



THE LEGAL GUIDE TO THE BILL EMERSON GOOD SAMARITAN FOOD DONATION ACT

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Introduction

Food waste and food insecurity are both very real and very large problems in the United States. Nonprofit organizations have identified these problems and have attempted to address them through food recovery. However, the perceived threat of liability has prevented many potential food donors from participating in these programs. State governments sought to encourage food recovery efforts by providing varying degrees of liability protection to those participating in food recovery efforts. However, the varied approaches by the states failed to provide the uniformity and certainty that businesses desire.

Congress saw that state-level liability protections were not reducing food waste or food insecurity; instead, these well-intentioned efforts were creating another barrier to donors because of their varied approaches. In 1996, Congress passed the Bill Emerson Good Samaritan Food Donation Act ("Bill Emerson Act") to address these issues. The Bill Emerson Act reduces potential donor liability and solves the problems created by a patchwork of various state laws through partial preemption. It also enables and encourages food recovery to help those that are food insecure.

Regrettably, 17 years after its passage, the Bill Emerson Act remains an underutilized tool. Increased food recovery serves the primary goal of reducing hunger and the secondary goal of decreasing the amount of material that finds its way into the local landfill. Unfortunately, many in the retail food industry are not aware of the Bill Emerson Act and the protections that it provides donors; some potential donors even believe it is illegal to donate food and grocery items. The primary purpose of this paper is to inform those involved in the retail food industry of the Bill Emerson Act and how it operates.

The Food Waste Problem

America wastes a lot of food. Waste occurs at all levels of the U.S. food system – "in fields, commercial kitchens, manufacturing plants, markets, schools, and restaurants."¹ In 1996, Congress estimated that the U.S. "thr[ew] away 20 percent of the food it produce[d] each year."² In 1997, EPA and USDA jointly published a document which found that "[e]ach year about 27% of America's food gets thrown out, with more than 300 pounds of food per person ending up

¹ U.S. DEP'T OF AGRIC. & U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA 530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY iii (1999), *available at* http://www.epa.gov/wastes/consERVE/pubs/wast_not.pdf.

² 143 CONG. REC. H7478 (daily ed. July 12, 1996) (statement of Rep. Clay).

in the waste stream.”³ This equates to approximately 96 billion pounds of food a year.⁴ Presently, there is no single agreed upon percentage of food waste – numbers range from 29 percent⁵ to 40 percent,⁶ depending on the study. Unfortunately, all studies show that the percentage of food wasted has continued to grow rapidly. In fact, one study concludes that the per capita food waste in the U.S. has increased fifty percent since 1974.⁷

Food waste occurs at three levels: the primary production level, the retail level, and the consumer level.⁸ The primary level includes losses that occur between the producer and the retailer.⁹ Examples of primary level losses include weather damage, pest damage, spillage, inefficiencies in the farm to retail outlet process, overplanting, food safety regulations which determine some food as inedible by humans, and out-grading of food, especially produce, that does not meet consumers’ expectations (blemished, oddly-shaped).¹⁰ Retail level losses include those at supermarkets, club stores, convenience stores, and small grocery stores, but do not include restaurants or other foodservice outlets.¹¹ Reasons for retail level losses include dented cans, damaged packaging, unpurchased holiday foods, spillages, bruising, improper storage, inadequate storage, overstocking or over-preparing resulting from incorrect customer predictions, and out-grading of food, especially produce, that does not meet consumers’ expectations (blemished, oddly-shaped).¹² Consumer level losses include “losses for food consumed at home and away from home (e.g., restaurants and fast food outlets) by consumers and foodservice establishments.”¹³ Causes of consumer level losses include improper handling or storage, failing to use before the item “goes bad,” consumers confusing “best by” / “use by” / “sell by” with an expiration date, excessive portions, plate waste,

³ U.S. DEP’T OF AGRIC. & U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA 530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY 7 (1999), available at http://www.epa.gov/wastes/conserves/pubs/wast_not.pdf.

⁴ *Id.* at iii. The Agency acknowledges that not all that amount is edible. “While not all of this excess food is edible, much of it is and could be going to those who need it. *Id.*”

⁵ Jean C. Buzby & Jeffrey Hyman, *Total and Per Capita Value of Food Loss in the United States*, 37 FOOD POLICY 561, 564 (2012).

⁶ Kevin D. Hall, Juen Guo, Michael Dore, & Carson C. Chow, PLOS ONE, *The Progressive Increase of Food Waste in America and Its Environmental Impact*, Nov. 2009, at 1, 1, available at <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0007940>.

⁷ *Id.*

⁸ Jean C. Buzby & Jeffrey Hyman, *Total and Per Capita Value of Food Loss in the United States*, 37 FOOD POLICY 561, 565 (2012).

⁹ *Id.*

¹⁰ *Id.* at 563.

¹¹ *Id.* at 565.

¹² *Id.* at 563.

¹³ Jean C. Buzby & Jeffrey Hyman, *Total and Per Capita Value of Food Loss in the United States*, 37 FOOD POLICY 561, 565 (2012).

consumer tastes, and food appearance.¹⁴ Much of this food waste occurs at the retail level, but consumers are responsible for a significant portion of the loss as well.

Jean Buzby and Jeffrey Hyman conducted a study on the amount of food wasted and its value using USDA's Economic Research Service's Loss-Adjusted Food Availability data.¹⁵ Their study estimated that 29 percent of food was wasted.¹⁶ Buzby and Hyman divided the losses at the retail level from those at the consumer level: 10 percent of the waste was attributed to retail level losses and 19 percent to consumer level losses.¹⁷ This study did not include losses generated at the primary production level because of limited data.¹⁸ If primary production level losses were included, the overall reported percentage of food waste would be even higher.

If the percentage of food wasted can increase through our actions, then it can also decrease through our actions. But based on the examples of where food waste is occurring at each level, it would be unrealistic, impractical, and prohibitively expensive to strive for a zero-waste food system. However, if we recovered just five percent of the food we wasted we could feed an additional four million Americans every day.¹⁹

Cost of Food Waste

Most people inherently understand that wasting food is bad and should be avoided, but the majority of these people do not know the extent of the issue nor are they aware of its economic or environmental costs.

A 1997 study estimated the value of the wasted food annually to be \$31 billion.²⁰ However, a more recent study conducted in 2008 puts the value of the food wasted at the retail and consumer levels at a combined \$165.5 billion.²¹ The value of wasted food would be greater if the value of the food wasted at the primary production level was included.

¹⁴ *Id.* at 563.

¹⁵ *Id.* at 561.

¹⁶ *Id.* at 564.

¹⁷ *Id.*

¹⁸ Jean C. Buzby & Jeffrey Hyman, *Total and Per Capita Value of Food Loss in the United States*, 37 FOOD POLICY 561, 565 (2012).

¹⁹ U.S. DEP'T OF AGRIC., A CITIZEN'S GUIDE TO FOOD RECOVERY 2-3 (1999).

²⁰ U.S. DEP'T OF AGRIC. & U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA 530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY 7 (1999), available at http://www.epa.gov/wastes/consERVE/pubs/wast_not.pdf.

²¹ Jean C. Buzby & Jeffrey Hyman, *Total and Per Capita Value of Food Loss in the United States*, 37 FOOD POLICY 561, 566 (2012).

Not only do we throw money away in the value of the food wasted, we actually pay for the ability to throw this food away. In the United States, at least \$1 billion is spent annually to dispose of food.²² This figure only reflects the annual amount of local tax fees for trash disposal;²³ it does not include any tipping fees,²⁴ disposal costs, or other internal costs, such as employee handling, that businesses routinely pay for food disposal.²⁵

Environmental Impact of Food Waste

Landfills are filling at an increasing rate, largely because of how much food Americans discard. “More food reaches landfills and incinerators than any other single material in municipal solid waste (MSW).”²⁶ In 1996, the U.S. generated 210 million tons of MSW²⁷, of which 21.4 million tons was food waste.²⁸ By 2010, the amount of MSW generated each year in the U.S. increased to 250 million tons,²⁹ of which food waste contributed more than 34 million tons.³⁰ That is 13.9 percent of all MSW in 2010.³¹ Food waste also has the lowest recovery rate of all MSW materials – less than 3 percent.³² When recovered materials are accounted for, food waste contributes 20.5 percent of all materials that have the landfill as their final destination.³³

Food waste is especially problematic because its decomposition produces greenhouse gas emissions. “When food is disposed of in a landfill it rots and becomes a significant source of methane – a potent greenhouse gas with 21 times the global warming potential of carbon dioxide. Landfills are a major

²² U.S. DEP’T OF AGRIC. & U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA 530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY iii (1999), available at http://www.epa.gov/wastes/conserves/pubs/wast_not.pdf.

²³ *Id.* at 7.

²⁴ Tipping fees are fees charged by a waste processing facility, such as a landfill, to accept a given quantity of waste. They are typically charged on a per-ton basis but may also be charged by volume.

²⁵ U.S. DEP’T OF AGRIC. & U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA 530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY 7 (1999), available at http://www.epa.gov/wastes/conserves/pubs/wast_not.pdf.

²⁶ *Reducing Food Waste for Businesses*, U.S. ENVTL. PROT. AGENCY www.epa.gov/epawaste/conserves/foodwaste/index.htm (last visited June 25, 2013).

²⁷ FRANKLIN ASSOC. LTD., U.S. ENVTL. PROT. AGENCY, REP. NO. EPA 530-R-98-007, CHARACTERIZATION OF MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1997 UPDATE 2 (1998).

²⁸ *Id.* at 45.

²⁹ U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA 530-F-11-005, MUNICIPAL SOLID WASTE GENERATION, RECYCLING, AND DISPOSAL IN THE UNITED STATES: FACTS AND FIGURES FOR 2010 4 (2011).

³⁰ *Id.* at 5.

³¹ *Id.* at 4.

³² *Id.* at 5. “Recovery” includes composting, recycling, and combusting for energy. *Id.* at 2.

³³ See U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA 530-F-11-005, MUNICIPAL SOLID WASTE GENERATION, RECYCLING, AND DISPOSAL IN THE UNITED STATES: FACTS AND FIGURES FOR 2010 5 (2011).

source of human-related methane in the United States, accounting for more than 20 percent of all methane emissions.”³⁴ Methane accounted for approximately ten percent of all greenhouse gas emissions from human activities in 2010.³⁵

Food Insecurity³⁶

The United States is the richest nation in the world, yet it continues to have a very real hunger problem. It is sad and seemingly irreconcilable that a country that wastes an estimated 96 billion pounds of food each year has a persistent and widespread hunger problem. Common sense would say that if the U.S. could dispose of so much food there must be a surplus and all Americans were adequately fed. But this is far from true. There is a serious disconnect in the U.S. food system.

Although hunger negatively affects the health of all hungry people, it is especially harsh on children: “[c]hronic hunger and malnutrition take a heavy toll on children’s lives. Days missed from school, inattentiveness in class, stunted growth, and frequent illness jeopardize their education and their future as productive citizens.”³⁷ Not only is hunger a troubling social problem, it also negatively affects the economy because it requires the government to increase spending on health care, it reduces worker productivity, and it reduces the United States’ economic competitiveness.³⁸

³⁴ *Reducing Food Waste for Businesses*, U.S. ENVTL. PROT. AGENCY www.epa.gov/epawaste/conserves/foodwaste/index.htm (last visited June 25, 2013).

³⁵ *Overview of Greenhouse Gasses*, U.S. ENVTL. PROT. AGENCY, www.epa.gov/climatechange/ghgemissions/gases/ch4.html (last visited June 27, 2013).

³⁶ In common parlance, hunger and food insecurity are used interchangeably, even by USDA. See generally U.S. DEP’T OF AGRIC. & U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA 530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY (1999), available at http://www.epa.gov/wastes/conserves/pubs/wast_not.pdf. However, they are distinct concepts. USDA defines “hunger” as “an individual-level physiological condition that may result from food insecurity.” *Definitions of Food Security*, U.S. DEP’T OF AGRIC., <http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security.aspx#.Ubv1cfm1HUV> (last visited June 27, 2013). While food insecurity “is a household-level economic and social condition of limited or uncertain access to adequate food.” *Id.* These terms are used interchangeably in this paper as well because “hunger” is more identifiable by a broader audience.

³⁷ U.S. DEP’T OF AGRIC. & U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA 530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY 5 (1999), available at http://www.epa.gov/wastes/conserves/pubs/wast_not.pdf.

³⁸ U.S. DEP’T OF AGRIC. & U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA 530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY 5 (1999), available at http://www.epa.gov/wastes/conserves/pubs/wast_not.pdf.

USDA defines food security as “access by all people at all times to enough food for an active, healthy life.”³⁹ Those who are not food secure are food insecure. Food insecurity is divided into two categories: low food security and very low food security.⁴⁰ Low food security is defined as “[r]eports of reduced quality, variety, or desirability of diet. Little or no indication of reduced food intake.”⁴¹ Very low food security is defined as “[r]eports of multiple indications of disrupted eating patterns and reduced food intake.”⁴²

USDA’s recent estimates of food insecurity are staggering. In 2011, 14.9 percent of American households were food insecure.⁴³ This equates to 17.9 million households.⁴⁴ These 17.9 million food insecure households “had difficulty at some time during the year providing enough food for all their members due to a lack of resources.”⁴⁵ More than 50 million Americans lived in these 17.9 million food insecure households.⁴⁶ Over one-third of these food insecure households experienced “very low food security,”⁴⁷ which equated to 6.8 million households or 5.7 percent of all U.S. households.⁴⁸

The hunger problem is worse for households with children. Of all the households in 2011 that had children under the age of 18, the percentage of food insecure households rises by more than one-third to 20.6 percent.⁴⁹ In slightly more than half of these households, only the adults experienced food insecurity.⁵⁰ However, in the remaining households both the adults and children experienced food insecurity – these households numbered 3.9 million.⁵¹ Food insecurity skyrockets to 36.8 percent for households with children headed by a single woman.⁵²

³⁹ *Food Security in the U.S.: Overview*, U.S. DEP’T OF AGRIC., <http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us.aspx#.UUE1gBzvUU> (last visited June 27, 2013).

⁴⁰ *Definitions of Food Security*, U.S. DEP’T OF AGRIC., <http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security.aspx#.Ubv1cfm1HUV> (last visited June 27, 2013).

⁴¹ *Id.*

⁴² *Id.*

⁴³ ALISHA COLEMAN-JENSEN, MARK NORD, MARGARET ANDREWS, & STEVEN CARLSON, U.S. DEP’T OF AGRIC., ECON. RESEARCH REPORT NO. 141, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2011 v (2012).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 16.

⁴⁷ *Id.* at v.

⁴⁸ ALISHA COLEMAN-JENSEN, MARK NORD, MARGARET ANDREWS, & STEVEN CARLSON, U.S. DEP’T OF AGRIC., ECON. RESEARCH REPORT NO. 141, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2011 v (2012).

⁴⁹ *Id.* at 7.

⁵⁰ The rate for this category is 10.6 percent. *Id.*

⁵¹ This is 10 percent of all U.S. households with children under 18. *Id.*

⁵² *Id.* at 10.

The general trend over the last decade is that food insecurity has increased among both households without children⁵³ and households with children.⁵⁴ This is true for both low food security and very low food security.⁵⁵

The hunger problem is not region-specific. Although food insecurity is higher than the national average in urban areas at 17.7 percent,⁵⁶ it is not just an urban problem as suburbs have a 13.2 percent food insecurity rate.⁵⁷ Regionally, the South⁵⁸ had the highest rate of food insecurity at 16 percent.⁵⁹ The West was a close second with a rate of 15.8 percent⁶⁰ but the Midwest and Northeast were not far behind, each having a rate of 13.5 percent.⁶¹

But this doesn't need to be. Even though food insecurity is a massive problem with multiple causes and is unlikely to be completely eradicated, it is one of our social ills that can be significantly reduced by recovering a portion of the food that is wasted in the U.S. and distributing it to the needy.

Food Recovery

Both the hunger and waste problems could be reduced through food recovery – specifically, food donation at the retail level and the “away from home” consumer level. Food recovery “is the collection of wholesome food for distribution to the poor and hungry.”⁶² There are four basic types of food recovery: field gleaning, perishable produce rescue or salvage, perishable and prepared food rescue, and nonperishable processed food collection.⁶³

⁵³ See ALISHA COLEMAN-JENSEN, MARK NORD, MARGARET ANDREWS, & STEVEN CARLSON, U.S. DEP'T OF AGRIC., ECON. RESEARCH REPORT NO. 141, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2011 6 (2012).

⁵⁴ See *id.* at 8.

⁵⁵ See *id.* at 6, 8.

⁵⁶ *Id.* at 10.

⁵⁷ *Id.*

⁵⁸ The numbers for Arkansas are quite disheartening. Arkansas has the highest rate of food insecurity with 19.2 percent of households experiencing it. ALISHA COLEMAN-JENSEN, MARK NORD, MARGARET ANDREWS, & STEVEN CARLSON, U.S. DEP'T OF AGRIC., ECON. RESEARCH REPORT NO. 141, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2011 16 (2012). Arkansas also has the highest rate of very low food security at 7.6 percent. *Id.* This results in 27.8 percent of Arkansas children experiencing food insecurity. *Map the Meal Gap, Food Insecurity in your County*, FEEDING AMERICA, <http://feedingamerica.org/hunger-in-america/hunger-studies/map-the-meal-gap.aspx> (last visited June 27, 2013).

⁵⁹ ALISHA COLEMAN-JENSEN, MARK NORD, MARGARET ANDREWS, & STEVEN CARLSON, U.S. DEP'T OF AGRIC., ECON. RESEARCH REPORT NO. 141, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2011 10 (2012).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² U.S. DEP'T OF AGRIC., A CITIZEN'S GUIDE TO FOOD RECOVERY 1 (1999).

⁶³ *Id.*

- **Field gleanings:** the collection of crops from farmers' fields that have already been mechanically harvested or on fields where it is not economically profitable to harvest. This term can also be used to describe the donation of agricultural products that have already been harvested and are being stored at a farm or packing house.
- **Perishable produce rescue/salvage:** the collection of perishable produce from wholesale and retail sources, including wholesale markets, supermarkets, and farmers' markets.
- **Perishable and prepared food rescue:** the collection of prepared foods from the food service industry, including restaurants, hospital, caterers, and cafeterias.
- **Nonperishable processed food collection:** the collection of processed foods, usually with long shelf lives, from sources such as manufacturers, supermarkets, distributors, grocery stores, and food drives.⁶⁴

The Liability Concern

Despite the array of public and private goods they provide, food recovery efforts are often stymied by potential food donors' fear of liability. The fear of liability preoccupies most players in the inherently risky retail food industry and drives many of their decisions. According to the Centers for Disease Control and Prevention (CDC), there are an estimated 48 million foodborne illness cases annually in the United States, which translates to one case for every six Americans each year.⁶⁵ Of these 48 million cases, 128,000 are hospitalized and 3,000 eventually die because of their foodborne illness.⁶⁶

The consequences for being the source of a foodborne illness are harsh: “[a]ll fifty states generally hold one who distributes food or any other defective product, the defective aspect of which causes injury, to be strictly liable, which means liable even in the absence of negligence.”⁶⁷ One example of a foodborne illness case is the Taco Bell *E. coli* O157:H7 outbreak of 1992.⁶⁸ Through its insurers, Taco Bell paid out over \$98 million to settle all of the

⁶⁴ U.S. DEP'T OF AGRIC., A CITIZEN'S GUIDE TO FOOD RECOVERY 1 (1999).

⁶⁵ CDC *Estimates of Foodborne Illness in the United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html> (last visited June 27, 2013).

⁶⁶ *Id.*

⁶⁷ H.R. REP. NO. 104-661, at 2 (1996); *Good Samaritan Food Donation Act: Hearing on H.R. 2428 Before the Subcomm. on Postsecondary Educ., Training, and Lifelong Learning of the H. Comm. Educ. and Econ. Opportunities*, 104th Cong. (1996) (statement of Henry Cohen, legislative attorney, Cong. Research Serv.).

⁶⁸ See generally JEFF BENEDICT, POISONED (2011).

damages claims that resulted from a single *E. coli*.⁶⁹ And this is just one example of how costly foodborne illness liability can be for food sector businesses.

In light of the risks of foodborne illness, the imposition of strict liability, and the potential magnitude of damage awards and settlements associated with foodborne illness claims, food retailers work diligently and continuously to manage their risk exposure in several ways, such as purchasing insurance and training employees. When perceived risks cannot be mitigated to an acceptable level through cost effective means, food retailers will simply refrain from engaging in certain activities.

Every few weeks there is a new foodborne illness outbreak, some of which are so significant that they force the source organization into bankruptcy.⁷⁰ Considering the implications of strict liability, it is understandable why a potential donor to a food recovery program might be apprehensive. The risk associated with selling food is real and has potentially serious results for both the retailer and the consumer. Retailers are only able to justify assuming this risk because they sell their food for a profit. Initially, it appears that participating in food recovery would merely increase a company's risk exposure without providing any bottom-line enhancing offset. But food recovery programs provide many benefits to numerous stakeholders. Some of these benefits include:

1. Save businesses money otherwise spent on trash collection and disposal fees;
2. Provide wholesome food to needy families in the community;
3. Help communities and businesses meet state and local waste reduction goals;
4. Create and improved public image for businesses; and
5. Help sustain local industries and jobs⁷¹

Other benefits include a reduction in waste generated and methane gas produced by landfills.⁷² Some organizations may be eligible for state or federal tax incentives.⁷³ But these benefits may not always outweigh the risk perceived

⁶⁹ *Id.* at 290. In fact, a single claimant received a settlement of \$15.6 million. *Id.* at 288.

⁷⁰ See generally MARLER BLOG, <http://www.marlerblog.com/> (last visited June 27, 2013).

⁷¹ U.S. DEP'T OF AGRIC. & U.S. ENVTL. PROT. AGENCY, PUB. NO. EPA 530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY 5 (1999), available at http://www.epa.gov/wastes/conserves/pubs/wast_not.pdf.

⁷² *Reducing Food Waste for Businesses*, U.S. ENVTL. PROT. AGENCY www.epa.gov/epawaste/conserves/foodwaste/index.htm (last visited June 25, 2013).

⁷³ These ancillary benefits are mentioned here only to highlight other dimensions of food recovery that are likely to be of interest to potential food donors. Deeper exploration of these topics is beyond the scope of this paper. For more information on the potential cost savings associated with food recovery see EPA's Food Waste Management Cost Calculator, available at <http://www.epa.gov/epawaste/conserves/foodwaste/tools/index.htm>. For more information

by a potential donor. This is why every state, as well as the federal government, has attempted to facilitate donation of recovered food by addressing the risk exposure that retailers face.

State Exemptions to the General Rule of Strict Liability

All fifty states have statutes that limit the liability of food donors so they are not subject to the harsh general rule of strict liability. These state laws vary widely and, before a uniform federal standard was established, they “le[ft] donors and distributors of food with a confusing patchwork of laws with which to contend.”⁷⁴ For example, some states protect donors from both civil and criminal liability, but others only protect donors from civil liability.⁷⁵ The states also differ in covered foods and the definitions of important terms such as “donor” and “good faith.”⁷⁶ Some states hold donors liable only for gross negligence or intentional acts, while other states only eliminate strict liability, allowing for negligence claims.⁷⁷ One can easily understand why potential donors, especially large food businesses operating in numerous states, would hesitate in the face of having to comply with such varying statutes.⁷⁸

All of these state-specific protections were enacted before 1990, when Congress first attempted to address the issues of liability and a lack of uniformity by developing a federal Model Good Samaritan Food Donation Act.⁷⁹ Unfortunately, the Model Act failed to address either issue because it did not have the force of law⁸⁰ and only one state adopted it.⁸¹

The Bill Emerson Good Samaritan Food Donation Act

Congress identified and understood potential donors' concerns over liability for donating items and saw that these legitimate concerns inhibited potential

on tax incentives see 26 U.S.C. § 170 and IRS Publication 526: *Charitable Contributions*. For additional information regarding other ancillary benefits of food recovery see Food Recovery Information Project's website: <http://law.uark.edu/academics/llm/food-recovery-project/>.

⁷⁴ 143 CONG. REC. S9532 (daily ed. Aug. 2, 1996) (statement of Sen. Santorum).

⁷⁵ H.R. REP. NO. 104-661, at 3 (1996).

⁷⁶ *Id.*

⁷⁷ See *id.*

⁷⁸ *Id.* at 2.

⁷⁹ See *id.* at 2-3; National and Community Service Act of 1990, Pub. L. No. 101-610, §§ 401-02, 104 Stat. 3127, 3183-85.

⁸⁰ *Good Samaritan Food Donation Act: Hearing on H.R. 2428 Before the Subcomm. on Postsecondary Educ., Training, and Lifelong Learning of the H. Comm. Educ. and Econ. Opportunities*, 104th Cong. (1996) (statement of Henry Cohen, legislative attorney, Cong. Research Serv.).

⁸¹ 143 CONG. REC. H7480 (daily ed. July 12, 1996) (statement of Rep. Conyers).

donation.⁸² In 1996, Congress made a significant effort to remove liability-related barriers to food recovery and donation efforts by passing the Bill Emerson Act, which aims to absolve donors of potential civil and criminal liability for injuries resulting from the use of the donated item, except in cases of gross negligence or intentional misconduct.⁸³ The Bill Emerson Act addresses both the liability issue and eliminates the difficulty of complying with 51 different liability schemes. The Act “establish[es] a uniform national law to protect organizations and individuals when they donate goods in good faith”⁸⁴ for the purpose of “encourag[ing] and enabl[ing] restaurants, grocers, and other donors to feed the hungry.”⁸⁵

History of the Act

Congress first attempted to address food donation-related liability concerns in 1990 by passing the Model Good Samaritan Food Donation Act, hoping States would adopt it in order to protect donors.⁸⁶ However, the Model Act did not have the force of law⁸⁷ and only one state adopted it.⁸⁸ The Bill Emerson Good Samaritan Food Donation Act converted Title IV of the National and Community Service Act of 1990, known as the Model Good Samaritan Food Donation Act, into permanent law, and transferred it to the Child Nutrition Act of 1966.⁸⁹ President Clinton signed the Bill Emerson Act into law on October 1, 1996.⁹⁰ Congress did so with the express purpose of “encouraging the donation of food and grocery products to nonprofit organizations for distribution to needy individuals by giving the Model Good Samaritan Food Donation Act the full force and effect of law.”⁹¹

Recognizing the limited utility of the Model Act, Representative Pat Danner of Missouri introduced H.R. 2428, which was the bill to give the Model Good

⁸² “[T]he threat of liability often inhibits the donation of food to the needy.” 143 CONG. REC. H10089 (daily ed. Sept. 5, 1996) (statement of Rep. Goodling).

⁸³ “With this legislation, private donors will be protected from such liability, except in cases of gross negligence and intentional misconduct.” 143 CONG. REC. S9533 (daily ed. Aug. 2, 1996) (statement of Sen. Bond).

⁸⁴ 143 CONG. REC. H7479 (daily ed. July 12, 1996) (statement of Rep. Danner).

⁸⁵ 143 CONG. REC. H7478 (daily ed. July 12, 1996) (statement of Rep. Clay).

⁸⁶ 143 CONG. REC. S9532 (daily ed. Aug. 2, 1996) (statement of Sen. Santorum).

⁸⁷ *Good Samaritan Food Donation Act: Hearing on H.R. 2428 Before the Subcomm. on Postsecondary Educ., Training, and Lifelong Learning of the H. Comm. Educ. and Econ. Opportunities*, 104th Cong. (1996) (statement of Henry Cohen, legislative attorney, Cong. Research Serv.).

⁸⁸ 143 CONG. REC. H7480 (daily ed. July 12, 1996) (statement of Rep. Conyers).

⁸⁹ See Bill Emerson Good Samaritan Food Donation Act, Pub. L. No. 104-210, 110 Stat. 3011, 3011 (1996) (codified at 42 U.S.C. § 1791 (2011)).

⁹⁰ *Id.*

⁹¹ *Id.*

Samaritan Food Donation Act the force of law.⁹² Early on in the legislative process, she enlisted the aid of fellow Missourian, Representative Bill Emerson, to cosponsor the bill.⁹³ Representative Emerson was recruited for his “long-standing support of issues relating to the hungry”⁹⁴ and his efforts were largely responsible for making this a popular bill among members of both parties, ensuring its passage.⁹⁵ Towards the later stages of the legislative process, Representative Emerson’s health began to fail. Although unable to be physically present in Congress, he continued to support the bill by submitting testimony to the committee.⁹⁶ Representative Emerson passed away on June 22, 1996,⁹⁷ before final passage of the bill. After his passing, Congress amended the bill so that it would be titled “The Bill Emerson Good Samaritan Food Donation Act” to honor his efforts at reducing hunger and improving the nation’s nutrition programs.⁹⁸

Legislative Intent of the Bill Emerson Act

Congress intended for the Bill Emerson Act to “relieve concerns over liability...that deter companies and individuals from donating as freely as they would like.”⁹⁹ During House debate on the Bill Emerson Act, one Representative said, “[m]any times individuals and corporations are interested in donating food to the needy. However, the fear of liability prevents them from doing so.”¹⁰⁰ During Senate debate, a Senator concurred, noting that “[l]iability concerns are the overriding reason why unsalable, but otherwise wholesome, food is destroyed rather than donated to charity.”¹⁰¹ Another Senator said, “[i]n the past, private donors have been reluctant to make contributions to nonprofit organizations because they are concerned about potential civil and criminal liability.”¹⁰² According to a former food rescue director, donors’ concerns about liability are the biggest obstacle that charitable food programs face.¹⁰³

⁹² 143 CONG. REC. H7477-78 (daily ed. July 12, 1996) (statement of Rep. Goodling).

⁹³ 143 CONG. REC. H7479 (daily ed. July 12, 1996) (statement of Rep. Danner).

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ *Id.*

⁹⁷ *Biographical Directory of the United States Congress*, OFFICE OF THE HISTORIAN, U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=e000174> (last visited June 27, 2013).

⁹⁸ 143 CONG. REC. H7477-78 (daily ed. July 12, 1996) (statement of Rep. Goodling).

⁹⁹ 143 CONG. REC. H7479 (daily ed. July 12, 1996) (statement of Rep. McKeon).

¹⁰⁰ 143 CONG. REC. H7477 (daily ed. July 12, 1996) (statement of Rep. Goodling).

¹⁰¹ 143 CONG. REC. S9532 (daily ed. Aug. 2, 1996) (statement of Sen. Santorum).

¹⁰² 143 CONG. REC. S9533 (daily ed. Aug. 2, 1996) (statement of Sen. Bond).

¹⁰³ *Good Samaritan Food Donation Act: Hearing on H.R. 2428 Before the Subcomm. on Postsecondary Educ., Training, and Lifelong Learning of the H. Comm. Educ. and Econ. Opportunities*, 104th Cong. (1996) (statement of Christina Martin, executive director of Foodchain).

Congress also understood that complying with 51 different regulatory regimes¹⁰⁴ served as a roadblock to potential donors. Representative Bill Emerson said, “[p]rivate companies are too often faced with different state laws governing food donations. These differences can stand between a willing donor and a needy family.”¹⁰⁵ Corporations told food pantries “that there were just too many different State laws governing food donations.”¹⁰⁶ The States’ varied approaches “ha[ve] required regional or national companies to devote sometimes scarce resources toward adopting donation plans and complying various states’ statutes.”¹⁰⁷ Retailers “can no longer allocate their resources to reviewing and complying with the differing state laws on the subject [of food donation].”¹⁰⁸ Businesses have said this patchwork caused them to stop donating food.¹⁰⁹ Congress believed that “[a] business should not have to hire a legal team to interpret numerous State laws so that it feels comfortable in contributing food to the hungry.”¹¹⁰ President Clinton agreed, observing in his signing statement for the Bill Emerson Act that “[a]lthough many States have enacted their own ‘Good Samaritan’ laws to support food recovery and donation efforts, many businesses have advised that these varying State statutes hinder food donations.”¹¹¹

A Closer Look at the Bill Emerson Act

The Bill Emerson Good Samaritan Food Donation Act partially preempts state liability laws by creating a uniform minimum liability protection for certain parties participating in particular activities related to food recovery and food distribution to the needy.

¹⁰⁴ “All 50 States and the District of Columbia have enacted some form of legislation aimed at extending liability protection to donors and distributors of donated food.” 143 CONG. REC. S9532 (daily ed. Aug. 2, 1996) (statement of Sen. Santorum).

¹⁰⁵ *Good Samaritan Food Donation Act: Hearing on H.R. 2428 Before the Subcomm. on Postsecondary Educ., Training, and Lifelong Learning of the H. Comm. Educ. and Econ. Opportunities*, 104th Cong. (1996) (statement of Rep. Emmerson).

¹⁰⁶ 143 CONG. REC. H7479 (daily ed. July 12, 1996) (statement of Rep. Danner) (relaying statement made to food pantry operators by a “major national corporation”).

¹⁰⁷ *Good Samaritan Food Donation Act: Hearing on H.R. 2428 Before the Subcomm. on Postsecondary Educ., Training, and Lifelong Learning of the H. Comm. Educ. and Econ. Opportunities*, 104th Cong. (1996) (statement of Rep. Danner).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 143 CONG. REC. H7479 (daily ed. July 12, 1996) (statement of Rep. Danner).

¹¹¹ Presidential Signing Statement on Signing H.R. 2428, 32 WEEKLY COMP. PRES. DOC. 1943 (Oct. 7, 1996).

Preemption

Facially, the Bill Emerson Act conflicts with most state laws concerning food donation and the liability of donors. The general rule for a conflict between state and federal law is that federal law preempts state law.¹¹² Preemption can be express or implied, full or partial. Express preemption occurs when the federal law states that Congress intends for the law to preempt state law. The Bill Emerson Act is silent on the matter of preemption.¹¹³ But because the legislative history (discussed above) clearly manifests Congressional intent for the Act to supersede conflicting state and local law, the Bill Emerson Act is an example of implied preemption.¹¹⁴ During floor debate, numerous congressional representatives expressly stated that they intended for the Bill Emerson Act to “establish[] a single national liability standard for the good-faith donation of food and grocery products”¹¹⁵ and believed that doing so would “encourage and enable restaurants, grocers, and other donors to help feed the hungry.”¹¹⁶ One major benefit of the Bill Emerson Act’s partial preemption is that there is now a uniform liability standard that applies nationwide.

The Act’s implied preemption power does not mean that states cannot develop their own “Good Samaritan” laws that protect those involved in food donation activities and encourage food donation. Rather, the Bill Emerson Act only preempts those state or local laws that provide less liability protection.¹¹⁷ The Act’s liability protection operates as a floor for liability protection for those involved in the covered activities.¹¹⁸ States are free to increase the amount of liability protection afforded to those involved or to expand the covered activities and personnel.¹¹⁹ Therefore, the Bill Emerson Act only partially preempts state law.

The Congressional Budget Office concluded that “[t]he bill would preempt civil and criminal liability laws of state and local governments that deal with the donation of food and grocery products to nonprofit organizations.”¹²⁰ Because

¹¹² See U.S. CONST., art. VI.

¹¹³ See Bill Emerson Good Samaritan Food Donation Act, Pub. L. No. 104-210, 110 Stat. 3011, 3011 (1996); 42 U.S.C.A. § 1791 (West 2013).

¹¹⁴ USDA requested and received an opinion from the U.S. Attorney General’s Office concerning the Bill Emerson Act and preemption. The opinion confirmed that the Bill Emerson Act partially preempted state liability laws. See Preemptive Effect of the Bill Emerson Good Samaritan Food Donation Act, 21 Op. O.L.C. 55, 1997 WL 1188104 (discussing legislative history).

¹¹⁵ 143 CONG. REC. S9532 (daily ed. Aug. 2, 1996) (statement of Sen. Santorum).

¹¹⁶ 143 CONG. REC. H10090 (daily ed. Sept. 5, 1996) (statement of Rep. Clay).

¹¹⁷ See 143 CONG. REC. H10090 (daily ed. Sept. 5, 1996) (statement of Rep. Clay).

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ H.R. REP. NO. 104-661, at 7 (1996).

the Act establishes gross negligence as a liability floor for food donors,¹²¹ “states that currently hold individuals liable for acts or omissions that do not constitute gross negligence or intentional misconduct c[an] no longer do so in the specified circumstances.”¹²²

States are free to provide greater protection than that which the Bill Emerson Act provides to those involved in food recovery efforts, but any state laws that do not provide at least the amount of protection provided by the Bill Emerson Act are preempted. This is also true of covered activities and the definitions of covered activities or personnel. The Act does not preclude states from eliminating liability for acts constituting gross negligence or even intentional misconduct.¹²³

Exemption of Liability for Damages

Under the express terms of the Bill Emerson Act, if a food donation that was made in good faith later causes an injury, the donor will not be held liable for that injury. The donor may only be liable for acts constituting gross negligence or for intentional misconduct.¹²⁴ At the time of writing, there are no notes of decision concerning the Bill Emerson Act.¹²⁵ Thus, it is only possible so to facially analyze the Act in light of its legislative history and intent.

The Bill Emerson Act states that covered parties engaged in covered activities “shall not be subject to civil or criminal liability arising from the nature, age, packaging, or condition”¹²⁶ of the donated items as long as the following requirements are met:

1. The donated item must be either an “apparently wholesome food” or an “apparently fit grocery product;
2. The covered party must donate the items in good faith;
3. The donation must be made to a nonprofit organization; and,
4. The nonprofit must distribute the donated items to needy individuals.¹²⁷

¹²¹ *Id.* at 4.

¹²² *Good Samaritan Food Donation Act: Hearing on H.R. 2428 Before the Subcomm. on Postsecondary Educ., Training, and Lifelong Learning of the H. Comm. Educ. and Econ. Opportunities*, 104th Cong. (1996) (statement of Henry Cohen, legislative attorney, Cong. Research Serv.).

¹²³ *Id.*

¹²⁴ “This legislation eliminates the threat of liability, except in instances of intentional harm and gross negligence. . . .” 143 CONG. REC. H10089 (daily ed. Sept. 5, 1996) (statement of Rep. Goodling).

¹²⁵ See 42 U.S.C.A. § 1791 (West 2013).

¹²⁶ *Id.* at § 1791(c)(1).

¹²⁷ *Id.*

But this exemption from liability is not absolute. Acts or omissions constituting “gross negligence” or “intentional misconduct” which result in the death or injury of “an ultimate user or recipient”¹²⁸ are not exempted; covered parties remain criminally and civilly liable for acts or omissions that are found to be either gross negligence or intentional misconduct.¹²⁹

The Act provides clear, simple definitions for acts that constitute “gross negligence” and “intentional misconduct.” The Act defines “gross negligence” as “voluntary and conscious conduct (including a failure to act) by a person who, at the time of the conduct, knew that the conduct was likely to be harmful to the health or well-being of another person.”¹³⁰ The Act defines “intentional misconduct” as “conduct by a person with knowledge (at the time of the conduct) that the conduct is harmful to the health or well-being of another person.”¹³¹

A finding of gross negligence requires consideration of several factors,¹³² including the type of food involved, the recommended sell by date, and the end user of the donated item.¹³³ The recommended sell by date alone should not be determinative; it must be considered in light of the type of food involved.¹³⁴ To understand how these first two factors are intended to operate, consider the example of the donation of a box of cereal with that of milk or chicken addressed in the House Report on the Bill Emerson Act. The “box of cereal that is provided to a food pantry just before or even after the date of retail sale would be perfectly safe for consumption, whereas a carton of milk or container of fresh poultry that is donated just beyond the retail sales date could be dangerous to a person’s health.”¹³⁵

Product dating for food items is an area that creates confusion among most end-users. This is likely because there is no uniform method of dating food in the U.S.: federal food regulations do not require dating for any foods other than infant formula, but more than twenty states have enacted their own requirements for select foods.¹³⁶ There are three common types of dates end-users will encounter:

¹²⁸ *Id.* at § 1791(c)(3).

¹²⁹ *Id.*

¹³⁰ 42 U.S.C.A. § 1791(b)(7) (West 2013).

¹³¹ *Id.* at § 1791(b)(8).

¹³² “[M]any factors must be considered when determining what is and is not gross negligence.” H.R. REP. NO. 104-661, at 5 (1996).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ U.S. DEP’T OF AGRIC., FOOD SAFETY INFORMATION: FOOD PRODUCT DATING, 1 (2011), available at http://www.fsis.usda.gov/PDF/Food_Product_Dating.pdf; see also *FDA Basics: Did You Know that a Store Can Sell Food Past the Expiration Date?*, U.S. FOOD & DRUG ADMIN.,

- A “Sell-By” date tells the store how long to display the product for sale. [Consumers] should buy the product before the date expires.
- A “Best if Used By (or Before)” date is recommended for best flavor or quality. It is not a purchase or safety date.
- A “Use-By” date is the last date recommended for the use of the product while at peak quality. The date has been determined by the manufacturer of the product.¹³⁷

None of these dates are safety dates, they are “stamped on a product’s package to help the store determine how long to display the product for sale.”¹³⁸ They also inform consumers the time limit to use or purchase an item at its best quality.¹³⁹ These dates do not always refer to home storage and use after purchase because other variables, such as freezing or mishandling will affect the quality of the food.¹⁴⁰ USDA’s Food Safety and Inspection Service (FSIS) provides more specific guidance on these dates and their relationships to particular food items.¹⁴¹ FDA does not require the use of these dates for the products it regulates; use of these dates is the sole discretion of the manufacturer.¹⁴² Instead, FDA relies on the principle that “foods in U.S. commerce must be wholesome and fit for consumption.”¹⁴³ FDA would pursue an action against a manufacturer for a product that is dangerous to consumers “regardless of any date printed on the label.”¹⁴⁴

Another factor to consider is the how and where the end-user will consume the donated food.¹⁴⁵ Consider the example concerning bruised fruit provided in the House Report. “Bruised fruit that is carefully prepared and used the day of

<http://www.fda.gov/AboutFDA/Transparency/Basics/ucm210073.htm> (last visited June 27, 2013).

A principle of U.S. food law is that foods in U.S. commerce must be wholesome and fit for consumption. *FDA Basics: Did You Know that a Store Can Sell Food Past the Expiration Date?*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm210073.htm> (last visited June 27, 2013). A “best by”, “use by” or expiration date does not relieve a firm from this obligation. *Id.* A product that is dangerous to consumers would be subject to potential action by FDA to remove it from commerce regardless of any date printed on a label. *Id.*

¹³⁷ U.S. DEP’T OF AGRIC., FOOD SAFETY INFORMATION: FOOD PRODUCT DATING, 1 (2011), available at http://www.fsis.usda.gov/PDF/Food_Product_Dating.pdf.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *id.*

¹⁴² *FDA Basics: Did You Know that a Store Can Sell Food Past the Expiration Date?*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm210073.htm> (last visited June 27, 2013).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ H.R. REP. NO. 104-661, at 5 (1996).

donation at a soup kitchen is very different from produce put into take-home bags at the food pantry and consumed later by patrons.”¹⁴⁶

Although it does not exempt donors from liability from gross negligence or intentional misconduct, the Act does not create any new liability. Indeed, the statute specifically states that it “shall not be construed to create any liability.”¹⁴⁷

Covered Activities

The Bill Emerson Act provides liability protection for activities such as donating, gleaning, receiving donations, and distributing donations. The terms “food recovery” and “gleaning” are used to describe certain activities that are performed to reduce food waste and to combat hunger through “the collection of wholesome food for distribution to the poor and hungry.”¹⁴⁸ Food recovery and gleaning are often used interchangeably, but under the Bill Emerson Act they are separate activities. Gleaning is a subset or type of food recovery.

USDA delineates four basic types of food recovery: field gleaning, perishable produce rescue or salvage, perishable and prepared food rescue, and nonperishable processed food collection.¹⁴⁹

- **Field gleaning:** the collection of crops from farmers' fields that have already been mechanically harvested or on fields where it is not economically profitable to harvest. This term can also be used to describe the donation of agricultural products that have already been harvested and are being stored at a farm or packing house.
- **Perishable produce rescue/salvage:** the collection of perishable produce from wholesale and retail sources, including wholesale markets, supermarkets, and farmers' markets.
- **Perishable and prepared food rescue:** the collection of prepared foods from the food service industry, including restaurants, hospital, caterers, and cafeterias.
- **Nonperishable processed food collection:** the collection of processed foods, usually with long shelf lives, from sources such as manufacturers, supermarkets, distributors, grocery stores, and food drives.¹⁵⁰

¹⁴⁶ *Id.*

¹⁴⁷ 42 U.S.C.A. § 1791(f) (West 2013).

¹⁴⁸ U.S. DEP'T OF AGRIC., A CITIZEN'S GUIDE TO FOOD RECOVERY 1 (1999).

¹⁴⁹ *Id.* (stating these are the most common).

¹⁵⁰ *Id.*

Covered persons engaged in each of these four basic types of food recovery would be eligible for the liability protections offered by the Bill Emerson Act.

Gleaning and Crop Insurance

Although field gleaning is a covered activity, farmers must take a few simple steps to ensure that the gleaning activity does not adversely affect their crop insurance coverage.¹⁵¹ While the Federal Crop Insurance Corporation (FCIC) encourages insurance providers to “allow gleaning in situations where a crop or portion of a crop may otherwise go unused or be destroyed,”¹⁵² insured parties must follow a few rules to maintain coverage. First, producers that want to donate a damaged crop should contact their insurance agent first so that crop damage can be properly assessed before gleaning occurs.¹⁵³ Second, FCIC only allows gleaning by an approved charitable organization.¹⁵⁴ The charitable organization must be listed in USDA’s handbook, *A Citizen’s Guide to Food Recovery*.¹⁵⁵ If a farmer is dealing with an unlisted organization, he must first contact the USDA state coordinator listed in the handbook.¹⁵⁶ Finally, insureds must not receive compensation from the gleaning organization.¹⁵⁷

Covered Parties

The Act protects “persons,” “gleaners,” and “nonprofit organizations.” The Act provides a very broad definition for “person.” This definition includes an:

1. Individual;
2. Corporation;
3. Partnership;
4. Organization;
5. Association;
6. Governmental entity;
7. Retail grocer;
8. Wholesaler;
9. Hotel;
10. Motel;

¹⁵¹ See generally U.S. Dep’t of Agric., Risk Mgmt. Agency, 2009 Insurance Fact Sheet: GLEANING (2008) available at http://www.rfhresourceguide.org/Content/cmsDocuments/USDA_RMA_GleaningFactSheet.pdf.

¹⁵² *Id.*

¹⁵³ See *id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ U.S. DEP’T OF AGRIC., RISK MGMT. AGENCY, 2009 INSURANCE FACT SHEET: GLEANING (2008) available at http://www.rfhresourceguide.org/Content/cmsDocuments/USDA_RMA_GleaningFactSheet.pdf.

11. Manufacturer;
12. Restaurant;
13. Caterer;
14. Farmer;
15. Nonprofit food distributor; or,
16. Hospital.¹⁵⁸

In the case of listed entities (2) through (6) above, the term “person” also “includes an officer, director, partner, deacon, trustee, council member, or other elected or appointed individual responsible for the governance of the entity.”¹⁵⁹ This list of potential “persons” does not appear to be exhaustive because the statute uses the term “includes” twice when listing these entities.¹⁶⁰

A “gleaner” is a person that harvests an agricultural crop that has been donated by the owner for either free distribution to the needy directly or to a nonprofit organization for ultimate distribution to the needy.¹⁶¹

A “nonprofit organization” can be either an incorporated or unincorporated entity that “operat[es] for religious, charitable, or educational purposes; and does not provide net earnings to, or operate in any other manner that inures to the benefit of, any officer, employee, or shareholder of the entity.”¹⁶²

Nonprofits are involved in all types of food recovery efforts as well as many different covered activities. However, distributing donations is the activity that presents the greatest risk to most nonprofit organizations. The Model Good Samaritan Act did not protect nonprofit organizations in most of their activities, to include food distribution.¹⁶³ Congress recognized this deficiency and amended the Model Act to include protection for nonprofit organizations when they enacted the Bill Emerson Act.¹⁶⁴ Now, nonprofits are protected when they distribute donations and when they perform other covered activities.¹⁶⁵ However, acts or omissions that constitute gross negligence or intentional misconduct are not.

¹⁵⁸ 42 U.S.C.A. § 1791(b)(10) (West 2013).

¹⁵⁹ *Id.* at § 1791(b)(10).

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at § 1791(b)(5).

¹⁶² *Id.* at § 1791(b)(9).

¹⁶³ H.R. REP. NO. 104-661, at 4-5 (1996).

¹⁶⁴ *Id.* “It amends the current model Act to provide protection to nonprofit organizations which distribute donated food.” *Id.* at 5. *See also* 143 CONG. REC. S9610-11 (daily ed. Aug. 2, 1996) (Leahy Amendment No. 5148).

¹⁶⁵ *See* 42 U.S.C.A. § 1791(c)(2) (West 2013). *See also* H.R. REP. NO. 104-661, at 4 (1996).

Covered Items

The covered donated items include “apparently fit grocery products” and “apparently wholesome food.” A “grocery product” includes “nonfood grocery products” such as:

- Disposable paper products;
- Disposable plastic products;
- Household cleaning products;
- Laundry detergent;
- Cleaning product; or,
- Miscellaneous household item.¹⁶⁶

An “apparently fit grocery product” is a grocery product that meets all federal, state, and local laws and regulations for quality and labeling¹⁶⁷ “even though the product may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”¹⁶⁸ These federal, state, and local requirements are generally no different from those that are required for retail sale.

The Act defines “apparently wholesome food” as food that meets all federal, state, and local laws and regulations concerning quality and labeling standards “even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”¹⁶⁹ The definition of “food” is quite broad because it includes “any raw, cooked, processed, or prepared edible substance, ice, beverage, or ingredient used or intended for use in whole or in part for human consumption.”¹⁷⁰ Simply stated, if the product is supposed to be eaten, it is covered.

As an example, a dented can of green beans being considered for potential donation would need to be checked to ensure that its label and container are still intact before it could be donated. Nevertheless, coverage may be extended to some items that do not initially meet the requirements, provided

¹⁶⁶ 42 U.S.C.A. § 1791(b)(6) (West 2013).

¹⁶⁷ Two main federal agencies, along with their several subagencies, are responsible for food safety and labeling. USDA is responsible for meat, poultry, and some egg products while FDA is responsible for everything else. See *Selected Federal Agencies with a Role in Food Safety*, FOODSAFETY.GOV, <http://www.foodsafety.gov/about/federal> (last visited June 27, 2013).

¹⁶⁸ 42 U.S.C.A. § 1791 (b)(1). “Often, food donations are made by grocery stores, food wholesalers, caterers, and the like, when the food has fallen below the donator’s quality or appearance standards but the food is still wholesome.” H.R. REP. NO. 104-661, at 4 (1996).

¹⁶⁹ 42 U.S.C.A. § 1791(b)(2) (West 2013).

¹⁷⁰ *Id.* at § 1791(b)(4).

that the items can be reconditioned as discussed in the *Partial Compliance* section below.

Proper Donation

In order for the Bill Emerson Act protections to apply, the items must be “donated” in “good faith.”¹⁷¹ The Act defines “donate” as “giv[ing] without requiring anything of monetary value from the recipient.”¹⁷² However, the definition of “donate” allows a donor nonprofit organization to charge a donee nonprofit organization a nominal fee as long as the ultimate user or recipient is not charged.¹⁷³

The Bill Emerson Act does not define “good faith.”¹⁷⁴ *Black’s Law Dictionary* defines “good faith” as “[a] state of mind consisting in:

1. Honesty in belief or purpose;
2. Faithfulness to one’s duty or obligation;
3. Observance of reasonable commercial standards of fair dealing in a given trade or business; or,
4. Absence of intent to defraud or to seek unconscionable advantage.¹⁷⁵

The Restatement (Second) of Contracts provides a similar definition, citing the Uniform Commercial Code:

1. Honesty in fact in the conduct or transaction concerned; or,¹⁷⁶
2. Honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.¹⁷⁷

“Good faith” is used in many different contexts and its exact meaning will vary with the context in which it is used.¹⁷⁸ “Good faith” is often defined by excluding acts of “bad faith,” which are those that “violate community standards of decency, fairness or reasonableness.”¹⁷⁹

¹⁷¹ *Id.* at § 1791(c).

¹⁷² *Id.* at § 1791(b)(3).

¹⁷³ *Id.*

¹⁷⁴ See 42 U.S.C.A. § 1791 (West 2013).

¹⁷⁵ BLACK’S LAW DICTIONARY 762 (9th ed. 2009).

¹⁷⁶ RESTATEMENT (SECOND) OF CONTRACTS § 205(a) (1981) (citing U.C.C. § 1-201(19)).

¹⁷⁷ *Id.* (citing U.C.C. § 1-103(b)).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (citing U.C.C. § 1-201(19)).

Protection from Premises Liability

In addition to addressing concerns about food-related liability, the Bill Emerson Act removes most of the risk associated with premises liability that is associated with the collection of donations on the donor's property.¹⁸⁰ But to be absolved of civil and criminal premises-related liability, certain conditions must be met:

1. The property where gleaning or donation collecting occurs must be owned or occupied by a "person;"
2. The "person" must permit the gleaners or representatives of a nonprofit (paid or unpaid) to enter his property;
3. For the purpose of collecting the donations; and,
4. The collected donations must ultimately be distributed to needy individuals¹⁸¹

However, the "person" remains liable for the death or injury of a collector or gleaner if such death or injury "result[ed] from an act or omission of the person constituting gross negligence or intentional misconduct."¹⁸²

Partial Compliance

The Bill Emerson Act extends the civil and criminal liability protection to products that may not meet all "quality and labeling standards imposed by Federal, State, and local laws and regulations"¹⁸³ as long as the Act's procedures for reconditioning are followed.¹⁸⁴ To extend the protection to nonconforming items, donors and nonprofits must follow three steps:¹⁸⁵

1. The donor must inform the nonprofit of the nonconforming nature of the item;
2. The nonprofit must agree to recondition the item so that it will be compliant; and,
3. The nonprofit must know the standards for reconditioning the item.¹⁸⁶

¹⁸⁰ "First, Section 402(d) provides that a person who allows the collection or gleaning of donations on property he or she owns will not be liable for the injury or death of the gleaner, except in cases of gross negligence or intentional misconduct." *Good Samaritan Food Donation Act: Hearing on H.R. 2428 Before the Subcomm. on Postsecondary Educ., Training, and Lifelong Learning of the H. Comm. Educ. and Econ. Opportunities*, 104th Cong. (1996) (statement of Henry Cohen, legislative attorney, Cong. Research Serv.).

¹⁸¹ 42 U.S.C.A. § 1791(d) (West 2013).

¹⁸² *Id.*

¹⁸³ *Id.* at § 1791(e).

¹⁸⁴ *Id.*

¹⁸⁵ "Items" include both food and grocery products. See *id.*

¹⁸⁶ *Id.*

FDA, in conjunction with the Association of Food and Drug Officials (AFDO), developed the Model Consumer Commodity Salvage Code to provide guidance to organizations that recondition food.¹⁸⁷ This Model Code is designed to help state and local governments, as well as those involved in food reclamation, ensure that food salvage and reconditioning are conducted in a manner that protects public health.¹⁸⁸ Before an organization makes a final determination on whether an item is suitable for donation, they should contact an organization that has expertise in food reclamation, such as Feeding America,¹⁸⁹ to help determine if their items may be reconditioned and subsequently distributed to the needy.

Health Regulations

The Bill Emerson Act does not waive state and local health regulations. In fact, the Act expressly states that “[n]othing in this act shall be construed to supercede State or local Health regulations.”¹⁹⁰ This means that donors, gleaners, and nonprofit organizations **must** still comply with **all** state and local health regulations.¹⁹¹ This requirement was not part of the Model Act, but was part of an amendment in response to the amendment that provided liability protection to nonprofit organizations.¹⁹² Senator Kennedy, the author of the amendment, believed that this amendment was necessary because “[i]f we diminish the protections afforded by the tort laws, it is vital for the health and safety of those who consume donated food that regulatory protections remain in place.”¹⁹³ Thus, the Bill Emerson Act strikes a balance between facilitating donation and ensuring food safety by removing the specter of liability for ordinary negligence while requiring compliance with state and local health regulations. Failure to follow state or local health regulations may constitute gross negligence or intentional misconduct and thus fall outside the protection of the Bill Emerson Act.

¹⁸⁷ *Food Safety*, FEEDING AMERICA, <http://qa.feedingamerica.org/get-involved/corporate-opportunities/become-a-partner/become-a-product-partner/food-safety.aspx> (last visited June 27, 2013). The Model Salvage Code can be found at *Model Consumer Commodity Salvage Code*, ASS'N OF FOOD AND DRUG OFFICIALS, <http://www.afdo.org/Default.aspx?pagelD=1280262> (last visited June 27, 2013).

¹⁸⁸ See *Model Consumer Commodity Salvage Code*, ASS'N OF FOOD AND DRUG OFFICIALS, <http://www.afdo.org/Default.aspx?pagelD=1280262> (last visited June 27, 2013).

¹⁸⁹ FEEDING AMERICA, <http://qa.feedingamerica.org/> (last visited June 27, 2013).

¹⁹⁰ 42 U.S.C.A. § 1791(f) (West 2013).

¹⁹¹ *Id.*

¹⁹² 143 CONG. REC. S9532-33 (daily ed. Aug. 2, 1996) (statement of Sen. Kennedy).

¹⁹³ *Id.*

Conclusion

Food waste and hunger are very real and difficult-to-reconcile problems in the United States. Food recovery, through food donations from businesses, can reduce the impact of both problems. Although risk is inherent to operating in the food industry, those participating in food recovery programs have their risks greatly reduced for the qualified donations they make. The Bill Emerson Good Samaritan Food Donation Act removes the risk of liability associated with food and grocery item donation and makes food donation a viable and beneficial business practice.

Attorneys should make their food industry and agricultural clients aware of the Bill Emerson Act and help them realize the benefits of recovery by developing food recovery plans.

Disclaimer

Nothing in this document should be construed as legal advice. Anyone interested in participating in food recovery should seek legal counsel to advise them concerning their particular situation.

APPENDIX A – The Bill Emerson Good Samaritan Food Donation Act

Effective: October 1, 1996

42 U.S.C.A. § 1791 (West 2013)

Bill Emerson Good Samaritan Food Donation Act¹⁹⁴

(a) Short title

This section may be cited as the “Bill Emerson Good Samaritan Food Donation Act”.

(b) Definitions

As used in this section:

(1) Apparently fit grocery product

The term “apparently fit grocery product” means a grocery product that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the product may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.

(2) Apparently wholesome food

The term “apparently wholesome food” means food that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.

(3) Donate

The term “donate” means to give without requiring anything of monetary value from the recipient, except that the term shall include giving by a nonprofit organization to another nonprofit organization, notwithstanding that the donor organization has charged a nominal fee to the donee organization, if the ultimate recipient or user is not required to give anything of monetary value.

¹⁹⁴ From Westlaw

(4) Food

The term “food” means any raw, cooked, processed, or prepared edible substance, ice, beverage, or ingredient used or intended for use in whole or in part for human consumption.

(5) Gleaner

The term “gleaner” means a person who harvests for free distribution to the needy, or for donation to a nonprofit organization for ultimate distribution to the needy, an agricultural crop that has been donated by the owner.

(6) Grocery product

The term “grocery product” means a nonfood grocery product, including a disposable paper or plastic product, household cleaning product, laundry detergent, cleaning product, or miscellaneous household item.

(7) Gross negligence

The term “gross negligence” means voluntary and conscious conduct (including a failure to act) by a person who, at the time of the conduct, knew that the conduct was likely to be harmful to the health or well-being of another person.

(8) Intentional misconduct

The term “intentional misconduct” means conduct by a person with knowledge (at the time of the conduct) that the conduct is harmful to the health or well-being of another person.

(9) Nonprofit organization

The term “nonprofit organization” means an incorporated or unincorporated entity that--

- (A) is operating for religious, charitable, or educational purposes; and
- (B) does not provide net earnings to, or operate in any other manner that inures to the benefit of, any officer, employee, or shareholder of the entity.

(10) Person

The term "person" means an individual, corporation, partnership, organization, association, or governmental entity, including a retail grocer, wholesaler, hotel, motel, manufacturer, restaurant, caterer, farmer, and nonprofit food distributor or hospital. In the case of a corporation, partnership, organization, association, or governmental entity, the term includes an officer, director, partner, deacon, trustee, council member, or other elected or appointed individual responsible for the governance of the entity.

(c) Liability for damages from donated food and grocery products

(1) Liability of person or gleaner

A person or gleaner shall not be subject to civil or criminal liability arising from the nature, age, packaging, or condition of apparently wholesome food or an apparently fit grocery product that the person or gleaner donates in good faith to a nonprofit organization for ultimate distribution to needy individuals.

(2) Liability of nonprofit organization

A nonprofit organization shall not be subject to civil or criminal liability arising from the nature, age, packaging, or condition of apparently wholesome food or an apparently fit grocery product that the nonprofit organization received as a donation in good faith from a person or gleaner for ultimate distribution to needy individuals.

(3) Exception

Paragraphs (1) and (2) shall not apply to an injury to or death of an ultimate user or recipient of the food or grocery product that results from an act or omission of the person, gleaner, or nonprofit organization, as applicable, constituting gross negligence or intentional misconduct.

(d) Collection or gleaning of donations

A person who allows the collection or gleaning of donations on property owned or occupied by the person by gleaners, or paid or unpaid representatives of a nonprofit organization, for ultimate distribution to needy individuals shall not be subject to civil or criminal liability that arises due to the injury or death of the gleaner or representative, except that this paragraph shall not apply to an injury or death that results from an act or omission of the person constituting gross negligence or intentional misconduct.

(e) Partial compliance

If some or all of the donated food and grocery products do not meet all quality and labeling standards imposed by Federal, State, and local laws and regulations, the person or gleaner who donates the food and grocery products shall not be subject to civil or criminal liability in accordance with this section if the nonprofit organization that receives the donated food or grocery products—

(1) is informed by the donor of the distressed or defective condition of the donated food or grocery products;

(2) agrees to recondition the donated food or grocery products to comply with all the quality and labeling standards prior to distribution; and

(3) is knowledgeable of the standards to properly recondition the donated food or grocery product.

(f) Construction

This section shall not be construed to create any liability. Nothing in this section shall be construed to supercede State or local health regulations.

Credits

(Pub.L. 89-642, § 22, formerly Pub.L. 101-610, Title IV, § 402, Nov. 16, 1990, 104 Stat. 3183; renumbered § 22, transferred and amended Pub.L. 104-210, § 1(a)(2), (b), Oct. 1, 1996, 110 Stat. 3011, 3012.)

42 U.S.C.A. § 1791, 42 USCA § 1791

Current through P.L. 113-12 (excluding P.L. 113-4) approved 6-3-13