

Carlton Fields Releases Annual Class Action Survey Results

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Class Action Defense is More Complicated, More Expensive Than Ever Before

The eighth annual Carlton Fields Class Action Survey reveals a continuing rise in class action defense spending, driven by more matters per company facing these cases, and, collectively, more complex, high risk, and bet-the-company matters than ever reported in past surveys. In total, companies spent \$2.46 billion defending class actions in 2018 and spending and the number of class actions defended by company are expected to increase again in 2019.

It was the fourth consecutive annual rise in spending after steadily decreasing expenditures from 2010 to 2014. The number of companies that reported facing class actions in 2018 dropped slightly to 54%, but the average number of matters per company increased from 6.3 in 2017 to 7.8 in 2018.

The 2019 Carlton Fields Class Action Survey is based on interviews with general counsel or senior legal officers at 395 *Fortune* 1000 and other large companies across a variety of industries.

The survey found that labor and employment cases remain the most common type of class action, accounting for 28.7% of matters and 26.1% of spending. In the past five years, nearly two-thirds of companies have faced at least one labor and employment class action and, overwhelmingly, companies report that wage and hour matters are their top concern in this category.

“As predicted, class action defense spending rose again in 2018 and this is likely to continue through 2019,” said Julianna McCabe, director of Carlton Fields’ Class Action Survey and chair of the firm’s National Class Actions practice group. “As the resources and financing available to pursue these costly matters have become increasingly available, the volume and complexity of the class actions filed continues to rise. In-house legal departments are dedicating significant resources to these cases and relying on outside counsel for help in making early assessments of their win-loss probabilities, among other factors.”

While most companies have not yet faced a data privacy class action, survey results show that they

predict these cases as the next wave. The percentage of companies making such a prediction nearly doubled from last year's survey, increasing from 28.9% to 54.3%. Eighty-six percent of companies have an action plan in place to address and limit the impact of a data breach, including class action exposure.

Nearly 9% of companies identified collective actions under the European Union's new privacy regulation (the GDPR) as a next wave, a significant enough number that it was reported separately in the survey. Approximately two-thirds of companies reported concern stateside, about the impending California Consumer Privacy Act.

Among additional key findings:

- Companies increased their use of contractual arbitration clauses in 2018, and the percentage of companies that included class action waivers in their arbitration agreements increased to near 50%. More companies now use arbitration clauses that bar class actions than in any previous survey.
- Exposure, win probability, the relevant case law and facts, and reputational impact were the class action risk variables companies ranked as most important, and more than 95% of companies report relying on outside counsel for an early assessment of win-loss probability.
- Increasingly, companies facing class actions employ a case-by-case approach to class action management, 53.2% reporting that they defend at the right cost, assessing each case separately. Only 10.6% say they prefer to settle such matters early, while 21.3% take an aggressive stance and 14.9% employ a "defend at all costs" strategy.
- Still, cases filed as class actions are most often resolved by settlement, with 53.1% of companies reporting that settlements typically occur pre-certification. Thirty-nine percent of matters filed as class actions are settled on an individual basis.
- Companies are taking notice of the impact of the political climate in Washington on their management of class actions, with 23.5% of companies reporting that it affects regulatory oversight and involvement relevant to class actions.
- The use of alternative fee arrangements (AFAs) in class actions declined slightly in 2018. More companies identified fixed fees as a successful type of AFA for class actions than any other type of arrangement.

- Finally, while most companies have not seen a reduction in class action discovery costs as a result of the federal proportionality standard, companies employ a host of strategies to control electronic discovery costs: among others, the aggressive negotiation of reasonable search terms; the use of a single e-discovery vendor; and the filing of motions to stay or for cost-shifting.

The Carlton Fields Class Action Survey is widely recognized as a powerful resource for in-house counsel who want to manage class actions effectively and efficiently. Participating companies in the 2019 survey had an average annual revenue of \$14.8 billion and median annual revenue of \$6.7 billion. They operate in more than 25 industries, including banking and financial services, consumer goods, energy, high tech, insurance, manufacturing, pharmaceuticals, professional services, and retail trade.

To download the 2019 Carlton Fields Class Action report, please visit www.classactionsurvey.com.

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