

LEGISLATURE OF NEBRASKA
ONE HUNDRED SIXTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 538

Introduced by Lathrop, 12.

Read first time January 22, 2019

Committee: General Affairs

- 1 A BILL FOR AN ACT relating to gambling; to amend sections 28-1107 and
2 77-3001, Reissue Revised Statutes of Nebraska; to change provisions
3 relating to possession of a gambling device; to redefine mechanical
4 amusement device under the Mechanical Amusement Device Tax Act; to
5 provide for approval of certain mechanical amusement devices by, and
6 provide duties for, the Department of Revenue as prescribed; to
7 harmonize provisions; and to repeal the original sections.
8 Be it enacted by the people of the State of Nebraska,

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

3 28-1107 (1) A person commits the offense of possession of a gambling
4 device if he or she manufactures, sells, transports, places, possesses,
5 or conducts or negotiates any transaction affecting or designed to affect
6 ownership, custody, or use of any gambling device, knowing that it shall
7 be used in the advancement of unlawful gambling activity.

8 (2) Intent under subsection (1) of this section is established if:

9 (a) The gambling device is capable of awarding:

10 (i) Cash;

11 (ii) Anything redeemable for cash;

12 (iii) Gift cards, credit, or other instruments which have a value
13 denominated by reference to an amount of currency; or

14 (iv) Anything redeemable for anything described in subdivisions (a)
15 (i) through (iii) of this subsection; and

16 (b) The gambling device does not bear an unexpired mechanical
17 amusement device stamp as required under the Mechanical Amusement Device
18 Tax Act.

19 (3) ~~(2)~~ This section shall not apply to any coin-operated mechanical
20 gaming device, computer gaming device, electronic gaming device, or video
21 gaming device which has the capability of awarding free games, which is
22 intended to be played and is in fact played for amusement only, and which
23 may allow the player the right to replay such gaming device at no
24 additional cost, which right to replay shall not be considered money or
25 property, except that such mechanical game (a) can be discharged of
26 accumulated free replays only by reactivating the game for one additional
27 play for each accumulated free replay and (b) makes no permanent record
28 directly or indirectly of free replays so awarded. Notwithstanding any
29 other provisions of this section, any mechanical game or device
30 classified by the federal government as an illegal gambling device and
31 requiring a federal Gambling Device Tax Stamp as required by the Internal

1 Revenue Service in its administration of 26 U.S.C. 4461 and 4462, amended
2 July 1, 1965, by Public Law 89-44, are hereby declared to be illegal and
3 excluded from the exemption granted in this section.

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

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

7 77-3001 For purposes of the Mechanical Amusement Device Tax Act,
8 unless the context otherwise requires:

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

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

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

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

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

6 (6) Whenever in the act, the words machine, device, person,
7 operator, or distributor are used, the words in the singular include the
8 plural and in the plural include the singular.

9 Sec. 3. (1) If any mechanical amusement device is capable of
10 awarding (a) cash, (b) anything redeemable for cash, (c) gift cards,
11 credit, or other instruments which have a value denominated by reference
12 to an amount of currency, or (d) anything redeemable for anything
13 described in subdivision (a), (b), or (c) of this subsection, no tax
14 stamp shall be issued unless, by determination of the Department of
15 Revenue, the operation of the device constitutes a game of skill and not
16 a game of chance and the use, operation, sale, or manufacture of the
17 device would not constitute a violation of section 28-1107.

18 (2) The Tax Commissioner may adopt and promulgate such rules and
19 regulations as deemed necessary and proper for the successful and
20 efficient regulation of skill-based devices and to prohibit devices which
21 constitute a game of chance. The application process described in this
22 section shall not be construed to limit further investigation by the
23 Department of Revenue or the issuance of further regulations to promote
24 compliance after the application process is completed.

25 (3) To receive a determination from the Department of Revenue as
26 described in subsection (1) of this section, a manufacturer, distributor,
27 operator, or owner of the device shall:

28 (a) Submit an application to the Tax Commissioner containing
29 information regarding the device's location, software, Internet
30 connectivity, and configuration as may be required by the Tax
31 Commissioner;

1 (b) Provide a specimen of the proposed device; and

2 (c) Prove by a preponderance of the evidence to the Tax Commissioner
3 at the operator's expense that, under all configurations, settings, and
4 modes of operation, operation of the device constitutes a game of skill
5 and not a game of chance and the use, operation, sale, or manufacture of
6 the device would not constitute a violation of section 28-1107.

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

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

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

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

16 (iv) The ability of any player to succeed at the game played on the
17 device is impacted by game features not visible or known to the
18 reasonable player; or

19 (v) The ability of any player to succeed at the game played on the
20 device is impacted by the exercise of skill that no reasonable player
21 could exercise.

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

25 (5) Other factors which may be considered to determine if a device
26 is skill-based include, but are not limited to:

27 (a) The results of analysis by any independent testing authority
28 approved by the Tax Commissioner to evaluate the reaction time required
29 for a player of a particular game on such device to consistently win;

30 (b) The results of analysis by any independent testing authority
31 approved by the Tax Commissioner to evaluate the level of skill, other

1 than reaction time, required for the player of a particular game on such
2 device to consistently win; or

3 (c) Whether the game played on such device can be completed without
4 physical interaction by the player or the degree of physical interaction
5 with the device or its components. Depressing buttons or other input
6 devices is physical interaction for purposes of this subdivision, except
7 that merely activating the device is not.

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

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

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

16 (c) Whether a player can increase his or her chance of winning
17 simply by skipping certain puzzles or choosing not to play.

18 (7) Upon approval by the Department of Revenue, the Tax Commissioner
19 shall submit notice of such determination to the Attorney General for
20 review. If the Attorney General does not object within thirty days after
21 receiving such notification, the Tax Commissioner shall issue the tax
22 stamp for the device as configured. If the Attorney General objects or
23 the Tax Commissioner determines that the device should not be approved,
24 the operator shall have the opportunity for an administrative hearing
25 before the Tax Commissioner at which evidence may be presented on the
26 issue of whether the device is specifically authorized by law and is not
27 a gambling device as defined in section 28-1101. After such hearing, the
28 Tax Commissioner shall enter a final decision approving or denying the
29 exemption. The Tax Commissioner's final decision may be appealed, and the
30 appeal shall be in accordance with the Administrative Procedure Act.

31 (8)(a) Upon approval of a specimen of a device as a game of skill,

1 the Department of Revenue may issue mechanical amusement device stamps
2 for such device:

3 (i) Certified by the manufacturer to be identical in both hardware
4 and software configurations to the specimen provided to the Department of
5 Revenue; and

6 (ii) For which the occupation tax described in section 77-3004 has
7 been paid.

8 (b) The stamp issued under this section shall be distinct from other
9 stamps issued by the Department of Revenue for mechanical amusement
10 devices that are not required to be evaluated under this section.
11 Regardless of the payment of the occupation tax or issuance of a stamp by
12 the Department of Revenue, no device shall be considered in compliance if
13 it does not bear an unexpired stamp in a conspicuous place.

14 Sec. 4. Original sections 28-1107 and 77-3001, Reissue Revised
15 Statutes of Nebraska, are repealed.