

Legal Fact Sheet

New Jersey Food Donation: Liability Protections

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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 donations. The federal Bill Emerson Good Samaritan Food Donation Act provides liability protection for food donors, and New Jersey's "Food Bank Good Samaritan Act" provides robust additional liability protection to food donors, distributors, and landowners who allow gleanings.

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.¹ The Emerson Act covers individuals, businesses, non-profit organizations, and the officers of businesses and non-profit organizations. It also covers gleaners—individuals that harvest donated agricultural crops to the needy or to a nonprofit organization that distributes to the needy.² 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."³
- **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,⁴ 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:⁵

- 1) The donor donates to a non-profit organization.⁶
- 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.⁷

- **Gross Negligence** involves "voluntary and conscious conduct (including a failure to act)" by a person or organization that either failed to follow local and state safety regulations, or 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.⁸ 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.⁹

Liability Protection for Food Donation in New Jersey

In addition to the federal liability protections, there are several ways in which New Jersey'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.¹⁰ 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. New Jersey has passed state legislation, codified in N.J. Rev. Stat. §§ 24:4A-1—A-5. and described below.

Overview of New Jersey State Liability Protection Law

New Jersey's liability protection law has been in place since 1982, predating the federal legislation (the Emerson Act in 1996). The law provides both civil and criminal liability protections beyond those provided by federal law. Additional protections include coverage for donations made directly to individuals, rather than extending only to those donations made through nonprofit organizations, and a presumption that the food donor was making the donation in good faith.¹¹ The state also provides protection to nonprofit intermediaries who charge a small fee for donated food, so long as the fee is "sufficient only to cover the cost of storing, transporting, or otherwise handling the food."¹² This means nonprofit intermediaries can recoup the costs of handling donated food, and can utilize innovative approaches to sell surplus food at deeply reduced prices.

In addition, whereas federal law is silent as to whether donation of post-date food is eligible for liability protection, New Jersey is explicit: donation of food that is past its "best by" or other open date but still fit for consumption is protected.¹³ Liability protection is unavailable when injury is a direct result of a donor, gleaner, or non-profit organization's gross negligence, recklessness, or knowing misconduct.¹⁴

Owners of agricultural land are not liable should the food gleaned from their land result in injury.¹⁵ They are also explicitly protected from civil liability stemming from injuries sustained by gleaners while on their property.¹⁶

Conclusion

Federal law and New Jersey state law provide ample liability protections from both civil and criminal liability for both food donors and distributors, for packaged as well as perishable or prepared foods, so long as the donated food complies with federal and state safety rules and is donated in good faith and without the donor acting with gross negligence or with intentional misconduct. New Jersey state law bolsters federal liability protections by providing protections for the ultimate distribution of donated food for a nominal fee and for donations made directly from the donor to an individual.

¹ 42 U.S.C. §1791.

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

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

⁴ 42 U.S.C. § 1791 (e).

⁵ 42 U.S.C. § 1791(c).

⁶ 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).

⁷ 42 U.S.C. §1791(c)(3).

⁸ 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.

⁹ 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>.

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

¹¹ N.J. Rev. Stat. §§ 24:4A-3.

¹² N.J. Stat. Ann. § 24:4A-2.

¹³ N.J. Stat. Ann. § 24:4A-3(d).

¹⁴ N.J. Stat. Ann. § 24:4A-3.

¹⁵ N.J. Stat. Ann. § 24:4A-3.

¹⁶ N.J. Stat. Ann. § 24:4A-3.1.



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