

Community Fridges: Legal Questions and Answers

Who wrote this guide and what is it?

This guide was written and compiled by the Harvard Law School Food Law and Policy Clinic, the Hofstra Law School Community and Economic Development Clinic, and the UCLA School of Law Food Law and Policy Clinic, with significant input from the Sustainable Economies Law Center. It includes answers to legal questions that we repeatedly received from community fridges in New York, Boston, Chicago, Los Angeles, and Las Vegas throughout the summer and fall of 2021. Thank you to all of the community fridge organizers and volunteers who took the time to share their insight and knowledge with us. We appreciate you tremendously.

We intend for this document to be a living document that community fridge and mutual aid organizers can consult, and we will continue to add questions and answers as we receive them. Please submit any further questions through this [link](#). If you would like to get in touch with us directly, please feel free to email flpc@law.harvard.edu. We look forward to hearing from you and hope to be able to provide legal support to your critical work.

1. Will a fridge be held liable if someone gets sick from eating food from the fridge?

Many food donors and community fridges worry they will be held liable if a consumer of donated food falls ill.

Key Takeaway: Donors to fridges, fridges themselves, and mutual aid organizations that run fridges generally will be protected from liability under the Federal Bill Emerson Good Samaritan Act (“Emerson Act”) for an illness that results from food so long as the food has met all safety requirements and the donor and/or fridge believe the food to be safe.

Deeper Analysis: The Emerson Act provides comprehensive federal civil and criminal liability protection for food donors and nonprofit distributing organizations.¹

¹ See 42 U.S.C. § 1791.

Who is covered?

The Emerson Act covers individual people, businesses, nonprofit organizations, government entities, and the officers of businesses and nonprofit organizations.² It also covers gleaners—individuals that harvest donated agricultural crops to give to the needy or to a nonprofit organization that distributes to the needy.³

The Emerson Act defines a nonprofit as either an incorporated or unincorporated entity that: 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.”⁴ Given this expansive definition, most mutual aid organizations and community fridges will likely be considered a “nonprofit organization” under the Act, so long as they do not operate for profit and regardless of whether they are incorporated formally or whether they are exempt from federal taxes under 501(c)(3).

Food donors are protected when they donate to nonprofit organizations and nonprofit organizations are protected when they distribute the food to needy individuals, but direct donations from food businesses or individuals directly to other individuals are not protected. Protection also will not apply unless the donations are given for free.⁵

What kinds of food are covered?

In order to receive the protections of the Emerson Act, donors must donate “qualifying” types of food.⁶ Qualifying products are “apparently wholesome foods” or “apparently fit grocery products” and 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.”⁷

Food donations must be made in good faith, and protection will not apply if the food donor or nonprofit organization acts with gross negligence or intentional misconduct.⁸ Gross negligence means the donor took actions they knew were “*likely to be* harmful to the health or well-being of

² 42 U.S.C. § 1791(c).

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

⁴ 42 U.S.C. §1791(b)(9).

⁵ 42 U.S.C. § 1791(c). 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.

⁶ 42 U.S.C. § 1791(c)(1)-(2).

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

⁸ 42 U.S.C. § 1791(c)(3).

another person,”⁹ and intentional misconduct means the donor knows the conduct “is harmful to the health or well-being of another person.”¹⁰

It should be noted that even if a donation is not covered by the Emerson Act, it is not illegal to donate or accept that donation. It only means that the parties to the donation will not be afforded federal liability protections if someone were to pursue a legal action against them. Furthermore, state laws may provide additional liability protections.

2. Are there any liability protections for accidents unrelated to food safety, such as if someone were to slip and fall by the fridge?

The liability protections under the Emerson Act (as described above) cover illness related to the food itself. Some fridges also worry that the mutual aid organization or its volunteers will be held liable for other harms unrelated to food safety. For instance, some organizers have asked if they can be sued by someone who slips and falls by the fridge.

Key Takeaways: While the likelihood of these claims being upheld seems to be low, the answer to whether the organizers of the fridge can be held personally liable depends on what state your fridge operates in, whether your group is formally incorporated, and the specific facts of the incident. In addition, a lot will depend on the host site of the fridge, which might be more likely to be the target of such a lawsuit.

Deeper Analysis: The liability protections afforded to individuals operating your fridge will depend on whether the fridge is legally incorporated or not. Put simply, “incorporated” means that your fridge group has formed a corporation in a state and is considered a legal entity separate from its owners by that state. There are many different types of corporate entities, but most mutual aid groups that are incorporated are incorporated as nonprofit corporations, though a few have chosen to incorporate as limited liability companies (“LLCs”), cooperative corporations, or other entities. That being said, many fridges are unincorporated, meaning that they are not recognized as formal legal corporations in their state.

Unincorporated Fridges

In the majority of states, if your fridge or mutual aid group is *not* incorporated, there is no legal entity to sue.¹¹ As a result, it is possible that organizers of your fridge can be held personally

⁹ 42 U.S.C. § 1791(b)(7).

¹⁰ 42 U.S.C. § 1791(b)(8).

¹¹ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 4, 7 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

liable for the conduct of the group. The federal Volunteer Protection Act, which provides protection to volunteers of a nonprofit organization for harm they cause, likely does not apply to volunteers of unincorporated entities.¹² Therefore, someone could bring a claim against an individual fridge organizer or another person closely associated with your fridge.

In these states, the liability of individual members of an unincorporated organization will be governed by agency law, so to hold an individual liable, a court will need to find that a member of the fridge's group directed or authorized the act resulting in the harm or some causal link between a member's conduct and the harm.¹³ In assessing whether such a causal link exists, state courts have differed on how connected to a claim a person must be, but have generally required a proximate connection beyond just membership in the group.¹⁴ For example, an organizer who mainly deals with collecting food donations is not likely to be held liable for a dangerous electrical wire sticking out of the fridge and electrocuting someone, while an organizer in charge of fridge maintenance is more likely to be held liable for it.

However, some states offer greater protection for individuals participating in unincorporated groups. Eighteen states – Louisiana, North Carolina, Hawaii, Wisconsin, Delaware, Arkansas, West Virginia, Texas, Alabama, Illinois, Colorado, Wyoming, Idaho, South Carolina, Kentucky, Pennsylvania, Iowa, Nevada, as well as Washington D.C. – have passed either the 1996 Uniform Unincorporated Nonprofit Association Act or its 2014 revision,¹⁵ which provide protection for organizers of unincorporated organizations by allowing unincorporated associations to sue and be sued like an entity. In these states, members of an unincorporated organization have the same protections against personal liability that members of an incorporated entity have.¹⁶ Thus, except in extremely narrow circumstances, fridge organizers in these states cannot be held personally liable in the event that someone brings a claim against the fridge.

¹² See Michael Haber, *Covid-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOYOLA L. REV. 61, 97 (2021) (describing why a court is not likely to find that the Act applies to unincorporated entities).

¹³ Michael Haber, *Covid-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOYOLA L. REV. 61, 95 (2021).

¹⁴ Michael Haber, *Covid-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOYOLA L. REV. 61, 96 (2021).

¹⁵ See *Unincorporated Nonprofit Association Act (1992)*, UNIFORM LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=cbc066de-ba1d-4eb1-a6e2-9b6f45be9a98> (last visited Nov. 16, 2021); *Unincorporated Nonprofit Association Act (2008)*, UNIFORM LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?communitykey=40227d3a-8b5d-47c2-8cd0-b0ec12da97f9&tab=groupdetails> (last visited Nov. 16, 2021).

¹⁶ Michael Haber, *Covid-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOYOLA L. REV. 61, 94 (2021).

Incorporated Fridges

If your fridge or mutual aid group *is* incorporated, then there is a legal entity to sue, and someone can bring a claim against the organization itself.¹⁷ Except in very unusual circumstances, organizers of the fridge will not be held personally liable if someone brings a claim against your fridge.

Furthermore, the Volunteer Protection Act provides protection from negligence claims to volunteers of an incorporated nonprofit as long as the group has not engaged in certain hate crimes and is either (a) exempt from taxation as a 501(c)(3) organization or (b) “organized and conducted for public benefit” and also operated “primarily for charitable, civic, educational, religious, welfare, or health purposes.”¹⁸ This language limits the benefits of the Volunteer Protection Act to certain incorporated groups: non-profit corporations that have 501(c)(3) status and non-profit corporations that have not obtained 501(c)(3) status but that look quite a bit like 501(c)(3) public benefit organizations in how they are organized and operated.¹⁹ In addition, for the protection to apply, the harm must not have been caused by “willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the person harmed by the volunteer.”²⁰

As discussed below, avoiding personal liability may be one reason why a community fridge or mutual aid group considers becoming an incorporated entity.

Mitigating Risk

Regardless of your incorporation status, your fridge can mitigate your risk of liability by:²¹

- Developing, distributing, and publishing written safety policies
 - In addition to keeping volunteers and fridge users safe, creating a policy can provide some protection for fridge organizers against claims of negligence

¹⁷ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 7 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

¹⁸ 42 U.S.C. 14503 § 4(a); 42 U.S.C. 14505.

¹⁹ See 26 C.F.R. § 1.501(c)(3)-1 (describing the “organizational” and “operational” tests for 501(c)(3) status). The Volunteer Protection Act might be interpreted more broadly by a court than merely applying to 501(c)(3)-eligible groups, as the term “civic” seems to indicate that the statute was intended to apply at least slightly more broadly. Still, groups that do not have 501(c)(3) tax exemption that are considering incorporation in order to receive the benefits of the Volunteer Protection Act should be careful to consider these requirements, which largely mirror the requirements to obtain 501(c)(3) status as a public charity.

²⁰ 42 U.S.C. 14503 § 4(a)(3).

²¹ See *Mutual Aid Legal Toolkit*, SUSTAINABLE LAW ECONOMIES CENTER, https://www.theselc.org/mutual_aid_toolkit/#h_6118206432711598469694450 (last visited Oct 8, 2021).

- Establishing a grievance policy and dispute resolution system so that individuals can file complaints directly with your fridge and mediate the issue between the parties
- Purchasing general liability insurance,²² a type of insurance policy that helps protect small businesses from claims that happen as a result of normal operations

3. Can food donors claim federal tax incentives for food donated to fridges?

In order to encourage more donations, a fridge may want to be able to inform prospective donors that their monetary or in-kind donations are tax-deductible.

Key Takeaways: Donations to fridges that are not registered as or fiscally-sponsored by a 501(c)(3) nonprofit will not be tax-deductible, whereas donations to fridges that are registered as a 501(c)(3) nonprofit will be tax deductible. In particular, donations of food are allowed to be claimed using an enhanced deduction that is larger than the tax deduction allowed for other in-kind donations, so long as the donations are made to a 501(c)(3) nonprofit. Some states offer further tax incentives designed to support donations of food by businesses and farmers in that state.

Deeper analysis: In an attempt to incentivize charitable donations, the federal tax code contains provisions to encourage contributions to nonprofit organizations. Monetary and in-kind (non-monetary) donations to a 501(c)(3) tax-exempt organization are tax-deductible. Donations of food, in particular, are also eligible for an enhanced deduction. An enhanced deduction allows donors to claim the lesser of 1) two times the cost to acquire the raw food products (the “basis” value) or 2) the basis value plus one-half the profit margin (defined as the fair market value of the food minus basis value.)²³ This is better than the normal tax deduction for other in-kind donations, which is usually just the simple basis value. Fridge donors cannot take advantage of federal charitable contribution tax deductions unless the receiving fridge is registered with the Internal Revenue Service (IRS) as a 501(c)(3) nonprofit or is fiscally sponsored by a 501(c)(3) nonprofit.²⁴ As discussed in later questions, this is one reason why a group might consider becoming a registered 501(c)(3) organization or being fiscally sponsored by one.

In addition to federal tax deductions, some states offer tax incentives to support businesses that do not benefit in a meaningful way from the federal tax incentive, like farmers and other

²² For more on general liability insurance, see *Bite Sized Legal Guide: Comprehensive Liability Insurance*, Sustainable Law Economies Center, <https://docs.google.com/document/d/1sLflmcqjzouZnA94ShhGnIVCsdU5xCvGYV6ZR7xz6hQ/edit?usp=sharing>.

²³ See 26 U.S.C. § 170(e)(3).

²⁴ See 26 U.S.C. § 170(c).

businesses with low profit margins.²⁵ These state benefits are more tailored to the unique circumstances of businesses in their state and are often easier to understand and take advantage of than the incentives available at the federal level.²⁶ To see a current map of all the states that offer state-level food donation tax incentives, visit the [ReFED Policy Finder](https://policyfinder.refed.org/) and click on “Recovery Policy” and then “Tax Incentives” on the right side of the page. Below is a brief overview of some of these state tax incentives:

- New York:
 - New York offers a tax credit to any “eligible farmer” who donates “apparently wholesome food” grown or produced within New York State to a food pantry, food bank, or other emergency food program operating within New York State that has a federal tax exemption. This credit provides a benefit of 25% of the fair market value of the food donated, up to \$5,000 per year.²⁷
- California:
 - California offers a tax credit to any “taxpayer responsible for planting, managing, and harvesting crops,” who donates fresh produce to food banks located in the state. This credit provides a benefit of 15% of the qualified value, which is equal to the wholesale market price.²⁸
 - California offers another tax credit to any “taxpayer engaged in the business of processing, distributing, or selling agricultural products,” who donates agricultural crops to nonprofits. This credit provides a benefit of 50% of transportation costs.²⁹
- Virginia:
 - Virginia offers a tax credit to “any person engaged in the business of farming” who donates crops of grains, fruits, nuts, or vegetables to a nonprofit food bank engaged in providing food to the “needy.” This credit provides a benefit of 30% of the fair market value, up to \$5,000 annually.³⁰

²⁵ See California Food Waste Policy: Tax Incentives, REFED, <https://policyfinder.refed.org/california/> (last visited Dec. 5, 2021).

²⁶ See California Food Waste Policy: Tax Incentives, REFED, <https://policyfinder.refed.org/california/> (last visited Dec. 5, 2021).

²⁷ New York Tax Law § 606(n-2)(3); See Margaret Brown, *NY Farm to Food Bank Tax Credit Aims to Help Those in Need*, NAT’L RESOURCES DEF. COUNCIL (Apr. 18, 2019), <https://www.nrdc.org/experts/margaret-brown/ny-farm-food-bank-tax-credit-aims-help-those-need>.

²⁸ Cal. Rev. & Tax. Code § 17053.88.5; See California Food Waste Policy: Tax Incentives, REFED, <https://policyfinder.refed.org/california/> (last visited Dec. 5, 2021).

²⁹ Cal. Rev. & Tax Code § 17053.12; See California Food Waste Policy: Tax Incentives, REFED, <https://policyfinder.refed.org/california/> (last visited Dec. 5, 2021).

³⁰ VA Code Ann. § 58.1-439.12:12.

4. Do fridges have to pay federal corporate income taxes?

Nonprofit entities and other groups are eligible to apply for a number of exemptions from the federal corporate income tax, including exemptions under 501(c)(3) and 501(c)(4) as well as roughly 30 other, less common exemptions. Under the federal tax code, both incorporated and unincorporated nonprofit organizations that meet all of the criteria to receive 501(c)(3) tax exemption are considered to be tax-exempt without formally applying for exemption if their annual gross receipts are “not normally” more than \$5,000.³¹ Therefore, if your fridge seems likely to have, on average, a gross annual income of less than \$5,000, it will already be considered tax-exempt as long as it is in compliance with other 501(c)(3) requirements, and submitting the required forms to register as a 501(c)(3) will not provide it with any additional tax exemptions. If your fridge has a gross annual income of \$5,000 or more, you will need to register with the IRS as a 501(c)(3) organization in order to receive the tax-exempt benefit. An organization that is exempt from the federal corporate income tax also is typically able to apply for exemption from similar state and local taxes.

Even if your fridge group does qualify for this “self-declared” 501(c)(3) status, you may be required to obtain an Employer Identification Number and submit annual informational filings (likely on the very simple Form 990-n) to the IRS.

5. What restrictions exist for 501(c)(3) organizations who want to participate in political campaigns or in lobbying activity?

Key Takeaway: The Internal Revenue Code forbids organizations that are registered as a 501(c)(3) from engaging in political campaigning. It places limits on the amount of legislative advocacy a 501(c)(3) can engage in. There are no limits on time spent engaging in activism that is not legislative advocacy, such as engaging in advocacy over matters before agencies or administrative bodies.

Deeper Analysis: Under the Code, all 501(c)(3) organizations are “absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. Contributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political

³¹ 26 U.S.C. § 508(c)(1). More specifically, “not normally” more than \$5,000 means: (a) during the group’s first tax year, it received gross receipts of \$7,500 or less; (b) during its first two tax years, it received a total of \$12,000 or less; and (c) if it is in existence for three or more years, it received \$15,000 or less in gross receipts over the immediately preceding two years plus the current year. 26 C.F.R. § 1.508-1(a)(3)(ii).

campaign activity.”³² Thus, a fridge that registers as a 501(c)(3) would be forbidden from engaging in any conduct that seeks to support or oppose a candidate for public office.

On the other hand, 501(c)(3) organizations may engage in legislative or issue advocacy, so long as they do so in a limited capacity. 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, an organization cannot qualify for 501(c)(3) status if a “substantial” portion of its work seeks to influence legislation.³³ “Legislation includes actions by Congress, any state legislature, any local council, or similar governing body, with respect to acts, bills, resolutions, or similar items (such as legislative confirmation of appointive office) or by the public in referendum, ballot initiative, constitutional amendment, or similar procedure. It does not include actions by executive, judicial, or administrative bodies.”³⁴ This means 501(c)(3) organizations have to ensure they are not spending substantial time trying to influence legislation, but they are unlimited in how much time they spend influencing administrative agencies, such as the Department of Health or other regulatory bodies.

How much legislative advocacy an organization can do depends on which of the two tests the organization chooses to measure its lobbying activity by: 1) the substantial part test; or 2) the expenditure test. The substantial part test considers a variety of factors, including the time devoted by both paid and volunteer workers and the expenditures devoted by the organization to the activity.³⁵ The expenditure test, on the other hand, looks at the organization’s expenditures and determines whether it exceeds a limit based upon the size of the organization.³⁶ For smaller entities, they should generally keep less than 20% of their effort focused on legislative advocacy to meet the expenditure test. Therefore, a fridge that incorporates as a 501(c)(3) organization can still engage in legislative or issue advocacy, but will be restricted in the amount of time, resources, and money it can devote to it.

In a broader view of politics shared by many activists, however, these restrictions on lobbying and partisan political activities only relate to a narrow universe of activities. If your group were

³² *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations>, (last visited Dec. 5, 2021).

³³ *Lobbying*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/lobbying> (last visited Dec. 5, 2021).

³⁴ *Lobbying*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/lobbying> (last visited Dec. 5, 2021).

³⁵ *Measuring Lobbying: Substantial Part Test*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/measuring-lobbying-substantial-part-test> (last visited Dec. 20, 2021).

³⁶ *Measuring Lobbying: Expenditure Test*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/measuring-lobbying-activity-expenditure-test> (last visited Dec. 20, 2021).

to issue a statement of support for the Movement for Black Lives, write something about your concerns over food apartheid in your community, or attend a demonstration in favor of police defunding, these activities would in most cases not count as lobbying or political activity--unless they were done to promote pending legislation or done in a context where they actively support or oppose a political candidate's campaign.

In summary, a 501(c)(3) organization cannot conduct advocacy for or against a political candidate and it can conduct legislative advocacy as long as it is not a "substantial" amount of the organization's time and resources. A 501(c)(3) organization is allowed and has no limits on its time spent engaging in forms of activism that fall outside of the IRS's definitions of lobbying and political activities, and it has no limits on its time spent engaging in advocacy over matters before agencies or administrative bodies.

6. What should fridges consider when determining whether to incorporate as a nonprofit and/or register as a 501(c)(3) nonprofit?

There are many reasons why community fridge and mutual aid organizers may be skeptical of incorporating as a nonprofit and/or registering as a 501(c)(3): it may seem too formal, too expensive, or too much of a long-term commitment, or you may have political concerns about what is sometimes called the "non-profit industrial complex" and how formalizing as a nonprofit can tend to push groups in the direction of becoming less political or overly reliant on money from foundations or the government.³⁷ These are important considerations and deserve your attention, but they should be measured against the potential benefits of incorporation and obtaining tax exemption.

First, it is important to note the difference between incorporating as a nonprofit corporation and registering as a 501(c)(3) tax-exempt organization. When an organization incorporates, they do so within a *state*. Incorporation provides certain benefits related to liability protections for individuals affiliated with the fridge, as described above. On the other hand, when an organization registers as a 501(c)(3), they do so with the Internal Revenue Service, which is part of the *federal* government. 501(c)(3) registration provides certain tax benefits. So, if your fridge is incorporated as a nonprofit, but is not registered as a 501(c)(3), it may benefit from liability protections of individuals affiliated with the fridge, but will not necessarily be exempt from

³⁷ For more on the non-profit industrial complex, see generally Dean Spade, *Mutual Aid: Building Solidarity During This Crisis (and the Next)* (2020); *The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex* (Incite! ed., 2007).

federal corporate income taxes (unless you fit the exception for groups that comply with the rules for 501(c)(3) organizations and you receive no more than \$5,000 in gross annual income).³⁸

In general, the more money your fridge is handling and the more complex your operations are, the more benefits your fridge may see from incorporation and/or registration as a 501(c)(3) or fiscal sponsorship by a 501(c)(3).³⁹ Please see the next question for a more detailed conversation on fiscal sponsorship.

Potential Benefits Associated with Incorporation and/or Registration as a 501(c)(3) Organization

- Nonprofit incorporation provides more protection from personal liability for members and volunteers

As discussed above, incorporating as a nonprofit corporation will provide a community fridge's organizers and volunteers with protection from personal liability in the event that a claim is brought against the fridge. As a nonprofit organization, your fridge will exist as an entity separate from you, the other organizers, or your volunteers. With very rare exceptions, this means that the fridge as an entity, not the individual people who run the fridge, would be responsible for any court-imposed judgments, taxes, or fines. Without this protection, individuals who work on the fridge may be held personally liable to pay for any injuries.

Furthermore, if your fridge is incorporated as a nonprofit, it can get additional protection by purchasing insurance.⁴⁰ If your fridge is sued for something that your insurance policy covers, your carrier should defend or pay a qualified lawyer to defend you in court, as well as pay for any damages that might be awarded at trial or in a settlement.

- Nonprofit incorporation can remove barriers to opening a bank account

Some banks and credit unions do not allow unincorporated associations to open up bank accounts, or they implement administrative barriers that make it very difficult to do so.⁴¹

³⁸ See *Mutual Aid Legal Toolkit*, SUSTAINABLE LAW ECONOMIES CENTER, https://www.theselec.org/mutual_aid_toolkit#h_6118206432711598469694450 (last visited Oct 8, 2021).

³⁹ See *Mutual Aid Legal Toolkit*, SUSTAINABLE LAW ECONOMIES CENTER, https://www.theselec.org/mutual_aid_toolkit#h_6118206432711598469694450 (last visited Oct 8, 2021).

⁴⁰ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 20 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

⁴¹ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 22 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

Incorporating as a nonprofit will make your fridge eligible to open up an account at almost any bank or credit union.

- 501(c)(3) registration may encourage prospective donors to contribute to your fridge because their donations will be tax deductible

Donations to fridges that are not registered as a 501(c)(3) or that are not fiscally-sponsored by a 501(c)(3) nonprofit are not tax deductible; having 501(c)(3) tax exemption either directly or through a fiscal sponsor may be helpful in garnering more donations by creating an incentive for individuals and companies who would like to be able to partially deduct their monetary contributions from their taxes, or receive the enhanced tax deduction for their food donations. If most of your donors are individuals (rather than businesses or charities), this tax benefit may sound more appealing than it actually is: in order for your donors to actually deduct donations from their taxes when they file, they must itemize their deductions, which has become uncommon for lower-income and middle-class families.⁴²

- For organizations that ordinarily receive more than \$5,000 in gross annual income, 501(c)(3) registration allows you to apply for federal tax-exempt status

Tax-exempt status through 501(c)(3) registration makes an organization eligible for exemption from paying federal corporate income tax.

Potential Costs Associated with Incorporation and/or Registration as a 501(c)(3) Organization

- Administrative and financial costs

The costs associated with incorporating as a nonprofit vary from state to state.⁴³ Corporate formation typically costs between \$75 and \$200. Once incorporated, there are ongoing requirements with which a nonprofit organization must comply.

No matter which state you incorporate in, if you want to apply for 501(c)(3) status, you would do that by applying to the IRS, the federal tax authority. Applying for tax-exempt status from the IRS requires completing an application that is either 3 pages long or 28 pages long, as well as

⁴² See Tax Policy Center, *How Did the TCJA Affect Incentives for Charitable Giving?*, <https://www.taxpolicycenter.org/briefing-book/how-did-tcja-affect-incentives-charitable-giving> (last visited Dec. 27, 2021).

⁴³ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 8 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

paying corresponding filing fees of either \$275 or \$600.⁴⁴ There is a test available in the [IRS instructions for the Form 1023-EZ](#) to determine whether an organization qualifies for the shorter and cheaper Form 1023-EZ or the longer and more expensive Form 1023.⁴⁵ For many organizations, the key factor is whether your group has annual gross receipts of \$50,000 or more—either in the past three years, or if you project having that much annual revenue in any of the next three years. Based on that factor alone, most community fridges will only need to complete the 3 page 1023-EZ application that costs \$275.

501(c)(3) organizations also must comply with ongoing requirements. These include both substantive limitations on things like your group’s ability to engage in lobbying and political campaigns, as described above, and compliance with formalities like filing an annual Form 990 information return with the IRS.⁴⁶

- Organizational and structural requirements

Once incorporated as a nonprofit, an organization must comply with its state law’s requirements in order to receive the protections associated with incorporation. For instance, nonprofit corporations generally must have a Board of Directors that holds regular meetings and keeps detailed records and, in some states, must also adopt corporate by-laws.⁴⁷ However, the nonprofit structure provides for significant flexibility in how organizations choose to comply with these requirements.⁴⁸ For a more complete discussion of what this might look like, please visit [Legal Issues in Mutual Aid Operations: A Preliminary Guide](#).

- Prohibition on participating in political campaigns and restrictions on lobbying activity

As described above, a 501(c)(3) organization cannot conduct advocacy for or against a political candidate and it can conduct legislative advocacy as long as it is not a “substantial” amount of the organization’s time and resources. A 501(c)(3) organization has no limits on its time spent engaging in forms of activism that fall outside of the IRS’s definitions of lobbying and political

⁴⁴ See *Mutual Aid Legal Toolkit*, SUSTAINABLE LAW ECONOMIES CENTER, https://www.theseclc.org/mutual_aid_toolkit#h_6118206432711598469694450 (last visited Oct 8, 2021).

⁴⁵ IRS, *Instructions for Form 1023-EZ* 13 (Rev. Jan. 2018), <https://www.irs.gov/pub/irs-pdf/i1023ez.pdf>.

⁴⁶ Again, the IRS asks for more information from groups with greater revenue. Many 501(c)(3) community fridges, with gross receipts less than \$50,000 per year, are eligible to file Form 990-N, which asks only a few very broad questions and can be filled out online. Medium-sized 501(c)(3)s, with gross annual receipts between \$50,000 and \$250,000 generally file on Form 990-EZ, and larger 501(c)(3)s with gross annual receipts over \$250,000 file on the lengthier and more detailed Form 990.

⁴⁷ See *Mutual Aid Legal Toolkit*, SUSTAINABLE LAW ECONOMIES CENTER, https://www.theseclc.org/mutual_aid_toolkit#h_6118206432711598469694450 (last visited Oct 8, 2021).

⁴⁸ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 12 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

activities, and it has no limits on its time spent engaging in advocacy over matters before agencies or administrative bodies.

7. What is fiscal sponsorship? What are the pros and cons of fiscal sponsorship?

Generally speaking, fiscal sponsorship is a contractual relationship whereby an established 501(c)(3) tax-exempt nonprofit corporation assists an individual, group, or non-exempt nonprofit in receiving donations, grants or other money, typically for a fee. The established 501(c)(3) organization essentially houses the unincorporated or junior nonprofit under its 501(c)(3) status. Fiscal sponsorship may be particularly appealing to community fridge/mutual aid groups that have limited capacity or are not interested in becoming incorporated nonprofits themselves, but who would like to manage their money through a centralized fund or take advantage of the benefits of tax-exemption.⁴⁹

Fiscal sponsorship is a commonly-employed arrangement in the nonprofit sector, and there are multiple ways to structure a fiscal sponsorship. Two common approaches are outlined below. Under either arrangement, the sponsor organization must take account of its own compliance issues and charitable purposes, and it will need to ensure that the money that passes through its bank accounts is spent in accordance with those guidelines.

- Under a “Model A” fiscal sponsorship, the community fridge/mutual aid group becomes a project of the sponsor entity and the degree of control and terms of the relationship are set out in a contract.⁵⁰ The money raised for the community fridge project is put into and then paid out of the sponsor’s bank account for the specific and previously-agreed upon purposes of the project. The sponsor will typically agree to managing tax, accounting, and legal compliance for the project.⁵¹
- Under a “Model C” fiscal sponsorship, the community fridge/mutual aid group remains independent from the sponsor.⁵² The sponsor still receives funds for the group’s work in its bank account, but unlike a “Model A” sponsorship, it then provides the money directly to the community fridge/mutual aid group. In turn, the sponsor may require

⁴⁹ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

⁵⁰ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

⁵¹ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

⁵² Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

documentation of how the money was spent or charge a fee for their work.⁵³ Additionally, the sponsor will typically agree to managing tax, accounting, and legal compliance for the project.⁵⁴

Please check out the following resources for further information on the questions discussed above:

- [*Covid-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*](#), Michael Haber
- [*Legal Issues in Mutual Aid Operations: A Preliminary Guide*](#), Michael Haber
- [*Mutual Aid Legal Toolkit*](#), Sustainable Law Economies Center
- [*Legal Fact Sheet: The Bill Emerson Good Samaritan Food Donation Act*](#), Harvard Law School Food Law and Policy Clinic
- [*Federal Enhanced Tax Deduction for Food Donation: A Legal Guide*](#), Harvard Law School Food Law and Policy Clinic

As a reminder, we hope to continue to update this document with questions and answers we receive from community fridges. **Please submit any further questions through this [link](#).**

⁵³ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

⁵⁴ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.