

# Legal Fact Sheet

## Mississippi Food Donation: Liability Protections

Created by the Harvard Law School Food Law and Policy Clinic, November 2020

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 Mississippi state law provides some additional liability protection to food donors and distributors in the state by providing protections for the ultimate distribution of donated food.

### 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 and distributing organizations.<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 to the needy or to a nonprofit organization that distributes to the needy.<sup>2</sup> Donating individuals and businesses are protected when 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 be protected by the Emerson Act if (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.

The Emerson Act protects most but not all donations of qualifying food. In order to get protection, the transaction must be structured such that:<sup>5</sup>

- 1) The donor donates to a non-profit organization.<sup>6</sup>
- 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.<sup>7</sup>

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<sup>1</sup> 42 U.S.C. §1791 (2018).

<sup>2</sup> 42 U.S.C. § 1791(c)(1); 42 U.S.C. §1791(b)(5).

<sup>3</sup> 42 U.S.C. § 1791(c)(1); 42 U.S.C. §1791(b)(5) (Outlining an exception for mislabeled food products that are “not readily marketable,” which can also be protected if the donor explains the mislabeling to the recipient, and the recipient has sufficient knowledge to and does recondition the product to meet applicable standards.)

<sup>4</sup> 42 U.S.C. § 1791 (e).

<sup>5</sup> 42 U.S.C. § 1791(c).

<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. §1791(b)(9).

<sup>7</sup> 42 U.S.C. §1791(c)(3).

- **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. Unfortunately, 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.<sup>8</sup> 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.<sup>9</sup>

### Liability Protection for Food Donation in Mississippi

In addition to the federal liability protections, there are several ways in which Michigan’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>10</sup> 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 are free to enact laws that are more protective of donors than the federal Emerson Act, which sets a floor on liability protection. Mississippi has state legislation, which is codified in the Miss. Code Ann. §95–7 and described below.

### Overview of Mississippi State Liability Protection Law

Mississippi state law provides civil liability protection to both donors<sup>11</sup> and to the charitable or non-profit organizations<sup>12</sup> as well. The law protects donors who make a “good faith” food donation of “apparently wholesome food” from civil liability in cases of injury or death.<sup>13</sup> Protected donors include any “individual, corporation, partnership, organization or association”, and “apparently wholesome food” is defined as “food that is prepared or perishable or raw agricultural products which appear to be fit for human consumption at the time it is donated.”<sup>14</sup> Although the law does not elaborate on what “fit for human consumption means”, it does exclude “canned goods that are leaking, swollen, dented on a seam, or no longer airtight.”<sup>15</sup> Like the federal protection, this protection does not apply when the injury or death directly results from “gross negligence, recklessness, or intentional misconduct of the donor.”<sup>16</sup> Intentional misconduct is defined by the state as “conduct that the person acting knows is harmful to the health or well-being of another person.”<sup>17</sup> This protection does not apply to the direct donation from a donor to an individual or to food donated for profit.<sup>18</sup>

<sup>8</sup> 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.

<sup>9</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>10</sup> 42 U.S.C. § 1791(c); 42 U.S.C. §1791(b) (1-2).

<sup>11</sup> Miss. Code Ann. §95–7–3 (1972 & supp. 1983).

<sup>12</sup> Miss. Code Ann. §95–7–5 (1972 & supp. 1983).

<sup>13</sup> Miss. Code Ann. §95–7–3 (1972 & supp. 1983).

<sup>14</sup> Miss. Code Ann. §95–7–1 (1972 & supp. 1983).

<sup>15</sup> Miss. Code Ann. §95–7–1 (1972 & supp. 1983).

<sup>16</sup> Miss. Code Ann. §95–7–3 (1972 & supp. 1983).

<sup>17</sup> Miss. Code Ann. §95–7–1 (1972 & supp. 1983).

<sup>18</sup> Miss. Code Ann. §95–7–3 (1972 & supp. 1983).

The law also protects charitable and non-profit organizations who, in “good faith”, receive and distribute food donations that they reasonably determine to be “apparently wholesome food” from civil liability in cases of injury or death.<sup>19</sup> The Mississippi provision defines a “charitable or non-profit organization” as “an incorporated or unincorporated organization that has been established and is operating for religious, charitable, or educational purposes and that does not distribute any of its income to its members, directors or officers.”<sup>20</sup> In order to qualify for the protection, the charitable or non-profit organization must distribute the donated item free of charge.<sup>21</sup> Further, the protection only applies to civil actions brought as strict liability tort actions,<sup>22</sup> meaning that it protects charitable and non-profit organizations in cases where they would otherwise be held liable for injury or death even if they were not negligent. The provision does not discuss protections in cases where negligence is involved, meaning that the protection for charitable and non-profit organizations is less expansive than the protection for donors. However, in cases involving negligence, the federal law would apply.<sup>23</sup>



## Conclusion

Federal law and Mississippi state law provide ample liability protections for food donors and distributors, so long as the donated food complies with federal and state safety rules and is donated in good faith and without the donor acting recklessly or with intentional misconduct. Mississippi state law bolsters federal liability protections by providing protections for the ultimate distribution of donated food.



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<sup>19</sup> Miss. Code Ann. §95–7–5 (1972 & supp. 1983).

<sup>20</sup> Miss. Code Ann. §95–7–1 (1972 & supp. 1983).

<sup>21</sup> Miss. Code Ann. §95–7–5 (1972 & supp. 1983).

<sup>22</sup> Miss. Code Ann. §95–7–5 (1972 & supp. 1983).

<sup>23</sup> 42 U.S.C. §1791(c)(3).