

## LEGISLATIVE BILL 538

Approved by the Governor May 29, 2019

Introduced by Lathrop, 12.

A BILL FOR AN ACT relating to gambling; to amend sections 28-1107, 77-3001, 77-3006, 77-3007, 77-3008, 77-3010, and 77-3011, Reissue Revised Statutes of Nebraska, and section 77-5601, Reissue Revised Statutes of Nebraska, as amended by section 2, Legislative Bill 237, One Hundred Sixth Legislature, First Session, 2019; to change provisions relating to possession of a gambling device; to define and redefine terms under the Mechanical Amusement Device Tax Act; to provide for approval of certain mechanical amusement devices by, and provide duties and powers for, the Department of Revenue as prescribed; to restrict operation of a cash device as prescribed; to provide for the use of certain fees for enforcement; to authorize the manufacture, sale, transport, placement, possession, or entry into transactions involving certain cash devices as prescribed; to provide fees; to harmonize provisions; to provide an operative date; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

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

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

(2) The owner or operator of a retail establishment who is not a manufacturer, distributor, or seller of mechanical amusement devices as defined under the Mechanical Amusement Device Tax Act, shall have an affirmative defense to possession of a gambling device described in subsection (1) of this section if the device bears an unexpired mechanical amusement device decal as required by such act. However, such affirmative defense may 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.

~~(2) This section shall not apply to any coin-operated mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding free games, which is intended to be played and is in fact played for amusement only, and which may allow the player the right to replay such gaming device at no additional cost, which right to replay shall not be considered money or property, except that such mechanical game (a) can be discharged of accumulated free replays only by reactivating the game for one additional play for each accumulated free replay and (b) makes no permanent record directly or indirectly of free replays so awarded.~~

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

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

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

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

(1) Cash device means 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) of this subdivision;

(2) Department means the Department of Revenue;

(3) Distributor means 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;

(4) Mechanical amusement device means any machine which, upon insertion of a coin, currency, credit card, or substitute into the machine, operates or may be operated or used for a game, contest, or amusement of any description, such as, by way of example, but not by way of limitation, pinball games, shuffleboard, bowling games, radio-ray rifle games, baseball, football, racing, boxing games, electronic video games of skill, and coin-operated pool tables. Mechanical amusement device also includes game and draw lotteries and coin-operated automatic musical devices. Mechanical amusement device does not mean vending machines which dispense tangible personal property, devices located in private homes for private use, pickle card dispensing devices which are required to be registered with the department pursuant to section 9-345.03, or devices which are mechanically constructed in a manner that would render their

operation illegal under the laws of the State of Nebraska;

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

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

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

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

(4) Distributor means 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;

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

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

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

Sec. 3. (1)(a) The Tax Commissioner or his or her agents or employees, at the direction of the Tax Commissioner, or any peace officer of this state may seize, without a warrant, 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 and regulations adopted and promulgated under the act or if the department determines the response to a request for information is materially deficient without good cause. In addition to seizure, any person placing in service or operating a cash device constituting a game of chance within this state shall be subject to a penalty of one thousand dollars for each day of such operation.

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

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

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

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

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

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

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

(c) Provide a specimen of the proposed device;

(d) Provide all supporting evidence, including a report by an independent testing authority preapproved by the Tax Commissioner, to the Tax Commissioner indicating 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 the use, operation, sale, or manufacture of the device would not constitute a violation of section 28-1107; and

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

(3) The Tax Commissioner shall issue a response in writing to the applicant within forty-five days after the applicant has completed and submitted all application requirements. The Tax Commissioner's response shall state the reason for any denial or the reasons a determination cannot be made.

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

(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 device;

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

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

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

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

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

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

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

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

(a) The results of an analysis by any independent testing authority preapproved by the Tax Commissioner to evaluate the reaction time required for a player of a particular game on such device to perform the tasks required by the game to win; or

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

(6) Factors which are not sufficient indications of a skill-based game include, but are not 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 predetermined 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 prize or outcome in a game or on a device;

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

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

(7) Upon approval of an application based on a determination that the mechanical amusement device is a game of skill and not a game of chance, the Tax Commissioner shall issue a mechanical amusement device decal for the device as configured and as provided in subsection (8) of this section. No mechanical amusement device decal shall be issued for any cash device unless the department has determined that such device is a game of skill and not a game of chance and that the manufacture, sale, transport, placement, possession, or operation of such device does not constitute a violation of section 28-1107. If the Tax Commissioner does not approve the application for the device, the application shall be denied and 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 section 28-1101. After such hearing, the Tax Commissioner shall enter a final decision approving or denying the application. The Tax Commissioner's final decision may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act.

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

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

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

(b) An owner or operator of a retail establishment shall operate no more than four cash devices, except that an establishment with over four thousand square feet may have one cash device for each one thousand square feet, up to a maximum of fifteen cash devices.

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

(9) The application process described in this section shall not be construed to limit further investigation by the department or the issuance of

further regulations to promote compliance after the application process is completed. At any point after a determination of skill by the department, the department 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 or to the device over the Internet. A manufacturer, distributor, or operator that receives a request shall respond with all responsive information in its possession or control within fifteen business days.

(10)(a) Before any rules and regulations adopted and promulgated to carry out this section become effective, any manufacturer, distributor, or owner may continue to manufacture, sell, transport, place, possess, or enter into a transaction involving (i) cash devices already in operation at an establishment as of May 1, 2019, or (ii) other cash devices that are functionally identical to those already in operation at an establishment as of May 1, 2019.

(b) After any rules and regulations adopted and promulgated to carry out this section become effective, until any determination of compliance or noncompliance by the department, any manufacturer, distributor, or owner may continue to manufacture, sell, transport, place, possess, or enter into a transaction involving cash devices described in subdivision (10)(a) of this section if, within ninety days after the date when any such rules and regulations become effective, the manufacturer or distributor files an application with the department for such a determination.

(c) If a manufacturer or distributor receives a determination from the department that a device described in subdivision (10)(a) of this section is not in compliance with the Mechanical Amusement Device Tax Act, such manufacturer or distributor shall have thirty days after the issuance of that determination to remove any such device from operation in Nebraska.

(11) Application fees collected under subsection (2) of this section and annual decal fees collected under subsection (8) of this section shall be remitted to the State Treasurer for credit to the Department of Revenue Enforcement Fund.

Sec. 4. No cash device shall be operated using a credit card, charge card, or debit card. No person under nineteen years of age shall play or participate in any way in the operation of a cash device. No operator or employee or agent of any operator shall knowingly permit any individual under nineteen years of age to play or participate in any way in the operation of a cash device.

Sec. 5. Section 77-3006, Reissue Revised Statutes of Nebraska, is amended to read:

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

Sec. 6. Section 77-3007, Reissue Revised Statutes of Nebraska, is amended to read:

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

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

Sec. 7. Section 77-3008, Reissue Revised Statutes of Nebraska, is amended to read:

77-3008 Nothing in the Mechanical Amusement Device Tax Act sections 77-3001 to 77-3011 shall be construed to limit, usurp, or repeal any power to tax granted to the political subdivisions and municipalities of the State of Nebraska by the laws and Constitution of the State of Nebraska.

Sec. 8. Section 77-3010, Reissue Revised Statutes of Nebraska, is amended to read:

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

Sec. 9. Section 77-3011, Reissue Revised Statutes of Nebraska, is amended to read:

77-3011 Sections 77-3001 to 77-3011 and sections 3 and 4 of this act shall be known and may be cited as the Mechanical Amusement Device Tax Act.

Sec. 10. Section 77-5601, Reissue Revised Statutes of Nebraska, as amended by section 2, Legislative Bill 237, One Hundred Sixth Legislature, First Session, 2019, is amended to read:

77-5601 (1) From August 1, 2004, through October 31, 2004, there shall be conducted a tax amnesty program with regard to taxes due and owing that have not been reported to the Department of Revenue. Any person applying for tax amnesty shall pay all unreported taxes that were due on or before April 1,

2004. Any person that applies for tax amnesty and is accepted by the Tax Commissioner shall have any penalties and interest waived on unreported and delinquent taxes notwithstanding any other provisions of law to the contrary.

(2) To be eligible for the tax amnesty provided by this section, the person shall apply for amnesty within the amnesty period, file a return for each taxable period for which the amnesty is requested by December 31, 2004, if no return has been filed, and pay in full all taxes for which amnesty is sought with the return or within thirty days after the application if a return was filed prior to the amnesty period. Tax amnesty shall not be available for any person that is under civil or criminal audit, investigation, or prosecution for unreported or delinquent taxes by this state or the United States Government on or before April 16, 2004.

(3) The department shall not seek civil or criminal prosecution against any person for any taxable period for which amnesty has been granted. The Tax Commissioner shall develop forms for applying for the tax amnesty program, develop procedures for qualification for tax amnesty, and conduct a public awareness campaign publicizing the program.

(4) If a person elects to participate in the amnesty program, the election shall constitute an express and irrevocable relinquishment of all administrative and judicial rights to challenge the imposition of the tax or its amount. Nothing in this section shall prohibit the department from adjusting a return as a result of any state or federal audit.

(5)(a) Except for any local option sales tax collected and returned to the appropriate municipality and any motor vehicle fuel, diesel fuel, and compressed fuel taxes, which shall be deposited in the Highway Trust Fund or Highway Allocation Fund as provided by law, no less than eighty percent of all revenue received pursuant to the tax amnesty program shall be deposited in the General Fund; ~~and ten percent, not to exceed five hundred thousand dollars, shall be deposited in the Department of Revenue Enforcement Fund; and ten percent, not to exceed five hundred thousand dollars, shall be deposited in the Department of Revenue Enforcement Technology Fund.~~ Any amount that would otherwise be deposited in the Department of Revenue Enforcement Fund ~~or the Department of Revenue Enforcement Technology Fund~~ that is in excess of the five-hundred-thousand-dollar limitation shall be deposited in the General Fund.

(b) For fiscal year 2005-06, all proceeds in the Department of Revenue Enforcement Fund shall be appropriated to the department for purposes of employing investigators, agents, and auditors and otherwise increasing personnel for enforcement of the Nebraska Revenue Act of 1967. ~~For fiscal year 2005-06, all proceeds in the Department of Revenue Enforcement Technology Fund shall be appropriated to the department for the purposes of acquiring lists, software, programming, computer equipment, and other technological methods for enforcing the act.~~

(c) For fiscal years after fiscal year 2005-06, twenty percent of all proceeds received during the previous calendar year due to the efforts of auditors and investigators hired pursuant to subdivision (5)(b) of this section, not to exceed seven hundred fifty thousand dollars, shall be deposited in the Department of Revenue Enforcement Fund for purposes of employing investigators and auditors or continuing such employment for purposes of increasing enforcement of the act.

(d) Ten percent of all proceeds received during each calendar year due to the contracts entered into pursuant to section 77-367 shall be deposited in the Department of Revenue Enforcement Fund for purposes of identifying nonfilers of returns, underreporters, nonpayers of taxes, and improper or fraudulent payments.

(6)(a) The department shall prepare a report by April 1, 2005, and by February 1 of each year thereafter detailing the results of the tax amnesty program and the subsequent enforcement efforts. For the report due April 1, 2005, the report shall include (i) the amount of revenue obtained as a result of the tax amnesty program broken down by tax program, (ii) the amount obtained from instate taxpayers and from out-of-state taxpayers, and (iii) the amount obtained from individual taxpayers and from business enterprises.

(b) For reports due in subsequent years, the report shall include (i) the number of personnel hired for purposes of subdivision (5)(b) of this section and their duties, (ii) a description of lists, software, programming, computer equipment, and other technological methods ~~acquired pursuant to such subdivision~~ and the purposes of each, and (iii) the amount of new revenue obtained as a result of the new personnel and acquisitions during the prior calendar year, broken down into the same categories as described in subdivision (6)(a) of this section.

(7) ~~The Department of Revenue Enforcement Fund is and the Department of Revenue Enforcement Technology Fund are created.~~ Transfers may be made from the Department of Revenue Enforcement Fund to the General Fund at the direction of the Legislature. The Department of Revenue Enforcement Fund may receive transfers from the Civic and Community Center Financing Fund at the direction of the Legislature for the purpose of administering the Sports Arena Facility Financing Assistance Act. The Department of Revenue Enforcement Fund shall include any money credited to the fund (a) under section 77-2703, and such money shall be used by the Department of Revenue to defray the costs incurred to implement Legislative Bill 237, One Hundred Sixth Legislature, First Session, 2019, and (b) under the Mechanical Amusement Device Tax Act, and such money shall be used by the department to defray the costs incurred to implement and enforce this legislative bill and any rules and regulations adopted and promulgated to carry out this legislative bill ~~this legislative bill~~. Any money

~~in the Department of Revenue Enforcement Fund and the Department of Revenue Enforcement Technology Fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act. The Department of Revenue Enforcement Technology Fund shall terminate on July 1, 2006. Any unobligated money in the fund at that time shall be deposited in the General Fund.~~

(8) For purposes of this section, taxes mean any taxes collected by the department, including, but not limited to state and local sales and use taxes, individual and corporate income taxes, financial institutions deposit taxes, motor vehicle fuel, diesel fuel, and compressed fuel taxes, cigarette taxes, transfer taxes, and charitable gaming taxes.

Sec. 11. This act becomes operative on January 1, 2020.

Sec. 12. Original sections 28-1107, 77-3001, 77-3006, 77-3007, 77-3008, 77-3010, and 77-3011, Reissue Revised Statutes of Nebraska, and section 77-5601, Reissue Revised Statutes of Nebraska, as amended by section 2, Legislative Bill 237, One Hundred Sixth Legislature, First Session, 2019, are repealed.