

Legal Fact Sheet

Pennsylvania Food Donation: Liability Protections

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Businesses (including farms) and nonprofits that donate or distribute donated food are generally well-protected by laws designed to provide immunity from liability related to such donations. The federal Bill Emerson Good Samaritan Food Donation Act provides liability protection for food donors, and Pennsylvania state law provides some additional liability protection to food donors in the state.

The Bill Emerson Good Samaritan Act

The Bill Emerson Good Samaritan Food Donation Act (the Emerson Act), passed in 1996, provides a federal baseline of comprehensive liability protection for food donors.¹ The Emerson Act covers individuals, businesses, non-profit organizations, and the officers of businesses and non-profit organizations. It also covers gleaners—individuals that harvest donated agricultural crops to the needy or to a nonprofit organization that distributes to the needy.² Donors are protected from civil or criminal liability when they donate qualifying types of food in good faith.

- **Qualifying Food:** The donated food must be “apparently wholesome” and meet “all quality and labeling standards imposed by Federal, State, and local laws and regulations,” even if the food is not “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”³ The Emerson act defines “food” very broadly as “any raw, cooked, processed, or prepared edible substance, ice, beverage, or ingredient used or intended for [...] human consumption.”⁴
- **Exception for Reconditioned Food:** Even if a food does not meet all applicable standards, the donor can be protected by the Emerson Act if (s)he follows all of the Act’s reconditioning procedures,⁵ which include:
 - 1) The donor informs the nonprofit of the nonconforming nature of the product;
 - 2) The nonprofit agrees to recondition the item so that it is compliant; and
 - 3) The nonprofit knows the standards for reconditioning the item.

The Emerson Act protects most but not all donations of qualifying food. To get protection, the transaction must be structured such that:⁶

- 1) The donor donates to a non-profit organization.⁷
- 2) The non-profit organization that receives the donated food distributes it to needy populations. Direct donations from the donor to needy individuals do not seem to be protected by the Act.
- 3) The ultimate recipients do not pay for this donated food. However, if one nonprofit donates food to another nonprofit for distribution, the Act allows the first nonprofit to charge the distributing nonprofit a nominal fee to cover handling and processing costs.

If these criteria are met, the Emerson Act is quite protective of donors, and does not hold a donor liable unless the donor acts with gross negligence or intentional misconduct.⁸

- **Gross Negligence** involves “voluntary and conscious conduct (including a failure to act)” by a person or organization that knew at the time of donation that the food was likely to have harmful health impacts.
- **Intentional Misconduct** is when a person or organization donates “with knowledge . . . that the conduct is harmful to the health or well-being of another person.”

Essentially, an individual or organization should not donate or facilitate the distribution of donated food that the individual or organization knows is likely to be harmful or dangerous. The Act gives little guidance on what activities are gross negligence or intentional misconduct. However, the House of Representatives Report associated with the Emerson Act indicates that each case must be analyzed individually, and that, for example, donating food past the sell-by date generally will not impact liability protections because such labeling is not federally required and generally does not correspond to food safety.⁹ The lack of court cases interpreting the Emerson Act suggests how protective the Act is of donors; research does not reveal a single case related to food donation liability.¹⁰

Some members of Congress have introduced bills to enhance federal liability protections for food donations,¹¹ but those bills have not advanced beyond committee.

Liability Protection for Food Donation in Pennsylvania

In addition to the federal liability protections, there are several ways in which Pennsylvania’s state law is relevant to liability protection for food donations.

- **The Emerson Act:** The Emerson Act indicates that donated food must meet all applicable state and local food

quality and labeling standards in addition to federal requirements.¹² Therefore, state laws regarding food labeling and safety must be followed for a food donor to receive protection under the federal Emerson Act.

- **State Authority:** States may enact laws that are more protective of donors than the Emerson Act, which sets a floor on liability protection. Pennsylvania's relevant law is the Donated Food Limited Liability Act.¹³

Pennsylvania State Liability Protection

Pennsylvania's Donated Food Limited Liability Act provides civil and criminal liability protection to individuals and organizations that donate, in good faith, to a charitable or religious organization.¹⁴ Pennsylvania law provides liability protection to both donors and charitable organizations.¹⁵ Additionally, both the donor and the charitable organization must reasonably inspect the food and find it fit for human consumption.¹⁶ To receive protection, a donor must in good faith believe that the charitable organization will distribute food at no cost to needy individuals.¹⁷

Importantly, Pennsylvania bans the sale of donated food for profit. This means that not only does the sale of donated food for profit not receive heightened liability protection, but that the sale of donated food is a third degree misdemeanor.¹⁸ However, a charitable organization may assess a nominal fee on another organization and still receive liability protection, if the organization does not make a profit.¹⁹ For example, a food bank could impose a small fee on a food pantry for transporting food to the food pantry that ultimately distributes food to needy individuals.

Under Pennsylvania law, either donors nor organizations that distribute food are protected if an injury results from "negligence, recklessness, or intentional misconduct... or if [they have]... actual knowledge that the food is tainted, contaminated, or harmful to the health or well-being of the ultimate recipient."²⁰ However, this standard is weaker than the federal floor that requires a finding of at least "gross negligence" to overcome a defense of liability protection for food donation.²¹ As such, courts would apply the higher federal standard of gross negligence in finding liability.

Miscellaneous Provisions

Pennsylvania extends liability protections to the donation of wild game, if the game is processed before reaching the end recipient.²² If a county government connects donors with distribution organizations, the county is also protected from civil and criminal liability unless it acted with gross negligence, recklessness, or intentional misconduct.²³

Conclusion

Federal law and Pennsylvania state law provide important liability protections for food donors, if the donated food complies with federal and state safety and labeling rules, and it is donated in good faith and without the donor acting with gross negligence or intentional misconduct.

¹ 42 U.S.C. §1791 (1996).

² 42 U.S.C. § 1791(c)(1); 42 U.S.C. §1791(b)(5).

³ 42 U.S.C. § 1791(c)(1); 42 U.S.C. §1791(b)(5). There is an exception for mislabeled food products that are "not readily marketable," which can also be protected if the donor explains the mislabeling to the donee, and the donee has sufficient knowledge to and does recondition the product to meet applicable standards. *Id.*

⁴ 42 U.S.C. §1791(b)(4).

⁵ 42 U.S.C. § 1791 (e).

⁶ 42 U.S.C. § 1791(c).

⁷ The Act defines a non-profit as an incorporated or unincorporated entity that satisfies these requirements: (1) operates "for religious, charitable, or educational purposes" and (2) "does not provide net earnings to, or operate in any other manner for the benefit of any officer, employee, or shareholder." 42 U.S.C. §1791(b)(9).

⁸ 42 U.S.C. §1791(c)(3).

⁹ U.S. GPO, House Report 104-661, Committee Views, E (July 9, 1996); Legal Guide to Food Recovery, U. ARK. L.L.M. DEP'T OF AGRIC. & FOOD LAW 10 (2013), available at <http://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf>. AKA: Legal Guide to Food Recovery, *supra* note 4, at 10.

¹⁰ Legal Guide to Food Recovery, U. ARK. L.L.M. DEP'T OF AGRIC. & FOOD LAW 10 (2013), available at <http://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf>. AKA: *Id.*

¹¹ Food Donation Act of 2017, H.R. 952, 115th Cong. (2017); Food Recovery Act of 2017, H.R. 3444, 115th Cong. (2017); Food Donation Act of 2018, S. 2787, 115th Cong. (2018).

¹² 42 U.S.C. § 1791(c); 42 U.S.C. §1791(b)(1-2).

¹³ 10 Pa. Con. Stat. § 354(a).

¹⁴ 10 Pa. Con. Stat. §§ 351-58.

¹⁵ 10 Pa. Con. Stat. §§ 354-55.

¹⁶ Donors must inspect at time of donation. *Id.* § 354. Charitable organizations must inspect at donation and distribution. *Id.* § 355.

¹⁷ 10 Pa. Con. Stat. § 354(a).

¹⁸ 10 Pa. Con. Stat. § 356.

¹⁹ 10 Pa. Con. Stat. § 354(a); 10 Pa. Con. Stat. § 356.

²⁰ 10 Pa. Con. Stat. § 354(b); 10 Pa. Con. Stat. § 355(b).

²¹ 42 U.S.C. §1791

²² 10 Pa. Con. Stat. § 355.1.

²³ 10 Pa. Con. Stat. § 358.

