

WHEN LESS IS MORE: Correcting Asymmetries in Gaming Regulation

By Mark Lerner



Gaming regulatory agencies might be expected to be supportive, even protective, of companies and employees based in their jurisdiction. It therefore comes as a surprise when gaming regulations burden local companies and employees more than similarly-situated companies and employees outside the jurisdiction. Asymmetries of this sort commonly involve gaming manufacturers with facilities both inside and outside the jurisdiction, although they can also occur with casino companies with operations in multiple jurisdictions. Such discrepancies are usually inadvertent, arising from outdated regulations or attempts to extend regulations to situations they were not originally meant to cover.

One example from Nevada gaming law of disparate treatment of local and foreign companies is gaming employee registration. Under Nevada's gaming employee registration process, "gaming employees" must register with the Nevada Gaming Control Board ("Board").¹ For casinos, the definition of "gaming employee" itemizes several specific jobs: employees who account for gaming revenue; dealers, floorpersons, and pit bosses; cashiers, change personnel, and count room workers; casino hosts; and more.² For gaming device manufacturers, the definition is not nearly as detailed. The definition does not enumerate positions. It says only that a gaming employee includes anyone "whose duties are directly involved with the manufacture, repair, sale or distribution of gaming devices."³ This definition could be construed to include every employee of a manufacturer: after all, what employee of a gaming device manufacturer could not be said to be involved with the manufacture, repair, sale, or distribution of gaming devices? No further guidance is found in the Nevada Gaming Commission regulations or on the Board's website, and informal advice from the Board over the years has not always been consistent. At least one manufacturer, lacking certainty as to who might or might not be included, at one time registered every Nevada employee, and other manufacturers have considered doing the same.

Manufacturers typically register employees who work on slot machine assembly lines, write code for slot machines and gaming systems, and sell slot machines. However, the law does not require manufacturers to register all such employees, but only those "in the State of Nevada."⁴ This geographic limitation makes sense for casinos, whose gaming employees rarely work outside the state where the casino is located. But manufacturers often have employees all over the world, and the geographic limitation creates a significant difference in the treatment of in-state and out-of-state employees. Employees in other states and countries escape the registration requirement altogether, even though their employers are licensed in Nevada and sell slot machines to Nevada casinos.⁵ Thus, the registration requirement as applied to manufacturers imposes burdens on Nevada workers and companies that are not imposed on out-of-state workers performing the same functions for the same companies.

Nevada's gaming device shipping rules are another example of regulations that burden in-state licensees more than similarly situated out-of-state licensees. Jurisdictions that regulate the shipment of gaming devices usually focus on

devices coming *into* the jurisdiction.⁶ One significant exception is Nevada.⁷ Nevada does not require reports of shipments into (or within) Nevada, even though there are more slots in Nevada than in any other jurisdiction. Instead, Nevada only requires reports of gaming devices that leave the state.⁸ This rule, or at least the current version of it, was adopted in 1989, after New Jersey became the first U.S. jurisdiction after Nevada to legalize casino gambling and just as the first riverboat and tribal casinos began to operate in other states.

The purpose of the Nevada shipping rule is not easily discerned and may be an anachronism. Shipping reports originally may have been required to determine whether Nevada licensees were sending products to jurisdictions where their operation was illegal. Or perhaps the reports were used to determine how many machines were going to emerging gaming jurisdictions viewed as possible competition for Nevada's industry. Either way, the passage of time has made those reasons obsolete. There are fewer and fewer jurisdictions remaining where slot machines are illegal, and it is doubtful that someone shipping machines illegally would report it. Also, slot machine shipments from Nevada are not a good measure of the economic impact of foreign operations, which may receive many shipments from places other than Nevada.

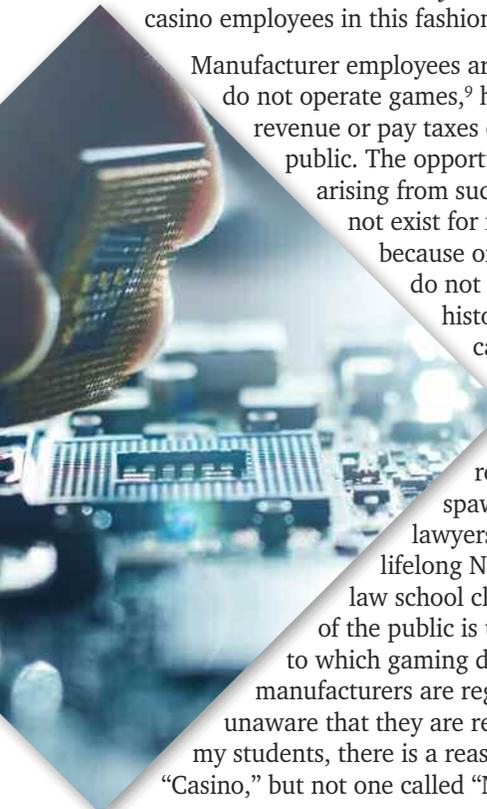
Regardless of its rationale, the shipping regulation by its terms applies only to companies that ship gaming devices from Nevada to other jurisdictions. A slot machine maker that ships from another state or country does not have to report its shipments under the Nevada regulation, even though the company is licensed in Nevada. There is no obvious justification for penalizing Nevada-based businesses in this way.

The regulatory reflex reaction to the asymmetries posed by the employee registration and gaming device shipping rules might be more regulation—expanding the rules to cover the employees, companies, and shipments not currently covered.

In the case of gaming employee registration, that would mean new legislation requiring registration for out-of-state employees of manufacturers licensed in Nevada. In the case of the shipping rules, it would mean requiring manufacturers licensed in Nevada to report shipments that originate outside the state. These reactions, however, would ignore alternatives suggested by the regulatory history, and would fail to take into account fundamental differences between casinos and manufacturers and their employees.



For example, with respect to employee registration, one might consider whether differences between casino and manufacturer employees recommend a different approach to registration. Casino employees who are required to register are those who handle cash (cashiers, count room workers); account for gaming revenue and taxes on it (accounting personnel); operate games (e.g., dealers, pit bosses, employees with slot machine keys); or otherwise interact with the public (casino hosts, security). Registration of such casino employees aligns with policies to protect the public and the interests of the state. History and popular perceptions of casinos also can furnish some justification for regulation of casino employees in this fashion.



Manufacturer employees are different. Manufacturers do not operate games,⁹ handle cash, earn gaming revenue or pay taxes on it, or interact with the public. The opportunities for misconduct arising from such activities in casinos do not exist for manufacturers. Perhaps, because of this, manufacturers also do not share the same clouded history and reputation as casinos. While most of the public is probably aware of casino gambling's colorful past and the regulatory institutions it spawned, informal surveys of lawyers and students, including lifelong Nevada residents, in my law school classes suggest that much of the public is unaware of the extent to which gaming devices and their manufacturers are regulated, and many are unaware that they are regulated at all. As I tell my students, there is a reason there's a movie called "Casino," but not one called "Manufacturer."

Thus, the policies that underlie the requirement that casino employees be registered do not align with concerns that might be presented by manufacturer employees. Fears about employees compromising slot machine integrity also seem misplaced. While old mechanical machines could sometimes be cheated, modern computerized devices and manufacturing assembly line and code review procedures make gaffing a machine difficult and detection likely. Even if not detected by modern manufacturing quality control processes, a machine that is not operating at par is quickly detected by casino personnel and the slot machine accounting systems they use. With the high risk of detection by different companies and people and the low chance for gain, the remote possibility that a slot machine might be cheated is not a good basis for registering every employee involved with its production.

In addition, the non-registration of out-of-state programmers, assemblers, and other manufacturing employees and contractors provides a natural laboratory for studying the regulation's effectiveness. Many unregistered, out-of-state employees work on products used in Nevada and have done so for many years. Those unregistered employees are not known to have caused any problems for Nevada. In that case,

the question is not whether the registration should be expanded to include out-of-state employees of manufacturers. Rather, the question is whether it is necessary to continue registering in-state employees. At least, thought should be given to specifying and requiring registration only for positions that pose realistic threats to state interests.

Expanding the Nevada shipping rules to cover shipments that originate outside the state also may not be the best option. Shipping rules are an enormous burden for manufacturers, and the necessity and effectiveness of shipping rules in general can be and has been debated.¹⁰ Certainly, then, before expanding the reports to cover shipments by Nevada licensees that originate outside the state, thought should be given to whether any problems have been caused by the lack of such reports in the past.¹¹ If not, then eliminating or at least reducing reports for shipments originating in-state would make more sense.

Regulations such as those mentioned not only impose unequal burdens on Nevada licensees and residents. They may also fail to achieve the desired results. The remedy may not be more regulation. Sometimes, less regulation may work better.



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¹ Nev. Rev. Stat. § 463.335(2).

² *Id.* § 463.0157(1).

³ *Id.* § 463.0157(1)(i).

⁴ *Id.* § 463.335(1)(a).

⁵ Independent contractors working for manufacturers are also exempt from the registration requirement, even if they do their work in Nevada. Nev. Gaming Comm'n Reg. 14.0215(8).

⁶ See, e.g., N.J. § 13:69E-1.23; Colo. Rev. Stat. § 44-30-803.

⁷ Mississippi, which copied many of Nevada's gaming statutes and regulations, also requires licensees to report shipments of machines leaving Mississippi. Miss. Admin. Code § 13-3:12.16. However, unless gaming manufacturers are based there or in any other jurisdictions with a comparable rule, as a practical matter this requirement only affects casinos that dispose of slot machines.

⁸ Nev. Gaming Comm'n Reg. 14.180.

⁹ This is true even for wide-area progressive systems. The manufacturer may pay WAP jackpots and may furnish the software and meters that calculate and display the jackpots. But typically the machines are operated (and lesser jackpots are paid by) the casinos at which the machines are located.

¹⁰ See David O. Stewart, *Three Reforms to Streamline Shipping of Gaming Machines* (American Gaming Association 2018), https://www.americangaming.org/sites/default/files/issues_files/Three%20Simple%20Steps%20to%20Streamline%20Shipping%20of%20Gaming%20Machines_2018.pdf; See also David O. Stewart, *Streamlining Shipping: Recommendations for Regulatory Reform* (American Gaming Association 2013), <https://www.americangaming.org/newsroom/press-releases/aga-calls-streamlined-shipping-rules>.

¹¹ Just as other jurisdictions that require reports of shipments into their jurisdictions might look to Nevada's long experience without such reports.