

# Legal Fact Sheet

## Maine Food Donation: Liability Protections

Created by the Harvard Food Law and Policy Clinic, September 2018

Businesses (including farms) and nonprofits that provide or receive 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 Maine law provides additional liability protection to good faith donors and nonprofits in the state.

### The Bill Emerson Good Samaritan Act

The Bill Emerson Good Samaritan Food Donation Act (the Emerson Act) provides a federal baseline of protection for food donors.<sup>1</sup> 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 for a nonprofit organization that distributes to the needy.<sup>2</sup> These individuals and businesses are protected so long as they donate qualifying types of food in good faith.

- **Qualifying Food:** The donated food must be “apparently wholesome” or an “apparently fit grocery product” and meet “all quality and labeling standards imposed by Federal, State, and local laws and regulations,” even if it is not “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”<sup>3</sup>
- **Exception for Reconditioned Food:** Even if a food does not meet all applicable standards, the donor can still be protected by the Emerson Act as long as (s)he follows all of the Act’s reconditioning procedures,<sup>4</sup> 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.<sup>5</sup>

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

- 1) The donor donates to a non-profit organization.<sup>6</sup>
- 2) This nonprofit organization that receives the donated food distributes it to needy populations.<sup>7</sup> Direct donations from the donor to needy individuals do not seem to be protected by the Act.<sup>8</sup>
- 3) The ultimate recipients do not pay for this donated food.<sup>9</sup> 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.<sup>10</sup>

So long as 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.<sup>11</sup>

- **Gross Negligence** involves “voluntary and conscious conduct (including a failure to act)” by a person or organization that knew when the donation was made that the donated food was likely to have harmful health impacts.<sup>12</sup>
- **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.”<sup>13</sup>

In other words, one should not donate or facilitate the distribution of donated food that one knows is likely to be harmful or dangerous. Unfortunately, the Act gives little guidance on what activities qualify as gross negligence or intentional misconduct. However, the House of Representatives Report associated with the Emerson Act has indicated 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.<sup>14</sup> The lack of court cases interpreting the Emerson Act suggests how protective the Act is of donors; research does not turn up a single case related to food donation liability.<sup>15</sup>

## Liability Protection for Food Donation in Maine

In addition to the federal liability protections, there are two ways in which Maine'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.<sup>16</sup> This means that 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 are free to enact laws that are more protective of donors than the federal Emerson Act, which sets a floor on liability protection.<sup>17</sup> Maine has passed such legislation.

Maine law provides protection from civil liability for good faith donors of food to a charitable or not-for-profit organization, as well as for any charitable or not-for-profit organization, and any employee or volunteer of that organization, that in good faith receives and distributes the food for free, provided that the food is apparently fit for human consumption.<sup>18</sup> Food may be fit for human consumption even if it is not readily marketable due to conditions such as age, appearance, or grade, and even if it is past the manufacturer's recommended date of last sale.<sup>19</sup> In order to receive this protection, the receiving organizations cannot charge end recipients for the food.<sup>20</sup>

Licensed health care facilities and eating establishments<sup>21</sup> are protected from civil liability as long as the injury or death is not a direct result of intentional misconduct; all other donors are protected from civil liability if the injury or death is not a direct result of the gross negligence, recklessness, or intentional misconduct of the donor or distributor.<sup>22</sup>

## Conclusion

Federal law and Maine state law provide ample liability protections for food donors, so long as the donated food is in compliance with federal and state safety and labeling rules, and it is donated to a nonprofit organization in good faith and without the donor acting with gross negligence, recklessness, or intentional misconduct.

<sup>1</sup> 42 U.S.C.A. §1791 (West 2018).

<sup>2</sup> *Id.* §1791(b)(5).

<sup>3</sup> There is an exception for mislabeled food products that are "not readily marketable," which can also be protected so long as 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.* §1791(b)(1-2).

<sup>4</sup> *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>.

<sup>5</sup> *Id.*

<sup>6</sup> 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.A. §1791(b)(9) (West 2018).

<sup>7</sup> *Id.* §1791(c).

<sup>8</sup> *See id.*

<sup>9</sup> *Id.* §1791(b)(3).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* §1791(c)(3).

<sup>12</sup> *Id.* §1791(b)(7).

<sup>13</sup> *Id.* §1791(b)(8).

<sup>14</sup> *Legal Guide to Food Recovery*, *supra* note 4, at 10.

<sup>15</sup> *Id.*

<sup>16</sup> 42 U.S.C.A. §1791(b)(1-2) (West 2018).

<sup>17</sup> *Legal Guide to Food Recovery*, *supra* note 4, at 10.

<sup>18</sup> Me. Rev. Stat. Ann. tit. 14, § 166(2)-(3), (5)(West 2017).

<sup>19</sup> Me. Rev. Stat. Ann. tit. 14, § 166(4)(West 2017).

<sup>20</sup> *Id.*

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<sup>21</sup> “Eating establishment” refers to a place where food or drink is prepared and served or served to the public for consumption on the premises or prepared and served or served ready to eat to the public for consumption off the premises, including but not limited to restaurants, catering establishments, cafeterias, correctional facilities, schools, and other places in the entertainment, hospitality, and recreational sector. 22 Me.Rev. Stat. Ann. § 2491 (West 2017).

<sup>22</sup> Me. Rev. Stat. Ann. tit. 14, § 166(2)-(3), (5)(West 2017).