SB61 (BDR 38-320)

Introduction by Shelley Hendren, Administrator of the Rehabilitation Division

Department of Employment, Training and Rehabilitation (DETR)

Good afternoon. My name is Shelley Hendren. I serve as the Administrator for the Rehabilitation Division of DETR-the Department of Employment, Training and Rehabilitation. I’m here to present SB61, which proposes changes to NRS 426, the statutes related to the Blind Business Enterprise of Nevada (BEN) program. The BEN program is part of the Rehabilitation Division for which I have oversight. With me today is Deputy Administrator, Drazen Elez, who was previously the Chief of the BEN program. And current program Chief, Chris Mazza. They are here as subject matter experts should we need to call on their expertise.

Briefly, the BEN program provides entrepreneurial opportunities for individuals who are blind to own and operate vending facilities in public buildings and properties. These vending facilities may include vending machines, cafes, cafeterias, cart services, micro-markets, and gift and sundry shops. The program was established with passage of the Randolph-Sheppard Act in 1936, which gave priority of right to blind licensees in federal buildings and properties to own and operate these vending facilities. States across the nation then created state statutes, often called the “mini Randolph-Sheppard Act,” mirroring the federal law within state law. In fact, Nevada’s statutes have existed for more than 60 years. The state statutes provide the priority of right for blind licensees in state, local and municipal buildings and properties.

The BEN program is an extension of our vocational rehabilitation program. When there is a client of the Bureau of Services to Persons who are Blind or Visually Impaired who desires to be an entrepreneur, and who demonstrates that aptitude, he/she may be referred to the BEN program. If accepted, the BEN program provides intensive training to that individual, such as in budgeting, payroll, operations, inventory control, management practices, merchandising and safety. Then, after on-the-job training, these candidates are considered for licensure. Licensees may then bid on sites to own and operate. These programs exist because blind individuals are employed at a rate of 52.3%, as compared to 78.2% for those without a disability. Blind individuals are in poverty at a rate of nearly 30%.

In Nevada, our blind licensees own and operate over 400 vending machines, and 29 sites statewide. During typical times, they employ over 100 Nevadans. (Currently, due to the pandemic, we are at about half that number). Some sites you may recognize include the snack bars at many DMV locations, the Hoover Dam café and mercantile, and the Caucus Deli at the legislative building in Carson City.

With the proposed changes within SB61, we hope to: 1) provide clarity to the law’s intent; 2) define terms and use them consistently throughout the statute; 3) align state law more closely with the federal Randolph-Sheppard Act and federal regulations; and 4) add a new section on training.

I would like to go through SB61 by section. However, I will not be addressing every section. Many simply have conforming language or are non-substantive. I want to be mindful of your time, and present only the most impactful changes we are proposing in the bill.

Section 2 is the new section on training. Training of our blind licensees, including “upward mobility training,” is required in federal law. We wanted to codify this in state law due to its importance, and because we have an obligation to our licensees and to our public entity partners. To this point, Section 11, NRS 426.670 (1)(b), states that the Bureau is obligated to “select, train, license and assign qualified persons who are blind to operate vending facilities.”

Section 3 appears new as our dispute resolution process has been re-written. The repealed section is included at the back of the bill draft request. The prior process placed the DETR Director as the decision-maker in disputes, and even potentially involved the Governor. This new section provides for a more formal, uniform, and objective means to settle disputes between the Bureau and any public entity partner through the state’s Hearings Division. Prior to submitting this bill draft request, I spoke with the senior appeals officer with the Hearings Division, and we have their support for this addition to our statutes.

I’d like to move forward to Section 6, Definitions. As you can see, we’ve added several new definitions. We think it’s important to clarify these terms and thus, clarify the intent of the program. I want to specifically point out the definitions in subsections (4), (5) and (6). Subsection (4) is the definition for “public building or property.” We wanted to clarify the intent of the priority of right for our blind licensees. To do so, we included “public entity” in our definition. However, in adding a new term, we looked first to see if “public entity” was defined in NRS 426 (which it is not). Then we looked to any other state statutes connected to NRS or NAC 426 (which we did not find). Finally, we looked for definitions anywhere within state statutes. Here we found a few examples. We modeled our definition for “public entity” in subsection (5), after NRS 286.070 which defines a “public employer.”

Subsection (4) also includes exceptions for those meeting the definition, but who would be exempt from participating in the BEN program. All but two of these are the same as have already existed in NRS. Amendments to SB61 included adding 2 more exceptions in subsection (4). The first is for “an airport authority operating in this State and a department of aviation which is operated by a political subdivision of this State.” The 2nd exception is due to the fact that we are seeing new public/private partnerships, especially in and around Las Vegas, and based upon some concerns that were raised by public entities, we added this exception for any public building or property “that is leased to private entities for live entertainment purposes, as defined in NRS 368A.090.” The definition of live entertainment is expansive. We think that’s a benefit, as all the examples listed in NRS 368A.090 help to illustrate the meaning and intent of “live entertainment.”

Subsection (6) defines “vending facility.” This new definition is taken directly from the federal regulations, 34 CFR 395.1(x). There are concerns that we are expanding the definition, which is not the case. The previous definition included vending machines, cafeterias, and snack bars, for example. But it was written in such a way that was difficult to understand. To clarify, we are using the federal definition. We also changed the term vending “stand” to vending “facility,” as the term “stand” has often been misunderstood to strictly mean *vending machines*. Indeed, the federal definition uses the term “facility.”

Section 7 includes new language to further explain the meaning of the licensees’ priority of right. First, their priority is defined in Sec. 6, then Sec. 7, subsection (1)(a) adds language to explain the right of first refusal. Then finally, the process to survey a site and the process to accept or waive it is explained in Sec. 11, with additional waiver language in Sec. 7, subsection (2). I have a sample waiver that I’d be happy to provide the committee. Waivers indicate the date, type of vending facility being waived, and address of the public building or property being waived. Waivers contain conditional language, when appropriate. It’s typical for a waiver to include that it is good until the public entity decides to “alter the intended use of the space, or the scope of the concessions.” Section 7 requires the waiver be in writing and signed by me in the capacity as the Rehabilitation Administrator or my designee. With this authority in the law, we feel the waiver is a legally enforceable document. However, due to concerns raised by some public entities, the amendment added further clarifying language, “Waivers shall set forth the conditions under which the waiver may be revoked or modified.”

A concern was raised about Sec. 7, subsection (1)(a) which states that if a public entity has an agreement in place for which the Bureau notifies it that it intends to exercise its priority of right, that agreement is null. However, it is not our intention to retroactively break contracts between public entities and their vendors. The amendments included limiting this ability to the period after passage of SB61, if approved, and not retroactively.

Section 7, subsection (1)(e) is new. Since airports are exempted from participation in the BEN program in Section 6, this new (e) includes the ability to work with airports in the future to establish vending facilities under this program, should both parties agree.

SB61, as amended, proposes to change the notification period in Section 8 from 30 days to 60 days. This was a compromise with other public entities from our originally proposed 90 days. A 60-day notification period is the same notification period required in 34 CFR 395.31.

I’d like to jump to Section 11, NRS 426.670. This is a heavy section of the law and contains details on surveys, establishing vending facilities, the Bureau’s ability to create regulations, and costs that shall or shall not be paid by blind licensees.

Section 11, subsection (1)(a) details the survey process. The Bureau would conduct a survey of the potential site to determine if it might be a viable site for a blind licensee. As an example, if the public entity wanted a cafeteria, and a site survey indicated the public entity had 40 employees in the building and the building was not open to the public, a full cafeteria would likely be waived by the Bureau, assuming there would not be enough foot traffic for a cafeteria to be profitable. However, if the Bureau surveys the site and determines it viable for the vending facility, subsection (2) details the necessity for cooperation from the public entity to establish the vending facility. Amendments to SB61 in this section address a concern that was raised that the Bureau could insist on the vending facility whether the public entity wanted it or not. The amendment includes that the public entity shall cooperate with the Bureau to “discuss options for a vending facility,” and if an *agreement* is reached, shall cooperate with the Bureau to establish one or more vending facilities. We need the ability to share with the public entity what the Bureau and its entrepreneurs have to offer it. And we of course, would require agreement to install a vending facility.

SB61 adds more detail to our ability to create regulations in subsection (4) of Sec. 11. The added language is taken directly from the requirements within the federal regulations. Subsection (5) distinguishes costs that shall be paid by licensees and those that shall not. These are taken from the Randolph-Sheppard Act which put constraints on what may be paid out of the licensees’ set-aside funds. I should add that the Bureau in Nevada is totally self-funded by these entrepreneurs. Each pays a proportionate amount of their net proceeds into a set-aside fund. Payments out of that fund are strictly limited. This has been tested in Nevada courts on two occasions related to paying rent - in 1998 and in 2011, both of which upheld the Bureau’s position that licensees are prohibited from paying rent. This further enforces our position with SB61 that courts in Nevada consider our alignment with the Randolph-Sheppard Act and federal regulations.

In subsection (6), we added the ability to pay “incentives” in the rare instance that it might be appropriate. This is the only payment (outside of increased utility costs) where we may have flexibility. The term has been borrowed from the state of Tennessee’s mini Randolph-Sheppard Act, where it is in use in their agreements to run commissaries in county jails. However, as stated in subsection (6), the establishment of a vending facility “must not, under any circumstances, be contingent upon the payment of an incentive.”

Lastly, in Section 11, subsection (7) has been eliminated. Public entities expressed concerns, and ultimately, this is not the Bureau’s practice.

Section 12 adds a description of management services in subsection (3), which are allowable to be paid out of the set-aside or “enterprise” account. This is the federal description. The change in Subsection (5)(b) regarding the portion each licensee would receive if the program was liquidated was determined and agreed to by the Nevada Committee of Vendors who are Blind.

Section 13 has added language that ensures the continuity of services in a vending facility should the blind licensee have a period of disability or permanent disability. It outlines what would occur, including that the Bureau would run the site until the licensee was able to return, up to 6 months.

Section 14 allows the Bureau to establish vending facilities in private buildings, if appropriate and with the consent of the private party.

Lastly, I’d like to call your attention to Section 19. NRS 426.715 is the penalty section of the law. The only changes herein are conforming language. However, a concern was raised that according to this Section, public employees could be guilty of a misdemeanor for ordering a sandwich from a sandwich shop or a pizza from a pizzeria, and that the delivery drivers of that sandwich or pizza could also be guilty of a misdemeanor. This is not our intent. Therefore, amendments in this section are to alleviate this concern.

This concludes my introduction of SB61. Thank you for your time. I and my team would be happy to answer any questions you may have.