



GENERAL COUNSEL
UP-AT-NIGHT REPORT



RISK + CRISIS MANAGEMENT IN-DEPTH REPORT

WINTER 2018

 **ALM** Intelligence

**MORRISON
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A MESSAGE FROM MORRISON & FOERSTER'S GLOBAL RISK & CRISIS MANAGEMENT CHAIR

In spring 2017, Morrison & Foerster partnered with ALM Intelligence on an online survey of U.S.-based general counsel and in-house lawyers to create the inaugural *General Counsel Up-at-Night Report*, shedding light on the most pressing substantive legal and operational challenges. A second wave of the survey was distributed in the fall to track evolving challenges and how law departments handle them.

In today's rapidly changing business world, companies must anticipate a growing range of serious risks, including those posed by complex regulatory environments, insider theft and misconduct, and cybersecurity incidents. It comes as no surprise that risk and crisis management remains a significant concern for law departments, particularly when you look at the burgeoning number of companies encountering a crisis. According to the fall 2017 results, one in four companies faced a corporate crisis in the past 12 months. Based on my experience – in my role leading the Firm's Global Risk and Crisis Management Practice and also in my prior roles as a government official, where I led the National Security Division of the U.S. Department of Justice and served as Chief of Staff to the Director of the Federal Bureau of Investigation – one lesson about crisis management has been reinforced time and again: The best way to manage a crisis is to plan for it.

Wave two data shows companies are more adequately prepared when a crisis response plan is in place; however, one-third of companies still have yet to implement a plan. There is also a decline from spring 2017 in the percentage of companies seeking external resources and counsel for preparation. Law firms can play a critical role in helping companies mitigate risks and anticipate potentially damaging crises before they hit. Failure to prepare for and anticipate crises can potentially expose a company's directors and officers to liability and adversely affect the company's brand, reputation, and bottom line.

In the pages that follow, we look at the fall 2017 survey results, including concerns associated with facing a crisis and trends in company preparedness.

Morrison & Foerster's Global Risk & Crisis Management Group has decades of collective experience, across disciplines and industries, helping businesses prepare for the unimaginable. We help clients develop a multi-pronged strategic response that addresses litigation and regulatory risks, as well as brand and reputational risks.

If you have questions or need assistance with any of the issues discussed herein, please feel free to contact us.

Best regards,

John P. Carlin
Chair, Global Risk & Crisis Management
Morrison & Foerster
jcarlin@mofo.com



INTRODUCTION

In fall 2017, ALM Intelligence and Morrison & Foerster conducted a second wave of the spring 2017 online survey targeted toward U.S.-based general counsel and in-house lawyers. The purpose of wave two was to capture trending insights across the five issues explored in wave one:

- Privacy and Data Security
- Risk and Crisis Management
- Regulation and Enforcement
- Litigation
- Intellectual Property

The study aimed to gain a better understanding of the demand for legal services, law department operational and sourcing strategies, and the approaches taken by law departments.

Risk and crisis management continues to be an area of concern among law department leaders, with 59% of respondents describing risk and crisis management as a significant concern (Figure 1).

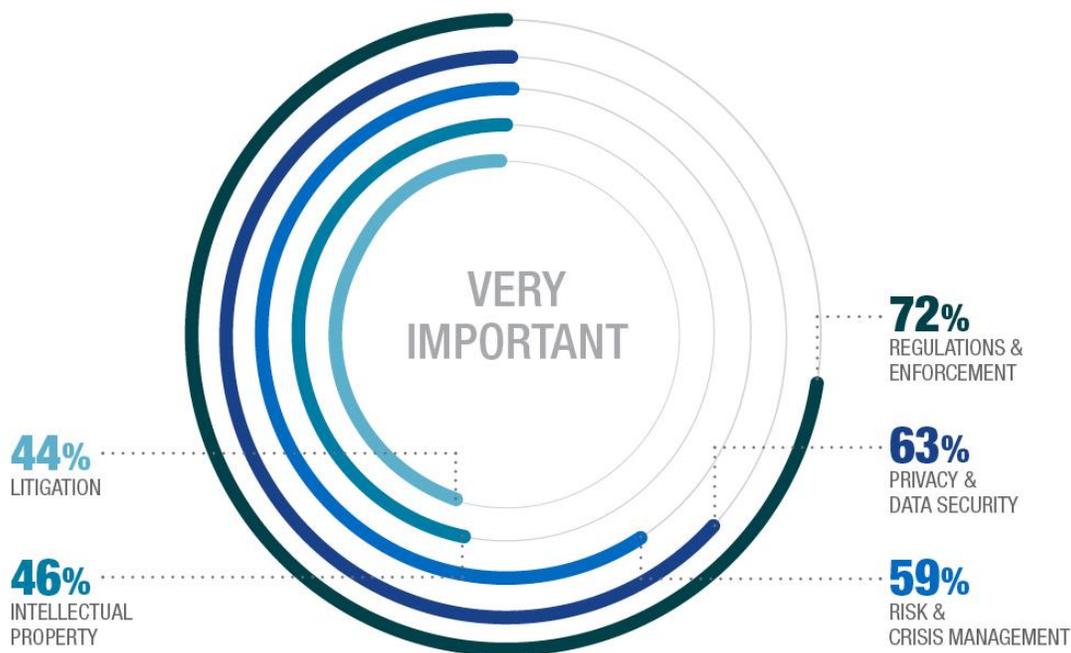


Figure 1
Most Significant Challenges Facing Law Departments



Although the structure of the survey considered the issues in Figure 1 in isolation from each other, Figure 2 below illustrates that these issues are inevitably connected. When in-house leaders think about risk and crisis management, themes of data security, regulation and compliance, and resource management are also top of mind. Cybersecurity threats, potential costs and budgetary impact, and government and regulatory investigations accounted for nearly 60% of all risk and crisis management concerns expressed by survey respondents in 2017.

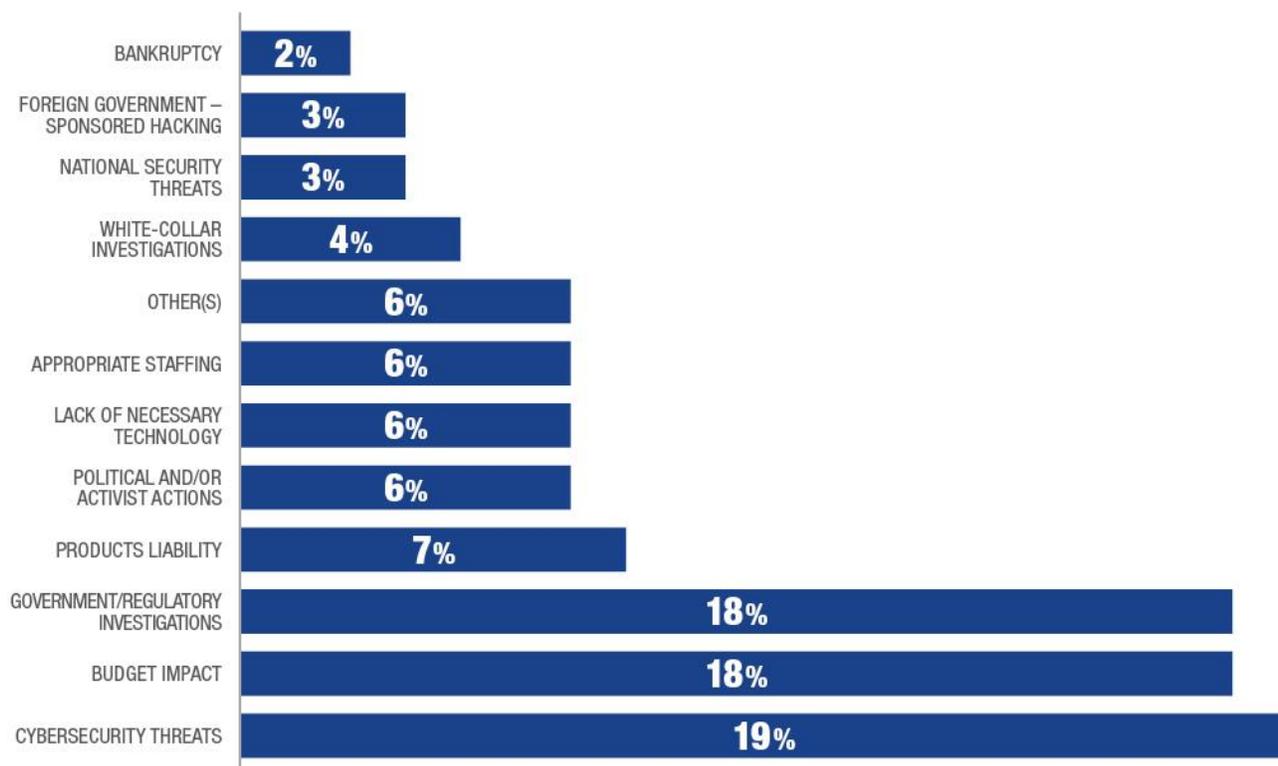


Figure 2
% of Total Risk & Crisis Management Concerns Expressed (2017 Surveys Combined)

In the sections that follow, we take a closer look at what specifically concerns law departments with respect to risk and crisis management, how prepared in-house legal teams are to address a significant corporate crisis, and the evolution of how law department leaders address issues between survey waves.



RISK AND CRISIS MANAGEMENT: AN EMERGING CHALLENGE

The potential of facing a corporate [crisis](#) remains a major concern among law department leaders for good reason. From spring 2017 to fall 2017, there was a large increase in respondents reporting that they had faced a significant corporate crisis during the previous 12 months; from one in 10 in wave one to one in four in wave two (Figure 3).

It is reasonable to assume that a significant crisis is an event that puts the entire business enterprise in substantial risk.

Has Your Company Faced a Significant Corporate Crisis in the Past 12 Months?

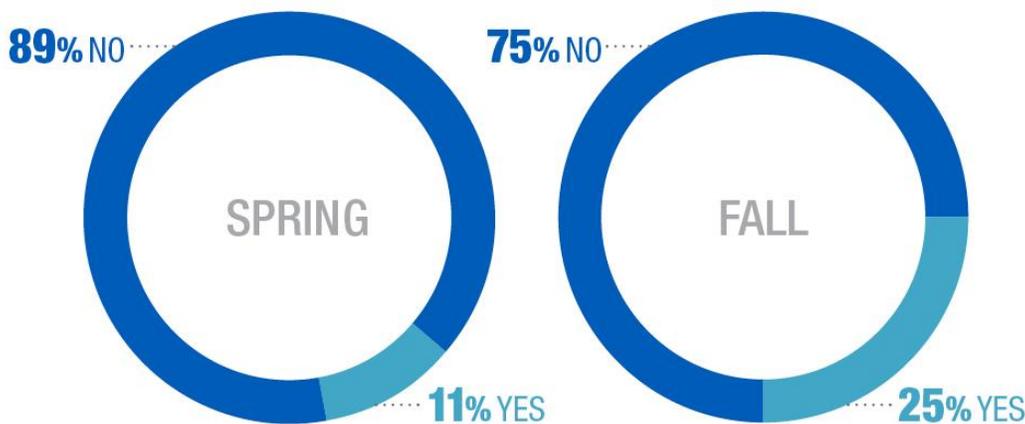


Figure 3
Companies Faced with a Corporate Crisis

A crisis, almost by definition, happens without warning. When a cyber-threat hits the company, you must react to analyze the situation and ensure you are responding appropriately and taking into account your legal obligations to notify affected customers and other stakeholders. Ransomware has emerged as a particularly dangerous type of cyber-threat. Nearly one in five respondents reported facing such an attack in the previous year (Figure 4).



Has Your Company Faced a Ransomware Attack in the Past Year?

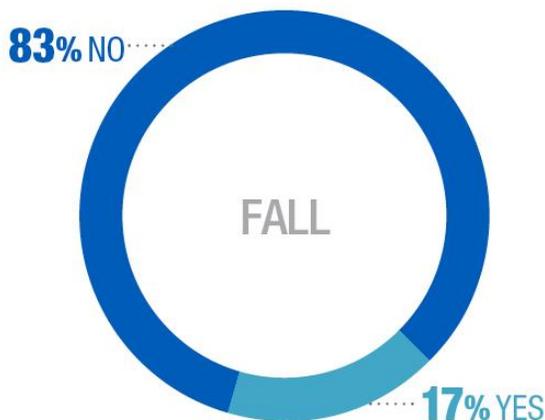


Figure 4
Companies Facing Ransomware Attacks

With a growing number of organizations facing these risks, and the potential consequences so severe, the chance that a significant crisis could befall your organization underscores the need for precise preparation.

Despite this trend, there does not appear to be much movement in the number of law departments that have crisis management and [cybersecurity](#) incident plans in place. According to our fall survey, less than one-third of respondents (30%) indicated that their companies do not have a crisis management plan in place (Figure 4), and only 35% indicated that their companies do not have a cybersecurity incident response plan (Figure 5).

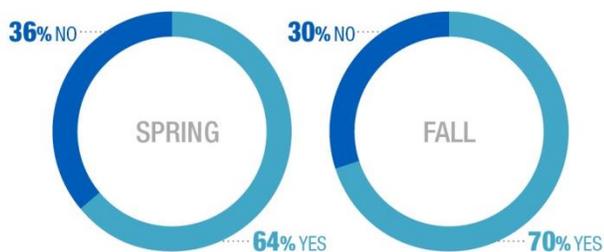


Figure 5
Companies with a Crisis Management Plan

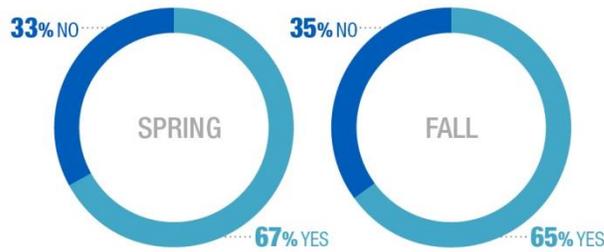


Figure 6
Companies with a Cybersecurity Plan



Although a majority of law departments have a plan in place, the mere existence of a plan does not ensure a business will emerge on the other side unscathed. Crisis management plans should include core components, such as those listed in Figure 7. According to the fall survey results, many of the organizations that reported having a crisis management plan may be putting themselves at greater risk because those plans fail to include some fundamental information. A full 25% of these respondents indicated that their plan did not include: i) escalation procedures; ii) emergency contact information for key players within the organization; iii) draft communication documents; iv) notices to regulators; or v) contacts with law enforcement.

Does Your Crisis Management Plan Include Any of the Following?

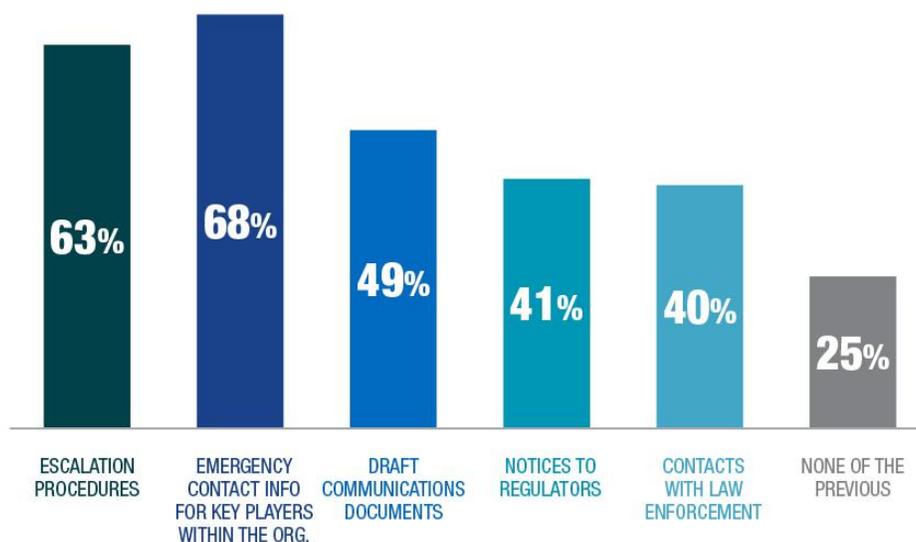


Figure 7
Key Components of Crisis Management Plans

At Morrison & Foerster, we lead pre-crisis discussions about the range of events that could possibly occur. During these discussions, we ensure organizations have asked themselves:

- Who will be empowered to make decisions quickly?
- What type of systems do we have that could be redundant?
- Who is going to lead the press strategy when minutes matter?

The first 24 hours when a crisis hits are critical. Decisions made within the first few hours should be strategic and not merely tactical. Statements you make or don't make can have implications months – even years – down the line.



WHAT ARE THE GREATEST CONCERNS FOR GENERAL COUNSEL?

When it comes to risk and crisis management, what concerns law department leaders in particular? In our survey, we asked respondents to rate on a scale of one to 10, with one representing least risk and 10 representing greatest risk, four categories of risk:

- **Behavioral Risk** – actions taken by company employees
- **Corporate Risk** – the impact on financial performance
- **Informational Risk** – the impact on keeping proprietary and sensitive data
- **Reputational Risk** – the impact on corporate brand and market reputation

In the event of a crisis, reputational risk is of paramount concern and appears to have elevated in importance from survey wave one to the latest results. Respondents in wave two were less worried about informational and corporate risk and increasingly concerned about damage to their company’s brand and market reputation (Figure 8).

In the Event of a Crisis, Rate the Following Risks to Your Company

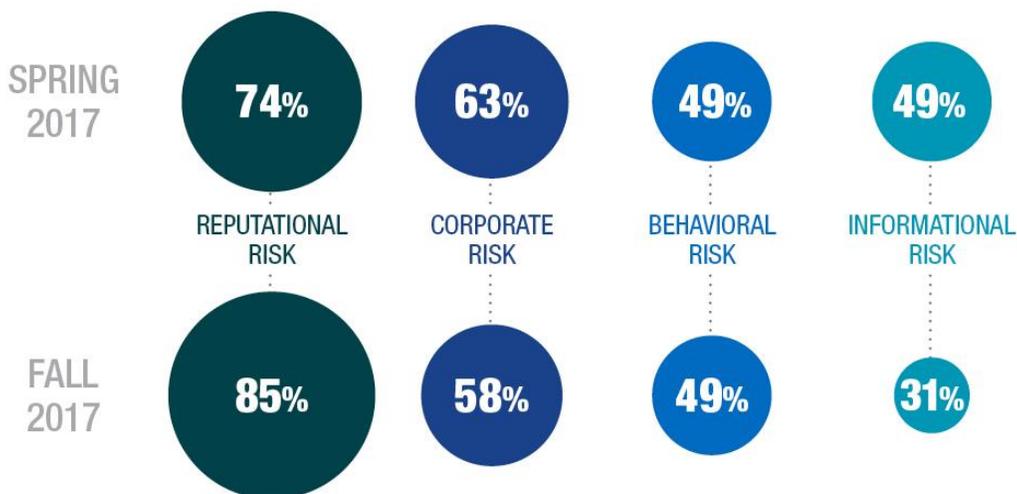


Figure 8
Categories of Risk



HOW PREPARED ARE CORPORATE LAW DEPARTMENTS?

Time is of the essence when a crisis hits. Successfully navigating a crisis boils down to preparation.

Trends in Adequate Preparation

We asked the in-house leaders who had experienced a significant corporate crisis in the previous 12 months how they would rate their company's preparedness. Very few gave themselves top marks; however, a majority (67%) felt they had been well prepared (Figure 9). This is an improvement over the spring survey, in which only 29% of companies experiencing a crisis felt well prepared. Despite what seems to be a positive trend from spring to fall, 7% of respondents in the fall survey felt poorly prepared to handle the crisis they faced. As discussed previously, a crisis response plan must contain fundamental information and, as we will explore in the next pages, be tested in simulated scenarios.

How Would You Rate Your Company's Response to This Crisis?

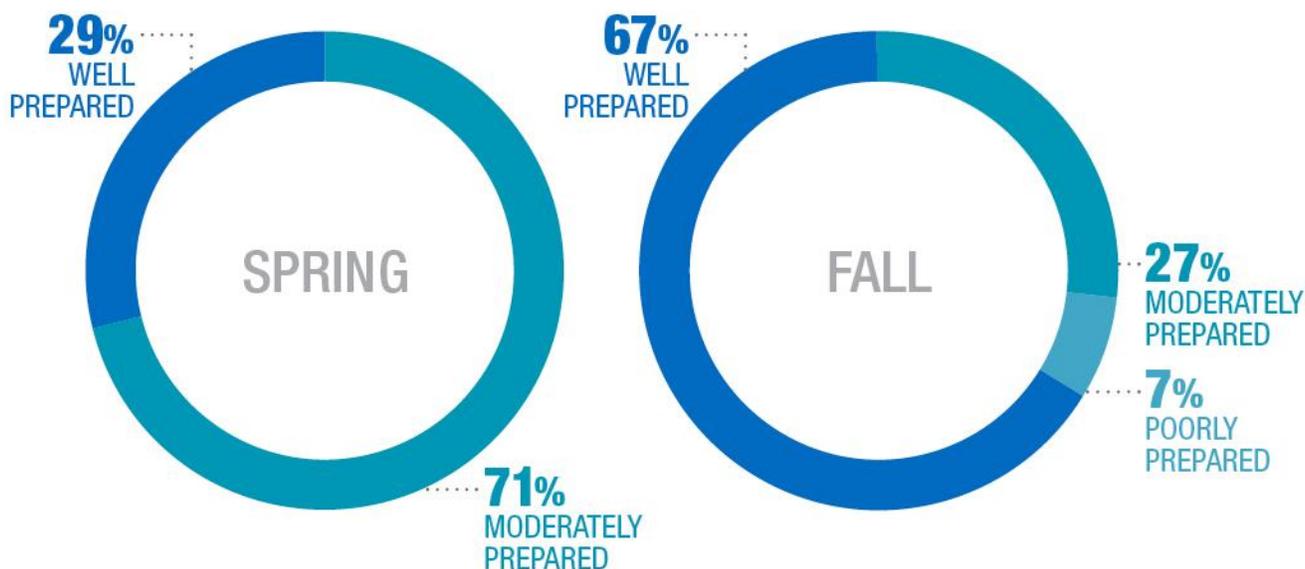


Figure 9
Crisis Readiness



Positive Movement in Advance Planning and Testing

As illustrated in Figure 4 above, we saw a slight uptick in companies with a crisis management plan in place, but it takes more than a formal plan with the right components (Figure 7) to be effective. Nearly one-quarter of respondents across both spring and fall surveys said they had never tested their plans. However, out of those that are testing their plans, there appears to be an increase in the regularity of tests. Compared to 48% in the spring survey, 65% of respondents in the fall survey said they are practicing their response to a crisis every six to 12 months (Figure 10).

How Often Does Your Company Practice Responding to a Crisis?

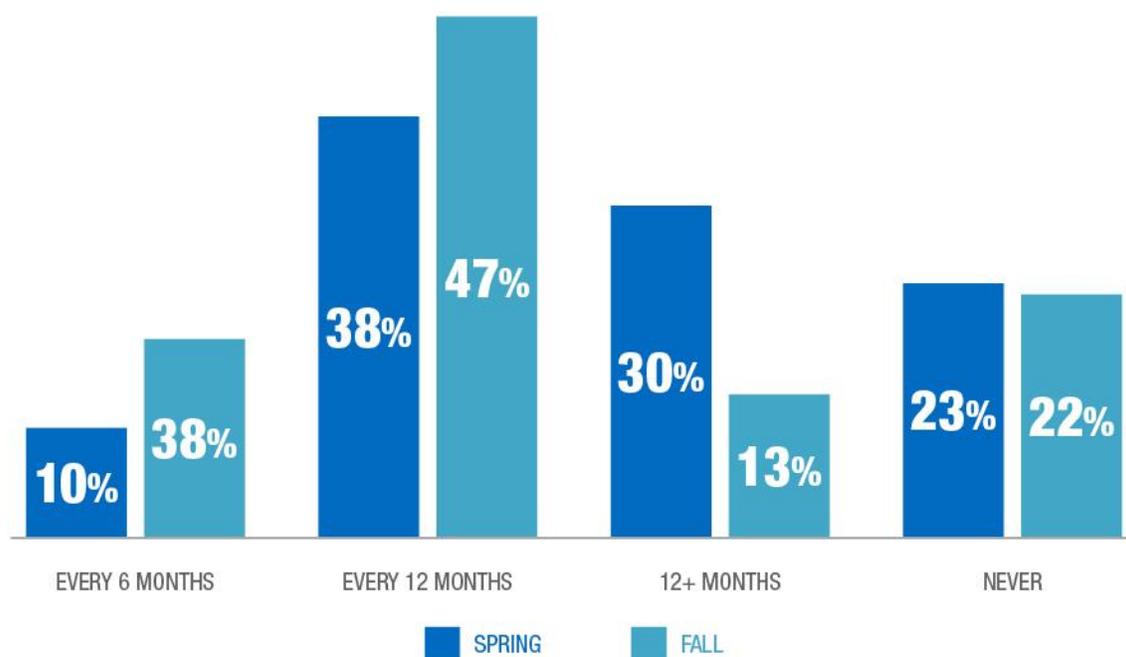


Figure 10
Test Frequency

Crises are stressful situations, and inadequately coping with that stress leaves companies at a disadvantage in the event of a real crisis situation. The best testing regimes schedule regular tabletop exercises in which their plan is put to the test with the senior executives and outside firms who would be involved in an actual crisis response. Out of organizations that test their plans, 66% of them are doing so with tabletop exercises (Figure 11). This is a minor improvement from the 61% reported in the spring survey.



If You Test Your Crisis Plan, Does It Include a Tabletop Exercise?

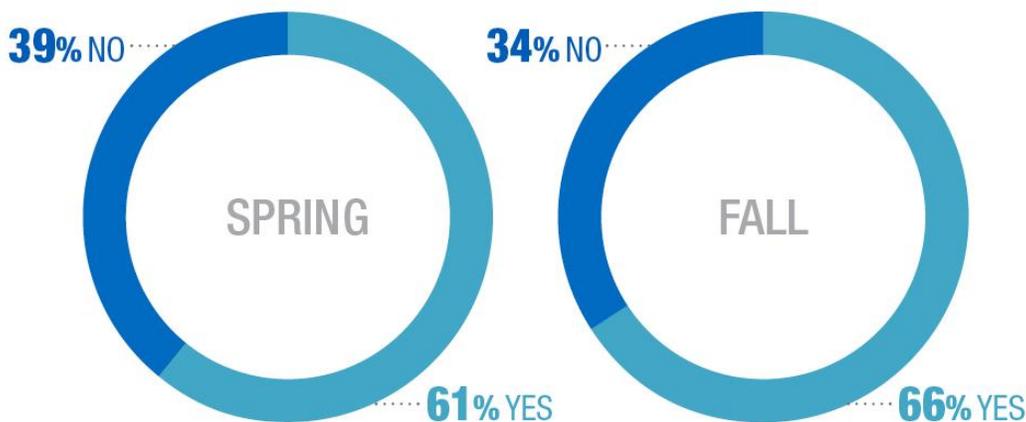


Figure 11
Tabletop Exercise

Decision-Making Authority

While the existence and components of crisis management plans vary from company to company, our survey found there is a broad consensus with respect to who is empowered to make quick decisions in times of crisis.

As illustrated by the word cloud in Figure 12 below, respondents overwhelmingly indicated that their companies have vested senior leaders with decision-making authority.



Figure 12
Corporate Stakeholders Empowered as Decision-Makers



That potentially raises some concerns. Quick and decisive action – especially within the first 24 hours – is one of most effective ways to mitigate the potentially negative impacts of a crisis. If only senior leaders are empowered to make decisions, companies need to ensure that clear escalation procedures have been put in place. Otherwise, a small issue could quickly escalate into a major crisis while reports of the incident make their way up the channel to an official empowered to make a decision. This is a clear vulnerability for over one-third of companies that do not include necessary escalation procedures in their crisis management plans, shown earlier in Figure 7.

Compounding the problem is the fact that a significant number of general counsel do not know which agencies and officials in government to contact in the event of a breach. According to our survey, four in 10 respondents (40%) reported that they do not know the appropriate government contacts.

Do You Know Who in Government to Call If You Are Breached?

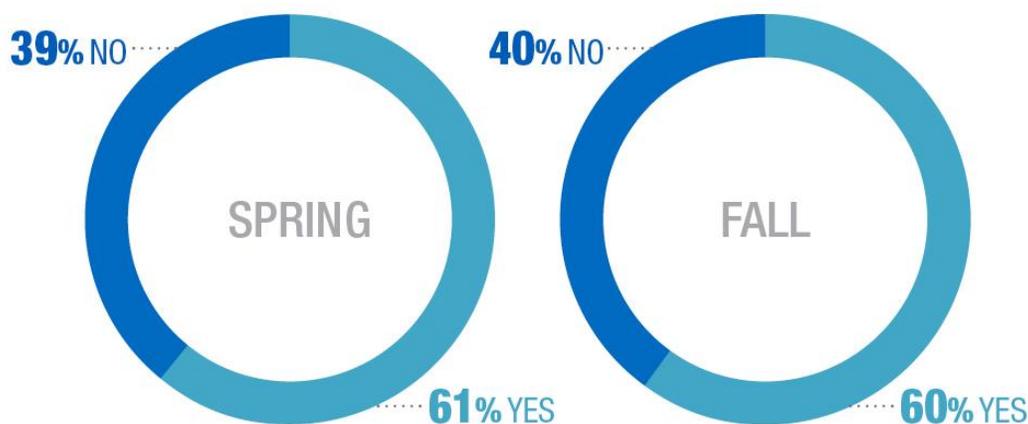


Figure 13
Government Contacts

Particularly in this context, it's important that companies have the correct corporate governance in place and empower the right people to make decisions quickly. To prepare for a crisis, stakeholders should take a long view and look across the whole range of potential risks, not just the legal or litigation risks, to ensure their decisions are strategic and not merely tactical. Organizations should develop a multifaceted strategic response that addresses litigation and regulatory risks, as well as risks to their brand.



The Role of Law Firms and Other External Resources

Given the various crisis scenarios that law departments need to anticipate, it comes as no surprise that many companies turn to external parties in developing crisis plans. However, from the spring to fall survey, fewer respondents indicated their organizations seek external resources or counsel in developing a crisis management plan (Figure 13). Budgetary limitations may explain this 12% decline.

Does Your Company Seek External Resources/Counsel to Prepare for Risk and Crisis Management Issues?

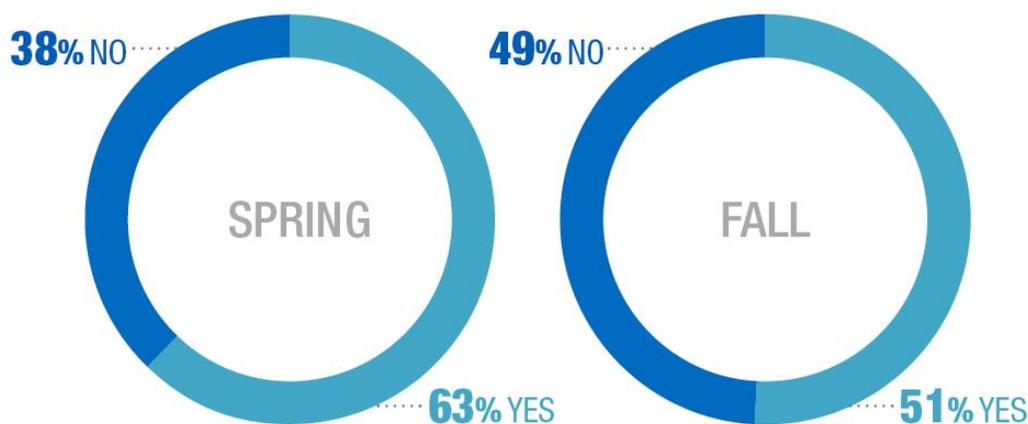


Figure 14
Companies That Include External Resources in Crisis Planning

While external resources or counsel were not defined in the survey, one may reasonably assume that this includes guidance from consulting firms and law firms in answering such questions as:

- Who within your company is empowered to make quick decisions?
- Who will speak to the media?
- What is the strategy for communicating with your board of directors and other internal stakeholders?
- How can you protect your company's most valuable assets?
- If business is disrupted, how can you quickly resume normal business operations?

While budgetary constraints may be a challenge, companies that turn to law firms and other external resources in pre-crisis planning are in a better situation to respond quickly and effectively.



CONCLUSION

Risk and crisis management continues to be a significant concern for law department leaders, and the number of companies that have faced a corporate crisis in the past year appears to be growing. If not properly managed, a crisis has the potential to irreparably damage a company's brand and market reputation, adversely impact financial performance, undermine employee morale, and weaken data security.

General counsel acknowledge the importance of advance planning and testing when it comes to crisis management. Although the data in wave two suggests a positive trend in adequate preparation, many law department leaders remain unsure about the effectiveness of their company's response plans.

Law firms have a vital role to play in helping corporate law departments anticipate and prepare for a crisis. The most-prepared law departments today are ones that include outside counsel and other key external experts in their crisis planning, testing, and response.

We hope you found these survey insights valuable. For additional resources around risk and crisis management, visit Morrison & Foerster's Risk and Crisis Management Resource Center (www.mofo.com/risk-crisis) and Cybersecurity Resource Center (www.mofo.com/cybersecurity). If you have questions or need assistance with any of the issues addressed in the report, please feel free to contact us. Morrison & Foerster's Global Risk and Crisis Management Group has the strategic insight and experience necessary to address any corporate crisis.



ABOUT THE AUTHORS

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ALM, an information and intelligence company, provides customers with critical news, data, analysis, marketing solutions, and events to successfully manage the business of business. Customers use ALM solutions to discover new ideas and approaches for solving business challenges; connect to the right professionals and peers to create relationships that move business forward; and compete to win through access to data, analytics, and insight. ALM serves a community of over six million business professionals seeking to discover, connect, and compete in highly complex industries.

About ALM Intelligence

ALM Intelligence supports legal, consulting, and benefits decision-makers seeking guidance on critical business challenges. Our proprietary market reports, rating guides, prospecting tools, surveys, and rankings inform and empower leaders, enabling them to proceed with confidence.

About Morrison & Foerster

We are Morrison & Foerster – a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, and Fortune 100, technology, and life sciences companies. The *Financial Times* has regularly named the firm to its lists of most innovative law firms in North America and Asia since publishing its Innovative Lawyers Reports in those regions. In the past few years, *Chambers USA* has honored MoFo's Privacy and Data Security, Bankruptcy, and IP teams with Firm of the Year awards, the Corporate/M&A team with a client service award, and the firm as a whole with the Global USA Firm of the Year award. Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger.



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