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SENATE MEMBERS ASK DOJ TO TAKE ACTION AS NUMBER OF WEBSITE ACCESSIBILITY LAWSUITS CONTINUES TO RISE

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Members of Congress are once again asking the U.S. Department of Justice ("DOJ") to take action addressing website accessibility under the Americans with Disabilities Act ("ADA") in light of the increasing number of lawsuits and claim letters asserting violation of the ADA.

Based on the first six months, 2019 is likely to exceed the records set in 2018 for the number of website accessibility cases filed, according to digital accessibility solutions provider AudioEye, which tracks such case filings. More than half of the cases filed, or 55 percent, were against retailers, followed by complaints against defendants in the hotel, restaurant, banking, and real estate industries. Many of those defendants have been hit with more than one lawsuit.

Despite the increasing number of lawsuits and claim letters, the DOJ has not issued regulations concerning website accessibility under the ADA. As we previously reported, the DOJ issued an Advanced Notice of Proposed Rulemaking concerning website accessibility standards in 2010, but withdrew the proposal in 2017, stating that it was "evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate."

In a September 2018 letter to then Attorney General Jeff Sessions, seven Senators urged DOJ "to promptly take all necessary and appropriate actions within its authority – including filing statements of interest in currently pending litigation – to resolve the current uncertainty." The letter is similar to a June 2018 letter by a bi-partisan assembly of 102 members of the House of Representatives, which we previously reported, stating that "private label action under the ADA with respect to websites is unfair and violates basic due process principles" and urging the DOJ to "provide guidance and clarity with regard to website accessibility" under the ADA.

In its October 2018 response letter, DOJ stated that it "first articulated its interpretation that the ADA applies to public accommodations' websites over 20 years ago" and that it appreciates "the impact that the risk of litigation has on covered entities." It noted that:

"[A]bsent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of

nondiscrimination and effective communication. Accordingly, noncompliance with a specific voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."

More recently, in a July 30, 2019 letter to current Attorney General William Barr, the same seven members of Congress responded that the DOJ's statement supporting "flexibility in compliance" with the ADA does not "clear up remaining uncertainty" and urged the DOJ "to provide further clarity, especially given that the issue of whether the ADA applies to private websites at all – or the scope of such application – continues to be subject to conflicting judicial opinions." The letter goes on to note that "[a]bsent further guidance, compliance will remain a matter of increasing litigation and inconsistent outcomes" and that "r]egulation through litigation should not be the standard."

The letter further notes that during Attorney General Barr's confirmation hearing before the Senate Judiciary Committee, he committed to "study[ing] this issue in greater detail and consult[ing] with [Congress] on these issues." Accordingly, the letter requests that he provide written answers to the following questions by August 30, 2019:

1. Since our letter of September 4, 2018, what specific steps has the Department taken to help resolve uncertainty regarding website accessibility requirements under the ADA? What additional steps does the Department intend to take, and by what date?

2. Does the Department consider WCAG 2.0 an acceptable compliance standard for the public under Title III of the ADA? Why or why not?

3. As with the regulations implementing Section 508, does the Department agree that consideration should be given to the resources available to a business or member of the public seeking to ensure website accessibility? Why or why not?

4. Has the Department considered intervening in pending litigation to provide clarity on these issues, or to push back against any identified litigation abuses? Why or why not?

In the absence of DOJ regulations, courts continue to apply the Website Content Accessibility Guidelines ("WCAG") promulgated by a private industry group, the World Wide Web Consortium (W3C). WCAG 2.0 and 2.1, the compliance levels most frequently demanded in lawsuits and claim letters, are based on four principles: Websites should be (1) perceivable, (2) operable, (3) understandable, and (4) robust. As a practical matter, this means the following:

1. Perceivable: Disabled users should be able to perceive website content using their available senses.

2. Operable: Websites should be operable using a variety of assistive technologies or adaptive strategies.

3. Understandable: Users should be able to easily understand not only the content, but how to operate the website.

4. Robust: Websites should be accessible using a variety of assistive technologies, and continue to be compatible as technology improves.

For questions or more information, or to schedule a website accessibility webinar for your company, contact the authors listed.

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