

AMENDMENTS TO LB538

(Amendments to Standing Committee amendments, AM900)

Introduced by Lathrop, 12.

1 1. Strike amendment 1 and insert the following new amendment:

2 1. Strike the original sections and insert the following new
3 sections:

4 Section 1. Section 28-1107, Reissue Revised Statutes of Nebraska, is
5 amended to read:

6 28-1107 (1) A person commits the offense of possession of a gambling
7 device if he or she manufactures, sells, transports, places, possesses,
8 or conducts or negotiates any transaction affecting or designed to affect
9 ownership, custody, or use of any gambling device, knowing that it shall
10 be used in the advancement of unlawful gambling activity.

11 (2) The owner or operator of a retail establishment who is not a
12 manufacturer, distributor, or seller of mechanical amusement devices as
13 defined under the Mechanical Amusement Device Tax Act, shall have an
14 affirmative defense to possession of a gambling device described in
15 subsection (1) of this section if the device bears an unexpired
16 mechanical amusement device decal as required by such act. However, such
17 affirmative defense may be overcome if the owner or operator had actual
18 knowledge that operation of the device constituted unlawful gambling
19 activity at any time such device was operated on the premises of the
20 retail establishment.

21 ~~(2) This section shall not apply to any coin-operated mechanical~~
22 ~~gaming device, computer gaming device, electronic gaming device, or video~~
23 ~~gaming device which has the capability of awarding free games, which is~~
24 ~~intended to be played and is in fact played for amusement only, and which~~
25 ~~may allow the player the right to replay such gaming device at no~~
26 ~~additional cost, which right to replay shall not be considered money or~~

1 ~~property, except that such mechanical game (a) can be discharged of~~
2 ~~accumulated free replays only by reactivating the game for one additional~~
3 ~~play for each accumulated free replay and (b) makes no permanent record~~
4 ~~directly or indirectly of free replays so awarded.~~

5 (3) Notwithstanding any other provisions of this section, any
6 mechanical game or device classified by the federal government as an
7 illegal gambling device and requiring a federal Gambling Device Tax Stamp
8 as required by the Internal Revenue Service in its administration of 26
9 U.S.C. 4461 and 4462, amended July 1, 1965, by Public Law 89-44, are
10 hereby declared to be illegal ~~and excluded from the exemption granted in~~
11 ~~this section.~~

12 (4) ~~(3)~~ Possession of a gambling device is a Class II misdemeanor.

13 Sec. 2. Section 77-3001, Reissue Revised Statutes of Nebraska, is
14 amended to read:

15 77-3001 For purposes of the Mechanical Amusement Device Tax Act,
16 unless the context otherwise requires:

17 (1) Cash device means any mechanical amusement device capable of
18 awarding (a) cash, (b) anything redeemable for cash, (c) gift cards,
19 credit, or other instruments which have a value denominated by reference
20 to an amount of currency, or (d) anything redeemable for anything
21 described in subdivision (c) of this subdivision;

22 (2) Department means the Department of Revenue;

23 (3) Distributor means any person who sells, leases, or delivers
24 possession or custody of a machine or mechanical device to operators
25 thereof for a consideration either directly or indirectly received;

26 (4) Mechanical amusement device means any machine which, upon
27 insertion of a coin, currency, credit card, or substitute into the
28 machine, operates or may be operated or used for a game, contest, or
29 amusement of any description, such as, by way of example, but not by way
30 of limitation, pinball games, shuffleboard, bowling games, radio-ray
31 rifle games, baseball, football, racing, boxing games, electronic video

1 games of skill, and coin-operated pool tables. Mechanical amusement
2 device also includes game and draw lotteries and coin-operated automatic
3 musical devices. Mechanical amusement device does not mean vending
4 machines which dispense tangible personal property, devices located in
5 private homes for private use, pickle card dispensing devices which are
6 required to be registered with the department pursuant to section
7 9-345.03, or devices which are mechanically constructed in a manner that
8 would render their operation illegal under the laws of the State of
9 Nebraska;

10 (5) Operator means any person who operates a place of business in
11 which a machine or device owned by him or her is physically located or
12 any person who places and who either directly or indirectly controls or
13 manages any machine or device;

14 (6) (1) Person means an individual, partnership, limited liability
15 company, society, association, joint-stock company, corporation, estate,
16 receiver, lessee, trustee, assignee, referee, or other person acting in a
17 fiduciary or representative capacity, whether appointed by a court or
18 otherwise, and any combination of individuals;

19 ~~(2) Mechanical amusement device means any machine which, upon~~
20 ~~insertion of a coin, currency, credit card, or substitute into the~~
21 ~~machine, operates or may be operated or used for a game, contest, or~~
22 ~~amusement of any description, such as, by way of example, but not by way~~
23 ~~of limitation, pinball games, shuffleboard, bowling games, radio ray~~
24 ~~rifle games, baseball, football, racing, boxing games, and coin-operated~~
25 ~~pool tables. Mechanical amusement device also includes game and draw~~
26 ~~lotteries and coin-operated automatic musical devices. The term does not~~
27 ~~mean vending machines which dispense tangible personal property, devices~~
28 ~~located in private homes for private use, pickle card dispensing devices~~
29 ~~which are required to be registered with the Department of Revenue~~
30 ~~pursuant to section 9-345.03, or devices which are mechanically~~
31 ~~constructed in a manner that would render their operation illegal under~~

1 the laws of the State of Nebraska;

2 ~~(3) Operator means any person who operates a place of business in~~
3 ~~which a machine or device owned by him or her is physically located or~~
4 ~~any person who places and who either directly or indirectly controls or~~
5 ~~manages any machine or device;~~

6 ~~(4) Distributor means any person who sells, leases, or delivers~~
7 ~~possession or custody of a machine or mechanical device to operators~~
8 ~~thereof for a consideration either directly or indirectly received;~~

9 ~~(7) (5) Whenever in the act, the words machine or device are used,~~
10 ~~they refer to mechanical amusement device; and~~

11 (8) Whenever in the act, the words electronic video games of skill,
12 games of skill, or skill-based devices are used, they refer to mechanical
13 amusement devices which produce an outcome predominantly caused by skill
14 and not chance; and

15 ~~(9) (6) Whenever in the act, the words machine, device, person,~~
16 ~~operator, or distributor are used, the words in the singular include the~~
17 ~~plural and in the plural include the singular.~~

18 Sec. 3. (1)(a) The Tax Commissioner or his or her agents or
19 employees, at the direction of the Tax Commissioner, or any peace officer
20 of this state may seize, without a warrant, any mechanical amusement
21 device if there is cause to believe such device is not in compliance with
22 the Mechanical Amusement Device Tax Act or any rules and regulations
23 adopted and promulgated under the act or if the department determines the
24 response to a request for information is materially deficient without
25 good cause. In addition to seizure, any person placing in service or
26 operating a device constituting a game of chance within this state shall
27 be subject to a penalty of one thousand dollars for each day of such
28 operation.

29 (b) For purposes of this subsection, a mechanical amusement device
30 is subject to seizure and penalties as if it were a game of chance if:

31 (i) The mechanical amusement device is a cash device; and

1 (ii) The mechanical amusement device does not bear an unexpired
2 decal as required under the Mechanical Amusement Device Tax Act.

3 (c) This section does not apply to any device (i) used in any bingo,
4 lottery by the sale of pickle cards, or other lottery, raffle, or gift
5 enterprise conducted in accordance with the Nebraska Bingo Act, Nebraska
6 County and City Lottery Act, Nebraska Lottery and Raffle Act, Nebraska
7 Pickle Card Lottery Act, Nebraska Small Lottery and Raffle Act, State
8 Lottery Act, or section 9-701, (ii) used for a prize contest as defined
9 in section 28-1101, or (iii) specifically authorized by the laws of this
10 state.

11 (2) To receive a determination from the department that a cash
12 device is in compliance with the Mechanical Amusement Device Tax Act and
13 any rules and regulations adopted and promulgated under the act, a
14 manufacturer or distributor of the device shall:

15 (a) Submit an application to the Tax Commissioner containing
16 information regarding the device's location, software, Internet
17 connectivity, and configuration as may be required by the Tax
18 Commissioner;

19 (b) Submit an application fee of five hundred dollars;

20 (c) Provide a specimen of the proposed device;

21 (d) Provide all supporting evidence, including a report by an
22 independent testing authority preapproved by the Tax Commissioner, to the
23 Tax Commissioner indicating that, under all configurations, settings, and
24 modes of operation, operation of the device constitutes a game of skill
25 and not a game of chance and the use, operation, sale, or manufacture of
26 the device would not constitute a violation of section 28-1107; and

27 (e) Provide an affidavit from the distributor affirming that no
28 functional changes in hardware or software will be made to the approved
29 device without further approval from the Tax Commissioner.

30 (3) The Tax Commissioner shall issue a response in writing to the
31 applicant within forty-five days after the applicant has completed and

1 submitted all application requirements. The Tax Commissioner's response
2 shall state the reason for any denial or the reasons a determination
3 cannot be made.

4 (4)(a) A device shall not be considered a game of skill if one or
5 more of the following apply:

6 (i) The ability of any player to succeed at the game played on the
7 device is impacted by the number or ratio of prior wins to prior losses
8 of players playing such device;

9 (ii) The ability of the player to succeed at the game played on the
10 device is impacted by the ability of any person to set a specified win-
11 loss ratio for the device or by the device having a predetermined win-
12 loss percentage;

13 (iii) The outcome of the game played on the device can be controlled
14 by a source other than any player playing the device;

15 (iv) The success of any player is or may be determined by a chance
16 event which cannot be altered by player action;

17 (v) There is no possibility for the player to win every game played
18 on the device or there are unwinnable games or game modes on the device;

19 (vi) The ability of any player to succeed at the game played on the
20 device requires the exercise of skill that no reasonable player could
21 exercise; or

22 (vii) The primary determination of the prize amount is determined by
23 the presentation or generation of a particular puzzle or group of symbols
24 dealt to the player and the player does not have control over the puzzle
25 or group of symbols presented.

26 (b) For purposes of this subsection, reasonable player means a
27 player with an average level of intelligence, physical and mental skills,
28 reaction time, and dexterity.

29 (5) The department or any court considering whether a gambling
30 device is a game of skill may consider:

31 (a) The results of an analysis by any independent testing authority

1 preapproved by the Tax Commissioner to evaluate the reaction time
2 required for a player of a particular game on such device to perform the
3 tasks required by the game to win; or

4 (b) The results of an analysis by any independent testing authority
5 preapproved by the Tax Commissioner to evaluate factors set forth by the
6 Tax Commissioner, other than reaction time, required for the player of a
7 particular game on such device to perform the tasks required by the game
8 to win.

9 (6) Factors which are not sufficient indications of a skill-based
10 game include, but are not limited to:

11 (a) Whether a comprehensive list of prizes or outcomes is offered to
12 the player or whether all outcomes are drawn from a finite pool of
13 predetermined outcomes or starting positions;

14 (b) Whether a player can increase his or her chance of winning based
15 on knowledge of probabilities in general or the probabilities of any
16 particular prize or outcome in a game or on a device;

17 (c) Whether a player can simply choose not to play before committing
18 money or credits; or

19 (d) A game task consisting solely of moving a symbol up or down,
20 replacing one symbol with another, or any similar action, with or without
21 a timer.

22 (7) Upon approval of an application based on a determination that
23 the mechanical amusement device is a game of skill and not a game of
24 chance, the Tax Commissioner shall issue a mechanical amusement device
25 decal for the device as configured and as provided in subsection (8) of
26 this section. No mechanical amusement device decal shall be issued for
27 any cash device unless the department has determined that such device is
28 a game of skill and not a game of chance and that the manufacture, sale,
29 transport, placement, possession, or operation of such device does not
30 constitute a violation of section 28-1107. If the Tax Commissioner does
31 not approve the application for the device, the application shall be

1 denied and the operator shall have the opportunity for an administrative
2 hearing before the Tax Commissioner at which evidence may be presented on
3 the issue of whether the device is specifically authorized by law and is
4 not a gambling device as defined in section 28-1101. After such hearing,
5 the Tax Commissioner shall enter a final decision approving or denying
6 the application. The Tax Commissioner's final decision may be appealed,
7 and the appeal shall be in accordance with the Administrative Procedure
8 Act.

9 (8)(a) Upon approval of a specimen of a mechanical amusement device
10 as a game of skill under this section, the department may issue a
11 mechanical amusement device decal for each such device:

12 (i) If certified by the manufacturer to be functionally identical in
13 both hardware and software configurations to the specimen provided to the
14 department; and

15 (ii) If the application fee described in subdivision (2)(b) of this
16 section and the annual decal fee described in subdivision (b) of this
17 subsection have been paid.

18 (b) The owner or operator of a cash device shall pay an annual decal
19 fee of two hundred fifty dollars to the department for each device in
20 operation in Nebraska. The decal issued under this section shall be
21 distinct from other decals issued by the department for mechanical
22 amusement devices that are not required to be evaluated under this
23 section. Regardless of the issuance of a decal by the department, no
24 device shall be considered in compliance if it does not bear an unexpired
25 decal in a conspicuous place.

26 (9) The application process described in this section shall not be
27 construed to limit further investigation by the department or the
28 issuance of further regulations to promote compliance after the
29 application process is completed. At any point after a determination of
30 skill by the department, the department may request from the
31 manufacturer, distributor, or operator information about any device in

1 operation in this state, including, but not limited to, information
2 regarding currently operable source code, changes to software or
3 hardware, and communications from or to the device over the Internet. A
4 manufacturer, distributor, or operator that receives a request shall
5 respond with all responsive information in its possession or control
6 within fifteen business days.

7 Sec. 4. Section 77-3006, Reissue Revised Statutes of Nebraska, is
8 amended to read:

9 77-3006 The administration of the Mechanical Amusement Device Tax
10 Act provisions of sections 77-3001 to 77-3011 is hereby vested in the Tax
11 Commissioner of the State of Nebraska subject to other provisions of law
12 relating to the Tax Commissioner. The Tax Commissioner may prescribe,
13 adopt and promulgate, and enforce rules and regulations relating to the
14 administration and enforcement of the act the provisions of sections
15 77-3001 to 77-3011, and may delegate authority to his or her
16 representatives to conduct hearings, or perform any other duties imposed
17 under the act. The Tax Commissioner may adopt and promulgate rules and
18 regulations necessary to carry out section 3 of this act provisions of
19 sections 77-3001 to 77-3011.

20 Sec. 5. Section 77-3007, Reissue Revised Statutes of Nebraska, is
21 amended to read:

22 77-3007 (1) The payment of the tax imposed by the Mechanical
23 Amusement Device Tax Act provisions of sections 77-3001 to 77-3011 shall
24 be evidenced by a separate decal for each device signifying payment of
25 the tax, in a form prescribed by the Tax Commissioner.

26 (2) Every operator shall place such decal in a conspicuous place on
27 each device to denote payment of the tax for each device for the current
28 year.

29 Sec. 6. Section 77-3008, Reissue Revised Statutes of Nebraska, is
30 amended to read:

31 77-3008 Nothing in the Mechanical Amusement Device Tax Act sections

1 ~~77-3001 to 77-3011~~ shall be construed to limit, usurp, or repeal any
2 power to tax granted to the political subdivisions and municipalities of
3 the State of Nebraska by the laws and Constitution of ~~the State of~~
4 Nebraska.

5 Sec. 7. Section 77-3010, Reissue Revised Statutes of Nebraska, is
6 amended to read:

7 77-3010 Prosecutions for any violations of the Mechanical Amusement
8 Device Tax Act sections ~~77-3001 to 77-3011~~ shall be brought by the
9 Attorney General or county attorney in the county in which the violation
10 occurs. Any prosecution for the violation of any of the provisions of the
11 act sections ~~77-3001 to 77-3011~~ shall be instituted within three years
12 after the commission of the offense.

13 Sec. 8. Section 77-3011, Reissue Revised Statutes of Nebraska, is
14 amended to read:

15 77-3011 Sections 77-3001 to 77-3011 and section 3 of this act shall
16 be known and may be cited as the Mechanical Amusement Device Tax Act.

17 Sec. 9. This act becomes operative on January 1, 2020.

18 Sec. 10. Original sections 28-1107, 77-3001, 77-3006, 77-3007,
19 77-3008, 77-3010, and 77-3011, Reissue Revised Statutes of Nebraska, are
20 repealed.