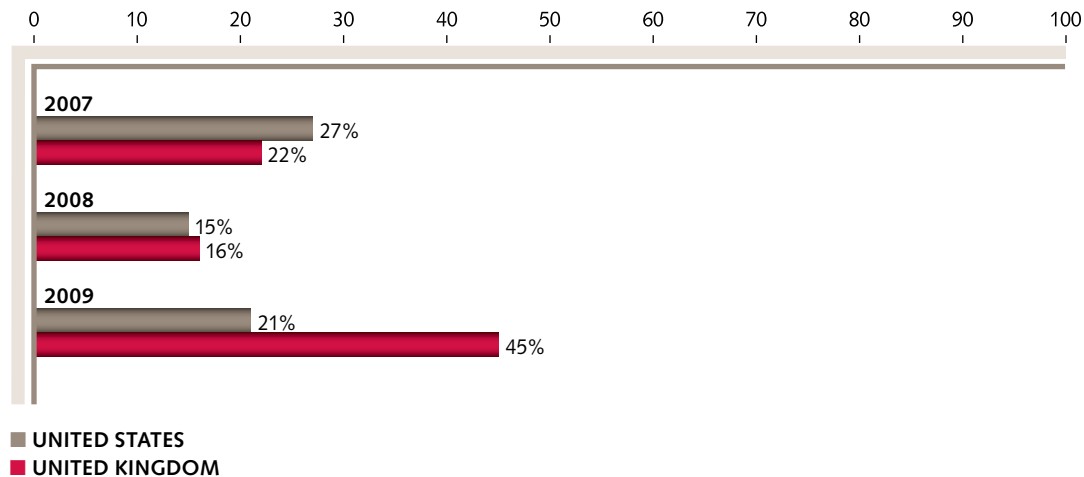
- Companies continue a three-year trend of initiating fewer lawsuits. In 2007, 61% of the total sample initiated at least one suit, in 2008 55% and in 2009 just 48%.
- This year, 15% of all respondents initiated at least one suit with more than \$20 million at issue, up from 10% last year, but well below the 23% in the 2007 survey.
- The trend is the same among the largest companies surveyed, declining from 85% initiating litigation in 2007 to 74% in 2008 and down to 63% this year. However, the largest companies have filed more lawsuits with over \$20 million at issue this year, doubling from 13% last year to 26% this year.
- Arbitrations commenced by all respondents also continue to decline from 29% in 2007 to 25% in 2008 to 22% this year. Those with more than \$20 million at stake moved back up this year to 7%, compared with just 3% last year, but below the 9% in 2007.

How Many Lawsuits Did Your Company File or Initiate In the Last 12 Months? *(All Respondents)*



Sum of percentages may total less than 100% due to rounding.

More Than Five In-House Lawyers Managing Litigation *(By Country of Residence)*

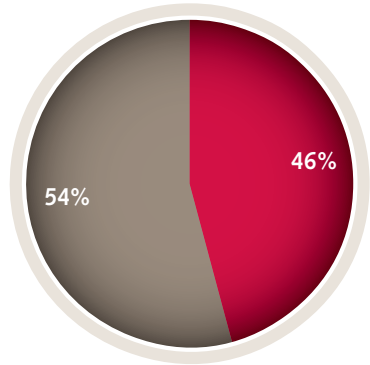


The shift toward more in-house lawyers managing litigation has continued since the 2007 survey. More respondents in the total sample, as well as on a country-of-residence basis, report more than five in-house lawyers managing litigation than previously. U.K. companies with larger litigation staffs jumped dramatically from the previous two years.

- ✦ It appears that most companies planning increases have already staffed up. Looking ahead, expected increases have fallen dramatically among all respondents (from 17% last year to 7% this year) and within virtually every category in which the data are analyzed.
- ✦ Companies with \$1 billion or more in revenues appear to have staffed up since last year. Those with five or more lawyers managing litigation this year stands at 48%, returning to 2007 levels, compared with 26% in 2008.
- ✦ Among the largest companies, expected future increases fell to 11% from 23% last year. Similar drops are evident among industry sectors, with predictions of increases mostly in the single digits.
- ✦ Insurance is the industry most likely to expect a decrease.

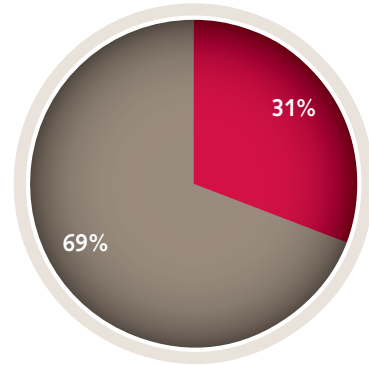
Has Your Company Had Any Matters Go to Trial in the Past 12 Months? *(By Company Type)*

(Publicly Held Companies)



■ NO (54%)
■ YES (46%)

(Privately Held Companies)



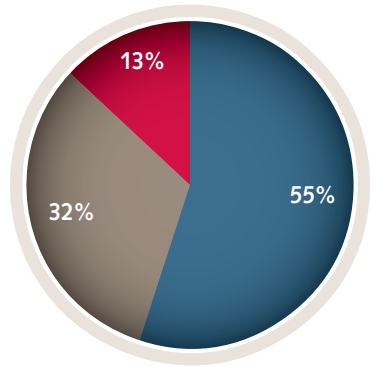
■ NO (69%)
■ YES (31%)

- 🔗 More than half of the largest companies surveyed had at least one matter go to trial.
- 🔗 About half or more of the health care, education, insurance and retail/wholesale sectors went to trial in the last 12 months.
- 🔗 Thirteen percent of all respondents are seeing higher awards in jury trials.
- 🔗 The largest companies also report higher awards in jury trials (15%), as well as non-jury trials (12%).

In Disputes That Are Not International in Nature, and When Given a Choice, Does Your Company Choose Litigation or Arbitration?

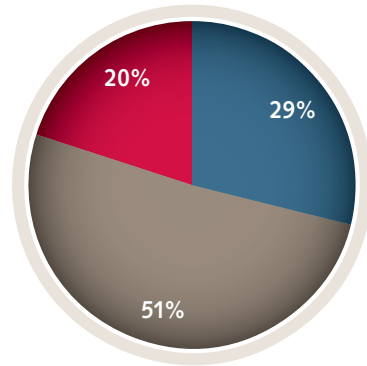
(By Country of Residence)

(U.S.)



■ LITIGATION (55%)
 ■ ARBITRATION (32%)
 ■ NO PREFERENCE INDICATED (13%)

(U.K.)



■ LITIGATION (29%)
 ■ ARBITRATION (51%)
 ■ NO PREFERENCE INDICATED (20%)

- Given a choice in purely domestic disputes, U.S. companies strongly prefer litigation; U.K. companies are almost as adamant about arbitration.
- Half of the largest companies prefer litigation, while mid-sized and smaller companies are more equally weighted in the 40% range between litigation and arbitration.
- Two-thirds of the health care and engineering/construction sectors prefer litigation, easily the highest endorsements among industry sectors.
- Lower cost is by far the most frequent reason that respondents give for their preference (whether litigation or arbitration). U.K. respondents are the most heavily weighted group (45%) toward lower cost as a reason for their choice.

Verbatim Reasons Respondents Give for Choosing Litigation

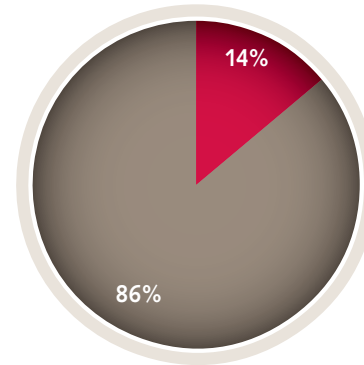
- “Less expense, more certainty, and arbitration is about splitting the baby.” U.S. energy respondent
- “Arbitration is too limiting, and regardless of what AAA says, its system is not cheaper, not faster, and arbitrators still seem to have a need to split decisions.” U.S. engineering/construction respondent
- “Prefer choice of jury rather than an arbitrator.” U.S. health care respondent
- “Arbitration does not have sufficient safeguards—very little room to correct mistakes—no appeal.” U.K. other industries respondent

Verbatim Reasons Respondents Give for Choosing Arbitration

- “Typically the venues where we are subject to jurisdiction do not provide favorable bench or jury trials.” U.S. energy respondent
- “Our biggest client is the government and we mutually prefer to arbitrate.” U.K. health care respondent
- “The specialized nature of our business warrants decision-makers with experience in our profession.” U.S. engineering/construction respondent
- “We think it is way faster and less expensive.” U.K. technology/communications respondent

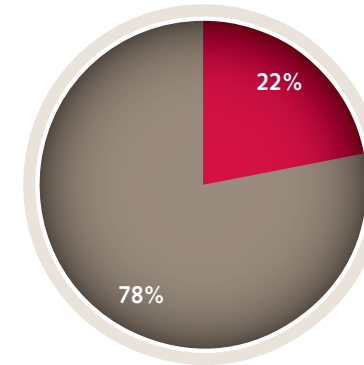
Has Your Company Been a Party to at Least One International Arbitration in the Last 12 Months? *(By Country of Residence)*

(U.S.)



■ NO (86%)
■ YES (14%)

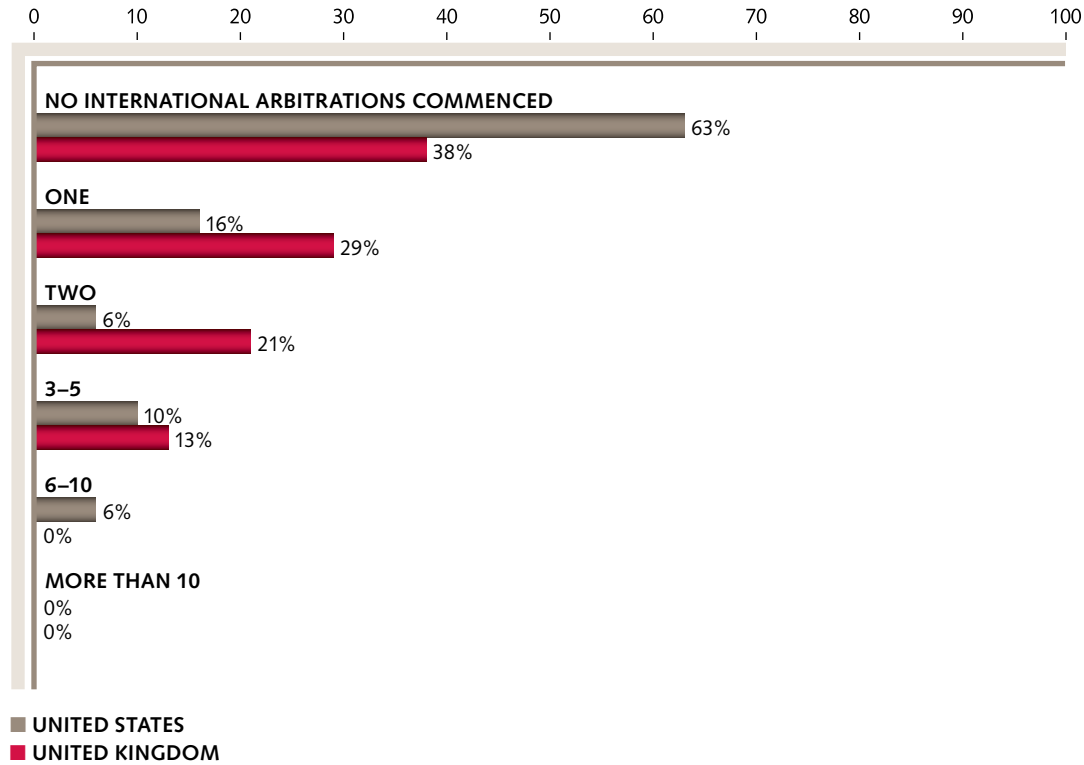
(U.K.)



■ NO (78%)
■ YES (22%)

In the Past 12 Months, How Many International Arbitrations Did You Commence?

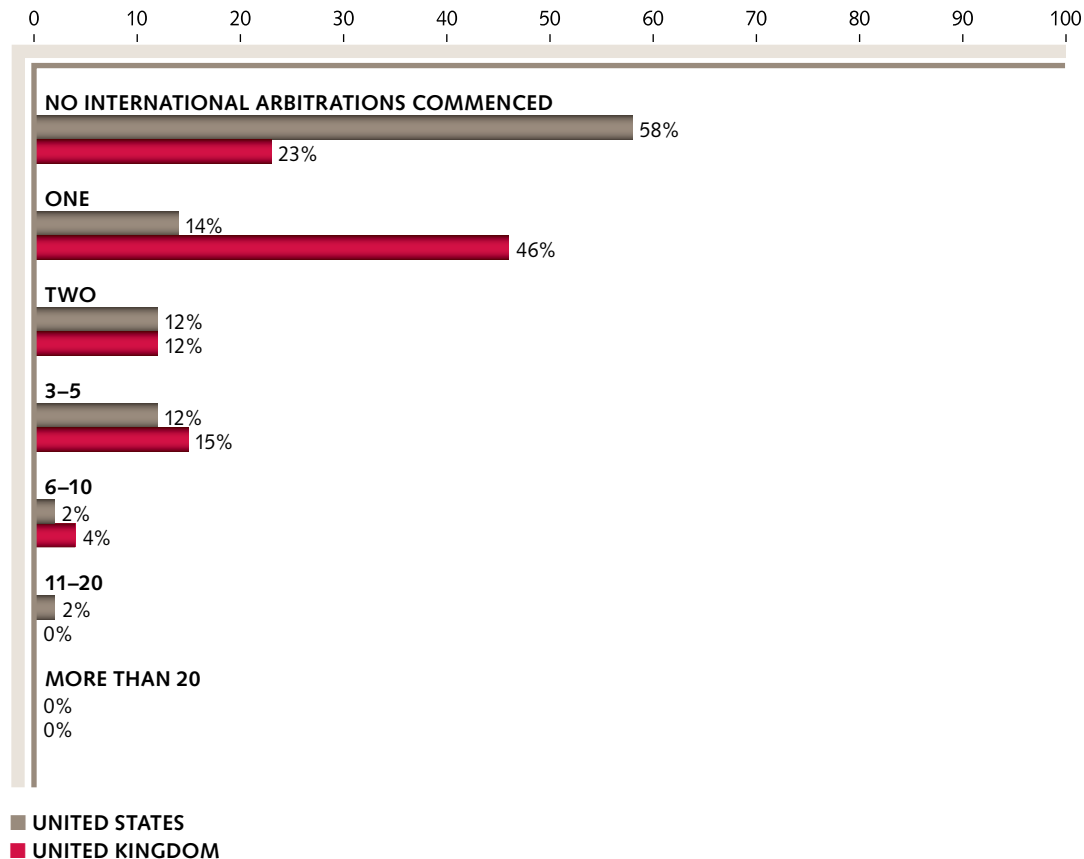
(By Country of Residence)



Sum of percentages may total more than 100% due to rounding.

- ✦ The U.S. and U.K. samples are inversely proportional when comparing those that commenced at least one arbitration over the past 12 months.
- ✦ Half of the largest companies surveyed and half of the public companies involved in an arbitration in the past 12 months commenced at least one proceeding in that period.
- ✦ Almost two-thirds of the energy companies commenced at least one in the past year.

In the Past 12 Months, How Many International Arbitrations Were Commenced Against You? *(By Country of Residence)*



- More than 60% of public companies and those with \$1 billion or more in revenues have become respondents in at least one international arbitration in the past 12 months.
- Most frequent industry targets are retail/wholesale, energy and insurance.
- London is the most frequent seat of arbitrations for both U.S. and U.K. companies, whether as claimants or respondents.

Expectations of Number of International Arbitrations (Next 12 Months)

- More than one in five U.K. respondents and one in seven U.S. respondents expect an increase in the number of commercial international arbitrations they will face over the next year. The number expecting decreases is in the low single digits.
- Almost a quarter of both the public companies and companies with \$1 billion or more in revenues expect an increase.
- Expectations of more international arbitrations are widespread across industry sectors, too. Increases are expected by 20% or more of the energy, financial services, insurance, manufacturing and retail/wholesale respondents.

LITIGATION COSTS AND BILLING TRENDS

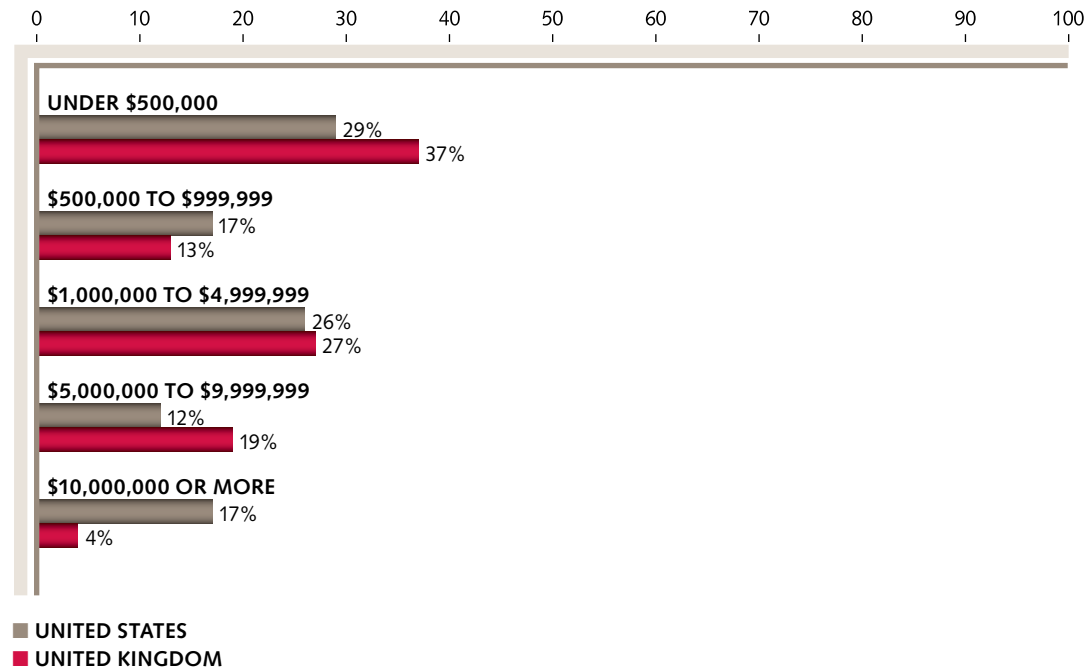
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“We have to do more with less.” U.S. Energy respondent

Litigation Costs and Billing Trends

- Among the total sample, companies spending \$1 million or more (U.S.\$) annually on litigation have increased from 45% to 53%. Since 2007, the increases in litigation spending have been even more dramatic, particularly among smaller and mid-sized companies.
- Smaller companies in the \$1 million or more category increased from 4% in 2007 to 13% in 2009, and mid-sized companies from 26% to 38%. The largest companies show a much smaller increase, from 75% to 78%.
- This year, those industries most likely to spend \$10 million or more are health care, insurance, energy and technology/communications.

Annual Litigation Expenditures (By Country of Residence – Excluding Costs of Settlements and Judgments)



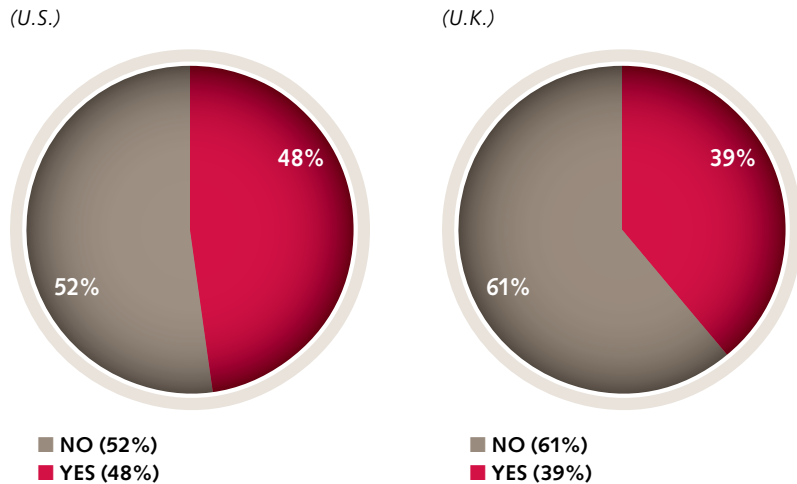
Sum of percentages may total more than 100% due to rounding.

Annual Litigation Expenditures (By Company Size)

Expenditures	Under \$100M	\$100M to \$999M	Over \$1B
Under \$500,000	69%	40%	10%
\$500,000-\$999,999	19%	23%	11%
\$1,000,000-\$4,999,999	7%	26%	33%
\$5,000,000-\$9,999,999	6%	8%	21%
\$10,000,000 or More	0%	4%	24%

Sum of percentages may total more or less than 100% due to rounding.

Does Your Company Use Alternative Fee Arrangements? *(By Country of Residence)*



Alternative Fee Arrangements

Respondents who do use alternative fee arrangements were asked to estimate the percentage of expenditures on outside counsel represented by alternative fee arrangements.

- ✦ About 40% of those respondents estimated 10%-25%, a range that is consistent across all sizes of companies.
- ✦ U.K. respondents are the exception, with only about a quarter estimating the 10%-25% range and half estimating from 26% to 99%.

Types of Alternative Fee Arrangements

Respondents who do use alternative fee arrangements were asked to select the three most frequently used arrangements from the following five choices: blended rate, capped, contingent (U.S.)/conditional (U.K.), fixed and performance/reward based.

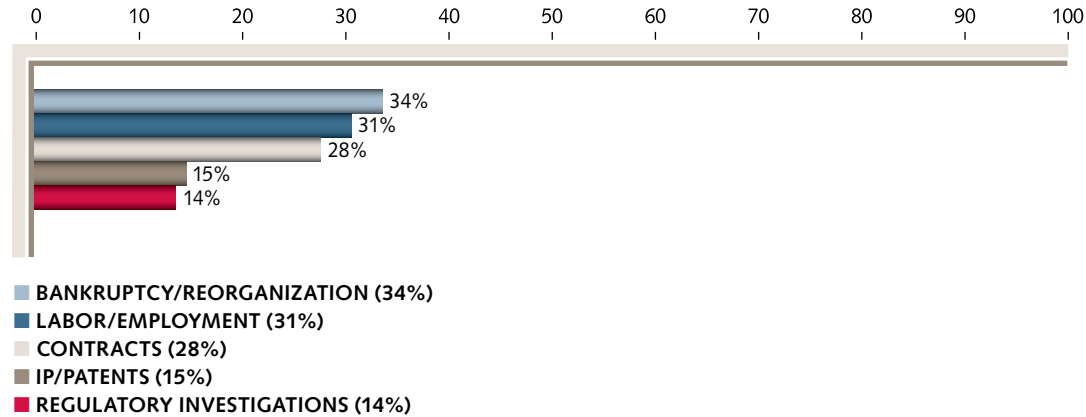
- ✦ Half or more of the mid-sized and largest companies use contingent/conditional fees and nearly as many use fixed fees.
- ✦ Conditional fee arrangements are the most popular arrangement in the U.K, where almost 60% of respondents say they use it. Half of the U.S. sample use fixed fees.
- ✦ Interestingly, the contingent/conditional fee is by far the least used arrangement for companies of less than \$100 million in revenues; just one in six use it. Nearly half of them use fixed fees.

Effects of the Economic Crisis

Respondents were asked a series of questions about the ways in which the economic crisis has affected the litigation environment and their management of it.

- ✦ Among the largest companies, more than 75% say they have been affected; 22% cite more lawsuits and 35% highlight tighter cost controls.
- ✦ Both U.S. and, to a lesser degree, U.K. respondents emphasize more lawsuits and tighter cost controls.
- ✦ Tighter cost controls are also being used in significant numbers across the manufacturing, health care and energy sectors.
- ✦ More than 40% of public companies and close to half of the largest companies have seen increases in litigation caseload and their use of alternative fees because of the economy.
- ✦ Decreases in litigation budgets and expenditures due to the economy are also significant among manufacturers, health care companies, energy and technology/communications companies.
- ✦ Approximately 20% of the total sample have seen decreases in litigation budgets, litigation expenditures and willingness to initiate litigation caused by the economic downturn.
- ✦ Four in 10 U.K. companies are now more willing to settle lawsuits, compared with two in 10 U.S. companies.

Types of Litigation With Largest Increases Attributed to the Economy *(All Respondents)*

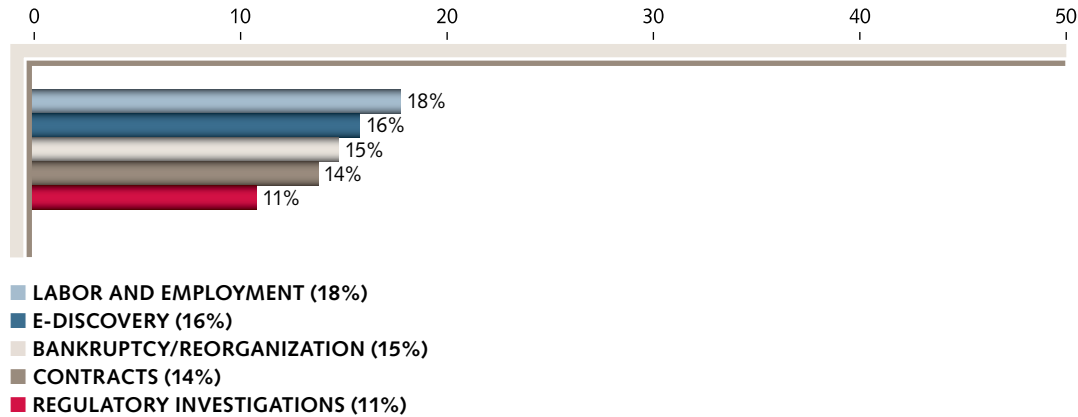


Sum of percentages exceeds 100% because respondents were permitted to name more than one type of claim.

Respondents chose from a list of 15 types of litigation in which their companies are experiencing increases due to the economic downturn.

- ✦ The U.S. sample closely follows the total respondent pattern, as do the responses by company size. However, the U.K. responses are far more evenly distributed across the entire spectrum of choices without any concentrations nearly as high as those in the chart.
- ✦ Decreases attributed to the economy are negligible for all litigation types.

Litigation Areas Targeted for Increased Spending *(All Respondents)*



Respondents chose from the same list of 15 litigation types where increases are planned in litigation spending over the next 12 months.

- ✦ U.S. companies and those in the mid-sized and largest categories follow a similar pattern to the total respondent group. Smaller companies show a broader, more even distribution of litigation types with planned increases.
- ✦ The U.K. responses also are more evenly distributed with one exception, E-discovery (17%).
- ✦ The data show no areas where planned decreases are heavily concentrated, with one exception. The health care sector has focused prominently on two areas for decreased spending—personal injury (12%) and professional malpractice (15%).

GOVERNMENT AND REGULATORY MATTERS

31 - 41

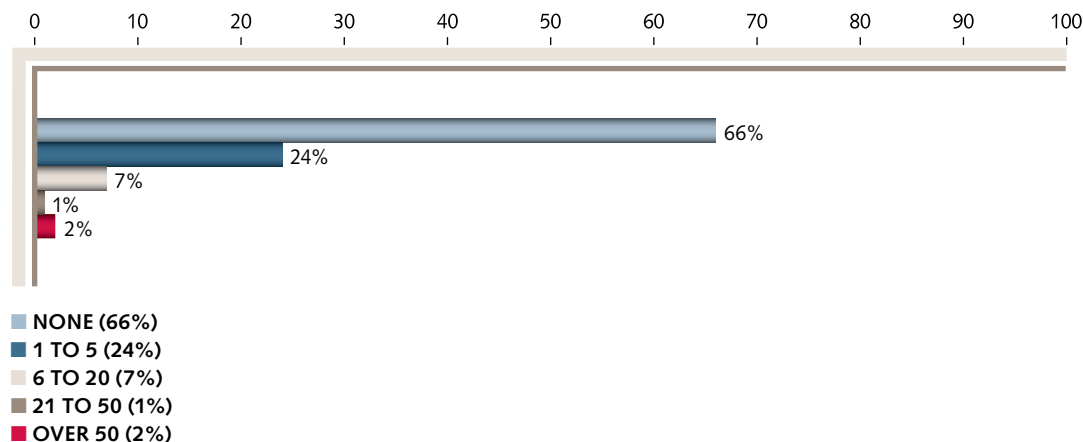
*“Increasing regulation and focus
on compliance.” U.S. Health care respondent*

Regulatory Proceedings Commenced Against Respondent Companies

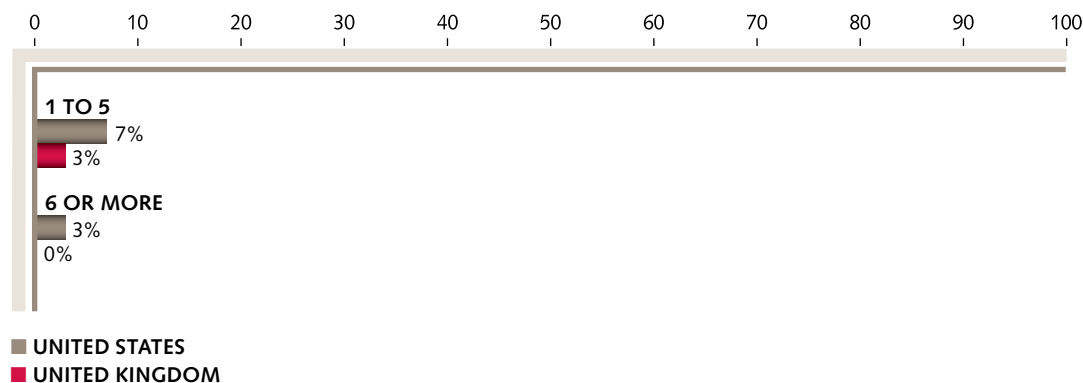
The percentage of U.S. companies with at least one regulatory proceeding commenced against them (45%) has remained relatively stable since last year's survey.

- ✦ The percentage of U.S. companies facing regulatory proceedings of any size is stable from last year at more than 40%, but up slightly in the \$20 million-plus category.
- ✦ U.K. companies have seen a decline in proceedings of any size (9% this year v. 18% last year). However, after a drop in 2008 in \$20 million-plus proceedings, there is an uptick this year.
- ✦ Health care, manufacturing and energy are the sectors most likely to have at least one regulatory proceeding of more than \$20 million this year.

General Litigation/Litigation Exposure: How Many Regulatory Proceedings Were Commenced Against Your Company In the Last 12 Months? *(All Respondents)*

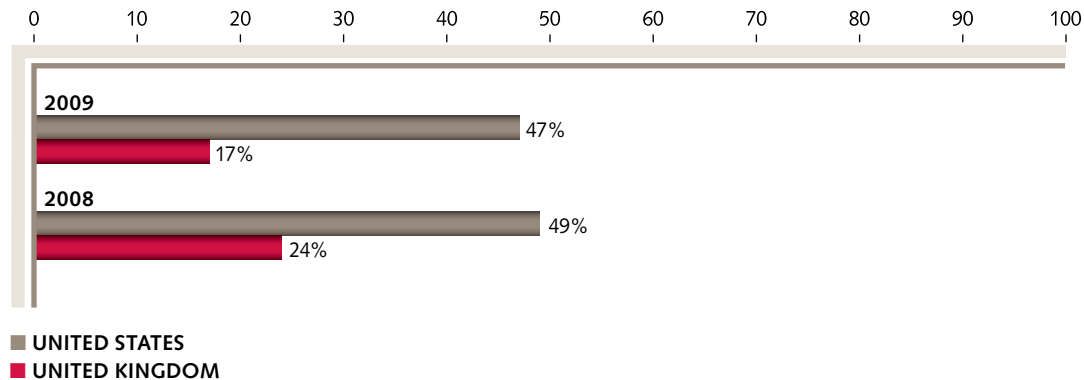


Regulatory Proceedings With More Than \$20 Million at Issue in 2009 *(By Country of Residence)*



In the Last 12 Months, Has Your Company Retained Outside Counsel for Assistance in Any Government or Regulatory Investigation?

("Yes" by Country of Residence)



- While U.K. companies reported a drop in government/regulatory investigations this year compared with 2008, U.S. and total respondent figures remained relatively stable.
- Half of the largest companies have retained outside counsel in the past 12 months for assistance with a government or regulatory investigation; however, it is a significant decline from last year's 63%.
- More than six in 10 health care companies and nearly half of the manufacturing and insurance sectors have done so.
- Just a third of energy companies have done so this year, compared with more than half last year.

Regulatory or Government Entities Most Often Involved in These Investigations

U.S. Agencies

- ☞ Of those who retained outside counsel for a government or regulatory investigation, the U.S. DOJ remains by far the most active U.S. entity, listed by 41% of respondents, down slightly from last year.
- ☞ EPA, State Attorneys General and the SEC are the next most active.
- ☞ As expected, the U.K. sample reporting U.S. investigations is much smaller, yet 30% have had U.S. DOJ investigations.

United Kingdom/EU Agencies

- ☞ Of those who retained outside counsel for a government or regulatory investigation, more than a quarter of all respondents list the FSA, which is more than double the figure last year.
- ☞ Next in order are the U.K. Competition Commission, the EU Commission and the SFO.
- ☞ Nearly a quarter of U.S. companies report FSA investigations, and nearly one-third cite the U.K. Competition Commission, as well as the EU Commission.

Internal Investigations Requiring Outside Counsel (At Least One, Past 12 Months)

- ☞ One-third of the U.S. respondent companies conducting internal investigations requiring assistance of outside counsel reported the matter to a regulatory agency. In contrast, only 5% of U.K. respondent companies conducting such investigations did so.
- ☞ Corporations may be increasing their own efforts to handle internal investigations in-house, as those reporting the use of outside counsel for such purposes in the past 12 months has decreased from last year.
- ☞ In health care, however, there was a marked increase in those using outside counsel for internal investigations, rising to nearly 50% from 37% last year.

Expected Trends in Internal Investigations (Next 12 Months)

- ✦ Almost a quarter of companies with \$1 billion or more in revenues expect an increase in the number of internal investigations over the next 12 months. Just 5% expect a decrease.
- ✦ About one in five technology/communications, financial services and insurance companies expect an increase, significantly more than those expecting a decrease.
- ✦ Half of the largest company respondents feel they have spent more time on regulatory investigative requests and enforcement matters over the past three years, and 40% believe more inquiries or investigations have been directed at their companies during the past three years than previously.
- ✦ One in seven of the largest company respondents expect an increase in the number of regulatory proceedings their companies face over the next 12 months.
- ✦ One in five financial services and energy respondents expect increases, far higher than all other sectors.

Trends in International Cooperation Among Regulatory Agencies (Past Three Years)

Respondents were asked about any changes witnessed in cross-border cooperation among regulatory agencies.

- ✦ Respondents are four times as likely to see increased international cooperation as opposed to decreased cooperation (12% v. 3%).

Engagement With Outside Advisors

Respondents were asked if their companies have engaged outside advisors in the past 12 months to assist with an inquiry or audit by the IRS (U.S.) or HMRC (U.K.).

There is little variation by size of company in those that have faced tax matters requiring outside advisors.

Under \$100 million: 22%

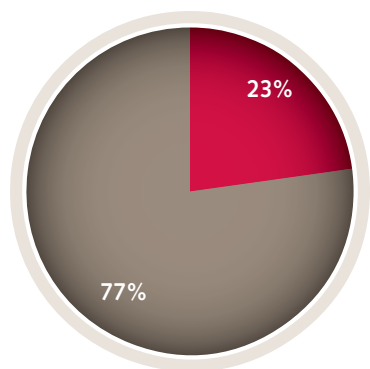
\$100-\$999 million: 18%

\$1 billion or more: 21%

Both U.S. and U.K. respondents expect an increase over a decrease in tax inquiries by a three to one margin.

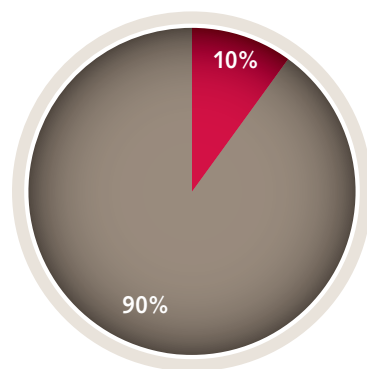
In the Past 12 Months, Has Your Company Engaged Outside Advisors to Assist With an Inquiry or Audit from the IRS (U.S.) or HMRC (U.K.)? *(By Country of Residence)*

(U.S.)



■ NO (77%)
■ YES (23%)

(U.K.)



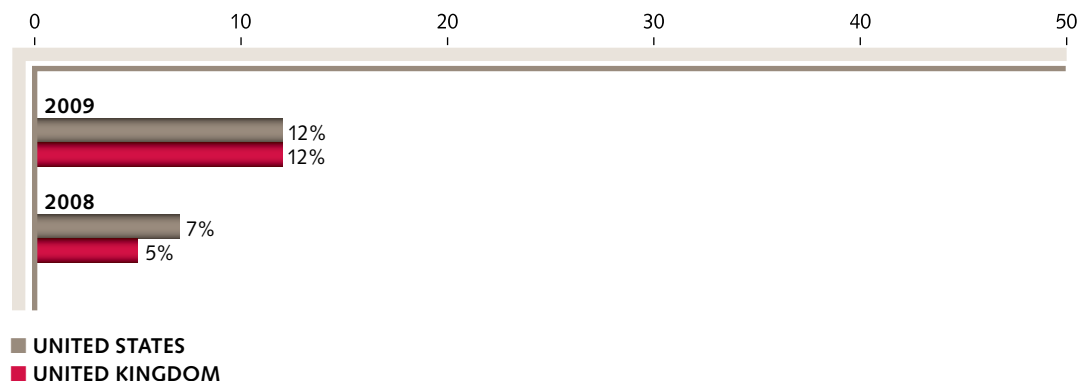
■ NO (90%)
■ YES (10%)

Corruption/Bribery Investigations (Past 12 Months)

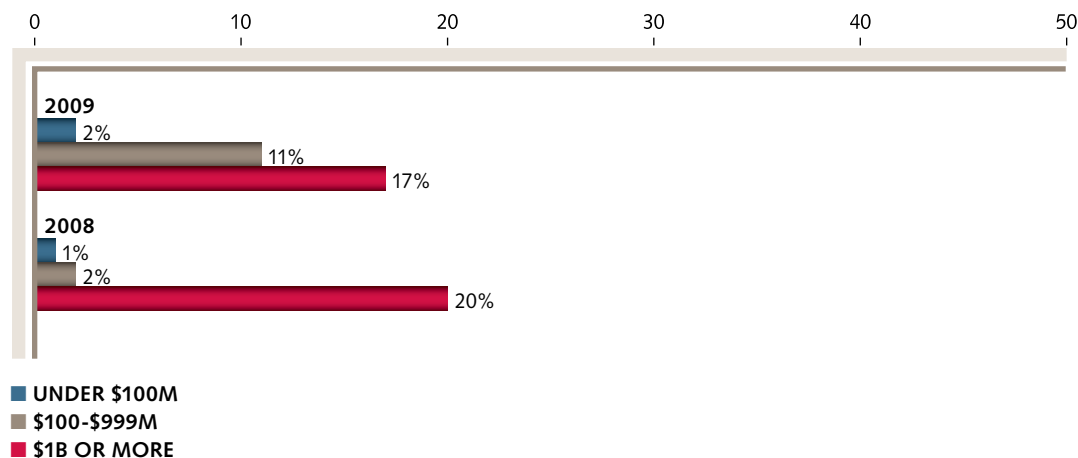
The percentage of companies that has engaged outside counsel in the past 12 months to assist with a corruption or bribery investigation (i.e., FCPA and U.K. equivalent) has nearly doubled—from 7% last year to 12% this year. Similar increases are apparent in most respondent categories.

Just as last year, the manufacturing sector (25%) is twice as likely as the total respondent sample to have been involved in this type of investigation.

Companies That Have Engaged Outside Counsel to Assist With a Corruption or Bribery Investigation in the Past 12 Months (Including, But Not Limited to, FCPA in U.S. and Equivalent in U.K.) (By Country of Residence)

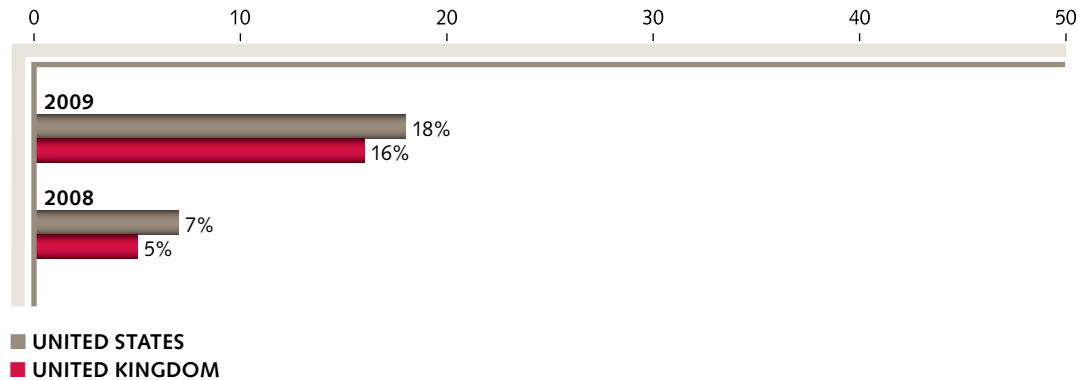


Companies That Have Engaged Outside Counsel to Assist With a Corruption or Bribery Investigation in the Past 12 Months (Including, But Not Limited to, FCPA in U.S. and Equivalent in U.K.) (By Gross Revenues)



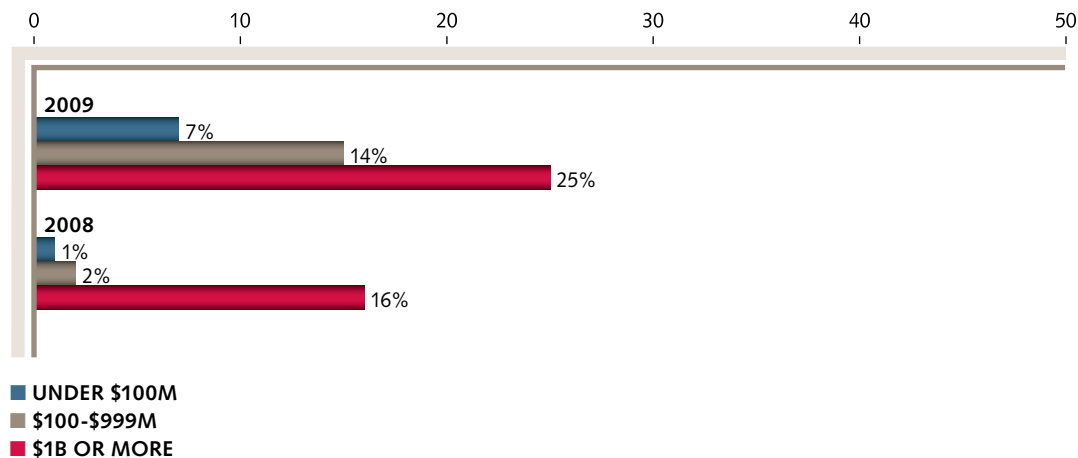
Companies That Have Engaged in Due Diligence for Bribery or Corruption (Including FCPA Matters) Relating to a Merger, Acquisition or Other Business Transaction With a Foreign Country in the Past 12 Months

(By Country of Residence)



Companies That Have Engaged in Due Diligence for Bribery or Corruption (Including FCPA Matters) Relating to a Merger, Acquisition or Other Business Transaction With a Foreign Country in the Past 12 Months

(By Gross Revenues)



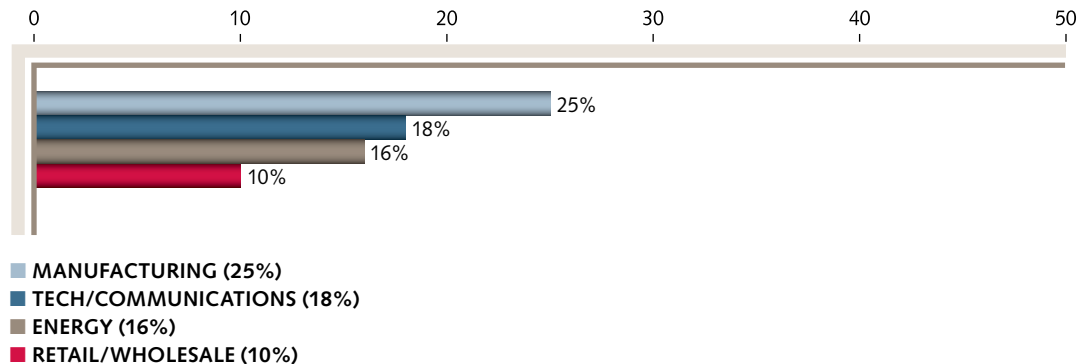
Companies are clearly becoming more cautious in this area. The incidence of due diligence for bribery or corruption relating to mergers, acquisitions or other transactions in foreign countries has more than doubled across the total respondent sample from 7% last year to 17% this year. Again, similar large jumps are apparent in most respondent categories.

- More than a quarter of manufacturers and more than one in five energy and financial services companies have conducted bribery/corruption due diligence abroad in the past 12 months.
- Ironically this year, only about half as many respondents as last year say their companies, at some point in the past, have decided against doing business in a country due to the perceived degree of local corruption. One exception is manufacturing, where 39% have made that decision v. 27% last year.

Import/Export Sanctions Investigations (Past 12 Months)

- Among U.S. companies, 13% report having an import/export sanctions investigation requiring outside counsel in the past year.
- The largest companies and publicly held companies report an even higher rate of these types of investigations (17% each).

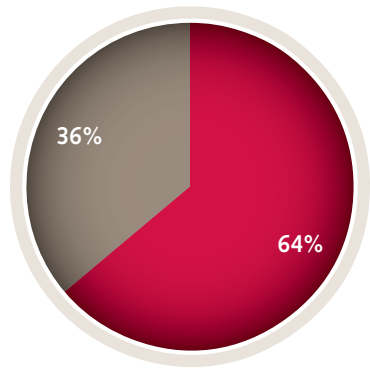
In the Past 12 Months, Have You Engaged Outside Counsel for an Import/Export Sanctions Investigation? (By Industry)



- All other industry sectors not charted are in the low-to-mid-single-digits of those that have faced such an investigation in the past 12 months.

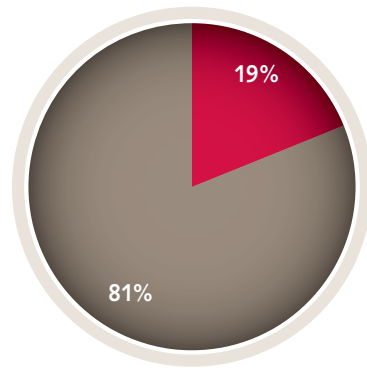
Do You Favor a Prohibition That Prevents Government Agencies From Asking Corporations to Waive Their Attorney-Client or Other Legal Privilege? *(By Country of Residence)*

(U.S.)



■ NO (36%)
■ YES (64%)

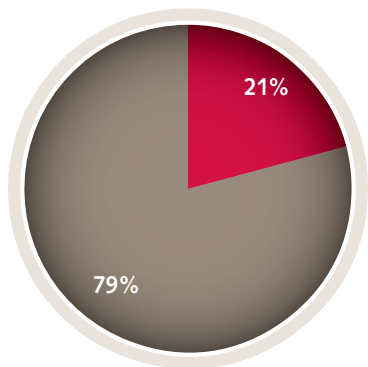
(U.K.)



■ NO (81%)
■ YES (19%)

- 📌 Companies of all sizes are divided about equally on this question.
- 📌 Most industry sectors are in favor of such a prohibition; surprisingly, just one-third of financial services companies favor it.

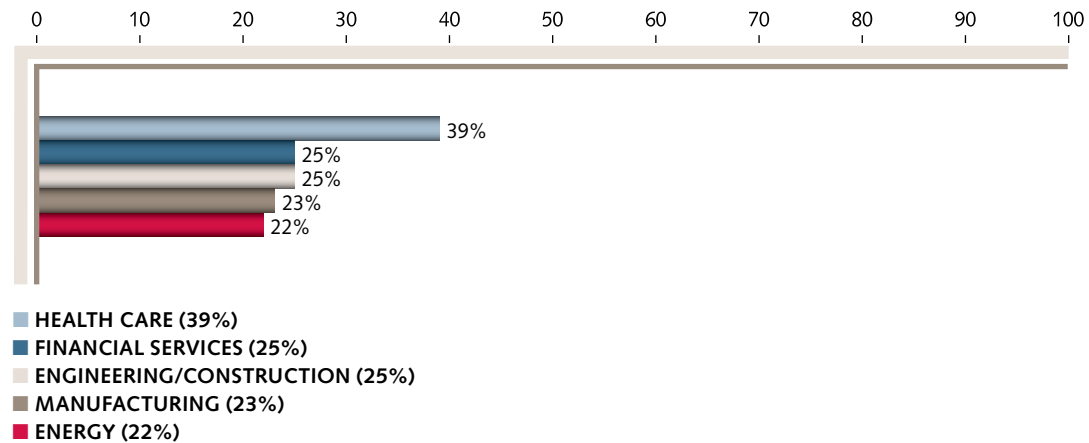
Has Your Organization Been Subject to Allegations by a “Whistleblower” in the Past Three Years? *(All Respondents)*



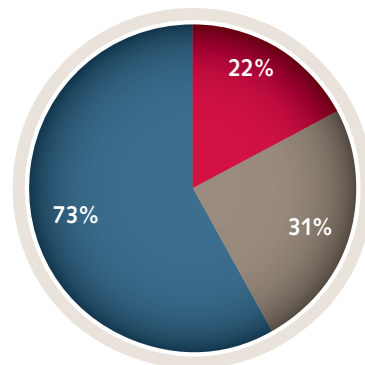
■ NO (79%)
■ YES (21%)

Not surprisingly, publicly held companies and the largest companies in the survey are more frequent targets of such allegations (28% and 30%, respectively).

Industry Sectors Most Frequently Subject to Whistleblower Allegations



If Your Organization Has Been Subject to Allegations by a “Whistleblower” in the Past Three Years, to What Were You Subjected? *(All Respondents)*



■ INTERNAL INVESTIGATION (73%)
■ 3RD-PARTY PROCEEDINGS (31%)
■ REGULATORY INVESTIGATION (22%)

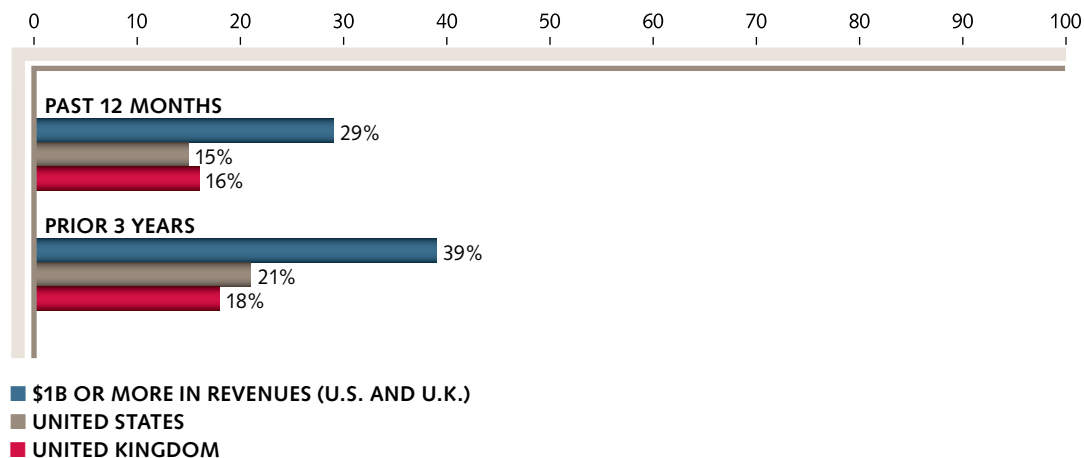
- Internal investigations are by far the most common. Four out of five public companies conducted internal investigations in the past three years.
- Health care and financial services companies are above the total sample’s figures in both regulatory investigations and 3rd-party proceedings.
- A quarter of all respondents expect whistleblower claims/lawsuits to increase in the next 12 months.
- The insurance and health care sectors have much higher expectations of increased whistleblower matters than the total sample.

PATENT INFRINGEMENT

42 - 44

*“Increasing trend in patent suits,
especially from non-operating
plaintiffs.” U.S. Technology/Communications respondent*

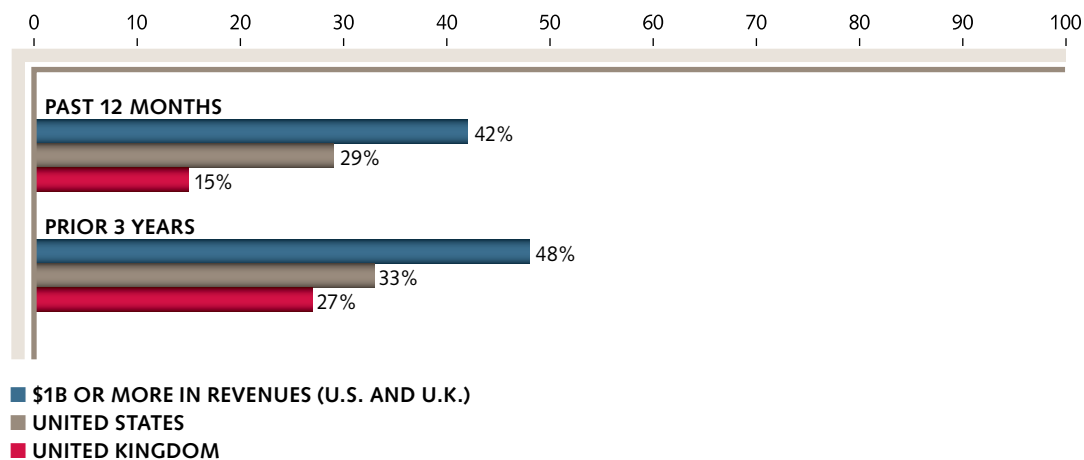
How Many Patent Infringement Proceedings Have You Been Involved With as the Claimant/Plaintiff? *(By Country of Residence and Revenue)*



Patent infringement activity appears to be down somewhat in the past 12 months compared with the prior three-year period that respondents reported on in the 2008 survey.

- ✦ In the 2008 survey, 29% of public companies had asserted patent infringement claims in the prior three years, compared with 23% this year that have been claimants or plaintiffs in proceedings during the past 12 months.
- ✦ By industry sector, the most aggressive patent protectors are technology/communications, retail/wholesale, health care and manufacturing.
- ✦ Looking ahead 12 months, just 5% of all respondents expect their companies will increase the number of patent infringement proceedings they bring, down from 7% last year. Even the largest companies appear less aggressive, with those that expect to be claimants/plaintiffs dropping from 12% last year to 9% this year.

How Many Patent Infringement Proceedings Have You Been Involved With as the Defendant? *(By Country of Residence and Revenue)*



- ▾ A little more than a third of public company respondents indicated at least one patent infringement proceeding against them this year, down from nearly half of the public company respondents last year.
- ▾ Expectations of defending against more patent infringement claims in the next 12 months have also dropped from last year, when 11% of all respondents expected more claims against them v. 8% this year. The largest companies dropped from 18% to 13%.

LABOR AND EMPLOYMENT

45 - 52

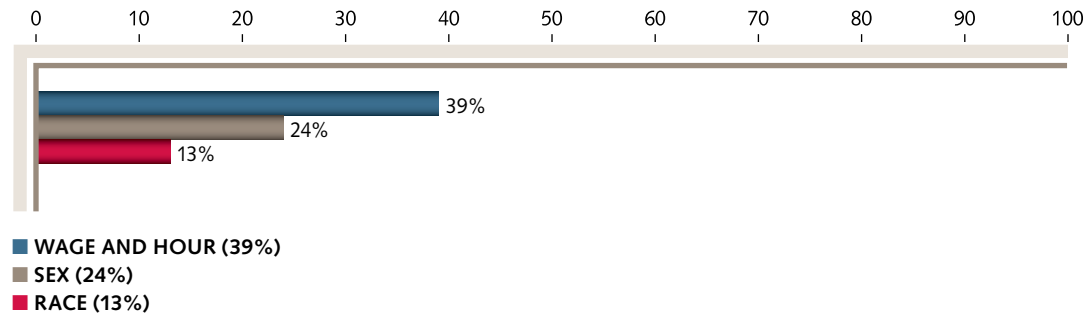
“Adverse economic conditions tend to prompt more contractual and employment disputes.” U.S. Retail/Wholesale respondent

Labor and Employment Cases

Respondents were asked about changes in the volume (increase/decrease/neither) of multi-plaintiff cases (class/collective actions) in the past 12 months in various areas of Labor and Employment law.

- 🦋 **Wage and hour disputes (FLSA).** Little change from 2008, although within the insurance sector, there was a large jump in respondents witnessing an increase from just 9% last year to 23% this year.
- 🦋 **Race and sex discrimination.** Increases in sex discrimination cases are slightly more prevalent than those of race discrimination across all respondents (11% and 10%, respectively) and in most respondent categories. Increases in sex discrimination cases are, by far, more prevalent in the relatively small sample of education respondents (33%) and the much larger retail/wholesale sector (22%).
- 🦋 **Age discrimination.** Increases are seen in U.S. cases from last year, but are stable in the U.K.
- 🦋 **Disability discrimination.** Relatively stable from last year, but those with the most increases reported last year (education, 29% and retail/wholesale, 22%) are down significantly this year (17% and 14%, respectively).
- 🦋 **Religious discrimination.** Low single-digit increases and decreases are reported in these types of cases.
- 🦋 **ERISA cases.** Respondents reporting increases are down from last year within the total sample (4% in 2009 v. 7% in 2008) and within most respondent categories. Among companies with \$1 billion or more in revenues, those reporting increases are down by half, from 13% in 2008 to 6% in 2009.

In Which Area Has There Been the Greatest Increase in Multi-Plaintiff Cases Whether They Be Class, Collective Action, or Significant Multiple Plaintiff Actions? *(All Respondents)*



Respondents were asked to select from eight areas of Labor and Employment law the one with the greatest increase in multi-plaintiff cases (collective, class or significant multiple plaintiff actions). This year's list varied somewhat from last year's, but wage and hour remains the leader and continues to grow.

- 📌 In the U.S., wage and hour selections increased from 28% last year to 39% this year.
- 📌 Increases in wage and hour cases remained stable among the largest companies, but among mid-sized companies (\$100 million - \$999 million in gross revenues), there was a dramatic jump from 18% last year to 64% this year.
- 📌 U.K. respondents choosing wage and hour cases as the area of greatest increase doubled from 18% in 2008 to 35% in 2009.

Most Frequent Jurisdictions for Wage and Hour (FLSA) Claims

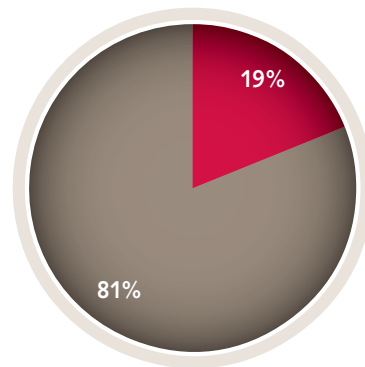
- State court wage and hour claims outnumber those filed in federal courts by a margin of more than five to one. This trend is strong across all respondent categories.
- Among U.S. regions, California predominates, followed by Texas and the East Coast/New England, then the South and Midwest.

Types of Wage and Hour Claims

- The bulk of these cases are misclassifications, followed by meals/rest breaks and overtime (about a third each), and finally, minimum wage (6%).

Does Your Company Require Arbitration of Employment Disputes in Non-Union Settings?

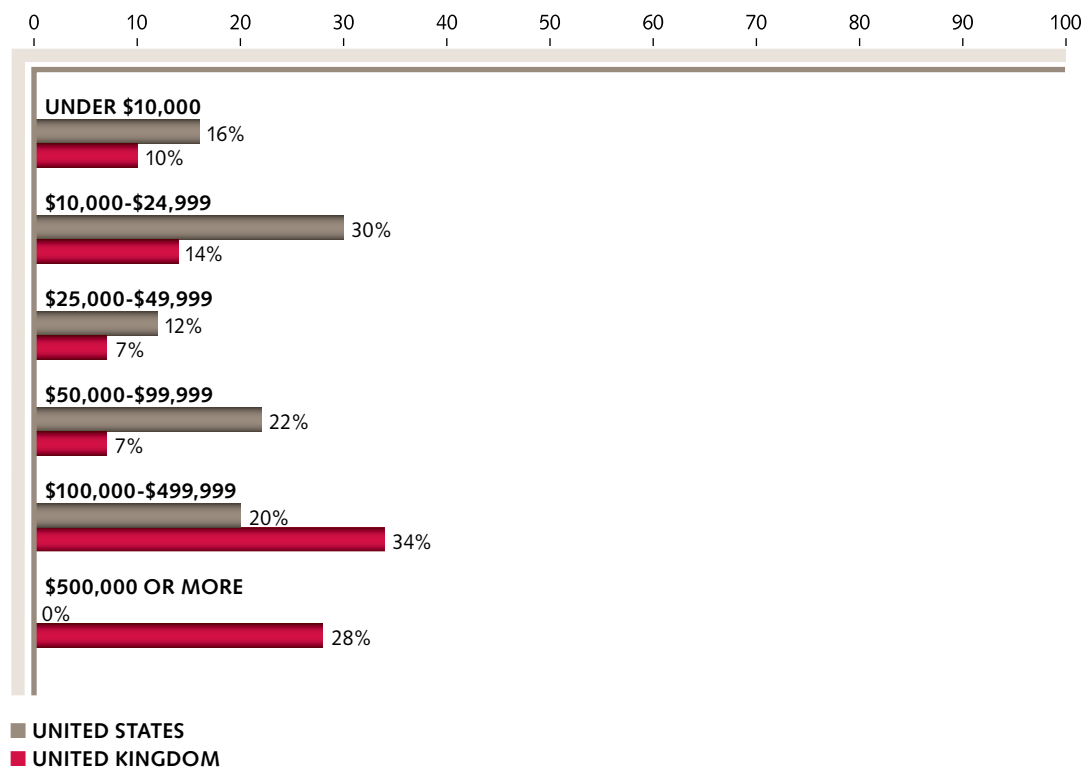
(U.S.)



■ NO (81%)
■ YES (19%)

- Company-required arbitration is down from a year ago when 25% of U.S. companies required it.
- Among the large and mid-sized companies, 16% require arbitration while 12% of the smaller companies do. Those percentages are also down from last year.
- More than 80% of all respondents view the arbitration process as beneficial from an employee relations standpoint.

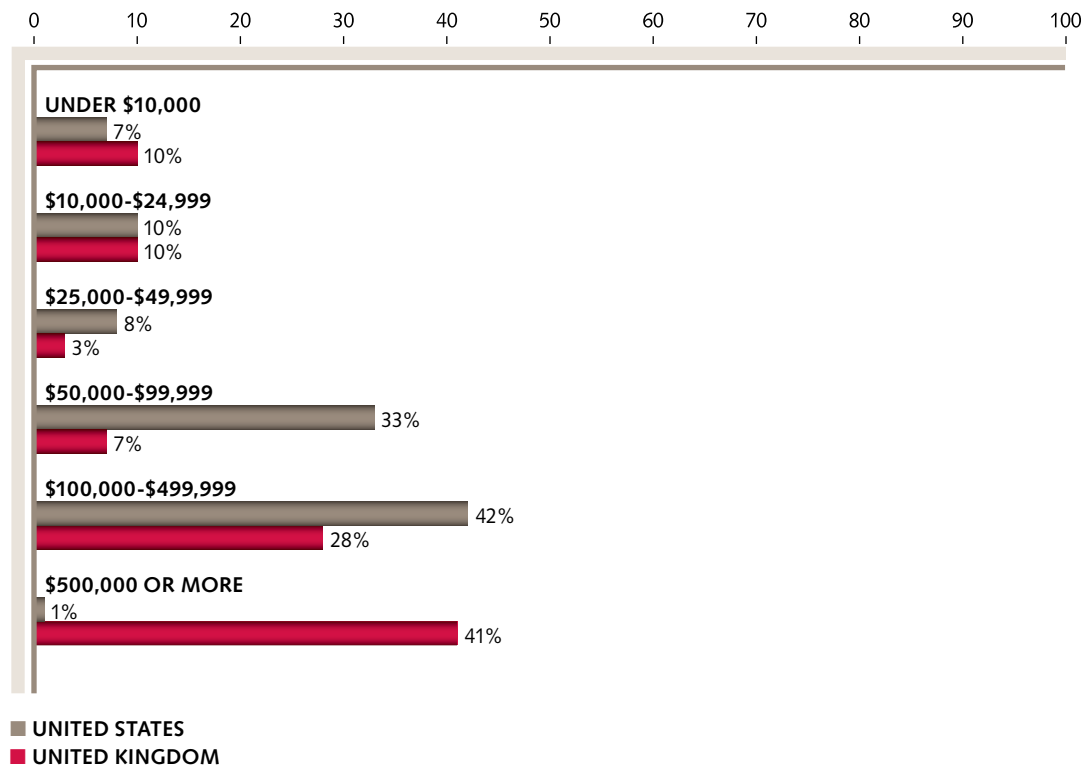
Excluding Cost of Settlement, What Is Your Company's Average Cost to Arbitrate a Single-Plaintiff Employment Case to Conclusion? *(By Country of Residence)*



Respondents were asked the average cost, excluding settlement, to arbitrate a single-plaintiff employment case to conclusion. Clearly, arbitrating these cases is viewed as a more costly proposition in the U.K.

- ▀ About 60% of the smaller companies and almost as high a percentage of the largest companies estimate the average cost in ranges below \$100,000. However, almost one in five of the largest company respondents place the average cost at \$500,000 or more.
- ▀ Industry sectors with the highest percentages in the \$100,000 or more range are energy, insurance and financial services.

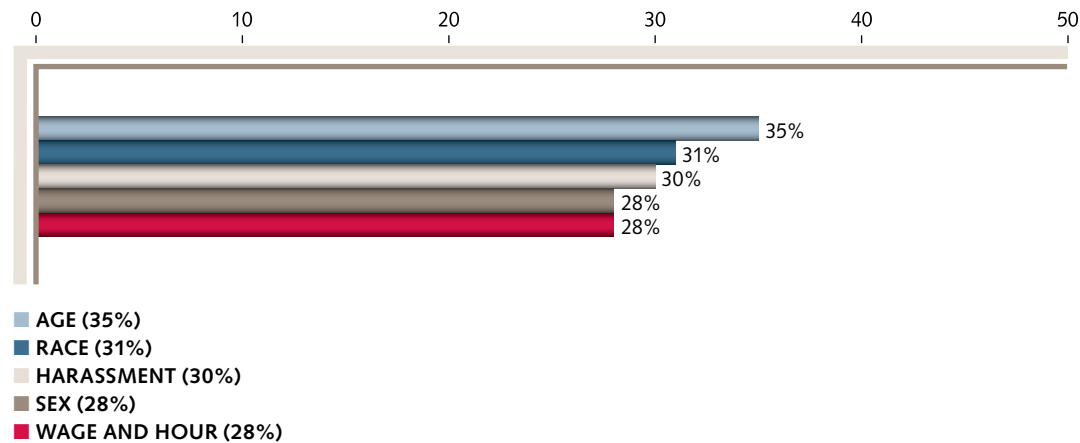
Excluding Cost of Settlement, What is Your Company's Average Cost to Litigate a Single-Plaintiff Employment Case to Conclusion? *(By Country of Residence)*



Sum of percentages may total more or less than 100% due to rounding.

- ✦ More than half of the companies with \$1 billion or more in revenues spend \$100,000 or more per employment case.
- ✦ Most industry sectors are strongly weighted toward the higher ranges.

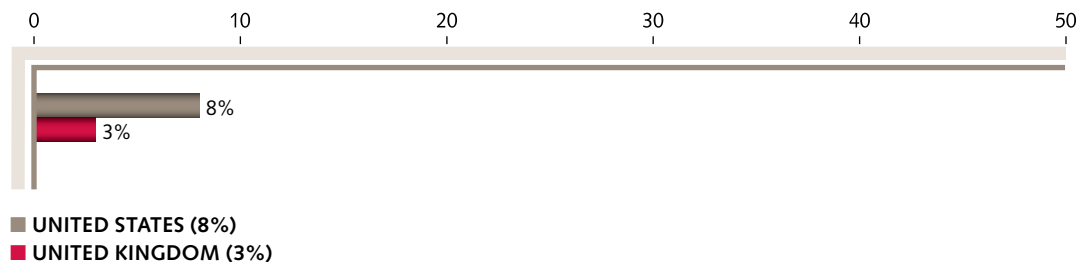
Which Three Types of Employment Claims Against Your Company Create the Most Monetary Exposure? *(All Respondents)*



Respondents were asked to name the three types of employment cases posing the greatest monetary exposure for their companies. The results are widely dispersed across the 10 areas listed. There are variations in the areas of highest concentrations throughout the different respondent categories.

- ✦ About one-third of the largest companies and of U.S. companies list wage and hour among their top three areas, but in the U.K., barely one in seven include wage and hour.
- ✦ Age discrimination and wage and hour also top the public company list.
- ✦ In the U.K., disability discrimination cases outweigh age discrimination for creating the greatest monetary concern.
- ✦ More than half of the health care sector lists age discrimination and retaliation.
- ✦ Age discrimination also makes nearly half of the retail/wholesale sector’s list, followed by wage and hour cases.

In the Past 12 Months, Has Your Company Seen an Increase in Multi-Plaintiff Cases in the Area of Traditional Labor Union Related Matters, Whether They Be Class, Collective Action, or Significant Multiple Plaintiff Actions? (“Yes” by Country of Residence)



Respondents were asked whether they perceive increases or decreases in issues related to traditional labor union-related matters over the past 12 months. Decreases are virtually non-existent; increases are mostly single-digit with a few isolated exceptions. As expected, the larger the company, the more common are labor union issues.

- ✦ The South (13%) is the one region of the U.S. that is far above the national average.
- ✦ Two industry sectors well above average are education (33%) and energy (14%).

In the Past 12 Months, Has Your Company Seen an Increase in Multi-Plaintiff Cases in the Area of Traditional Labor Union Related Matters, Whether They Be Class, Collective Action, or Significant Multiple Plaintiff Actions? (“Yes” by Gross Revenues)

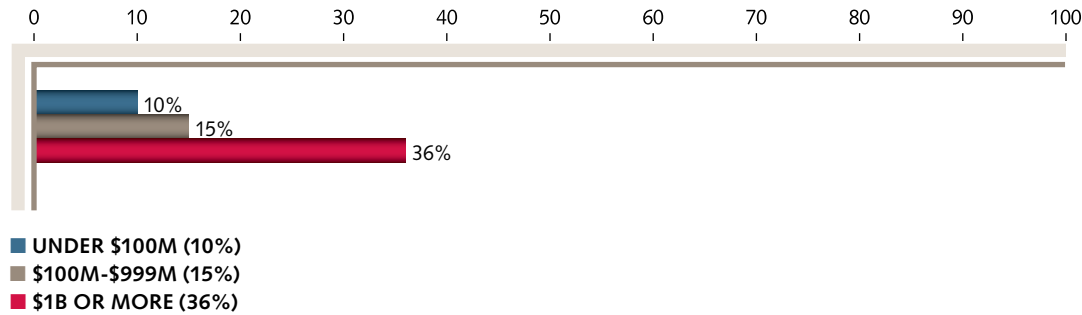


CLASS ACTIONS

53 - 55

“Reduce exposure to unexpectedly high litigation costs in lengthy/big ticket litigation matters.” U.S. Manufacturing respondent

How Many Class Actions Were Brought Against Your Company in the Past 12 Months in the U.S.? *(By Gross Revenue)*



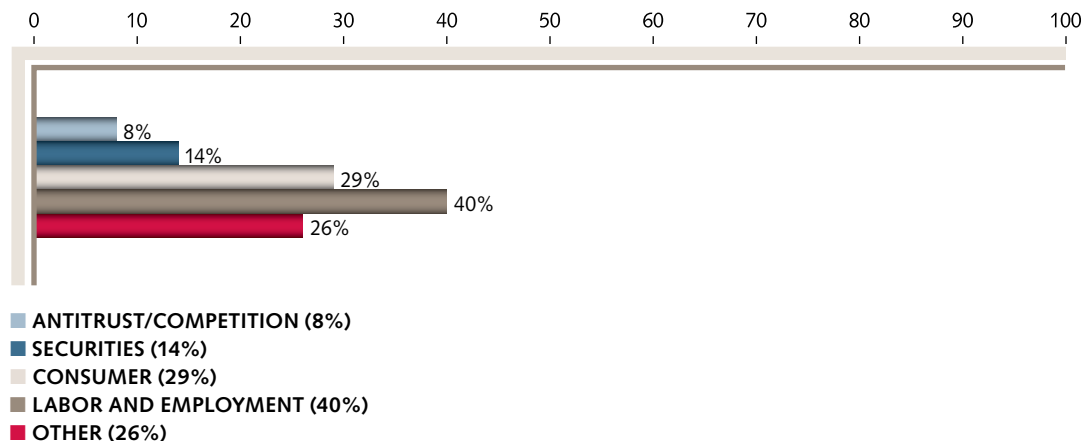
Class actions remain down from their peak in 2007 when more than half of all companies in the survey had at least one class action pending in the U.S. This year, respondents were asked about new class actions brought in the past 12 months against their companies.

- ✦ This year, 23% of all respondents report at least one new class action against their company in the past 12 months, and 3% report more than five new class actions.
- ✦ Just 6% of U.K. companies had a class action brought in the U.S., compared with 30% of U.S. companies.
- ✦ Among the largest companies, 5% had more than five class actions brought against them in the past 12 months, but just 1% of mid-sized companies and none of the smaller companies did.
- ✦ Four of every 10 retail/wholesale companies report one to five class actions. A third of the insurance and health care sectors are in the same range.

Group Actions Against Companies in the U.K. (Last 12 Months)

- ✦ Just 6% of U.K. companies had any group actions brought against them in their home territory in the last 12 months compared with only 1% of U.S. companies.
- ✦ Among the largest companies, 6% had U.K. group actions brought against them, including 2% with more than five.

In Which Categories Were These Class/Group Actions Brought Against Your Company in the Past 12 Months? *(By Category)*



Respondents were asked to identify the categories of the actions brought against their companies in the past 12 months.

- Of those respondents in the retail/wholesale industry who indicated they had at least one class/group action in past 12 months, two-thirds indicated the action was from the labor and employment category, and nearly one-half of the respondents in the health care industry also identified labor and employment as the category.
- Labor and employment also comprises more than half of the cases in California, the Atlantic region and the South, while consumer cases are just as dominant in the East Coast/New England region.

ELECTRONIC DISCOVERY

56 - 63

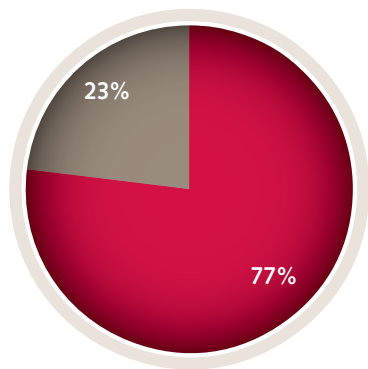
“The legal department is under more scrutiny to control costs. It has forced us to re-examine how we conduct e-discovery.” U.S. Energy respondent

“Full” Pre-Trial Disclosure in the U.S.

Just as last year, respondents were asked if, in light of the complexities and cost of making full pre-trial documentary disclosures, should the process be reconsidered in the U.S. to make it more affordable and efficient?

In Light of the Complexities and Cost in Making Full Pre-Trial Documentary Disclosures, Do You Think the Use of “Full” Pre-Trial Disclosure Should Be Reconsidered to Make the Process More Affordable and Efficient in the United States?

(U.S.)



■ NO (23%)
■ YES (77%)

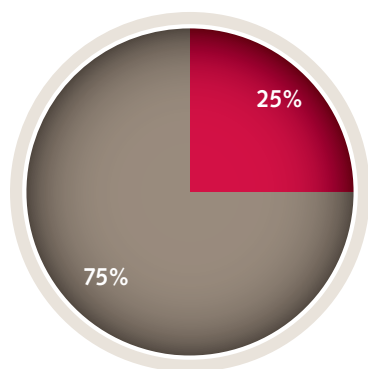
This year, U.S. respondents are even more unhappy with the process, compared with last year when 63% said “Yes.”

- ❖ Mid-sized and large companies say “Yes” by a three to two margin and smaller companies agree by a slightly smaller margin.
- ❖ More than half of the public company sample favors reconsideration while the privately held group strongly favors it by about three to one.
- ❖ Several industry sectors are evenly split on the question (engineering/construction, financial services, retail/wholesale and technology/communications), and the rest heavily favor reconsidering full disclosure (energy, health care, insurance, manufacturing and real estate).

“Full” Pre-Trial Disclosure in the U.K.

In Light of the Complexities and Costs in Making Full Pre-Trial Documentary Disclosures, Do You Think the Use of “Full” Pre-Trial Disclosure Should Be Reconsidered to Make the Process More Affordable and Efficient in England and Wales?

(U.K.)



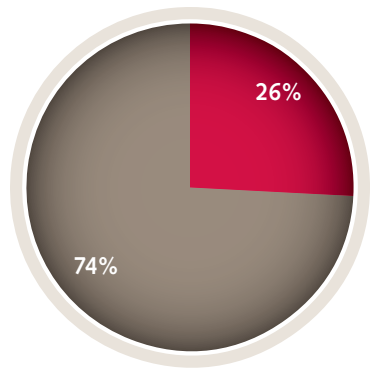
■ NO (25%)
■ YES (75%)

Reflecting its less burdensome nature, the process in England and Wales has a higher level of satisfaction than the U.S. process—just as it did last year. In fact, those answering “Yes” to the question of reconsidering the process to make it more affordable and efficient are down significantly in virtually all respondent categories from last year. Three-quarters of all respondents say “No” this year.

Methods to Reduce E-Discovery Costs

Please Indicate What, of the Following, Your Company is Doing to Reduce E-Discovery Costs Now or In the Near Future:

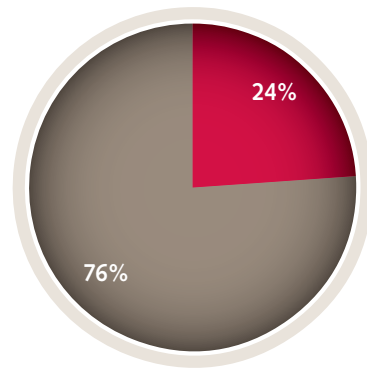
Using Law Firm(s) With Specialized E-Discovery Practices *(All Respondents)*



■ NO (74%)
■ YES (26%)

More than half of the companies answering “Yes” use law firms with specialized e-discovery practices for collection, processing and review. About 40% use them for document preservation.

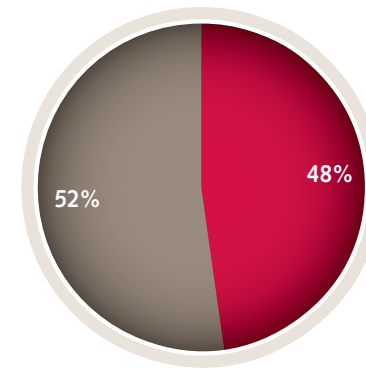
Outsourcing Certain E-Discovery Functions Through Preferred Provider Relationships or Master Service Agreements *(All Respondents)*



■ NO (76%)
■ YES (24%)

More than half of those answering “Yes” have preferred provider relationships or master service agreements for collection and processing, while a little more than a third have such relationships for preservation and review.

In-Sourcing Some E-Discovery Activities *(All Respondents)*



■ NO (52%)
■ YES (48%)

About 50% to 60% of companies answering “Yes” do preservation, collection or some processing in-house. Slightly less than half perform document review in-house.

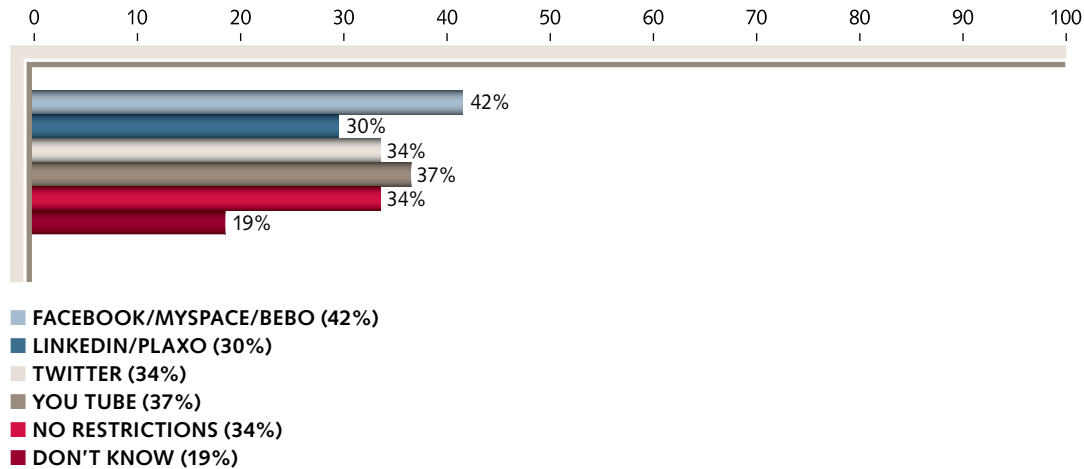
Other Methods

About one in seven respondents say they are using other methods to reduce e-discovery costs.

Some of their comments are:

- ✦ “Enforcing the document retention policy more vigorously.” U.S. engineering/construction respondent
- ✦ “Negotiations with the other side to reduce the scope.” U.S. manufacturing respondent
- ✦ “Sorting without coding and incorporating clawback provisions for any confidential information inadvertently produced.” U.S. other industries respondent
- ✦ “We are trying to improve/shorten records retention policies.” U.S. financial services respondent
- ✦ “We are currently reviewing our practices to develop new procedures.” U.S. energy respondent

Does Your Company Block Your Internal Network Users From Accessing Any of the Following Social Media Web Sites? *(All Respondents)*

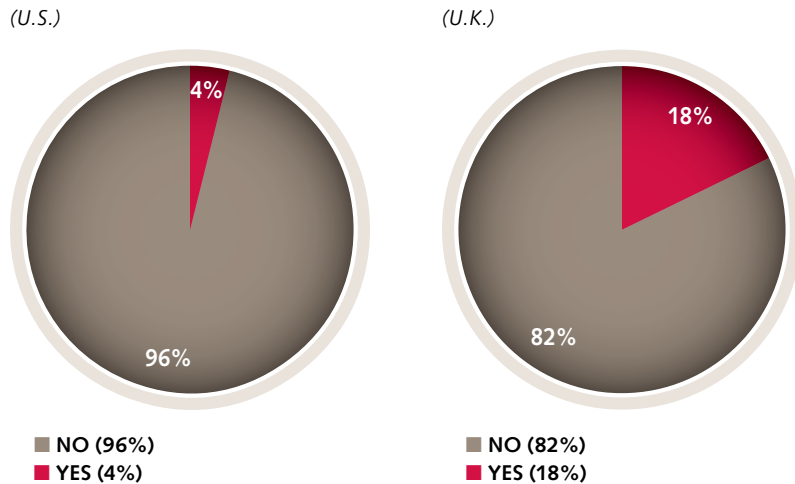


Sum of percentages exceeds 100% because respondents were permitted to name more than one type of claim.

- Generally, insurance and financial services are the most active blockers of the Web sites listed. One-third of financial service companies have no restrictions, about the same as the energy and health care sectors.
- The most liberal sector for social networking, as expected, is technology/communications, with more than half reporting no restrictions.

Has Your Company Been Required to Produce as Part of Discovery in the U.S. or Disclosure in the U.K. Any ESI From Any Such Social Media Site in the Last 12 Months?

(By Country of Residence)



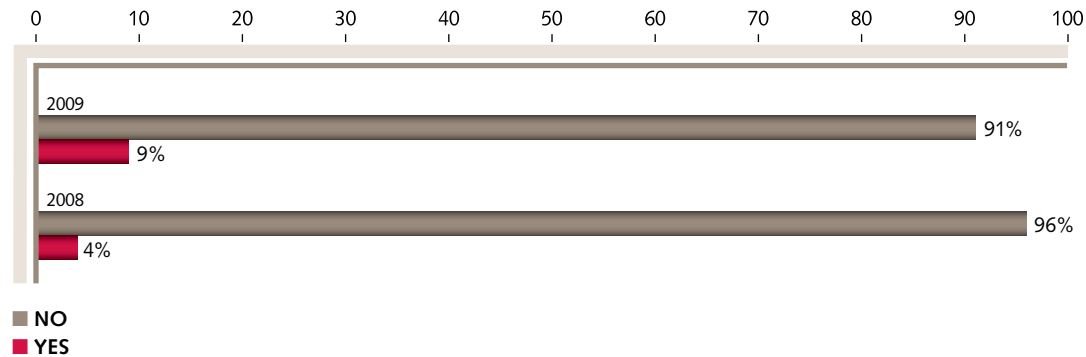
- Public companies (13%) and the largest companies (11%) are those most likely to have been required to produce such information.
- However, the retail/wholesale sector has a surprisingly high rate of “Yes” answers (19%), followed by financial services (12%) and energy (10%).

Federal Rule of Evidence 502 Savings

Federal Rule 502, enacted in September 2008, permits “clawback” of privileged evidence and “quick peek” review. It was enacted, in part, to address the cost of preproduction privilege review. Relatively few respondents say their companies have experienced savings from the new rule thus far.

- Just 1% of all respondents say their companies had significant cost savings, and 8% report moderate savings. At the moment, the “No Savings” sentiment (89%) is overwhelming.
- However, one in five retail/wholesale respondents and one in seven in the financial services sector believe they've seen moderate savings.

Are You Using “Off-shore” Personnel to Review and Code Documents Prior to Production in Litigation? *(All Respondents)*



Use of off-shore personnel to review and code documents prior to production in litigation has increased, although from a very low level last year.

- ❖ Public companies and those with \$1 billion or more in revenues are also up over last year.
- ❖ One in five companies in the retail/wholesale and financial services sectors use offshoring.
- ❖ Of the 9% of total respondents who have sent such work offshore, 6% are dissatisfied this year whereas no respondents indicated being dissatisfied last year; 49% indicated they were very satisfied this year, up from 38% last year.

U.K. companies' use of offshoring has virtually tripled from last year's 7% to 20% this year.

Fulbright & Jaworski conducts on-site and Web seminars of our survey findings with C.L.E. credit, if desired. For a customized presentation to your company of this year's findings, please contact any Fulbright location below.

To suggest survey topics or to participate in the next survey, please e-mail litigationtrends@fulbright.com. Thank you for your interest, and remember, for information on dispute resolution trends, Think Fulbright.™

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