



UNITED STATES

UNITED STATES
**LEGAL
GUIDE**
FOOD DONATION
LAW AND POLICY

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About The Global Food Donation Policy Atlas

The Global Food Donation Policy Atlas is a first-of-its-kind initiative to promote better laws around food donation in order to help address both food loss and food insecurity. This project maps the laws affecting food donation in countries across the globe, in order to: help practitioners understand national laws relating to food donation; compare laws across countries and regions; analyze legal questions and barriers to donation; and share best practices and recommendations for overcoming these barriers. The project is a partnership between Harvard Law School Food Law and Policy Clinic and The Global FoodBanking Network. To learn about and compare the food donation laws and policies for the countries FLPC has researched to date, visit www.atlas.foodbanking.org.

About the Harvard Law School Food Law and Policy Clinic

The Harvard Law School Food Law and Policy Clinic (FLPC) serves partner organizations and communities by providing guidance on cutting-edge food system legal and policy issues, while engaging law students in the practice of food law and policy. Our focus is on increasing access to healthy foods, supporting sustainable food production and food systems, and reducing waste of healthy, wholesome food. For more information, visit www.chlpi.org/FLPC.



About The Global FoodBanking Network

The Global FoodBanking Network is an international non-profit organization that nourishes the world's hungry through uniting and advancing food banks in more than 40 countries. GFN focuses on combating hunger and preventing food waste by providing expertise, directing resources, sharing knowledge and developing connections that increase efficiency, ensure food safety, and help food banks reach more people facing hunger. For more information visit www.foodbanking.org.



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INTRODUCTION

Purpose of this Guide

Food loss and waste has emerged as one of the greatest food system challenges that we face today. An estimated one-third of food produced globally is lost or wasted along the supply chain;¹ this amounts to approximately 1.3 billion tons of food each year that ends up in the landfill.² Food loss or waste occurs at every stage of the food system: food is lost during the initial harvest due to low market prices, high labor costs, and demand for perfect-looking produce; food is wasted by grocery stores and restaurants over-estimating customer demands; and food is discarded by consumers who engage in inefficient shopping and cooking practices and lack a clear understanding about date labels.³

These behaviors have significant environmental, economic, and social consequences: food that is lost or wasted has a huge carbon footprint of 3.3 gigatons,⁴ using roughly 28% of agricultural land,⁵ and accounting for eight percent, or 70 billion tons, of total global greenhouse gas emissions.⁶ The market value of food products lost or wasted is approximately \$940 billion per year.⁷ Meanwhile, more than 820 million people are undernourished and one in nine is food insecure.⁸ The international community has sought to address this paradox and mobilize the reduction of food waste, especially within the framework of the *2030 Agenda for Sustainable Development* and Sustainable Development Goal 12.3.⁹

In many countries, food donation has emerged as a popular and logical solution to redirect safe, surplus food into the hands of those who need it most. Most food donations are facilitated through food banks or other charitable, non-governmental organizations that recover surplus, wholesome food and redirect the recovered food to local beneficiary agencies (such as soup kitchens, shelters, and community pantries) to feed low-income, food insecure persons. As food insecurity, food loss, and food waste have continued to rise, new, innovative models of food recovery have emerged around the world.

However, uncertainty surrounding the laws and regulations most relevant to food donation threatens to hinder the expansion of these food recovery organizations and limit their potential impact. To help address the most pressing and universal legal and policy questions, the Harvard Law School Food Law and Policy Clinic (FLPC) and The Global FoodBanking Network (GFN) have partnered to create The Global Food Donation Policy Atlas.¹⁰ This innovative partnership will map the laws and policies affecting donations in 15 countries over the course of two years. The project aims to: identify national laws relating to food donation, analyze the most common legal barriers to promoting greater food donation and share best practices and recommendations for overcoming these barriers.

THE PROJECT AIMS TO IDENTIFY AND EXPLAIN NATIONAL LAWS RELATING TO FOOD DONATION, ANALYZE THE MOST COMMON LEGAL BARRIERS TO PROMOTING GREATER FOOD DONATION AND SHARE BEST PRACTICES AND RECOMMENDATIONS FOR OVERCOMING THESE BARRIERS.

This Legal Guide focuses on the United States, where every year 63 million tons of food winds up in landfills, costing the U.S. about \$218 billion each year to grow, process, transport and dispose of food that is never eaten.¹¹ At the same time, 11.1 percent of U.S. households were food insecure in 2018.¹² FLPC and GFN, in collaboration with partners in the U.S.,¹³ have developed this resource to help food donors, food banks and food recovery organizations understand the relevant legal frameworks that impact food waste and donation efforts.

After providing initial commentary on food loss and recovery in the United States in Section I, Section II of this guide provides an overview of the legal frameworks most relevant to food donation at the national and state

level. The subsequent sections take a closer look at the laws generally applicable to food donation: food safety laws and regulations, food date labeling laws, “Good Samaritan” or liability protection laws, tax incentives for food donation and tax policy disincentives, and waste diversion laws that penalize food waste or require food donation or recovery. The extent to which a particular country has developed and subsequently implemented these authorities may vary.

State of Food Insecurity, Food Loss, Waste, and Recovery in the United States

Policies to prevent food loss and waste and to promote food donation gain new importance when a country’s socio-economic conditions perpetuate food insecurity, especially among the most vulnerable. This is the case in the United States, which, despite possessing the world’s largest GDP and highest net wealth, is experiencing greater income inequality than it has in 50 years.¹⁴ In 2018, 38.1 million Americans lived in poverty, or 11.8% of the country’s population.¹⁵ 46 million people rely on emergency food assistance through food banks every year. Nearly 40 percent of food produced in the United States is wasted, while 1 in 8 Americans is food insecure, meaning that they lack access to a sufficient amount of food to lead an active, healthy lifestyle.¹⁶

Against this socio-economic backdrop, the United States has attempted to address some of the underlying concerns contributing to food waste through advisory opinions and regulations on date labeling, liability protections, and tax incentives for food donations. However, awareness and understanding of these tools differs and has varying degrees of success among food donors. In addition to utilizing those tools, some states and local municipalities utilize organic waste bans or food waste diversion requirements.¹⁷

Nevertheless, 63 million tons of food winds up in landfills each year, costing the U.S. about \$218 billion each year to grow, process, transport and dispose of food that is never eaten.¹⁸ Food is wasted at each stage of production: some food never leaves the farm (or another source), while other foods spoil or are otherwise wasted by producers, wholesalers, and retailers.¹⁹ Finally, much of the food purchased by consumers is thrown out, often due to misinformation about food safety and date labeling on the package.²⁰

At the same time, the land allocated to grow food, the use of scarce resources like water, the fossil fuels used to ship it, and the space used to store it are all wasted when food ends up in a landfill. To illustrate, food waste consumes 21 percent of all fresh water, 19 percent of fertilizer, and 18 percent of cropland in the U.S.²¹ As it decomposes, this food emits methane, a greenhouse gas 25 times more potent than carbon dioxide.²² The biggest tragedy is that while millions of tons of food needlessly go to waste, about 11 percent of American households experience food insecurity.²³

The United States by the Numbers

Population 329,350,564	Prevalence of Severe Food Insecurity 1.0%	World Bank Classification High Income
Median Age 38.5 years	Global Food Security Index 83.7	Human Development Index 0.920
GDP \$20.544 trillion	GINI Index 41.5	FLW Estimates 63 million tons
Poverty Rate 11.8%	Food Sustainability Index 68.6	

Source: Global FoodBanking Network, Feb., 2020.

OVERVIEW OF THE UNITED STATES' RELEVANT LEGAL FRAMEWORK

The United States legal system is divided between the federal government and the fifty states and the District of Columbia. At the federal level, there are three branches of government: the legislative branch, which makes laws; the executive branch, which consists of the President and the executive agencies and implements and enforces the laws; and the judicial branch, which evaluates the laws and interprets them. In terms of the hierarchy of legal sources, the first binding source is the U.S. Constitution, followed by (on the federal level) federal statutes, federal administrative agency rules, and federal court decisions, which are accorded precedential weight (known as “common law”). States have the same three branches of government; states make their own laws, carry them out, and have their own court systems to interpret them.

Under the U.S. Constitution, states have control over all government powers not exclusively enumerated in the Constitution as federal powers.²⁴ In the areas in which the federal government has authority to govern, federal laws generally override state laws; however, if there is no applicable federal law and no reason to believe the federal government has intended to preempt state law in that area, despite being an area over which the federal government has authority, states are generally free to act in that area.

In general, federal authority to regulate food stems from the power given to the federal government under the Constitution to regulate goods and products in interstate commerce. Under this authority, the federal government generally has the power to regulate domestic and imported food that substantially affects²⁵ or is marketed in interstate commerce, meaning food that moves across state lines.²⁶ Congress passes statutes that create broad mandates, and delegate authority to federal agencies to fill in the details. More than fifteen different agencies have some regulatory authority over food; however, as discussed below, the two most important are the Food and Drug Administration (FDA) and the Department of Agriculture (USDA), which have authority over the safety and labeling of the majority of the food supply.²⁷

Agencies carry out the powers that Congress has delegated to them by publishing detailed regulations related to a federal statute. In addition to these regulations, agencies often issue guidance or policy statements, which inform the public of the agency’s interpretation of a particular statute or regulation. Agencies also play an enforcement role, monitoring compliance with statutes or regulations by businesses and individuals, and taking action against those entities for failure to comply with statutes or regulations. Courts have the power to ensure that laws and regulations are consistent with the U.S. Constitution and to decide whether Congress or different federal agencies have overstepped their authority, as well as to hold individuals and organizations accountable for violations of the law.

United States’ Food Safety Laws

Food law in the United States is a complex system engaging an array of federal administrative agencies, as well as a division of labor across federal and state governments. At the federal level, the U.S. Code is divided into 50 titles, arranged by subjects. Most food-related laws can be found in Title 21 of the U.S. Code, entitled “Food and Drugs.”

Many agencies play a role in food regulation, but the most important are the FDA and USDA. FDA has statutory authority to regulate the safety and labeling of all foods with the exception of meat, poultry, and some fish, under the Food, Drug, and Cosmetic Act of 1938 (FDCA), and its amendments in the Nutritional Labeling and

FOOD LAW IN THE UNITED STATES IS A COMPLEX SYSTEM ENGAGING AN ARRAY OF FEDERAL ADMINISTRATIVE AGENCIES.

Education Act of 1990, the Fair Packaging and Labeling Act of 1966, the Infant Formula Act of 1980, and the Food Safety Modernization Act of 2011.²⁸ USDA has jurisdiction to regulate meat, poultry, and certain egg products, under the Poultry Products Inspection Act of 1957, the Federal Meat Inspection Act of 1906, the Egg Products Inspection Act of 1970, the Perishable Agricultural Commodities Act of 1930, and the Agricultural Marketing Act of 1946.²⁹ FDA and USDA share jurisdiction over certain products including eggs.³⁰ In addition, both the FDA and USDA regulate food labeling for the products that fall within their respective jurisdictions.³¹

Beyond FDA and USDA, the Federal Trade Commission is responsible for regulating food advertising, including taking enforcement actions against deceptive food advertising.³² The Environmental Protection Agency (EPA) sets standards and regulates to support a clean environment. EPA has the authority to regulate solid and hazardous waste under the Resource Conservation and Recovery Act.³³ Within its mandate under RCRA, EPA has developed the Sustainable Materials Management (SMM) Program, which works to improve use and reuse of many products. The SMM program works to promote sustainable management of food,³⁴ and leads various programs meant to reduce food waste.³⁵

Federal agencies create the laws and carry out the inspections for food processing plants and production facilities that create products that will travel interstate.³⁶ However, for the most part, the federal government does not license and inspect food establishments such as restaurants and retail stores.³⁷ This is because those foods are being sold in-state, rather than across state lines. Scholars argue that FDA has the authority to regulate food retail if it chooses, because it has the authority to prevent adulteration or mislabeling of food held for sale “after shipment in interstate commerce.”³⁸ However, the agency’s authority over food retail sales has not been tested, since the agency has restrained from exercising such authority for lack of resources and leaves regulation of such entities up to the states.³⁹

Bill Emerson Good Samaritan Food Donation Act

The Bill Emerson Good Samaritan Food Donation Act was enacted in 1996 and was designed to increase food donations while reducing food waste.⁴⁰ The Emerson Act provides comprehensive civil and criminal liability protection for food donors and nonprofit organizations that distribute food donations to those in need, as long as they act without gross negligence or intentional misconduct.⁴¹ The act also specifies that in order to be eligible for liability protection, donations must be intended for ultimate distribution to needy individuals, who must not pay anything of monetary value for the donated food.⁴²

THE EMERSON ACT PROVIDES COMPREHENSIVE CIVIL AND CRIMINAL LIABILITY PROTECTION FOR FOOD DONORS AND NONPROFIT ORGANIZATIONS THAT DISTRIBUTE FOOD TO THOSE IN NEED.

In addition to the Emerson Act’s federal liability protection, all 50 states also offer liability protection for food donation. Several states offer additional protections above that offered under federal law. It is important to note, however, that the federal protection in the Emerson Act offers a floor of federal protection; this means that states cannot offer any less protection than that offered under the Emerson Act; they can only offer additional protection.

Many other federal laws impact food donation, as are explained below; however, these are the key federal laws specifically crafted to address food donation.

Federal Agency Activities and Programs on Food Waste Reduction

Awareness of the problems arising from food waste and efforts to improve and resolve the situation have increased over the years. In 2015, the USDA and the EPA set a national goal to reduce food waste levels in the United States by 50 percent by 2030.⁴³ The goal aims to reduce food waste to 109.4 pounds per capita by 2030 (which is half the waste per capita in 2010).

In 2018, USDA, EPA, and FDA signed a joint agency formal agreement,⁴⁴ with the intention to reduce food loss and waste. In 2019, the three agencies followed by launching the Winning on Reducing Food Waste Federal Interagency Strategy.⁴⁵ The strategy includes several important aspects, such as clarifying roles and responsibilities of each agency, forging new partnerships with stakeholders and expanding existing ones, and enhancing food donations through federal policy.⁴⁶

In addition, USDA and EPA host several initiatives aimed at reducing food waste. The Food Waste Challenge, a shared venture of EPA and the USDA, was launched in 2013 with a goal to have 400 partner organizations by 2015 and 1,000 by 2020.⁴⁷ The Food Waste Challenge created a call for actors across the food chain, from other government agencies to retailers, to take action and join the efforts to reduce food waste.⁴⁸ It has since been merged into the other recognition programs. EPA and USDA also jointly implement the U.S. Food Loss and Waste 2030 Champions, which encourages businesses and organizations to publicly announce their commitment to reduce food waste by 50% by the year 2030.⁴⁹

The USDA maintains several food waste initiatives focused on food manufacturers, farm and post-harvest, schools, businesses, and consumer households.⁵⁰ For example, in the school context, the USDA has guidance encouraging the implementation of share tables in cafeterias, which are tables where kids can place unopened or whole foods they do not intend to eat, so other kids can take them and consume during or after mealtime.⁵¹ In addition, as mandated by the 2018 Farm Bill, USDA will create a Food Loss and Waste Liaison to coordinate federal programs aimed at measuring and reducing food loss and waste.⁵²

The EPA also provides several programs and resources related to food recovery, such as the Too Good To Waste program, an implementation guide and toolkit meant to help reduce practices that lead to food waste in American households,⁵³ and the Excess Food Opportunities Map, which maps surplus food and locations for it to be recovered.⁵⁴ The EPA also hosts the Food Recovery Challenge, in which organizations state their commitment to improving sustainable food management practices and report their results.⁵⁵

IN 2015, THE USDA AND EPA SET A NATIONAL GOAL TO REDUCE FOOD WASTE LEVELS IN THE UNITED STATES BY 50 PERCENT BY 2030. THE GOAL AIMS TO REDUCE FOOD WASTE TO 109.4 POUNDS PER CAPITA BY 2030.

Other Relevant Federal Laws

Another relevant area of federal law that impacts food donation is the Internal Revenue Code (IRC), which governs the federal tax system. While taxes operate to raise funds for government,⁵⁶ the tax code also is used to influence taxpayers' behaviors.⁵⁷ Beneficial activities such as donating surplus wholesome food can be incentivized through the tax system. As will be detailed later in this guide, the IRC offers a federal enhanced tax deduction for eligible food donations.⁵⁸

State and Local Law

State Power Over Food Safety

Federal laws and regulations apply to food processing facilities that create products that will enter interstate commerce, and to the labeling of food products in interstate commerce.⁵⁹ Though federal law regulates food manufacturing and labeling for food sold in interstate commerce, federal food safety laws leave states a great deal of authority to pass and enforce laws relating to foods sold within the state.⁶⁰

State governments are responsible for regulating and enforcing food safety for retail and food service establishments within their borders.⁶¹ This state regulatory authority is structured differently in different states. Most states designate their health department to oversee restaurants and retail food establishments. Some states designate their agriculture department to regulate food safety. Other states divide up regulatory authority between these two agencies and give authority to the health department to oversee restaurants, and authority to the agriculture department to oversee retailers and grocery stores (including restaurants inside grocery stores).⁶² In some states, the state agency or agencies regulating food safety share regulatory authority with local health departments. In such states, the state agency enacts food safety regulations that apply statewide, while local health departments interpret and enforce those regulations, and generally also have the option to implement stricter local regulations.⁶³

ALTHOUGH THE FDA FOOD CODE IS NOT BINDING UNLESS A STATE OR LOCAL GOVERNMENT CHOOSES TO ADOPT IT, IT HAS A SIGNIFICANT IMPACT ON STATE FOOD SAFETY LAWS. ALL 50 STATES AND THE DISTRICT OF COLUMBIA HAVE ADOPTED SOME VERSION OF THE FDA FOOD CODE.

While the federal government does not directly regulate retail food establishments, it plays a key role in influencing the state laws regarding these entities by providing model food safety regulations for restaurants and retail stores in the FDA Food Code.⁶⁴ Although the FDA Food Code is not binding unless a state or local government chooses to adopt it, it has a significant impact on state food safety laws. All 50 states and the District of Columbia have adopted some version of the FDA Food Code.⁶⁵ States are free to modify the Food Code in any manner they see fit when they adopt it into their laws or regulations; however, most state modifications are minor. This means that language in the FDA Food Code tends to make up the majority of state and local food safety codes, while concepts that are not addressed in the FDA Food Code are often not addressed by state and local codes. The FDA Food Code does not mention food donation, so this topic generally is not included in state laws.⁶⁶

Other Relevant State and Local Law

Most states collect personal income tax in addition to federal income tax. As of 2018, the states that do not impose such a tax are Alaska, Florida, New Hampshire, South Dakota, Texas and Wyoming.⁶⁷ In addition to income tax, states often place sale taxes on goods and services. This tax is used by most states in the United States.⁶⁸ As will be described later in this guide, in addition to the federal tax incentives for food donations, a number of states have enacted state-level tax incentives for such donations.⁶⁹

Many states and localities are taking action to reduce food waste and increase food donation. Several states and localities have enacted organic waste bans or waste diversion requirements, which impose penalties for excess food sent to landfills. Many states also offer liability protection for food donations that is more robust than the protection afforded by the federal Emerson Act. In addition, many states have provided tax incentives for the donation of wholesome food.⁷⁰ Each of these topics are discussed below.

LEGAL ISSUES RELEVANT TO FOOD DONATION

Food Safety for Donations

A key barrier to the donation of surplus food can be the lack of knowledge or readily available guidance regarding safety procedures for food donation. All donated food should be safe for consumption and comply with applicable food safety laws and regulations. Potential donors, however, are often uncertain as to which food safety regulations apply to donated food, as opposed to purchased food, as well as the steps necessary to safely donate food in compliance with applicable regulations. As a result, safe, surplus food that could have been redirected to populations in need is instead destined for landfills.

Federal regulation of food safety is enshrined in several statutes, with the most important being the Food, Drug, and Cosmetic Act (FDCA), Poultry Products Inspection Act, Federal Meat Inspection Act, Egg Products Inspection Act, and Perishable Agricultural Commodities Act.⁷¹ Authority to develop standards and enforce these acts extends across multiple agencies, though the Food and Drug Administration (FDA) and U.S. Department of Agriculture (USDA) are the two primary agencies with federal food safety authority. These federal agencies develop specific requirements and inspect food production and processing at farms, food manufacturing facilities, and slaughterhouses. However, U.S. federal food safety legislation and the regulations developed by FDA and USDA under this legislation generally do not mention the food safety practices that should be followed for food donations. With the exception of a recent USDA directive on donation of food with certain labeling flaws,⁷² there also is no guidance regarding food safety for food donations by facilities that are regulated and inspected directly by FDA or USDA. Further, food banks and food recovery organizations struggle to understand whether they are subject to inspections under federal laws, and what practices they should follow.⁷³ Despite the outstanding legal questions, the clear liability protection provided under federal law for food donors and food recovery organizations (discussed below), coupled with the federal agencies' stated goals to support food waste reduction, should provide comfort to food donors that donation is allowed and supported under federal law.

In the U.S., food safety regulation and enforcement for restaurants and retail stores is carried out by state governments rather than the federal government. However, the federal government plays a key role in influencing state laws through publication of the FDA Food Code, which provides model food safety regulations for restaurants and retail stores⁷⁴ and has been adopted in some form by all 50 states.⁷⁵ The Food Code does not include language or guidance regarding food safety for food donations;⁷⁶ as a result, most states do not have regulations that delineate the food safety requirements for food donation.⁷⁷ Thus, donors often have trouble determining which food safety regulations apply to the foods they wish to donate or lack clarity as to what food items are allowed to be donated.⁷⁸

Though the Food Code is published by the FDA, the recommendations for what changes to make to the Food Code come from an expert body called the Conference for Food Protection (CFP), which examines and reports on best practices for food safety. In the late 1990s, the USDA and the FDA, working with the CFP, responded to inquiries about safe practices for food recovery organizations by creating the Comprehensive Resource for Food Recovery Programs, a federally-endorsed guidance document that provides safety information for food donations to food recovery organizations and food banks.⁷⁹ The Comprehensive Resource, which was most recently updated in 2016, is primarily intended as guidance for the operation of food recovery programs, rather than for food donors.⁸⁰ The Comprehensive Resource is not included in the FDA Food Code⁸¹ and is not as widely disseminated as the Food Code; as a result, state regulators, health inspectors, and donors are not as familiar with its guidance.

In 2018, the CFP created a Food Recovery Committee to address the question of whether and what language

on food donations could potentially be added to the FDA Food Code to better guide state regulations on safety practices for food donations.⁸² Creating regulations for food safety for food donations was one of 25 recommendations for changes to the FDA Food Code that CFP included in its letter to the FDA after the 2018 CFP meeting.⁸³ In the FDA's response letter, the FDA expressed general agreement with 14 of the recommendations, partial concurrence with two of the recommendations, and stated that the FDA either does not agree with or will consider the other nine recommendations. The recommendation to add a section to the CFP on food safety for donations was in FDA's category for "does not agree or will consider," with FDA noting that it would consider suggestions developed by the CFP Food Recovery Committee on the matter.⁸⁴ The CFP meets again in 2020.⁸⁵

Several states do have regulations or guidance relating to food safety for donated foods, but most of these are very specific to just one type of food.⁸⁶ For example, several states have guidance on food safety for "share tables," or tables placed in schools for students to leave their excess (whole or unopened) food to make it available to other students.⁸⁷ A few states have laws relating to the donation of surplus wild game from hunting activities.⁸⁸ According to a 2018 survey of state regulations on the topic, only Texas had a comprehensive regulation explaining food safety procedures to be followed for food donation.⁸⁹

Date Labeling

Date labels affixed to food products are a major driver of food waste and obstacle to food donation. Date labels are the dates on food packaging that are accompanied by phrases such as "use by," "best before," "sell by," "enjoy by," and "expires on." As explained in the previous section, most food donors and food banks are appropriately cautious about donating food that meets safety standards, but it is not always clear which standards relate to food safety. While fresh products like fruits and vegetables will appear visibly spoiled when they are no longer safe to consume, it can be more difficult to gauge when this is the case for packaged foods. Many donors interpret date labels affixed to such food products as indicators of safety and will therefore throw away food once the date has passed; food recovery organizations also may refuse to accept donated food after this date, deeming the food product unfit for human consumption.

Contrary to this perception, date labels generally are intended to indicate freshness or quality rather than food safety for the vast majority of foods. Manufacturers use a variety of methods to determine the timeframe for label dates, almost all of which are intended to reflect when the food will be at its "peak quality."⁹⁰ Nevertheless, global trends indicate that consumers generally confuse date labels as indicators of safety rather than quality.⁹¹ This confusion leads, in turn, to considerable food waste.⁹² In the United Kingdom, for example, researchers found that consumers discarded about twenty-two percent of food that they could have eaten due to confusion over date labeling.⁹³ Similarly, eighty-four percent of Americans report that they throw away food after the date passes due to safety concerns, even if there is minimal risk of foodborne illness at that time.⁹⁴

In the United States, there is no federal law regulating date labels on food products other than infant formula,⁹⁵ and no restrictions on sale or donation of food past the date. The U.S. Congress has given general authority to the FDA and the USDA to protect consumers from deceptive or misleading food labeling.⁹⁶ However, the FDA and the USDA have not used this authority to regulate date labels.

As noted above, the FDA does not require date labels on foods other than infant formula.⁹⁷ While food manufacturers are thus free to select whether to use a date label and what phrase to include, in 2019, the FDA published a letter encouraging the food industry to use the phrase "Best if Used By" on products if a date label is meant to indicate quality.⁹⁸ The USDA also does not require date labels on the foods it regulates, which are meat, poultry, and some egg products.⁹⁹ If USDA-regulated foods are dated, either as required under state law or voluntarily, USDA does require them to include: (i) a day and month (and year for frozen or shelf-stable products) and (ii) an explanatory phrase, such as "Sell by" or "Best if used by."¹⁰⁰ While food manufacturers are free to select which explanatory phrase to include on a date label, in 2017 USDA released a guidance document recommending "Best if Used By" be used for products where the date is intended as an indicator of quality.¹⁰¹

As federal regulation of date labels is so limited, states have vast discretion to regulate date labels. Thus, each state regulates date labels differently. Some states have used their discretion enthusiastically, creating a system of stringent requirements for date labels, while others have not regulated date labels at all.¹⁰² For instance, Michigan requires date labels on pre-packaged perishable foods¹⁰³ and dairy products,¹⁰⁴ and restricts the sale of both of these items once the labeled date has passed,¹⁰⁵ while New York does not require date labels on any food products and does not regulate the sale of past-date foods.¹⁰⁶ Twenty states place restrictions on sale and, in some cases, donation, of food past the label date.¹⁰⁷ The result is an inconsistent state-by-state regulatory scheme which has created confusion.¹⁰⁸

In the absence of federally-mandated date labels, some food businesses have sought to make date labeling clearer. In 2017, the Consumer Brands Association (formerly called the Grocery Manufacturer’s Association)¹⁰⁹ and the Food Marketing Institute launched a voluntary Product Code Dating Initiative in an effort to standardize industry date labels. The Initiative encourages companies to use only one of two labels on food products: either a “BEST if Used by” label on a product to indicate quality or freshness or a “USE by” label to indicate that a food may have increased risk past the date and should be discarded.¹¹⁰ According to a related study, eighty-eight percent of Americans found these streamlined phrases to be clear.¹¹¹ While many companies have agreed to use these standard labels, they are not required to by law and utilization is still voluntary.¹¹²

In recent years, some states also have attempted to clarify and standardize date labels.¹¹³ For example, both New Jersey¹¹⁴ and California,¹¹⁵ have enacted laws requiring or encouraging the use of the same phrases recommended by the Product Code Dating Initiative. Legislation pending before Congress would require use of these standard phrases under federal law as well.¹¹⁶

Liability Protection for Food Donations

A significant barrier to food donation is the fear among donors that they will be found liable if someone becomes sick after consuming donated food. In the U.S., the Bill Emerson Good Samaritan Act has been in existence since 1996 and provides comprehensive federal protection from civil and criminal liability to food donors and nonprofit organizations for food donations.¹¹⁷ The Act protects both food donors and the nonprofit organizations that receive and distribute the food, as it provides protection to individuals, businesses, nonprofit food recovery organizations, the officers of businesses and nonprofit organizations, and gleaners—individuals that harvest donated agricultural crops for a nonprofit organization that distributes the food to the needy.¹¹⁸

With respect to gleaners, the Act not only protects against liability arising from the consumption of donated food, but also protects the property owner from liability related to injuries the gleaner might sustain while on the property.¹¹⁹ Federal law also explicitly grants liability protection to schools and local educational agencies that donate excess food.¹²⁰

The Emerson Act protections apply so long as the following criteria are met:

- 1) **Donation Recipient:** The donor must donate to a nonprofit organization that distributes the food to needy populations. Direct donations from the donor to needy individuals are not protected by the Act.¹²¹
- 2) **Good Faith:** The donations must be made in good faith.¹²²
- 3) **Qualifying Foods:** The donor must donate qualifying foods unless specific reconditioning steps have been taken.¹²³ Qualifying foods are those that meet “all quality and labeling standards imposed by Federal, State, and local laws and regulations,” even if they are not “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”¹²⁴
 - Exception for Non-Qualifying Food: If a food does not meet all applicable federal, state, and

local standards, the donor can still be protected by the Emerson Act as long as they follow all of the Act's reconditioning procedures, which include:

- The donor informs the nonprofit of the nonconforming nature of the product;¹²⁵
- The nonprofit agrees to recondition the item so that it is compliant;¹²⁶ and
- The nonprofit knows the standards for reconditioning the item.¹²⁷

4) No Charge for Food: The ultimate recipients cannot pay anything of monetary value for the donated food. However, if one nonprofit provides donated 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.¹²⁸

Types of Donations not Covered by the Emerson Act: In addition to meeting the above requirements, in order to receive liability protection, donors or nonprofit organizations may not act with gross negligence or intentional misconduct.¹²⁹ 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.¹³⁰ Intentional misconduct means donating “with knowledge . . . that the conduct is harmful to the health or well-being of another person.”¹³¹ The Act gives little guidance on what activities qualify as gross negligence or intentional misconduct; however, it is clear that to receive protection the food donor or food recovery organization should not donate or facilitate the distribution of donated food that it knows is likely to be harmful or dangerous.

The Emerson Act offers a generous grant of protection. For most products, courts will find a company liable if they find that the company was “negligent” (which is a lower threshold than “grossly negligent”). However, for food products, courts generally apply a “strict liability” standard. This means that there is a presumption that the company was liable, so long as the plaintiff proves that they consumed the product and suffered an illness or injury.¹³² The Emerson Act changes the liability standard with respect to donations of food or grocery products from strict liability (for food) or ordinary negligence (for grocery products) to the more egregious gross negligence or intentional misconduct standards.

A donation beyond that which is protected by the Emerson Act is not necessarily prohibited by law, so long as the food meets all food safety laws. However, only donations that are in compliance with the Emerson Act's requirements will maintain liability protection for the donor and distributing organization.¹³³ For example, while the Emerson Act only protects donations made by a donor to a nonprofit organization that then distributes the food to those in need, a food donor can legally donate wholesome food directly to a needy individual. However, such a donor will not receive the Emerson Act's liability protection.¹³⁴

Federal legislation passed in 2018 through the U.S. Farm Bill added a new defined term, “qualified direct donor,” that appears to expand the liability protection to certain qualified donors that are protected if donating directly to the needy, rather than having to donate to a nonprofit distributing organization.¹³⁵ Qualified direct donors are defined as “a retail food store, wholesaler, agricultural producer, restaurant, caterer, school food authority, or institution of higher education.”¹³⁶ However, the 2018 Farm Bill does not amend the Emerson Act directly, so the implications of this change in terms of protections afforded such donations is still not clear.

Despite having this liability protection in place since 1996, a 2016 survey conducted by the Food Waste Reduction Alliance (FWRA) found that 50% of food manufacturers, 25% of retailers and wholesalers, and 39% of restaurants cite liability as a barrier to food donation.¹³⁷ This is primarily because some provisions of the Emerson Act are still unclear, so donors remain afraid of legal liability.¹³⁸ No food donor has been sued for damages caused by donated food. While this should provide some comfort to food donors, it also means that as a result, there are no judicial opinions interpreting the law.¹³⁹ Similarly, no federal agency has promulgated any rules relating to this act, though in late 2019 USDA released responses to basic frequently asked questions on the Emerson Act.¹⁴⁰

On top of the protection provided by the Emerson Act, states also provide their own liability protection for

food donors and food recovery organizations.¹⁴¹ All fifty states have passed state liability protection acts, and several states have expanded upon the protections afforded by the Emerson Act. For example, a number of states offer protection for donors that donate directly to the final recipient.¹⁴² As another example, several states offer liability protection for donors and nonprofit food recovery organizations if the food recovery organization charges the final recipient a low price for the food.¹⁴³

Taxes

Reducing food loss and waste results in sizable economic benefits to society, as it minimizes the environmental costs associated with producing food that is ultimately sent to the landfill. Food donation also helps mitigate the costs of hunger and stimulates the economy, as food recovery organizations provide jobs and recipients of donated food are able to spend limited financial resources on other basic goods and services. Many food donors turned to food banks as a waste solution for excess food, and worked to support the formation of a national network of food banks to ease coordinating national distribution of food donations. Yet food donation can also be expensive, as food donors must allocate time and money to train staff as well as harvest, package, store, and transport surplus food that otherwise would be discarded. As a result, it is sometimes less expensive, and easier, for farmers, businesses, and private individuals to throw away food rather than donate food. Some countries have sought to address this issue by offering tax incentives and removing tax barriers to food donation.

Incentives

Individuals and corporations in the United States pay more than \$2.2 trillion dollars of income tax each year.¹⁴⁴ The bulk of the taxes collected (primarily on income, sales, and property) are paid to the federal and state governments while a smaller portion is paid to local and municipal governments.¹⁴⁵

Although the tax system's primary objective is to raise funds for government, taxes are also used to influence behaviors through incentives and penalties.¹⁴⁶ Tax incentives, including tax deductions and tax credits for food donation, can provide significant support for food donation efforts and for the reduction of food loss and waste. A deduction is a reduction of the taxpayer's taxable income, whereas a credit is a direct reduction in the amount of taxes owed.¹⁴⁷

Taxpayers who donate property that could have otherwise provided them income, including food products, are eligible for a tax deduction under U.S. law. U.S. taxpayers who donate food are eligible for two deductions: one is the general deduction that applies to all charitable contributions and the other is an enhanced tax deduction that offers a higher benefit specifically for qualified food donations.

General tax deduction requirements: In order for a charitable contribution to qualify for a federal tax deduction, the donation must be used for charitable purposes and given to a qualified organization as laid out under section 170 of the Internal Revenue Code (IRC).¹⁴⁸ For the general deduction, the taxpayer may claim a tax deduction in the amount of the property's basis,¹⁴⁹ which is usually the cost to the business to acquire the product. Businesses other than C-corporations (corporations structured in a way such that owners/shareholders are taxed separately from the entity)— including S-corporations,¹⁵⁰ sole proprietorships,¹⁵¹ and some LLCs¹⁵² — cannot deduct more than either 30% or 50% of the business' total taxable income each year, depending on the type of organization to which the business is donating.¹⁵³ C-corporations generally cannot deduct more than 10% of their taxable income each year.¹⁵⁴

Enhanced tax deduction requirements: The enhanced tax deduction provides an extra incentive for donation of food products by allowing the donating business to deduct the lesser of (a) twice the basis value of the donated food or (b) the basis value of the donated food plus one-half of the food's expected profit margin (if the food were to be sold at fair market value).¹⁵⁵ This deduction can amount to as much as twice the general deduction. Further, under the enhanced deduction, all businesses may deduct up to 15% of their taxable income for food donations.¹⁵⁶

Example: A grocery store donates potatoes with a fair market value of \$100. The basis value of these potatoes was \$30. The expected profit margin is the fair market value minus the basis value (\$100 - \$30), which is \$70. Under the enhanced deduction, the grocery store is eligible to deduct the smaller of:

(a) Basis Value x 2 = \$30 x 2 = \$60, or

(b) Basis Value + (expected profit margin / 2) = \$30 + (\$70 / 2) = \$65

The enhanced deduction would be \$60, which is substantially higher than the general deduction (the \$30 basis value).

In order to qualify for the enhanced tax deduction, a business must donate to a recipient organization that meets several criteria:

1. The donation must go to a qualified domestic 501(c)(3) nonprofit organization that uses the food solely for the care of the ill, needy, or infants.¹⁵⁷
2. The recipient organization must use the donated food in a manner consistent with the organization's 501(c)(3) exempt status.¹⁵⁸
3. The recipient organization may not use or transfer the food in exchange for money, property or other services.¹⁵⁹ Note, however, that the recipient organization can charge another organization a "nominal" amount that is "designed to reimburse the [recipient] organization for its administrative, warehousing, or other similar costs."¹⁶⁰
4. The donor must receive from the recipient organization a written statement which:
 - Describes the contributed property, stating the date of its receipt;
 - Represents that the property will be used for a qualified purpose (i.e. that the use of the property is related to the 501(c)(3) tax-exempt purpose or function of the nonprofit distributing organization);
 - Represents that the recipient organization is recognized as exempt from federal income tax under I.R.C. 501(c)(3); and
 - Represents that adequate books and records will be maintained and made available to the Internal Revenue Service upon request.¹⁶¹
5. Finally, the donated property must satisfy the requirements of the Federal Food, Drug, and Cosmetic Act (FDCA) at the time of donation and for the preceding 180 days.¹⁶² For food that did not exist for 180 days prior to donation, this requirement is satisfied if the food was in compliance with the FDCA for the period of its existence and at donation, and any similar property held by the donor during the 180 days prior to donation was also held in compliance with the FDCA.¹⁶³

Businesses that do not account for inventories and are not required to capitalize indirect costs have the option to calculate the basis value at 25% of the products' fair market value.¹⁶⁴ Businesses also have the option to calculate the fair market value of products that cannot be sold because of failure to meet internal standards, lack of a market, or similar reasons by using the price of the same or substantially similar, saleable food items.¹⁶⁵

In addition, a growing number of states are realizing they can spur increased food donation by providing state-level tax incentives that are tailored to farms and businesses within their states. At present, twelve states (Arizona, California, Colorado, Iowa, Kentucky, Maryland, Missouri, New York, Oregon, South Carolina, Virginia and West Virginia) offer tax incentives specifically targeted at food recovery efforts.¹⁶⁶ Each state's incentive for food donations is unique. For example, all states except Arizona offer tax credits instead of tax deductions.¹⁶⁷ Additionally, states offer tax incentives for different types of donors, ranging from farmers, to restaurants, to all taxpayers.¹⁶⁸ California provides one type of tax credit for farmers, and another for all food donors, with the latter targeted at costs associated with the transportation of food donation.¹⁶⁹ South Carolina offers a tax credit for the processing of deer meat for donation.¹⁷⁰ These sorts of tax incentives help to ensure that excess food is donated rather than thrown away.

Barriers

While tax incentives encourage food donations, certain tax schemes may stand as deterrents to donation. In several countries, the Value Added Tax (VAT) presents a financial barrier to donating food. The VAT is a federal tax that is levied on a good at each stage of the supply chain, from production to the point of sale, whenever value is added. In some countries, food donors may be responsible for paying a VAT charge on food that is donated, meaning that the donation itself may raise the tax burden, even if there was no value paid for the goods.¹⁷¹ In such a case, throwing away food can be a better financial decision for companies than donating such food. The U.S. does not utilize a VAT, and no elements of the U.S. tax code pose a barrier to donation.

Donation Requirements or Food Waste Penalties

Some countries have employed food donation requirements or impose monetary penalties for food that is sent to the landfill (often known as organic waste bans or waste diversion requirements) in order to influence business behavior and reduce needless waste. In the United States, there are currently no federal food donation requirements or organic waste bans. However, many state and local governments have enacted organic waste bans or waste diversion laws. In addition to reducing waste and improving landfill management, organic waste bans and waste recycling laws can help encourage food businesses to use their excess food as a resource by diverting it to higher uses. For example, after Vermont implemented an organic waste ban, the Vermont Food Bank saw food donations increase by sixty percent the following year.¹⁷²

Six states have instituted organic waste bans or mandatory organic waste recycling laws: California,¹⁷³ Connecticut,¹⁷⁴ Massachusetts,¹⁷⁵ New York,¹⁷⁶ Rhode Island,¹⁷⁷ and Vermont.¹⁷⁸ With the exception of California, all of the states have passed organic waste bans. These laws generally require “food waste generators”—the businesses, institutions, households, and other entities that create food waste—to reduce their food waste and make sure it is not being sent to a landfill. For example, Vermont’s Universal Recycling Law bans disposal of food scraps in addition to “blue bin” recyclables and leaf and yard debris. All residents and businesses must divert food scraps, with larger businesses and institutions subject to the ban even earlier depending on the amount of food waste generated annually.¹⁷⁹

In contrast, California’s law is structured as a mandatory organics recycling law.¹⁸⁰ The California waste recycling law requires entities to take a specific action with their organic waste, such as sending it to compost or anaerobic digestion.¹⁸¹ Businesses in California that generate four cubic yards of organic waste per week or more are required to recycle organic waste on-site or subscribe to organic waste recycling services.¹⁸² A progressive realization clause within the law will also phase in businesses that generate at least two cubic yards per week starting in 2020, in the event that fifty percent of the organic waste in the state has not yet been eliminated.¹⁸³ California also recently passed a law that requires that at least twenty percent of edible food that meets certain eligibility criteria to be donated for human consumption rather than disposed of by 2025.¹⁸⁴

In addition to state-level waste recycling initiatives, many local municipal governments have sought to divert food from landfills as well. For example, New York City, New York requires large hospitality venues to sort and organize the transport of organic waste they create.¹⁸⁵ The City of Austin, Texas requires large restaurants to compost food scraps.¹⁸⁶ Austin has also enacted a non-binding zero waste target.¹⁸⁷ San Francisco, California¹⁸⁸ and Seattle, Washington¹⁸⁹ both require businesses and households to sort waste into separate categories. These laws are generally enforced through injunctions, restrictions on permits or licenses or civil fines.

Government Grants and Incentives

Grants and incentive programs funded at the federal or local level offer another important resource for food donation initiatives. This is particularly true in countries where donors consider tax incentives to be insufficient to offset the costs of donation or where a lack of infrastructure limits food recovery efforts. For

example, government grants can help food donors and food banks acquire equipment and resources necessary for gleaning, storing, processing, and transporting food for donation. Government funding can also support new innovations and emerging technologies that will make food donation more efficient and sustainable.

One way the U.S. federal government provides financial assistance for food distribution is through The Emergency Food Assistance Program (TEFAP), a federal program that helps supplement the diets of low-income Americans by providing them with emergency food assistance at no cost. Under TEFAP, local agencies (usually food banks) receive food purchased by the USDA as well as financial assistance for administrative expenses.¹⁹⁰ The amount of food and financial assistance that each state receives is determined by a formula that is based on the percentage of the state's population living below the poverty line.¹⁹¹ In addition to entitlement food funded through the farm bill, USDA also purchases U.S. commodities in need of market support and donates those foods to food banks through TEFAP.¹⁹² Lastly, the 2018 Farm Bill¹⁹³ also provided \$4 million dollars annually from TEFAP to be allocated among states to operate Farm to Food Bank projects, a term that describes projects meant to increase the amount of fresh produce in food banks by supporting payments made to farmers for the labor involved in harvesting and preparing their surplus for donation.¹⁹⁴

There are also a number of competitive federal grants that are not specifically crafted to support food donation, but that food banks and food recovery organizations often use to support their operations. One such grant is the Value-Added Producers Grant Program (VAPG),¹⁹⁵ which helps farmers get involved in value-added efforts related to the processing and marketing of products, with the goal of developing new products, expanding marketing opportunities, and increasing producer income. VAPG grant funding ranges from \$75,000 for a planning grant to \$250,000 for a working capital grant.¹⁹⁶ Another competitive federal grant program is the Community Food Projects Grant Program,¹⁹⁷ which awards grants to eligible nonprofits, tribal organizations, and food program service providers to promote self-sufficiency and increase food security in low-income communities by developing comprehensive, community-based solutions. Grants in this program range from \$35,000 - \$400,000.¹⁹⁸ The new Local Agriculture Marketing Program (LAMP)—which was created in the 2018 Farm Bill and combines two pre-existing programs, the Farmers Market Promotion Program (FMPP)¹⁹⁹ and the Local Food Promotion Program (LFPP)²⁰⁰—also now states that the funding can be used to support food recovery and business opportunities aiming to reduce food waste on farms.²⁰¹

Government support for food banks also exists at the state level, where some states have appropriations for the purpose of supporting state food purchase programs. One example is the Massachusetts Emergency Food Assistance Program (MEFAP).²⁰² The program, established in 1995, ensures access to food through a public-private partnership between the Massachusetts Department of Agricultural Resources (MDAR) and four regional food banks. In 2018, total funding provided by MDAR for food purchasing was \$16,413,831, with another \$1 million provided for operational costs.²⁰³ Another state-level program is the Pennsylvania Agricultural Surplus System (PASS), which compensates agricultural producers for distributing surplus produce to those in need of food assistance through over 1,800 local charitable partners.²⁰⁴ Further, under the State Food Purchase Program, the state of Pennsylvania provided over \$18 million in 2018-19 to support food purchases for food banks in the state.²⁰⁵ Ohio's Agricultural Clearance Program (OACP) purchases and distributes surplus agricultural goods from over 100 farmers and producers to 12 state food banks, supplementing federal programs like the Emergency Food Assistance Program (TEFAP). OACP distributed over 52 million pounds of produce in 2016.²⁰⁶

Similar grants also exist at the local level. For example, New York City has offered several types of mini-grants including a \$2,000 grant for small businesses to implement solutions for food waste reduction.²⁰⁷ The Zero Waste Program of the San Francisco Department of the Environment distributed \$857,000 to non-profit organizations involved in reducing waste of various kinds between 2017-2019.²⁰⁸ At the state level, one example comes from the Tennessee Department of Environment and Conservation, which has given 13 grants totaling almost \$4 million to various entities combating food waste and organic waste.²⁰⁹ The California Food Waste Prevention and Rescue Grant Program grants funds ranging from \$50,000 to \$500,000 to qualifying entities including local governments, universities, and nonprofits to reduce or reuse food. The program gave a total of \$5.75 million in the 2018-19 fiscal year.²¹⁰

Lastly, in an effort to incentivize states to implement food waste reduction plans, the Agriculture Improvement Act of 2018 (2018 Farm Bill) authorized creation of the Compost and Food Waste Reduction Pilot program. If funds are appropriated, up to \$25 million could be used by USDA to support pilot projects in at least ten states to develop and implement municipal compost plans and food waste reductions plans.²¹¹ These pilot programs will help create new infrastructure and incentives to recover food and address the harmful environmental impacts of food waste in landfills. However, as of the time of publication, Congress had not yet appropriated the funding for this pilot program.

Miscellaneous

In addition to the relevant laws addressed in the above sections, one other relevant U.S. law is the Federal Food Donation Act of 2008,²¹² which encourages all executive agencies that enter into contracts above \$25,000 for the provision or sale of food or foodservice, or for the use of federal property by private parties for events where food is provided, to donate excess food to nonprofit organizations that serve or distribute food to food insecure Americans. In order to comply with the Act, executive agencies must include a clause in all such contracts that encourage the contractor “to the maximum extent practicable and safe, to donate excess, apparently wholesome food to nonprofit organizations that provide assistance to food-insecure people in the United States.”²¹³ However, donation under this Act is not mandatory, and no records are kept as to the donations made pursuant to this Act so the impact is not known.²¹⁴

CONCLUSION

This Legal Guide is intended to identify the United States’ current laws, policies, and programs that relate to food waste or food donation.²¹⁵ While the federal government is primarily responsible for guaranteeing food security and sustainable food systems, food recovery organizations acting in a private capacity can provide an additional social safety net. In the U.S., the government has recently implemented legislative and policy changes to promote greater food donation and the reduction of food loss and waste. Among the most recent developments include the adoption of the Winning on Reducing Food Waste Federal Interagency and the EPA and USDA U.S. Food Loss and Waste 2030 Champions initiative.

This Legal Guide provides a starting point from which policymakers, private sector actors, and civil society may better understand the current laws and policies as well as begin a dialogue about food loss and waste prevention and the value of food recovery to U.S. food security, economic stability, and environmental sustainability. A separate document produced under The Global Food Donation Policy Atlas sets forth policy recommendations specific to the U.S. to contribute to this discussion. In the meantime, food donors and food recovery organizations should take into account the laws, policies and legal issues discussed in this Legal Guide when donating food or facilitating the distribution of donated food to those in need. To better understand the regulation of food donation in the U.S., donors, intermediaries, and policymakers should investigate the laws identified in this guide and seek additional legal counsel, if necessary.

ENDNOTES

- ¹ FOOD & AGRIC. ORG. OF THE UNITED NATIONS [FAO], GLOBAL FOOD LOSSES AND FOOD WASTE—EXTENT, CAUSES, AND PREVENTION 4 (2011), <http://www.fao.org/3/a-i2697e.pdf> [<https://perma.cc/DD6H-U99T>].
- ² *Id.*
- ³ HARVARD LAW SCHOOL FOOD LAW AND POLICY CLINIC, KEEPING FOOD OUT OF THE LANDFILL: POLICY IDEAS FOR STATES AND LOCALITIES 1 (2016), [HTTPS://WWW.CHLPI.ORG/WP-CONTENT/UPLOADED/2013/12/FOOD-WASTE-TOOLKIT_OCT-2016_SMALLER.PDF](https://www.chlpi.org/wp-content/uploads/2013/12/Food-Waste-Toolkit_Oct-2016_smaller.pdf) [hereinafter *Keeping Food Out of the Landfill*].
- ⁴ FAO, FOOD WASTAGE FOOTPRINT: IMPACTS ON NATURAL RESOURCES 6 (2011).
- ⁵ *Id.*
- ⁶ FAO, FOOD WASTAGE FOOTPRINT & CLIMATE CHANGE 1 (2015).
- ⁷ *Id.*
- ⁸ FAO, THE STATE OF FOOD SECURITY AND NUTRITION IN THE WORLD: SAFEGUARDING AGAINST ECONOMIC SLOWDOWNS AND DOWNTURNS 6 (2018), <http://www.fao.org/3/ca5162en/ca5162en.pdf> [<https://perma.cc/WS34-9DCZ>].
- ⁹ G.A. Res. 70/1 at 22 (Oct. 21., 2015) (“By 2030, to halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses.”).
- ¹⁰ The Global Food Donation Policy Atlas project would not be possible without the support of the Walmart Foundation. The Walmart Foundation is not responsible for the content of this document or the views contained herein. The content of this document should not be interpreted as legal advice; those seeking legal advice should speak to an attorney licensed to practice in the applicable jurisdiction and area of law.
- ¹¹ *Food Loss and Waste Building On Existing Federal Efforts Could Help to Achieve National Reduction Goal*, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE HIGH LIGHTS OF GAO-19-391; *A Roadmap to Reduce U.S. Food Waste by 20 Percent*, REFED 16 (2016), https://www.refed.com/downloads/ReFED_Report_2016.pdf (<https://perma.cc/9SW3-KP2Y>) [hereinafter *A Roadmap to Reduce U.S. Food Waste*].
- ¹² Alisha Coleman-Jensen et al, *Key Statistics & Graphics: Food Security Status of U.S. Households in 2018* (Sept. 04 2019), U.S.D.A., <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx#foodsecure>.
- ¹³ FLPC would like to express its gratitude to Feeding America for its contributions to this research, as well as many other NGOs, businesses, and government agencies who shared input with the FLPC team.
- ¹⁴ U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2018 (2019), <https://www.census.gov/library/publications/2019/demo/p60-266.html>
- ¹⁵ *Id.*
- ¹⁶ *Food Waste*, NATURAL RES. DEF. COUNCIL, <https://www.nrdc.org/issues/food-waste> (last visited Feb. 27, 2020).
- ¹⁷ *Disposal Bans & Mandatory Recycling in the United States*, NATURAL RES. DEF. COUNCIL (2017).
- ¹⁸ *A Roadmap to Reduce U.S. Food Waste*, *supra* note 11 at 11.
- ¹⁹ Linda S. Cantor, et. al., *Estimating and Addressing America’s Food Losses* 20, FOOD REV. 2 (Jan. 1997), <http://gleaningusa.com/PDFs/USDA-Jan97a.pdf>.
- ²⁰ Norbert L.W. Wilson, et. al, *Food Waste: The Role of Date Labels, Package Size, and Product Category* (2017). FOOD QUALITY AND PREFERENCE, 35 (2017).
- ²¹ *27 Solutions to Food Waste*, ReFED, <https://www.refed.com/?sort=water-conservation> (last visited Feb. 27, 2020) (<https://perma.cc/W55W-R67S>).
- ²² *See A Roadmap to Reduce U.S. Food Waste*, *supra* note 11, at 50. *See also Understanding Global Warming Potentials*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ghgemissions/understanding-global-warming-potentials> (last visited Mar. 3, 2020).
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- ²⁴ Toni M. Fine, AMERICAN LEGAL SYSTEMS, A RESOURCE AND REFERENCE GUIDE 2 (2008).
- ²⁵ *See e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (holding government has authority to regulate agriculture if it has a substantial effect on interstate commerce).
- ²⁶ *Ensuring Safe Food from Production to Consumption*, U.S. INSTITUTE OF MEDICINE AND U.S. NATIONAL RESEARCH COUNCIL COMMITTEE TO ENSURE SAFE FOOD FROM PRODUCTION TO CONSUMPTION (1998).
- ²⁷ *See Renée Johnson, The Federal Food Safety System: A Primer*, 1 CONG. RESEARCH SERV., RS22600, (2016).
- ²⁸ 21 U.S.C. §§ 301-392 (2012); 21 C.F.R. § 1.4 (2012); 21 U.S.C. § 343-1 (2012); 15 U.S.C. §§ 1451-1461 (2012); 21 C.F.R. § 10.40 (2013); 7 U.S.C. 499 (2012); 21 U.S.C. § 2201-52 (2012). *See also*, U.S. Dep’t of Agric., Food Safety & Inspection Serv., A Guide to Federal Food Labeling Requirements for Meat and Poultry Products 6 (2007).
- ²⁹ 21 U.S.C. §§ 451-472 (2012); 21 U.S.C. §§ 601-695 (2012); 21 U.S.C. §§ 1031-1056 (2012); 12 U.S.C. § 1141 (2012); 7 C.F.R. § 2.79 (a)(1) (2013); 7 C.F.R. § 2.53 (2013); 9 C.F.R. § 300.2 (2013). *See Regulations & Policies: Regulations for Package Dating*, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/labeling-policies/package-dating/package-dating> (<https://perma.cc/T58J-XMNG>).
- ³⁰ FDA regulates shell eggs and USDA regulates processed egg products as well as certified shell eggs under a voluntary grading program. 21 U.S.C. §§ 1031-1056 (2012); 21 U.S.C. §§ 301-392 (2012). Under the Egg Products Inspection Act, FDA and USDA share responsibility over egg products; USDA has a primary role. 63 Fed. Reg. 27502, 27508 (May 19, 1998).
- ³¹ DHHS, FOOD & DRUG ADMIN., 3-1 FDA/USDA JURISDICTIONAL CHART, FDA -2013-S-0610 (2015). [HTTPS://WWW.FDA.GOV/MEDIA/75238/DOWNLOAD](https://www.fda.gov/MEDIA/75238/DOWNLOAD)
- ³² *See* 15 U.S.C. § 45(a)(2) (giving the FTC authority to prohibit “unfair or deceptive acts or practices”); 15 U.S.C. § 52-55 (prohibiting the dissemination of misleading claims for food, drugs, devices, services or cosmetics); 15 U.S.C. § 52-53 (authorizing FTC to file suit in the U.S. District Court for an act or practice in violation of any provision of law enforced by the FTC).
- ³³ *See Regulatory Information by Topic: Waste*, U.S. ENV’TL. PROT. AGENCY <https://www.epa.gov/regulatory-information-topic/regulatory-information-topic-waste> (<https://perma.cc/E7XU-UPT9>).
- ³⁴ *Sustainable Management of Food, United States 2030 Food Loss and Waste Reduction Goal*, ENV’TL. PROT. AGENCY, <https://www.epa.gov/sustainable-management-food/united-states-2030-food-loss-and-waste-reduction-goal> (<https://perma.cc/YU9-X4AL>).
- ³⁵ *See e.g., Reducing Food Waste at Home*, ENV’TL. PROT. AGENCY <https://www.epa.gov/recycle/reducing-wasted-food-home>, (last visited 12.11.2019), (<https://perma.cc/Z9TC-U2TL>).
- ³⁶ *See* 21 C.F.R. 1.226 (outlining the facilities exempt from federal registration and inspection by FDA); *Inspection for Food Safety: The Basics*, U.S. DEP’T OF AGRIC. <https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/inspection-for-food-safety-the-basics/inspection-for-food-safety-basics> (<https://perma.cc/2WAK-P6WS>).
- ³⁷ *See e.g.,* 21 U.S.C. § 331 (West 2017); *Food Safety Regulations & Guidance for Food Donations: A Fifty-State Survey Of State Practices*, HARVARD FOOD LAW & POL’Y CLINIC 2 (2018) [hereinafter *Fifty-State Survey*].
- ³⁸ “The following acts and the causing thereof are hereby prohibited . . . (k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, tobacco product, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) *after shipment in interstate commerce* and results in such article being adulterated or misbranded.” 21 USC § 331 (emphasis

added); PETER B. HUTT ET AL., FOOD AND DRUG LAW 528 (2014).

39 PETER B. HUTT ET AL., FOOD AND DRUG LAW 527-8 (2014).

40 Jessica A. Cohen, *Ten Years of Leftovers with Many Hungry Still Left Over: A Decade of Donations Under the Bill Emerson Good Samaritan Food Donation Act* 5.1
SEATTLE JOURNAL FOR SOCIAL JUSTICE 455 (2006).

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has also begun recognizing food banks as "retail-type" establishments, which allows food banks (under certain circumstances) to break down bulk shipments of
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140 42 U.S.C. § 1791(d).
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142 42 U.S.C.A. § 1791(c)(1).
143 42 U.S.C.A. § 1791(c)(1).
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(noting that Delaware, Virginia, Massachusetts, Michigan, and North Carolina have rejected strict liability). A consumer harmed by foodborne illness may also sue under a contractual claim of breach of implied warranty, which is largely analogous to a strict liability claim. See U.C.C. §§ 2-314, 2-315 (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2012); NEAL D. FORTIN, FOOD REGULATION: LAW, SCIENCE, POLICY, AND PRACTICE 608 (2009).

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215 The information contained in this guide is current as of February 2020.

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