August 6, 2024

TO: Members, Senate Appropriations Committee

SUBJECT: AB 1757 (KALRA) ACCESSIBILITY: INTERNET WEBSITES
OPPOSE – AS AMENDED JUNE 12, 2024

The California Chamber of Commerce and the undersigned are **OPPOSED** to **AB 1757 (Kalra)** as amended June 12, 2024, because it will create further litigation abuses in California related to online website accessibility.

Context: AB 1757's Two Parts: (1) Imperfect Liability Shield and (2) New Pass-through Liability.

AB 1757 can best be understood as two separate legal concepts: (1) a form of temporary immunity from website accessibility lawsuits if the business meets specific criteria and publishes any of their website's defects on a Digital Accessibility Report (DAR); and (2) creation of new pass-through liability, allowing plaintiffs' attorneys to sue companies that provide websites with services to smaller businesses if the resulting website has accessibility issues.

To be clear – **AB 1757** is attempting to address an important issue. As websites have proliferated over recent decades, accessibility has been an important issue. At the same time, website accessibility lawsuits have been increasing exponentially.[1] Functionally, these lawsuits allege that a given website has some element (such as a picture, text, or video) that is not accessible to some disabled community (blind, color-blind, deaf, dyslexic, or others). These lawsuits are a recent phenomenon and have been used abusively by a range of firms to shake-down businesses across California.[2] Generally, the law firm will send a demand letter or file a complaint alleging that the company's website has some minor error, and then offer to settle at an amount *below the cost of responding to the complaint*. Employers – particularly small, family-owned companies – are completely ill equipped to understand their obligations around website accessibility and cannot afford to litigate such cases … so they generally pay whatever is demanded.[3] This present equilibrium is far from ideal – and though we oppose **AB 1757's** approach, we acknowledge that **AB 1757**

[1] *See* Forbes' June 30, 2023 article: "Website Accessibility Lawsuits Rising Exponentially in 2023 According to Latest Data", available here: https://www.forbes.com/sites/gusalexiou/2023/06/30/website-accessibility-lawsuits-rising-exponentially-in-2023-according-to-latest-data/.

[2] Obviously, there are also legitimate uses of these suits, filed to change practices and improve accessibility. These righteous suits are not our concern here.

[3] A perfect example of this abusive practice is the 1-man business of Bob Kramer, who received such a complaint related to his website, and was forced to litigate. *See "The Law Firm Hitting Businesses with Thousands of Disability Suits",* by the Wall Street Journal. Available at: https://www.wsj.com/business/entrepreneurship/small-business-web-accessibility-lawsuits-c910f6fb.

is an attempt to address this reality. Sadly, for employers, it creates even more liability than it addresses – rendering it even less ideal than the present situation.

With this context in mind - we are appreciative of the Author's attempt to address abusive litigation practices related to website accessibility, and the many months of discussions we have had regarding **AB 1757**. However, despite these lengthy discussions with committee staff and the sponsors, we sadly do not see **AB 1757**'s provisions as an improvement over present law. To the contrary, we see **AB 1757** as creating new liability for online resource service providers while offering illusory liability protections. We have offered multiple rounds of amendments to address these concerns and attempted to make **AB 1757** into a balanced improvement over existing law over the course of the year – providing protection for good actors, and pass-through liability for bad actors – but those amendments have not been accepted. Our ongoing concerns are outlined below.

(1) Concerns With AB 1757's Digital Accessibility Report and Temporary Immunity from Suit.

Proposed Civil Code Section 55.565(d) contains **AB 1757**'s attempt at protecting businesses from the abuses of drive-by-lawsuits related to website accessibility. In simplest terms, **AB 1757** takes a "publish your issues, and we'll give you 90-day protection" approach - though there are many subtle details that bear consideration. In other words: if a company undertakes a list of identified practices, and makes certain guarantees, then that company can enjoy brief (90 day) immunity for parts of their website that are inaccessible to disabled persons. However, that immunity only applies to defects that the company *internally* identifies and *publishes online* in a DAR. After that 90-day period, even if the company has worked diligently to repair those defects, the published accessibility issues can be the basis of lawsuits.

Speaking generally, our concerns with this approach are: (a) it is difficult to comply with, (b) it offers protection that is often too brief, and (c) it ultimately increases the likelihood of litigation by requiring companies to publicly flag grounds for potential future lawsuits.

a. The requirements of DAR protection are infeasible for most businesses.

In order to be granted temporary protection under **AB 1757**, businesses must undertake a list of reforms and ongoing efforts, identified in proposed Section 55.565(d)(1). Specifically, companies must:

- Attest that their website is in full compliance with a third-party guidance document[4] for accessibility.
- Utilize automated and manual testing of their website to "regularly monitor" its website for accessibility.
- Construct a new "accessibility" website page, including a range of information about its accessibility activities, a mechanism to request a copy of the company's DAR, and a comment tool for users.
- Review any reported issues of inaccessibility within 5 business days and send a confirmation of receipt within 48 hours of any such report – regardless of weekends or holidays.
- Publish any accessibility issues that they identify on their DAR, effectively admitting liability for any future lawsuits.

Put simply, most public and private entities will not have the resources or the ability to meet these requirements, and therefore will not see any liability protection from **AB 1757**. This is particularly true for smaller- or medium-sized businesses, who will see no benefit from **AB 1757** and will continue to face the tide of the website accessibility lawsuits that have become increasingly commonplace in California.

Another problem with this approach is that complying with **AB 1757**'s requirements for DAR protection (including rigorous self-testing) does not actually shield an entity from all website-accessibility lawsuits. Instead, **AB 1757** only shields a company for self-identified inaccessible website elements. This means that **AB 1757**'s "liability shield" provision is even less helpful to a small- or medium-sized business who cannot

[4] To be deemed "fully accessible" under **AB 1757**, the website needs to fully comply with an industry guidance document (the "Web Content Accessibility Guidelines (WCAG)). Notably, WCAG was written as a set of recommendations, *not* a checklist – making it unclear if full compliance is even reachable.

retain a team of website reviewers to meet its requirements – as they will face the same lawsuit abuse that they are experiencing today.

b. <u>The 90-day immunity for publicly-identified accessibility issues is too short to be effective.</u>

Even if an entity can comply with **AB 1757's** considerable requirements to receive 90-day protection, **AB 1757**'s 90-day protection is too brief to be effective. Depending on the particular glitch or oversight causing an accessibility issue, and the practical realities of scheduling and testing new code, 90 days of protection will often not be sufficient time.[5] In that scenario, a good-faith employer faces a difficult choice upon discovering an accessibility issue: (A) publicly flag it for any plaintiffs' attorneys and hope to finish within 90 days (with an immediate lawsuit on day 91 should they fail) or (B) Try to avoid a lawsuit on day 91 by working on the defect without publicly identifying it, and hope that it is not noticed by any plaintiff's law firm before the fix is complete.

To address these issues, we have offered amendments to allow sufficient time for correction of any inadvertent errors (150 days) and ensure that the DAR mechanism (public posting of potential liability) is functional for employes.

c. <u>AB 1757 compels employers to publicly identify defects and invite lawsuits – both in California, and in other states.</u>

If a business manages to meet the legal requirements for DAR protection, and hires new staff to constantly review their website, and successfully identifies an accessibility issue before they are sued . . . the reward for DAR compliance (temporary protection) is not worthwhile when compared to the increased litigation risks after those 90 days expire.

Consider the contents of the DAR list[6]: it must identify the inaccessible element on the website, describe how this defect would affect a user with a disability, and identify the specific provisions of the WCAG standard which the provision fails to meet. These are <u>*exactly the components that a plaintiff's attorney would use to sue that entity related to its website*</u>. So, by complying with **AB 1757**, entities are essentially providing all the information necessary for a lawsuit against them if they cannot finish their repairs within **AB 1757**'s 90-day immunity. If they cannot finish their repairs within 90 days, they will immediately face a lawsuit that they cannot win, despite their best efforts at maintaining a compliant website.

Moreover, the DAR concept (publication and brief protection in California) is even worse for multi-state entities. Multi-state employers who utilize a DAR will be gaining immunity <u>*only for 90 days in California*</u> while flagging their potential liability in <u>*all other states as soon as they post their DAR.*</u>

To address these issues, we have offered amendments to clarify that the DAR may not be used as an admission of liability in California.[7]

d. <u>AB 1757's affirmative defense is unavailable for any defect that is "similar" to a previously identified issue.</u>

The simple truth is that certain inaccessibility errors are likely to re-occur … despite the best efforts of complying companies to catch them before they go live. As a workplace analogy: despite the existence of Grammarly and other word processing software – typos occur in email communications.

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[5] We have repeatedly proposed amendments to adjust this period to 150 days – which would allow for the majority of issues to be addressed and make the protections of **AB 1757** less illusory – but those amendments have not been accepted.

[6] *See* proposed Section55.565 (f)(4)(A).

[7] Notably, our amendments do not address the structural problem with public disclosures under California law inviting lawsuits in other jurisdictions under federal law. While we have attempted to create a solution to this problem, we have been unable to identify any solution. However, our amendments would have at least lessened the likely litigation abuse that would result from this provision <u>*inside*</u> of California.

Similarly, here: when a company makes a small mistake relating to accessibility, that company should be able to address the small issue by posting it on its DAR and rapidly fixing the inaccessible element.

However, **AB 1757** presently denies immunity for any accessibility issues that are "similar" to a prior issue posted on the DAR.[8] We expect this carve-out to invite litigation over whether a present defect is "similar" to a prior issue in some form. For example: a common accessibility issue for websites is that a picture may be posted without properly coded text describing its contents.[9] For companies who post thousands of new images on a weekly (or daily) basis, an occasional error will occur – and be corrected. Would the existence of a small error on one photo make any subsequent errors on any other photo too "similar" for protection?

Furthermore, **AB 1757** does not require the "similar" error be recent in time. As a result, a mistake made 10 years prior on a similar website element[10] could forever remove an entity's protection under the DAR.

Stepping back to the larger perspective: this provision reduces the benefits of utilizing a DAR for California businesses, as they may simply be flagging a defect for plaintiff's attorneys who will claim that defect is "similar" to a prior defect, and therefore subject to immediate suit.

(2) AB 1757 Creates New Pass-through for Website Creators Which Will Make it Harder and More Costly to Provide Website-related Services in California.

Section 3 of **AB 1757** creates a new form of pass-through liability for so-called "resource service providers," essentially allowing website end-users to skip suing a website that is inaccessible, and instead directly sue a company that helped create or maintain a portion of the website.

a. AB 1757 creates liability for online "Resource Service Providers" – even when those RSPs have no control over the content of a website.

AB 1757 defines "resource service providers" (RSPs) as an "… entity that, in exchange for money or any other form of remuneration, constructs, licenses, distributes, or maintains for online use any internet website or resource to be used within or in conjunction with an internet website." This definition applies very broadly – including all businesses that provide software or hardware services to other businesses to construct online resources, webpages, and particular website elements. Notably, **AB 1757** specifically exempts one particular group of RSPs which provide hardware support services[11] – which is appropriate because they do not control the content of the website.

However, **AB 1757** fails to exempt other RSPs who provide software services *but do not control the website's content*. This is important because a variety of businesses provide online software tools to help small businesses create their websites – but do not control the content of the website. The present text of **AB 1757** does not insulate those "building block"-style tools from subsequent lawsuits alleging that they are responsible for inaccessibility issues occurring in situations where they have no control. We are concerned that this will drive up the cost for such products, and make it harder for small businesses to create websites and connect with consumers.

b. AB 1757 creates new pass-through liability that is a massive litigation risk for companies which do not own or control the websites at issue.

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[8] *See* proposed Section 55.565(d)(2) ("(2) An entity shall not claim the affirmative defense . . . for a specific accessibility barrier that previously was identified by the entity in a digital accessibility report or that is so similar to a previously identified specific accessibility barrier that it has the same effect on a user as the previously identified specific accessibility barrier").

[9] This coded text is not visible to most viewers, but visually-impaired website users utilize a "reader" application, which reads this code and describes the photo to the user. For example: a picture of a red shirt would need to be coded for the text "red shirt" to allow the application to describe it. Without such coding, the reader would not be able to describe the image.

[10] For example: two colors that were too similar for color-blind users might have been used in contrast on a display 10 years prior. If the same mistake was made in the present – with two different colors that color-blind users could not distinguish – that would create liability even if an entirely different team was working to maintain the entity's website by then.

[11] Proposed section 55.566(e)(3)(B)(i).

Putting aside the overbroad definition of resource service providers, **AB 1757** allows RSPs to be sued by (1) their customers (businesses or websites who use/used their services); (2) the Attorney General; or (3) a private litigant who was affected by the inaccessible element in a website, whether or not the RSP was aware of the accessibility issue.

We do not oppose the right of customer-businesses to seek appropriate contribution if an RSP causes them to be sued. Indeed, indemnification in such a contract services situation is a normal part of business contracting. Nor do we oppose the involvement of the Attorney General in pursuing truly bad actors.

However, we do strongly oppose the creation of pass-through liability to allow plaintiffs' attorneys to sue an RSP because of a defect in a customer/former customer's website *which the RSP may be totally unaware of*. We view this new pass-through liability as only adding to the already-existing issue of shakedown litigation threats in the website accessibility space. Moreover, this new liability is likely to push RSP's out of providing website-related services, and thereby make it harder for small businesses to set up their own websites.

c. AB 1757's present text creates liability for RSPs even if they have identified a known defect in their own DAR and are working to repair It.

As presently written, **AB 1757** appears to create liability *even for compliant companies* who utilize the DAR process. Specifically, **AB 1757** provides that it is:

"…unlawful for a resource service provider …to intentionally, negligently, recklessly, or knowingly do any of the following:
(1) Construct, license, distribute, or maintain for online use an internet website that is not accessible.
(2) Construct, license, distribute, or maintain … any resource or part of an internet website that, when used by the entity in accordance with any instructions provided by the resource provider, causes an entity's internet website to be inaccessible."

This text notably *does not protect* an RSP who is aware of an inaccessible element, is working to fix it, and has appropriately listed it on a DAR. That RSP would *still* be in violation of **AB 1757**'s text because they would still be "knowingly" "maintain[ing]" an inaccessible resource during that 90-day period … *despite actively working to address the inaccessibility and complying with **AB 1757**'s DAR requirements*.

In other words: **AB 1757** creates new pass-through liability for a range of companies who design, maintain, or provide resources for websites. And even if such websites will eventually prevail in litigation, **AB 1757** will create new litigation costs for such businesses just to defend the resulting lawsuits.

Conclusion: Despite Months of Discussions, Drafts, and Redlines – Our Concerns Have Not Been Resolved.

Our coalition has worked closely with proponents of this legislation from late 2023 to the present to address the above-identified concerns, including reviewing multiple drafts, participating in multiple stakeholder meetings, and sharing multiple responsive redlines to attempt to address our concerns. However, we have not been able to resolve the above concerns – as well as many others – and so we must now publicly state our opposition to **AB 1757**.

Sincerely,

Robert Moutrie
Senior Policy Advocate
on behalf of

Acclamation Insurance Management Services, Philip Vermeulen
Allied Managed Care, Philip Vermeulen
American Petroleum and Convenience Store Association, Bobbie Singh-Allen
California Alliance of Family Owned Businesses, Courtney Gladfelty

California Association of Sheet Metal and Air Conditioning Contractors National Association, Emily Mills
California Bankers Association, Jason Lane
California Chamber of Commerce, Robert Moutrie
California Craft Brewers Association, Chris Walker
California Credit Union League, Emily Udell
California Hotel & Lodging Association, A.J. Rossitto
California Water Association, Jennifer Capitolo
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Coalition of Small and Disabled Veteran Businesses, Philip Vermeulen
Computer & Communications Industry Association, Naomi Padron
Flasher Barricade Association, Philip Vermeulen
Internet Works, Austin Heyworth
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