

## Office of the General Counsel Annual Report FY2022

### BACKGROUND

The Office of the General Counsel (OGC) provides an annual report to the President and the other Executive & Audit Committee members to assist with their governance and oversight responsibilities as outlined in the charter of the Oregon State University Executive & Audit Committee.

The OGC serves as a key resource to Oregon State University, providing legal advice on all manner of issues facing the complex and large organization. The OGC statement of philosophy and staffing details are provided in Attachment 1.

### MAJOR AREAS OF FOCUS FOR FY22

Major areas of focus for the OGC in 2021-22 fell into several categories:

- *COVID-19 Response* – OGC continued advising in this area throughout much of FY22. Most of OSU's decisions in this area had a number of legal implications, and like all universities across the nation, OSU faces a complex and uncertain legal landscape as a result of the pandemic. OSU leadership involved OGC in proactive ways to ensure that reasonable legal risk mitigation was included in decision-making. OGC also continued to defend class action litigation against the institution related to COVID-19-related remote instruction, and won a separate employment administrative agency claim related to OSU's COVID-19 policies.
- *Diversity/inclusion efforts* – OGC continued to work proactively to support OSU's goal of becoming an antiracist institution, without positioning the institution in a way that significantly compromises OSU's legal defenses against individual lawsuits. The office also advised OSU surrounding free speech rights that may sometimes appear to thwart diversity and inclusion goals. This complicated legal area often involves overlapping rights and presents risk in the legal and reputational arenas.
- *Presidential Search* – OGC provided substantial support throughout the Presidential search. The office advised on a number of complexities surrounding the search process, as well as working with the Board Chair and outside counsel on the drafting of, and negotiations surrounding, the President's contract.
- *Athletics* – The volume and complexity of OGC advising in this area increased substantially last year, as the landscape of college athletics is in significant transition and under challenge in multiple agencies and courts nationally. Areas of advising included Name/Image/Likeness (NIL) (generally, as well as group licensing and potential donor collectives), *Alston* benefits, Pac12 conference realignment issues, national efforts to find athletes to be employees for purposes of collective bargaining and wage/hour law, NCAA rules surrounding pay-for-play and inducement, antitrust, coach contracts, student athlete conduct issues, COVID issues, sports gambling and health/safety protocols.
- *State and federal legislative or policy changes* – Compared to the previous few years, this year saw less focus needed in responding to changing federal legislative or policy changes. OGC supported government relations colleagues and others during the

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*October 27-28, 2022 Board of Trustees Meetings*

Oregon 2022 legislative session, interpreting bills and impact to OSU and engaging with others to strategize OSU's response.

- *Compliance issues* – Compliance issues continued to take focus because of the increased complexity and quantity of regulations in recent years, as well as heightened agency enforcement and public focus nationally. Because compliance is difficult to tackle in large, decentralized universities with diverse compliance topic areas, OGC's partnerships with the Office of Audit, Risk and Compliance and key compliance partners is critical. Title IX remained a top compliance area of risk for OSU this year and continued to require a substantial amount of focus, including OGC advising on individual cases (especially as reporting and responding parties engaged lawyers). Other specific areas of compliance focus included cybersecurity, national security (including undue foreign influence in research), workplace safety, ADA digital accessibility and international activities.
- *Transactions supporting innovation, research and infrastructure* – OGC advised on a number of transactions and related issues that supported OSU's research, innovation and infrastructure. Many examples from last year continued this year, given the complexity, size and duration of the projects. OGC continued advising on the large Regional Class Research Vessels (RCRV) project, including resolution of numerous operational and contract issues; advising on contractual, risk management, operational and compliance matters for the complex PacWave wave energy project; analyzing opportunity, risks and potential terms for acquisition or management of the Elliott Forest; advising on the Samaritan lease arrangement for the new wellness center in the Reser Stadium renovation project; advising on issues surrounding the complex acquisition of the off-campus GEM housing facility; advising on multiple water rights disputes with agricultural experiment stations; advising the Global Hemp Innovation Center and other research efforts related to cannabis; and working to resolve issues with Link Oregon, OSU's spin-out organization building a statewide internet network. OGC also supported OSU's efforts in converting OSU's equity holding in NuScale as it became a publicly traded entity, expanding Ecampus internationally, negotiating with PPL Electric Utilities for upgrading OSU's electrical grid, and ongoing capital improvement projects including the Arts and Education Complex, Completing Reser Stadium and Washington Way Improvement Project.
- *Public Safety* – OGC continued to focus advising OSU's new sworn law enforcement unit as it continued to grow its programs and services and to engage with the OSU community.
- *Student Government* – ASOSU leadership sought substantial changes in constitution, structure, process and representation and was focused on clarifying role and increasing student voice. This required an increase of OGC advising for our ASOSU and Student Affairs colleagues in a complex legal and political framework.
- *Student Mental Health* – As student mental health concerns continue to increase nationally and at OSU, the office continued to advise threat/care management teams working to resolve complex student issues. These cases present myriad legal issues, especially as courts defer less to universities in supporting students in crisis.

- *Vacancies in Public Records Officer & Export Control Officer Positions* – With the departure and long-term vacancies of OSU’s public records officer and export control officer, the office (in coordination with outside counsel) significantly increased support in these critical functional areas this year.

See Attachment 2 for an overview of key subject areas in addition to the high focus areas listed here.

### LITIGATION AND ADMINISTRATIVE CLAIMS

OGC works with leaders of all levels to address problems early and resolve concerns before they reach the litigation stage. But, where lawsuits are filed in court against OSU, OGC manages the defense and works closely with outside litigation counsel.

A snapshot of defense litigation rates over the past five years is provided in Attachment 3.<sup>1</sup> OSU has traditionally had extremely low litigation rates compared to similarly situated national peers, but those rates have been expected to rise as OSU has grown in size, complexity and profile. As can be seen in Attachment 3, OSU’s defense litigation rate increased substantially in FY21, although the total number of cases was still at the low end of national peers. In that year, there was not a discernible trend or pattern to explain the increase, other than OSU experiencing litigation in areas in which it had not seen litigation previously i.e. sponsored research, COVID-19, fair credit reporting act, public records, and potential research forest acquisition. Moving to FY22, OSU’s litigation rate substantially decreased, with just one employee and one student case filed in court. It remains to be seen if future years will show FY21 or FY22 to be the outlier, but based on national trends, it would be surprising to see the FY22 numbers every year.

OGC also manages all civil rights and administrative claims to and investigated by outside agencies. These include complaints filed by employees or students in agencies such as the federal Department of Education’s Office for Civil Rights (OCR), the federal Equal Employment Opportunity Commission (EEOC), and the state Bureau of Labor & Industries (BOLI). Attachment 4 includes a snapshot of the numbers and types of these administrative claims over the past five years. OSU continued to experience a lower number of these claims this year. Additionally, there is no discernible trend identified in the claims – one was related to an employee’s COVID concerns and one was an OCR claim that was filed against all NCAA Division 1 schools related to the categorization of student athletes.

Management of other types of pre-litigation property or personal injury claims is coordinated by OSU’s third-party administrator, Berkley Risk Management, along with OSU’s Office of Risk Management. OGC advises the Office of Risk Management as needed on those claims.<sup>2</sup>

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<sup>1</sup> The defense litigation over this five-year period involved employment disputes, injuries, breach of contract, breach of trust, student discrimination and retaliation claims, a research sponsor dispute, a claim of violation of the Fair Credit Reporting Act, and defense of a public records decision.

<sup>2</sup> The Office of Risk Management also manages OSU’s insurance program. All of the former OUS institutions, with the exception of the University of Oregon, participate in the Public Universities Risk Management and Insurance Trust (PURMIT), which is a self-insurance program allowed by statute. PURMIT is a separate legal entity from OSU, with separate legal counsel. OSU’s Chief Risk Officer, however, sits on the PURMIT Board of Trustees, and OSU has a number of OSU-specific insurance policies (e.g., maritime policies).

### **WORKING WITH OUTSIDE COUNSEL**

OGC engages the assistance of outside counsel in several types of situations. Even when outside counsel is engaged, OGC lawyers work closely with that counsel on strategy, communication and implementation, as well as on ensuring that the advice is tailored to and consistent with OSU's context, values and goals.

The most common situation where outside counsel is engaged is where the area of expertise is highly specialized and where it is inefficient or infeasible to build that specialized expertise in-house. Additionally, although several OGC attorneys have backgrounds as litigators, litigation matters take more time, resources and attorneys than is feasible to handle in-house at the current OGC size. The office also engages outside counsel for matters in which it is advisable or required to have an independent review or opinion. Finally, there are times that outside counsel is engaged because the work and needed timelines surpass the capacity of the office; however, efforts are made to minimize this approach given the higher cost of outside counsel. Staffing numbers of in-house counsel versus outside counsel are monitored to ensure provision of the most cost-effective legal services.

It is encouraging that it remains the case that the majority of university-wide outside counsel costs are to support OSU's proactive endeavors, rather than traditional defense-related costs (see Attachment 5).

Attachment 6 provides a five-year snapshot of OSU-wide outside counsel costs. Outside counsel work ebbs and flows with the needs of new initiatives and issues. This year's total costs were substantially lower than last year's, although the mix shifted in a few areas. The overall decrease was primarily due to less litigation and claims being filed, as well as the fact that multiple ongoing litigation matters had met OSU's insurance deductible. Another large difference this year was related to the fact that OSU did not issue a large revenue bond, which had incurred outside bond counsel costs in the previous year. Decreases were also seen in COVID compliance, non-real property transactions, research project-related costs, and employment matters. A large increase was seen this year in intellectual property, with much smaller increases seen in real property development and immigration, as well as public records and export control support during the longer-term vacancies of the public records and export control officers.

### **PREVENTATIVE LAW – OUTREACH AND TRAINING**

OGC attorneys engage in the practice of preventative law every day, serving as key members of OSU teams in proactive planning and pre-decision phases. This advance advising often avoids or mitigates legal action later. Additionally, serving as thought partners with leaders of all levels as they address particular issues presents opportunities to provide education on applicable laws and policies. OGC also takes opportunities to provide more formal training in a variety of arenas.

**OGC Statement of Philosophy**

The Office of the General Counsel (OGC) serves as a key resource to Oregon State University, as we provide legal advice on all manner of issues facing this complex and large organization.

In providing legal advice, we add value by crafting creative and pragmatic solutions, fostering critical analysis, and facilitating resolution towards common goals across a spectrum of agendas and viewpoints. Our attorneys bring a high level of knowledge, judgment and common sense to every issue on which they advise, and their advice is contextualized and specific to OSU's needs. To be effective advocates and advisors, we take a genuine interest in and ensure understanding of OSU's history, culture, current activities/challenges and goals.

In working with OGC, OSU employees can count on impeccable ethics and integrity, as well as respect, collaboration and inclusivity. Building and maintaining relationships across OSU is paramount to our ability to provide excellent service. OGC is just one part of a large and multi-faceted team at OSU, and our attorneys respect the expertise, judgment and business decisions of OSU leaders. It is imperative that we be viewed as partners, advisors, and problem-solvers.

Although OGC is a fast-paced and often high-pressure environment that calls for a level of professional autonomy in each employee, our attorneys, paralegals and assistants work together to provide the university with seamless service and to support and guide each other collaboratively. The principle of teamwork that is integral to the relationships with constituents outside the office is evidenced in our working relationships within OGC.

**OGC Staff**

The office includes seven (7) attorneys (including the General Counsel), two (2) paralegals, an executive assistant and a part-time administrative assistant. While the office is staffed leanly compared to national benchmarks, OGC provides high quality legal services in an efficient way. The university has a collaborative culture of bringing OGC in early in planning and problem-solving and the attorneys strive to practice preventative law in all arenas. OGC's success in providing efficient legal services is dependent on both of these conditions — leaders of all levels utilizing OGC in this proactive manner and a focus on preventative law. OGC also connects often with colleagues within the state and nationwide to stay ahead of the curve on best practices for efficient and cost-effective services.

**DYNAMIC ADVISING ACROSS DIVERSE SUBJECT AREAS**

OGC provided advice in the following key areas in 2021-22<sup>3</sup>:

*Student issues* – Advised on issues related to student conduct, student wellness, student government, academic appeals, academic programs, Greek life and other student organizations, free speech, firearm rights, undocumented students, admissions policy, and scholarships/financial aid.

*Civil rights investigations/issues* – Advised on discrimination, sexual assault and bullying investigations, as well as disability accommodations and facilities accessibility reviews. Advised leaders across the university on civil rights and constitutional law issues.

*Employment issues* – Advised on faculty grievances (through faculty senate and through the new UAOSU CBA), staff grievances (through SEIU and CGE CBAs), labor arbitrations, potential terminations-for-cause, reassignments, agency complaints, tort claims, personnel management issues, employment law compliance, collective bargaining, benefits and athletics employment contract issues. Supported the Board Office in the Presidential search process and contract.

*Contracts, industry partnerships, association collaborations, real property development* – Advised on variety of procurements and contracts including high value or complicated construction and goods/services agreements and transactions, as well as industry collaborations, sponsored research agreements and consortium/association agreements. Advised on land use and water rights issues involved in the development or use of OSU real property.

*Compliance* – In addition to Title IX compliance, advised on many different regulatory compliance areas, including, for example, COVID19, Clery Act timely warning/crime reporting, export control, Title VI and VII, IT security compliance, environmental health/safety regulations, HIPAA/FERPA, NCAA rules, financial aid regulations, controlled substances and human/animal subject research regulations.

*Research issues* – Advised on large research projects, hemp and marijuana research questions, research compliance, research misconduct actions, technology transfer issues, and liability/risk issues regarding research vessels and field work.

*Intellectual property issues* – Advised on patent, copyright and trademark issues regarding commercialization and ownership of technology, research, and course curricula.

*Athletics issues* – Coordinated with the Pac-12 GC and other Pac-12 institutional GCs on matters of common interest, as well as continued to provide support to OSU's Department of

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<sup>3</sup> OGC works with many offices at the university who have primary responsibility in these areas (e.g., the Office of Human Resources and Office of Faculty Affairs for employment issues, the Office of Equal Opportunity and Access on discrimination issues, the Office of Student Conduct and Community Standards on student conduct issues, Procurement and Contract Services on transactions, OSU Advantage Intellectual Property & Licensing team on licensing). OGC is consulted when legal advice is needed or matters are particularly complicated, high value or high profile.

Intercollegiate Athletics regarding increasingly complex and high profile issues. Advised on matters regarding student athlete conduct, concerns regarding student athlete criminal or student conduct history, drug and COVID19 testing, diversity and inclusion efforts, discrimination complaints, scholarships, gender equity in athletic opportunity and facilities, coach contracts, personnel matters, concussions and other injuries, antitrust, use of student athletes' name/image/likeness, and pay-to-play.

*Risk management* – Advised on Enterprise Risk Management initiative, as well as threat assessment, emergency response plan update, Veterinary Hospital client claims, personal injuries on university property, university property damage, infectious disease issues, travel policy, large or particularly risky events, and other matters.

*International issues* – Advised on issues related to international research endeavors, export control and heightened federal national security concerns on research/education collaborations, student study abroad and athletic/music/academic team international travel, employee travel, immigration and travel ban issues, overseas employee compliance, international transactions and federal regulations regarding foreign gift reporting. Also advised OSU regarding INTO relationship, as well as international compliance issues regarding extending Ecampus to students residing in other countries.

*Policies* – Advised on variety of proposed university policies or policy revisions, especially partnering with the Office of Audit, Risk and Compliance and the director of policy and standards on university's long-term policy modernization effort. Advised Faculty Senate and ASOSU on their policy efforts as critical shared governance partners.

*Legislation* – Advised regarding variety of bills in the 2022 Oregon legislative session. Advised regarding variety of proposed federal bills.

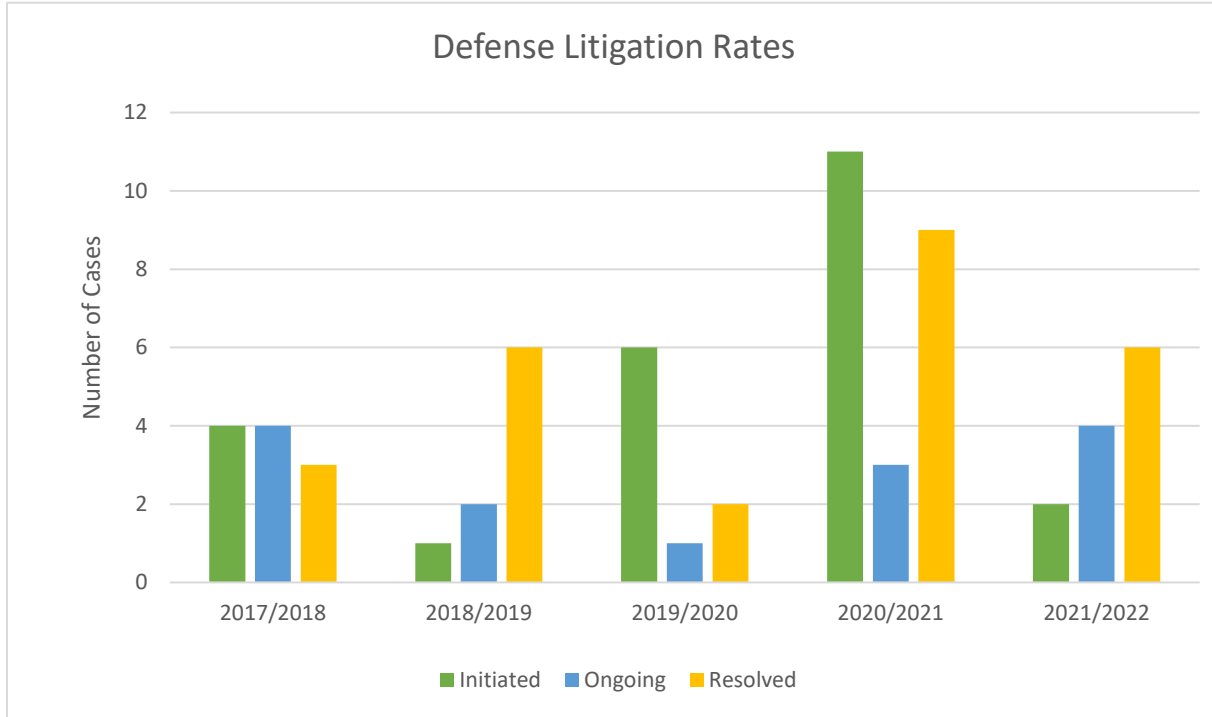
*Foundation* – Advised OSU employees and coordinated with OSU Foundation counsel on variety of contract, gift and ethics questions.

*Ethics/audits* – Advised on government ethics issues and internal/external audits.

*Bankruptcy/collections matters* – Advised on student and corporate vendor bankruptcies and collections matters to the extent they impacted OSU.

Attachment 3

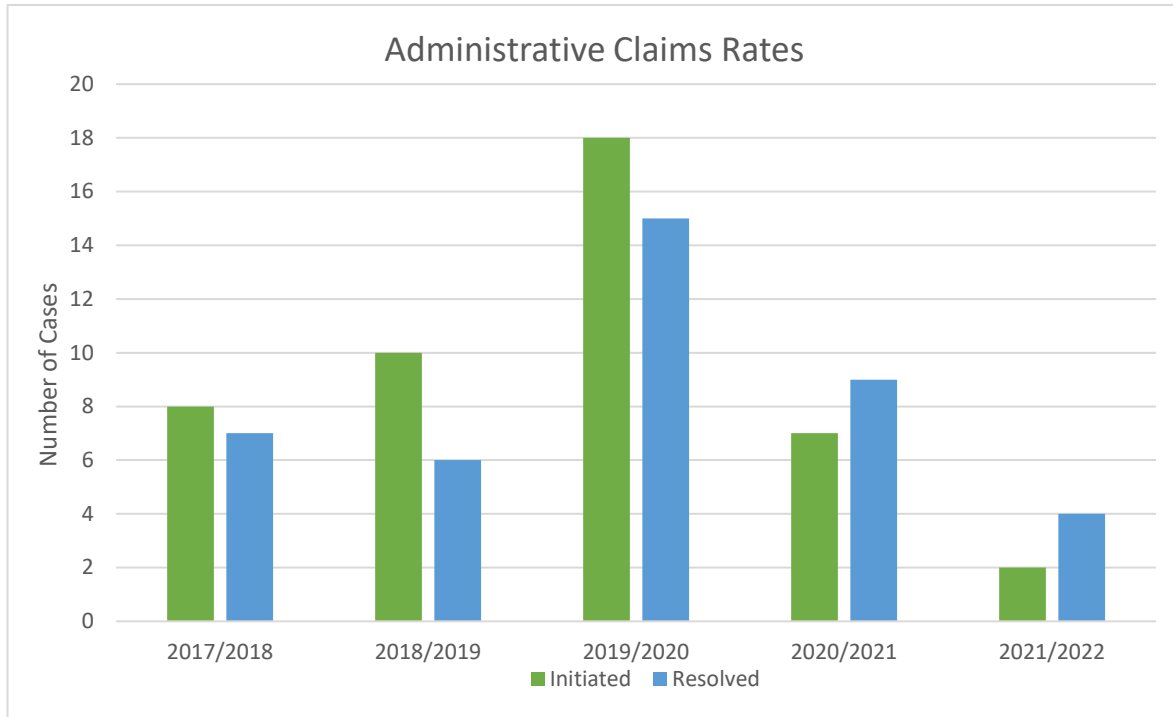
Defense Litigation Rates: Five-year snapshot showing number of cases filed against OSU and resolved each year, as well as those carried over from previous years.





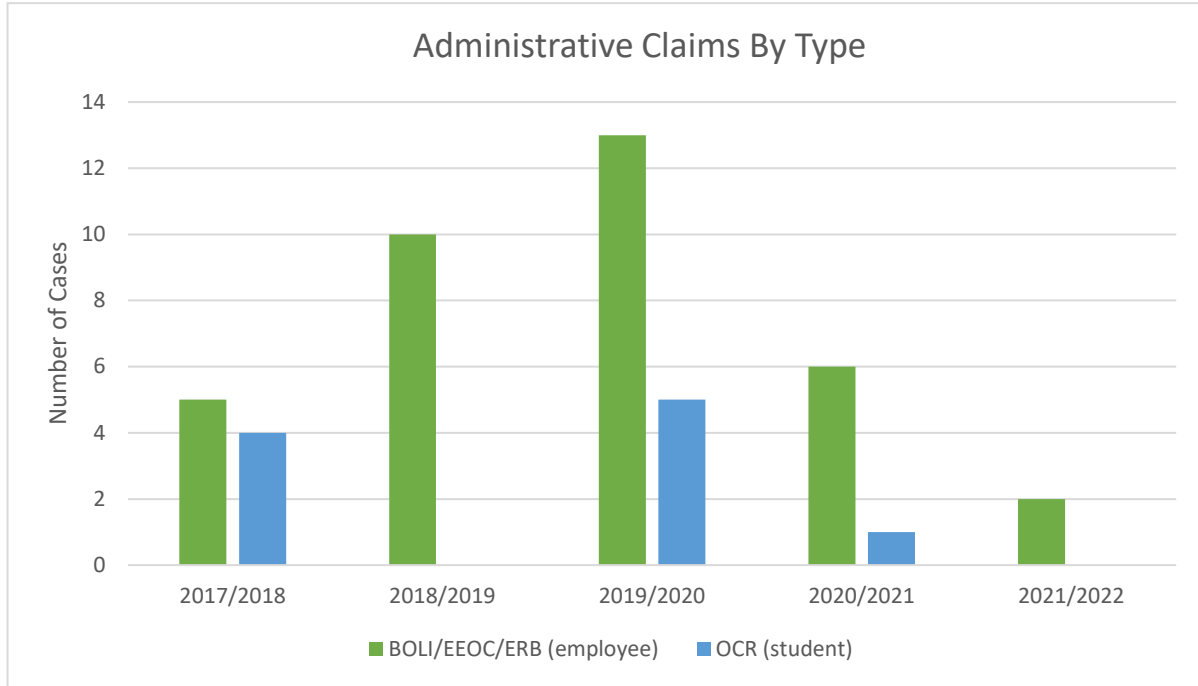
Attachment 4 (1 of 2)

Administrative Claim Rates: Administrative claims (claims by students or employees to and investigated by outside agencies) made over the past five years. Claims are generally resolved within a one-year period, but may carry over from year to year.



Attachment 4 (2 of 2)

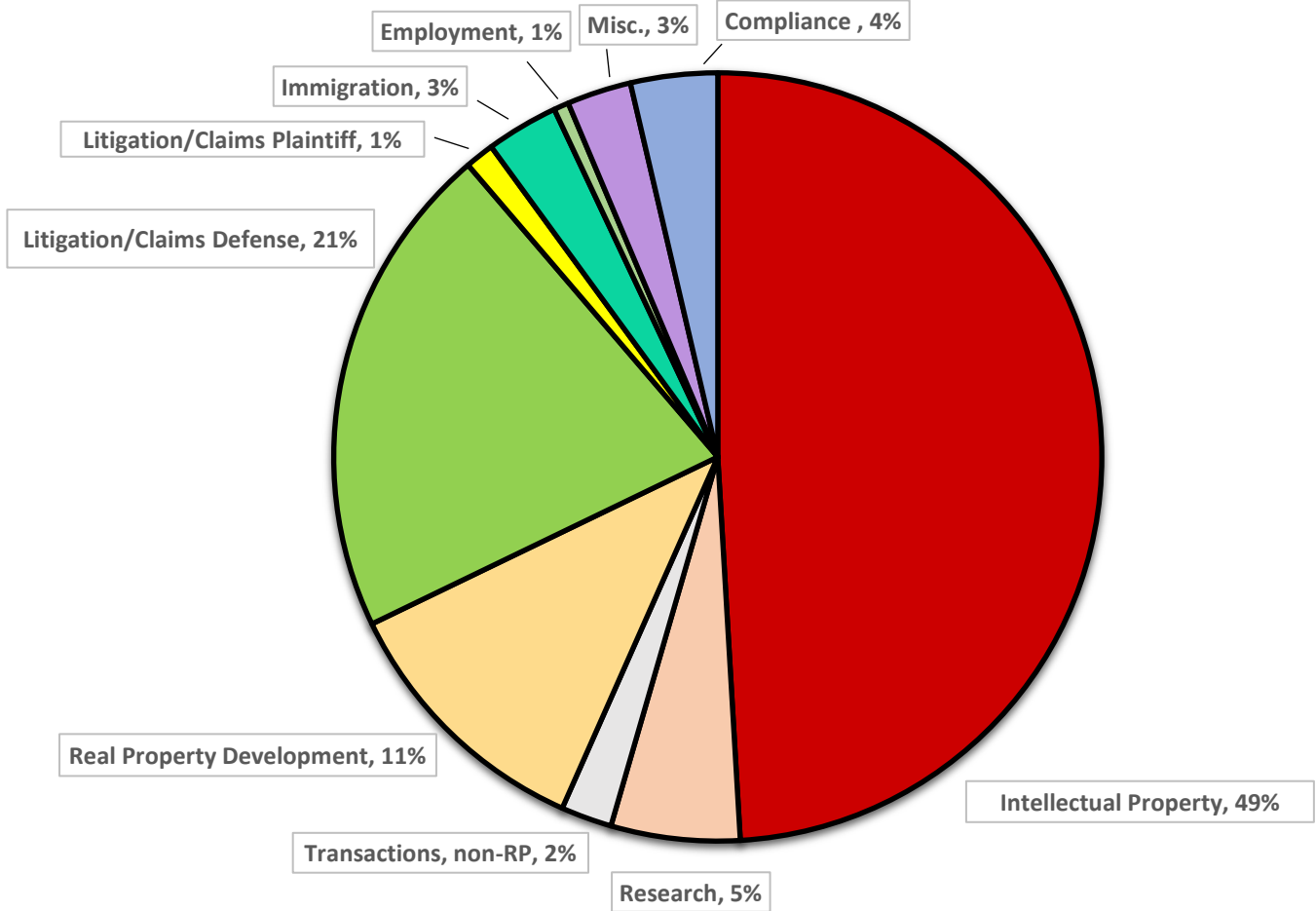
Administrative Claims by Type: Administrative claims broken out by those from students versus employees, over the past five years.



Attachment 5

University-wide outside counsel expenses broken out by type. Miscellaneous includes environmental, public finance, general advice, and other topics.

**Total Outside Counsel Expenses by Type 2021/2022**



Attachment 6

University-wide outside counsel expenses annually over the past five years. These amounts include all outside counsel costs paid by the university, regardless of the unit ultimately paying the costs.

