

## GCs Must Brace For AI-Based Litigation Risks

By Michele Gorman

*Law360 (January 22, 2020, 3:56 PM EST)* -- As in-house lawyers embrace artificial intelligence, they should get ahead of growing litigation risks by beefing up their compliance departments and preparing for breaches, according to a report released Wednesday by Crowell & Moring LLP.

The international law firm's eighth annual report, titled "Litigation Forecast 2020: What Corporate Counsel Need to Know for the Coming Year," looks at the litigation trends and challenges that legal departments are likely to face over the next 12 months, with a focus on how technology opens up companies to new litigation threats.

"While this new era ushers in tremendous opportunities for companies and consumers alike, it also presents new risk in an environment where both the products and the law are often without precedent," said Crowell & Moring Chair Philip Inghima.

AI and the internet of things are exposing companies to more litigation risks and liability from a variety of fronts including cybersecurity, privacy, tort law and consumer protection, Mark Klapow, co-chair of Crowell & Moring's litigation group and editor of the report, said in an interview.

According to Klapow, companies need to be aware of the risks from regulatory enforcement at a variety of levels and in court. There's more government oversight of privacy and data — at the federal and state levels in the U.S. and overseas — and a growing plaintiffs bar focusing on the alleged misuse of that data.

By the end of the year, there will be at least 20 billion smart watches, refrigerators and other devices connected to the internet of things, according to a World Economic Forum datapoint cited in the firm's report.

"The increasing sophistication of digitally enabled, intelligent products will drive new litigation in the coming years as these products are inevitably breached, either because a product fails or a cybersecurity incident occurs," said Jeffrey Poston, a Crowell & Moring partner and co-chair of the firm's privacy and cybersecurity group in Washington, D.C.

To get ahead of the risk, the report's authors advise legal departments to enhance their compliance departments and take advantage of technology to conduct risk assessments and understand where vulnerabilities exist.

Perhaps above all, they suggest companies prepare for what many experts deem the inevitable.

"Even if you have the best culture of compliance and the best technology, these events still can happen that could lead to liability," Klapow said. "Having a plan for when there is a breach or other potential liability event that diminishes the risk of the information being further leveraged and diminishes the risk of brand damage are important."

Among the other significant trends discussed in the report is rising skepticism surrounding noncompete agreements. According to Klapow, this is not only happening at the federal level — where the Federal Trade Commission has been more active in worrying about whether noncompetes stifle competition and limit the ability of workers to move around freely — in state legislatures and in media reports, but also now in the courts.

As an example he mentioned Jimmy John's, which recently garnered attention for asking its sandwich makers to **sign noncompete agreements** banning them from employment with competitors after leaving the chain. The fast food chain has **nixed its compacts** in New York and Illinois.

"Employers should generally expect to have a harder time enforcing their noncompetes and have to be more thoughtful and more strategic in how they do so," Klapow said.

According to Klapow, the increasing skepticism around this part of some businesses' hiring practices is likely due to a variety of factors, including a dramatically changing employment cycle in which workers move jobs more frequently and the perception that noncompetes can be abusive against lower-wage earners.

"Broadly speaking," Klapow said, "we think that employers need to take particular care in how they structure their noncompetes in legal documents and when they choose to enforce them in court."

--Editing by Jack Karp.