



CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

November 25, 2019

The Honorable William Barr
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530-0001

Dear Attorney General Barr:

The Civil Justice Association of California,¹ on behalf of its members and the below-listed organizations, respectfully urges the U.S. Department of Justice to adopt clear standards for website accessibility under the Americans with Disabilities Act (ADA) at the soonest possible time. The signatories of this letter represent a broad cross section of California businesses of all sizes from a variety of industry sectors. We write because the lack of clear standards for website accessibility has created a national litigation crisis, with California among the top ten states for website accessibility lawsuit filings. Only the Justice Department is in the position to provide the uniform clarifications and modernization of ADA regulations needed to stem this crisis.

The Problem

Websites have become an integral part of society; a Pew Research Center poll shows that 90% of all Americans currently use the Internet in some form.² It is mutually beneficial to both consumers and businesses that serve them that websites be accessible. Businesses desire to provide access to their websites and to comply with the ADA, but the absence of clear standards on website accessibility leaves businesses guessing as to what it means to comply and has created a field day for litigation. Between 2017 and 2018, website lawsuits filed in federal court under the ADA increased by 177%.³ Absent clear guidelines around website accessibility, these numbers will continue to grow. Unnecessary lawsuits arising from the lack of ADA regulations regarding current technology neither help consumers nor advance

¹ The Civil Justice Association of California offers research and guidance on policy issues that impact California's civil liability laws. A trusted source of expertise in legal reform and advocacy for almost half a century, we confront legislation and laws that create unfair burdens on California businesses, employees, and communities.

² Pew Research Center, *10% of Americans don't use the internet. Who are they?*, April 22, 2019; <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/>

³ Seyfarth, *Number Of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 In 2018*, January 31, 2019; <https://www.adataleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/>

compliance and waste both government and business resources. For small businesses in particular these lawsuits can be financially devastating.

We believe this litigation crisis is exacerbated by the following developments and unresolved questions over website accessibility:

- **Inconsistent application by the courts on nexus:** There is a split among the federal district courts throughout the country as to whether a website is a place of public accommodation under the ADA, and if so, whether there must be a nexus between the website and the services of a business's brick and mortar location.⁴ There will continue to be litigation over this issue until the Department resolves it through regulation.
- **No definition of "accessible":** While the Department has consistently filed *amicus curiae* briefs on behalf of plaintiffs in various website access lawsuits, it has yet to define what website access is for those with disabilities. The Department has stated that "effective communication" must be provided to those with disabilities,⁵ but the Code of Federal Regulations is vague on the definition of "effective communication."⁶ Additionally, the term "auxiliary aids and services" includes "accessible electronic and information technology," but does not define "accessible."⁷ These ambiguities are problematic as communication disabilities are almost never uniform throughout the disabled population which leaves compliance as a moving target. What may be "accessible" to one person with a communication disability, may not be accessible to another. Without clear definitions from the Department, defendants are subject to widely inconsistent website access compliance standards as determined by individual courts.
- **Inadequate consideration of the cost burden of compliance:** In an effort to define "effective communication," the Courts have looked to the private, non-government endorsed guidelines of the World Wide Web Consortium's Website Content Accessibility Guidelines ("WCAG") level 2.0AA. Yet, these standards are difficult and costly for businesses to fully meet. For example, an effective audit of a website can cost between \$7,000 to \$50,000 depending on the interactive level of the website. This does not include the cost to remediate the website or the cost to defend against a website access lawsuit. The mounting expenses can, and often do, cause businesses to close their doors.
- **Vagueness of voluntary technical standard:** We appreciate the Department providing guidance in its September 25, 2018 response to Congress's request

⁴ See, *Gil v. Winn-Dixie Stores, Inc.* 257 F.Supp.3d 1340 (S.D. Fla. 2017); *Robles v. Domino's Pizza, LLC* 913 F.3d 898 (9th Cir. 2019).

⁵ 28 C.F.R. 36.303(a).

⁶ 28 C.F.R. 36.303(b), stating only, "A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities," without furnishing a definition for "effective communication."

⁷ 28 C.F.R. 36.303(b)-(c).

for clear rules establishing website accessibility standards⁸ However, the guidance did not provide clear standards or certainty. Specifically, the Department stated: “Absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA’s general requirement of nondiscrimination and effective communication.”⁹ Similarly, the Department indicated voluntary standards are not the definitive technical standards, but left open the question of what is by stating: “[N]oncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA,”¹⁰ By not defining clear standards up front, regulation through costly litigation is the default.

The Solution

The undersigned coalition applauds the Department’s willingness to provide businesses flexibility with compliance, but businesses need a framework of clear guidelines within which to operate. In its September 25, 2018 letter to Congress, the Department indicated it would consider whether rules should be established. We strongly urge the Department to commence, as matter of urgency, a rulemaking to adopt clear technical standards for website accessibility.

In establishing standards for website accessibility, we ask the Department to consider and incorporate the following approaches:

- Include unambiguous language establishing the need to have a clear nexus between the website and the services provided of a physical business location.
- For consistency, adopt the WCAG 2.0 standard for the provision of “accessible” and “effective” communication for privately owned businesses, which is the standard that was adopted by the United States Access Board in its “Section 508 Refresh” of the Rehabilitation Act of 1973 for Federal entities.¹¹
- Provide an indefinite safe harbor for those businesses that have completed website remediation according to WCAG 2.0 or above.
- Ensure standards are not cost-prohibitive and unduly burdensome for businesses to implement.
- Continue to provide businesses flexibility on how to comply with regulatory directives.
- Provide a reasonable implementation deadline of at least one year to 18 months.

⁸ See, June 20, 2018 Letter from House of Representatives to Department of Justice and July 30, 2019, Letter from United States Senate to Department of Justice

⁹ See, September 25, 2018 Letter from Department of Justice to the Honorable Ted Budd and October 25, 2019 Letter from Department of Justice to Honorable Thom Tillis

¹⁰ *Ibid.*

¹¹ See, Executive Summary, Subdivision B – Summary of Key Provisions: <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/final-rule/single-file-version>

We believe clear and balanced standards that take into consideration the needs of the website user, as well as the compliance burden on businesses, will promote businesses' compliance with the ADA and expand website accessibility. Thank you for your consideration of this important request.

Respectfully Submitted,



Kyla Christoffersen Powell
President and Chief Executive Officer

And the below-listed organizations:

Brea Chamber of Commerce	California Society of Enrolled Agents
Building Owners and Managers Association of California	California Trucking Association
California Apartment Association	Cooperative of American Physicians
California Assisted Living Association	Folsom Chamber of Commerce
California Association of Boutique and Breakfast Inns	Greater Riverside Chambers of Commerce
California Bankers Association	Hotel Association of Los Angeles
California Building Industry Association	International Council of Shopping Centers
California Business Properties Association	Long Beach Hospitality Alliance
California Chamber of Commerce	NAIOP California Chapters
California Citizens Against Lawsuit Abuse	North Sacramento Chamber of Commerce
California Credit Union League	Regional Chamber of Commerce-San Gabriel Valley
California Dental Association	Sacramento Regional Builders Exchange
California Grocers Association	Tulare Chamber of Commerce
California Hospital Association	West Hollywood Chamber of Commerce
California Hotel and Lodging Association	Western Manufactured Housing Communities Association
California New Car Dealers Association	Yorba Linda Chamber of Commerce
California Restaurant Association	
California Retailers Association	