

ONE HUNDRED SIXTH LEGISLATURE - FIRST SESSION - 2019
COMMITTEE STATEMENT
LB538

Hearing Date: Monday February 11, 2019
Committee On: General Affairs
Introducer: Lathrop
One Liner: Change provisions relating to possession of a gambling device and provide for approval of certain mechanical amusement devices by the Department of Revenue

Roll Call Vote - Final Committee Action:
Advanced to General File with amendment(s)

Vote Results:
Aye: 5 Senators Arch, Blood, Brandt, Hunt, Wayne
Nay:
Absent:
Present Not Voting: 3 Senators Briese, Lowe, Moser

Oral Testimony:

Proponents:
Steve Lathrop
Nick Thielen
Calvin Brown

Representing:
Introducer
EHDV Management Group
Growth Unlimited Corp

Opponents:
Matt Kroeger
John Lindsay
Russell Westerhold
Tim Keigher

Representing:
All American Games
All American Games
Winners Marketing Inc.
Nebraska Petroleum Marketers & Convenience Store Assoc.

Neutral:
Nate Graz
Walt Radcliff
John Fox

Representing:
Nebraska Family Alliance
American Amusements Company
American Amusements Company

Summary of purpose and/or changes:

LB538 establishes an approval and regulatory process under the Department of Revenue for mechanical amusement devices that dispense cash prizes or similar awards with cash value, to determine and demonstrate if such device constitutes a game of chance or a game of skill. A game of chance would be considered a gambling device and would not be allowed. A game of skill would not be considered a gambling device and would be allowed, regulated and taxed under the Department of Revenue and Tax Commissioner.

LB538 makes the following changes by section:

Section One of the Bill: Amends Section 28-2207 to define intent for purposes of the offense of possession of a gambling device if it is established that the gambling device is capable of awarding:
Cash;

Anything redeemable for cash;

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

Anything redeemable for anything described above and

The gambling device does not bear an unexpired mechanical amusement device stamp as required under the Mechanical Amusement Device Tax Act.

Section Two of the Bill: Amends section 77-3001 to include electronic video games of skill in the definition for mechanical amusement device.

Section Three of the Bill: Creates a new section that regulates skill based devices and prohibits devices which constitute a game of chance. Such section provides if any mechanical amusement device is capable of awarding (a) cash, (b) anything redeemable for cash, (c) gift cards, credit, or other instruments which have a value denominated by reference to an amount of current, or (d) anything redeemable for anything described in subdivisions (a) (b) or (c), no tax stamp shall be issued unless, by determination of the Department of Revenue, the operation of the devices constitutes a game of skill and not a game of chance and the use, operation, sale or manufacture of the device would not constitute a violation of section 28-1107.

Provides the Tax Commissioner the authority to adopt and promulgate rules and regulations necessary and proper for the successful and efficient regulation of skill based devices to prohibit devices which constitute a game of chance. Specifies that the application process described should not limit the further investigation of the Department of Revenue or the issuance of further regulations to promote compliance after the application process is complete.

Sets out the application process required in order to receive a determination from the Department of Revenue a manufacturer, distributor, operator or owner of the device shall

a) Submit an application to the Tax Commissioner containing information on the devices location, software, internet connectivity, and confirmation as required by the Tax Commissioner

b) Provide a specimen of the proposed device

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

Sets out the circumstances under which a device would not be considered a game of skill. If one of more of the following apply a device would not be considered a game of skill:

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

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

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

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

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

Defines reasonable for purposes of this subsection as a player with an average level of intelligence, physical and mental skills, reaction time and dexterity.

Describes other factors which may be considered to determine if a device is skill based include but are not limited to:

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

(b) The results of analysis by any independent testing authority approved by the Tax Commissioner to evaluate the level

of skill, other than reaction time, required for the player of a particular game on a device to consistently win; or
(c) Whether the game played on such device can be completed without physical interaction by the player or the degree of physical interaction with the device or its components. Defines physical interaction as including depressing buttons or other input devices as physical interaction, except that merely activating the device is not physical interaction.

Describes factors which are not indications of a skill-based game to include but not be limited to:

- (a) Whether a comprehensive list of prizes or outcomes is offered to the player or whether all outcomes are drawn from a finite pool of predetermines outcomes or starting positions;
- (b) Whether a player can increase his or her chance of winning based on knowledge of probabilities in general or the probabilities of any particular prizes or outcome in a game or on a device; or
- (c) Whether a player can increase his or her chance of winning simply by skipping certain puzzles or choosing not to play.

Describes the approval and appeal process as follows: once approved by the Department of Revenue, the Tax Commissioner shall submit notice of such determination to the Attorney General for Review. If the Attorney General does not object within thirty days after receipt of such notification, the Tax Commissioner shall issue the tax stamp for the device. If the Attorney General objects or the Tax Commissioner determines that the device should not be approved the operator shall have the opportunity for an administrative hearing before the Tax Commissioner at which evidence may be presented on the issue of whether the device is specifically authorized by law and is not a gambling device as defined in 28-1101. After such hearing the Tax Commissioner shall enter a final decision approving or denying the exemption. The Tax Commissioners final decision may be appealed in accordance with the Administrative Procedure Act.

Describes the process of issuing the Tax Stamp as follows: Upon approval the Department of Revenue may issue mechanical amusement device stamps for such device if:

- (i) It is certified by the manufacturer to be identical in both hardware and software configuration to the specimen provided to the Department of revenue; and
- (ii) The occupation tax described in section 77-30004 has been paid

Specifies that the stamp issued under this section shall be distinct from other stamps issued by the department of Revenue for mechanical amusement devices that are not required to be evaluated under this section. No device shall be considered in compliance with this section if it does not bear an unexpired stamp in a conspicuous place.

Section Four of the Bill: Repeals the original sections.

Explanation of amendments:

AM900 makes the following changes:

Provides the owner or operator of a retail establishment an affirmative defense to possession of a gambling device if it has an unexpired tax decal as required which can be overcome if the owner or operator had actual knowledge that operation of the device constituted unlawful gambling activity at any time such device was operated on the premises of the retail establishment

Defines a cash device and separates out cash devices from other Mechanical Amusement Devices that are covered now

o Cash Device defined as any mechanical amusement device capable of awarding (a) cash, (b) anything redeemable for cash, (c) gift cards, credit, or other instruments which have a value denominated by reference to an amount of currency or (d) anything redeemable for anything described in subdivision (c).

Defines additional terms

o Department = Department of Revenue

- o Distributor = any person who sells, leases, or delivers possession or custody of a machine or mechanical device to operators thereof for a consideration either directly or indirectly received
- o Mechanical amusement device (original statutory definition)
- o Operator = any person who operates a place of business

Authorizes the department to seize any mechanical amusement device if there is cause to believe such device is not in compliance with the Mechanical Amusement Device Tax Act or any rules or regulations under the act or if the department determines the response to request for information is materially deficient without good cause. In addition to seizure, any person placing in service or operating a device constituting a game of chance within state shall be subject to a penalty of one thousand dollars for each day of such operation. For purposes of this act a mechanical amusement device is subject to seizure and penalties as if it were a game of chance if:

- o Device is a cash device; and
- o The device does not bear an unexpired decal as required under the Mechanical Amusement Device Tax Act

Provides an application process

Requires an affidavit from the distributor affirming that no functional changes in hardware or software will be made to the approved device without further approval by the Tax Commissioner

Sets 45 day requirement for the Department of Revenue to notify an applicant if application is approved or denied

Defines a game of skill and what department can use in determination of if device is a game of skill or chance

Sets an application fee of \$75

Allows for further investigation by the department to promote compliance after the application process is completed. The department at any time may request from the manufacturer, distributor, or operator information about any device in operation in this state, including but not limited to, information regarding currently operable source code, changes to software, or hardware and communications from the device over the internet. Such request shall be responded to with the requested information in its possession or control within fifteen business days.

Increases the fee in the tax that is paid each year for the device (occupation tax) for cash devices to \$250.

Sets out that tax commissioner must adopt rules and regulations for section three of this act by October 15, 2019

States that the bill becomes operative on Nov. 1, 2019

Tom Briese, Chairperson