

LEGISLATURE OF NEBRASKA  
ONE HUNDRED FOURTH LEGISLATURE  
SECOND SESSION

**LEGISLATIVE BILL 1087**

Introduced by Davis, 43.

Read first time January 20, 2016

Committee: Revenue

1 A BILL FOR AN ACT relating to revenue and taxation; to amend section  
2 77-2701.13, Reissue Revised Statutes of Nebraska, and sections  
3 77-2701 and 77-2701.04, Revised Statutes Supplement, 2015; to change  
4 sales tax provisions relating to the definition of engaged in  
5 business in this state; to provide a penalty; to harmonize  
6 provisions; to provide an operative date; to provide severability;  
7 and to repeal the original sections.  
8 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 77-2701, Revised Statutes Supplement, 2015, is  
2 amended to read:

3 77-2701 Sections 77-2701 to 77-27,135.01, 77-27,235, and 77-27,236  
4 and section 4 of this act shall be known and may be cited as the Nebraska  
5 Revenue Act of 1967.

6 Sec. 2. Section 77-2701.04, Revised Statutes Supplement, 2015, is  
7 amended to read:

8 77-2701.04 For purposes of sections 77-2701.04 to 77-2713 and  
9 section 4 of this act, unless the context otherwise requires, the  
10 definitions found in sections 77-2701.05 to 77-2701.55 shall be used.

11 Sec. 3. Section 77-2701.13, Reissue Revised Statutes of Nebraska, is  
12 amended to read:

13 77-2701.13 Engaged in business in this state means any of the  
14 following:

15 (1) Maintaining, occupying, or using, permanently or temporarily,  
16 directly or indirectly, or through a subsidiary or agent, by whatever  
17 name called, an office, place of distribution, sales or sample room or  
18 place, warehouse, storage place, or other place of business in this  
19 state;

20 (2) Having any representative, agent, salesperson, canvasser, or  
21 solicitor operating in this state under the authority of the retailer or  
22 its subsidiary for the purpose of selling, delivering, or taking orders  
23 for any property;

24 (3) Deriving rentals from a lease of property in this state by any  
25 retailer;

26 (4) Soliciting retail sales of property from residents of this state  
27 on a continuous, regular, or systematic basis by means of advertising  
28 which is broadcast from or relayed from a transmitter within this state  
29 or distributed from a location within this state;

30 (5) Soliciting orders from residents of this state for property by  
31 mail, if the solicitations are continuous, regular, seasonal, or

1 systematic and if the retailer benefits from any banking, financing, debt  
2 collection, or marketing activities occurring in this state or benefits  
3 from the location in this state of authorized installation, servicing, or  
4 repair facilities;

5 (6) Being owned or controlled by the same interests which own or  
6 control any retailer engaged in business in the same or similar line of  
7 business in this state;~~or~~

8 (7) Maintaining or having a franchisee or licensee operating under  
9 the retailer's trade name in this state if the franchisee or licensee is  
10 required to collect the tax under the Nebraska Revenue Act of 1967; ~~or~~

11 (8) Engaging in an activity described in section 4 of this act.

12 Sec. 4. (1) In addition to the activities described in section  
13 77-2701.13, engaged in business in this state includes the selling,  
14 leasing, or delivering in this state, or any activity in this state in  
15 connection with the selling, leasing, or delivering in this state, of  
16 tangible personal property or taxable services for use, storage,  
17 distribution, or consumption within this state. Engaged in business in  
18 this state includes, but is not limited to, the following acts or methods  
19 of transacting business on a regular or systematic basis:

20 (a) Maintaining within this state, directly or indirectly or by an  
21 affiliate, an office, distribution facility, salesroom, warehouse,  
22 storage place, or other similar place of business, including the  
23 employment of a resident of this state who works from a home office in  
24 this state;

25 (b) Engaging in, either directly or indirectly through a marketplace  
26 provider, referrer, or other third party, direct response marketing  
27 targeted at this state. For purposes of this subdivision, direct response  
28 marketing includes, but is not limited to, sending, transmitting, or  
29 broadcasting of flyers, newsletters, telephone calls, targeted electronic  
30 mail, text messages, social media messages, targeted mailings;  
31 collecting, analyzing, and utilizing individual data on purchasers or

1 potential purchasers in this state; using information or software,  
2 including cached files, cached software, or other data tracking tools,  
3 that are stored on property in or distributed within this state; or  
4 conducting any other actions that use persons, tangible property,  
5 intangible property, digital files or information, or software in this  
6 state in an effort to enhance the probability that a person's contacts  
7 with a customer in this state will result in a sale to that customer; and

8 (c) Entering into one or more agreements under which a person or  
9 persons that have a nexus with this state, under the Commerce Clause of  
10 the United States Constitution, directly or indirectly refer potential  
11 purchasers of products to the seller for a commission or other  
12 consideration, whether by an Internet-based link or an Internet web site  
13 or otherwise. The activities described in this subdivision constitute  
14 "engaged in business in this state" regardless of whether or not the  
15 referral is related to the sale of tangible personal property or taxable  
16 services. An agreement under which a seller purchases advertisements from  
17 a person or persons in this state, to be delivered on television, radio,  
18 in print, on the Internet, or by any other medium, is not an agreement  
19 described in this subdivision unless the advertisement revenue paid to  
20 the person or persons in this state consists of commissions or other  
21 consideration that is based in whole or in part upon sales of products.

22 (2) Subdivision (1)(c) of this section does not apply if the seller  
23 can demonstrate that no person in this state with whom the seller has an  
24 agreement engaged in referral activity in this state on behalf of the  
25 seller that would satisfy the requirements of the Commerce Clause of the  
26 United States Constitution. In order to qualify for the safe harbor  
27 provided by this subdivision, the seller must:

28 (a) Be able to demonstrate that each in-state person with whom the  
29 seller has an agreement is prohibited from engaging in any solicitation  
30 activities in this state that refer potential customers to the seller;  
31 and

1       (b) Obtain annually a certification from each such in-state person  
2 or persons that the person or persons have complied with the prohibition  
3 stated in subdivision (2)(a) of this section. A person who intentionally  
4 or negligently provides an inaccurate certification is guilty of a Class  
5 I misdemeanor.

6       (3) A seller is also engaged in business in this state if any part  
7 of the sale process, including listing products for sale, soliciting,  
8 branding products, selling products, processing orders, fulfilling  
9 orders, providing customer service, or accepting or assisting with  
10 returns or exchanges, occurs in this state, regardless of whether that  
11 part of the process has been subcontracted to an affiliate or third  
12 party. The sale process does not include shipping via a common carrier.

13       (4) A seller is also engaged in business in this state if the seller  
14 offers its products for sale through one or more marketplaces operated by  
15 any marketplace provider that has a substantial nexus with this state.

16       (5) A seller is presumed to be engaged in business in this state if  
17 the total cumulative sales price of products sold to purchasers in this  
18 state exceeds ten thousand dollars in the immediately preceding calendar  
19 year and the seller either has a physical presence in or is registered to  
20 collect and remit sales tax in a state that is a member of the  
21 streamlined sales and use tax agreement. The seller is required to  
22 collect and remit sales and use tax unless it can prove that it does not  
23 have a nexus with this state under the Commerce Clause of the United  
24 States Constitution.

25       (6) A person is also presumed to be engaged in business in this  
26 state if such person is related to a person that has a nexus with this  
27 state under the Commerce Clause of the United States Constitution, and  
28 such related person:

29       (a) Sells under the same or a similar business name tangible  
30 personal property or taxable services similar to that sold by the person  
31 against whom the presumption is asserted;

1       (b) Maintains an office, distribution facility, salesroom,  
2 warehouse, storage place, or other similar place of business in this  
3 state to facilitate the delivery of tangible personal property or taxable  
4 services sold by the person against whom the presumption is asserted to  
5 such person's in-state customers;

6       (c) Uses, with consent or knowledge of the person against whom the  
7 presumption is asserted, trademarks, service marks, or trade names in  
8 this state that are the same or substantially similar to those used by  
9 the person against whom the presumption is asserted;

10       (d) Delivers, installs, or assembles tangible personal property in  
11 this state, or performs maintenance or repair services on tangible  
12 personal property in this state, which tangible personal property is sold  
13 to in-state customers by the person against whom the presumption is  
14 asserted;

15       (e) Facilitates the delivery of tangible personal property to in-  
16 state customers of the person against whom the presumption is asserted by  
17 allowing such customers to pick up tangible personal property sold by  
18 such person at an office, distribution facility, salesroom, warehouse,  
19 storage place, or other similar place of business maintained in this  
20 state; or

21       (f) Shares management, business systems, business practices, or  
22 employees with the person against whom the presumption is asserted, or  
23 engages in intercompany transactions with the person against whom the  
24 presumption is asserted related to the activities that establish or  
25 maintain the market in this state of the person against whom the  
26 presumption is asserted.

27       (7) For purposes of subsection (6) of this section, two persons are  
28 related if:

29       (a) Such persons are related to the remote seller within the meaning  
30 of subsections (b) and (c) of section 267 or section 707(b)(1) of the  
31 Internal Revenue Code; or

1       (b) Such persons have one or more ownership relationships and such  
2 relationships were designed with a principal purpose of avoiding the  
3 application of this section.

4       (8) The presumption set forth in subsection (6) of this section may  
5 be rebutted by a preponderance of evidence that, during the taxable  
6 period in question, the related person with a nexus under the Commerce  
7 Clause of the United States Constitution did not engage in any activities  
8 in this state that are sufficient under the Commerce Clause to establish  
9 a nexus in this state on behalf of the person against whom the  
10 presumption is asserted.

11       (9) A marketplace provider or a referrer is subject to this state's  
12 sales and use tax jurisdiction if it performs any of the activities  
13 described in subsection (1), (3), (4), or (5) of this section.

14       (10) For purposes of this section:

15       (a) Marketplace provider includes any person who facilitates a  
16 retail sale by a retailer. For purposes of this subdivision, a  
17 marketplace provider facilitates a retail sale when the marketplace  
18 provider both (i) lists or advertises tangible personal property and  
19 services for sale in any forum, including a catalog or Internet web site,  
20 and (ii) either directly or indirectly through agreements or arrangements  
21 with third parties, collects receipts from the customer and transmits  
22 those receipts to the marketplace seller, whether or not the marketplace  
23 provider deducts any fees from the transmission of those receipts to the  
24 marketplace seller;

25       (b) Marketplace seller means a retailer that has any sales  
26 facilitated by a marketplace provider; and

27       (c) Referrer means every person who (i) contracts or otherwise  
28 agrees with a retailer to list multiple items of tangible personal  
29 property and services for sale and the sales price of those items in any  
30 forum, including a catalog or Internet web site, (ii) receives a fee,  
31 commission, or other consideration from a retailer for the listing, (iii)

1 transfers, via telephone, Internet link, or otherwise, a customer to the  
2 retailer or the retailer's web site to complete a purchase, and (iv) does  
3 not collect receipts from the customer for the transaction.

4 (11) Notwithstanding any section of law to the contrary, if the Tax  
5 Commissioner issues one or more assessments against a taxpayer due to the  
6 application of this section, any appeal may be made directly to the  
7 Supreme Court within sixty days after the date the Tax Commissioner  
8 issued the assessment if the primary issue raised by the taxpayer is the  
9 constitutionality of this section.

10 Sec. 5. This act becomes operative on January 1, 2017.

11 Sec. 6. If any section in this act or any part of any section is  
12 declared invalid or unconstitutional, the declaration shall not affect  
13 the validity or constitutionality of the remaining portions.

14 Sec. 7. Original section 77-2701.13, Reissue Revised Statutes of  
15 Nebraska, and sections 77-2701 and 77-2701.04, Revised Statutes  
16 Supplement, 2015, are repealed.