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# **FREE PASSES AT THE TRACKS**

**Bennett Liebman, Esq.  
Coordinator/Staff Attorney  
Racing and Gaming Law Program**

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## Free Passes at the Tracks

There was news this weekend that the New York Racing Association [NYRA} had ended its free pass policy. Citing and complaining about Section 236 of the Racing Law, NYRA at the beginning of February advised numerous people that they would no longer be entitled to free clubhouse admission. See Ed Fountaine, "Pletcher 35 Top TC Nominee List" New York Post, February 2, 2004; Jerry Bossert, "The Day at the Races," New York Daily News, February 2, 2004. These people – who would no longer receive free clubhouse admission - included former NYRA employees, spouses of horse owners, and people who hold telephone accounts from NYRA. Additionally, prior to February 1, there were numerous individual free passes given to regular fans.

NYRA advised people that its "actions are in response to an inquiry by our regulators about compliance with an obscure section of the racing law that prohibits anyone other than public officials, horsemen, employees and vendors from gaining free admission to the racetrack. Our legal department has recommended the strictest possible interpretation ... to demonstrate that we are in full compliance of a law that applies to all New York racetracks."

That particular law is Section 236 of the Racing Law which states that thoroughbred racing associations (and that would include Finger Lakes and NYRA) can only give free passes to certain classes of people. These people include the track's personnel, racing license holders, the press, the personnel of the Racing Board, the personnel of the Jockey Club, the personnel of the National Steeplechase and Hunt Association, and members of turf organizations. It also includes "public officers engaged in the performance of their duties," a term that has traditionally been utilized to authorize legislators and many other higher governmental types to obtain passes since they could be said to be reviewing racing, breeding, and/or governmental revenue raising policy during the course of their attendance at the tracks. The pass list is supposed to be filed with the Racing and Wagering Board. In the mid 1970's, investigative reporter Jack Newfield writing for the Village Voice disclosed abuses in the numbers of free passes given to public officials, and it may well be that the pass list has been unseen in public in the past quarter century.

The substantive language of Section 236 has gone unchanged since the State's first pari-mutuel revenue law enacted in 1940. L. 1940, ch. 254, §17. Its object was clearly "to discourage gambling among people most likely to be injured by it." Matter of Stewart v. DOS, 174 Misc. 902, 905 (Sup. Ct. Albany Co. 1940) The theory is that free passes would simply encourage gambling by those who would otherwise not be able to attend the track and would serve as a regressive means of taxing the poor.

A virtually identical provision of law limiting free passes at the harness tracks was also a feature of L. 1940, ch. 254. See §50. That provision has also gone substantially unchanged. See Racing Law §324. While there have been no quarter horse racing meets in New York State since 1988, the quarter horse racing law provisions also contain a provision limiting free passes. See Racing Law §422.

Despite State Attorney General Lefkowitz opining (1962 NYAG 43 at 44) that the “free pass” provision barred free admission to all others not covered by current §236, the fact remains that this section – besides being hopelessly antiquated – was always the subject of an endless number of dodges. First, the section on its face only bars the licensed racetrack from issuing free passes. Nothing on its face barred the State or its agencies from issuing the passes, and agencies such as the State Department of Taxation and Finance would commonly issue passes. The chief donor of passes used to be the advisory State Racing Commission which would disseminate numerous passes to its friends. Additionally, the provision only on its face bars “free” passes. The racetracks would utilize passes that were not fully free but which would technically require the bearer to pay State and local admission tax. (This contrasted with the §236 passes which were tax exempt.) As a practical matter, the tracks then picked up the admission taxes on their own. In recent years, racetracks have simply begun to use freebies in abundance. Numerous tracks have free admission policies for specific days or for the entire race meeting. Passes are routinely given out to a wide assortment of people.

In 1972, after New York City OTB’s 1971 opening had negatively impacted attendance at and handle at the New York metropolitan tracks, the thoroughbred “free pass” law was changed until March 31, 1973 to allow NYRA to have promotional admissions – so long as admissions tax was collected. L. 1972, ch. 533. This adjustment to current Section 236 was not renewed, and the law currently reads the same as it did in 1940.

But there is certainly no longer any basis for the “free pass” provision. In 1940, when horse racing was the only legal gambling game in town, there may have been some paternalistic policy reason for the government to believe that granting free admission to people without any direct connection to horse racing might cause people to gamble to excess. In 2004, there is no such basis for restricting free admission. People gamble regularly without a cover charge throughout New York State and the rest of the nation. The State Lottery spends tens of millions of dollars to persuade people to gamble. The State’s Indian casinos don’t require an admission fee. Neither do the numerous non-teletheater branches of the State’s OTB’s. Attendance at racetracks has declined dramatically over the past 40 years. All the free passes in the world wouldn’t increase attendance at a harness track in New York or at Aqueduct. Section 236 no longer protects anyone from gambling excessively. It is a residue of a different era, and it should be repealed.

Arguably, the only interests that Section 236 could currently serve are that: (1) the State and its localities receive certain admission tax revenue from attendance at the racetracks which might be reduced by a track’s regular utilization of free passes and (2) the public disclosure requirement serves as a restriction on a racetrack’s ability to distribute free passes to favored public officials. Neither of these goals are currently served by the current law. Revenue from racing admissions taxes is now minimal. In total, State admission taxes from horse racing are only \$300,000, and as a practical matter, the tracks are already utilizing free admissions. State and local government sources will not be affected by a repeal of Section 236.

Finally, the required disclosure of the pass list is not serving any purpose. First of all, there apparently have been no recent pass list disclosures. Secondly, even if there was a disclosure of the pass list, public officials who wished to avoid scrutiny could just avail themselves of numerous daily passes – rather than the season’s free pass under Section 236 of the Racing Law. Moreover, a public official and/or a legislator who accepted a large number of passes would likely be forced to disclose receipt of the passes under applicable financial disclosure laws.

Since nearly all the State’s racetracks are engaged in lobbying, a gift of free passes or seats to legislator or legislative employee by a racetrack might be required to be disclosed under the State’s lobbying laws. This would be similar to the State Lobbying Commission’s recent efforts to get the New York Yankees to disclose its pass lists. See Kenneth Lovett, “Yankees Are Off Base: Lobby Watchdog,” New York Post, December 25, 2003. There is the further problem that §1-m of the Legislative Law states, “No person or organization required to file a statement or report pursuant to this article shall offer or give a gift with a value in excess of seventy-five dollars to any public official as defined within this article.”. In short, since 1940, the State has developed other means to obtain disclosures of unethical conduct. The “free pass” limitation policy of Section 236 of the Racing Law currently serves no purpose. It deserves to be repealed.