

Legal Fact Sheet

Ohio Food Donation: Liability Protections

Created by the Harvard Law School Food Law and Policy Clinic, June 2023

Businesses (including farms) and nonprofits that donate or distribute 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 the basis for liability protection for food donors. In 2022, The Food Donation Improvement Act expanded upon and clarified these protections. Additionally, Ohio state law provides liability protection to food donors and distributors. Consequently, the risk of liability for food donation is very low. As of the time of publication of this factsheet, court cases database searches did not return a single court case related to food donation liability.

The Bill Emerson Good Samaritan Act

The Bill Emerson Good Samaritan Food Donation Act, as amended by the Food Donation Improvement Act¹ (together referred to as the Emerson Act), provides a federal baseline of liability protection to encourage food donations to individuals experiencing food insecurity.² The Emerson Act covers individuals, government entities, schools,³ businesses, nonprofit organizations, and the officers of businesses and nonprofit organizations. It also covers gleaners—individuals that harvest donated agricultural crops for nonprofit organizations that distribute to the needy.⁴ These individuals and entities are protected so long as the following four requirements are met:

- 1) **Qualifying Foods and Grocery Products:** The donor must donate “apparently wholesome food” or an “apparently fit grocery product” that meets “all quality and labeling standards imposed by Federal, State, and local laws and regulations,” even if the food or grocery product is not “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”⁵

¹ Food Donation Improvement Act of 2021, Pub. L. No. 117-362.

² 42 U.S.C. § 1791.

³ 42 U.S.C. § 1758 (I)(3) (providing that any “school or local educational agency making donations pursuant to this subsection shall be exempt from civil and criminal liability to the extent provided under section 1791 of this title.”)

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

⁵ 42 U.S.C. § 1791(c)(1); 42 U.S.C. §1791(c)(4) (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.)

- **Exception for Reconditioned Items:** Even if a food or grocery product does not meet all applicable standards, donors can still be protected by the Emerson Act if the donor follows all the Act’s reconditioning procedures,⁶ 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.

- 2) **Direct Donations or Donations Through Non-Profits:** Unless the donor is a “qualified direct donor” all donations must be made through a nonprofit organization, such as a food bank or food recovery organization, to needy individuals.⁷ A “qualified direct donor” may donate through a nonprofit organization or directly to needy individuals. Organizations that qualify as direct donors are retail grocers; wholesalers; agricultural producers, processors, and distributors; restaurants, caterers, school food authorities, and higher educational institutions.⁸

- 3) **Free or Good Samaritan Reduced Price:** When donors donate food or grocery products to a nonprofit organization, the nonprofit must offer the items to needy individuals for free or at a “Good Samaritan Reduced Price,” which is a price not greater than the cost of handling and distributing the items.¹² When a “qualified direct donor” donates directly to individuals, the donation must be provided at no cost.¹³

- 4) **Good Faith:** Donations must be made and distributed in “good faith.”⁹ While “good faith” is not defined in the Emerson Act, it will likely be satisfied if all other elements of the Act are met, including the donation meeting the requirements for an “apparently wholesome food” or “apparently fit grocery product” and the absence of acts or omissions constituting “gross negligence” or “intentional misconduct.”
 - **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.¹⁰
 - **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.”¹¹

⁶ 42 U.S.C. § 1791(e).

⁷ 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 warnings to, or operate in any other manner for the benefit of any officer, employee, or shareholder.” 42 U.S.C. § 1791(b)(10).

⁸ 42 U.S.C. § 1791(b)(12); Food Donation Improvement Act of 2021, Pub. L. No. 117-362.

⁹ 42 U.S.C. § 1791(e)(1).

¹⁰ 42 U.S.C. § 1791(b)(8).

¹¹ 42 U.S.C. § 1791(b)(9).

In other words, one should not donate or facilitate the distribution of donated food that one knows is likely to be harmful or dangerous. The Emerson Act gives little guidance on what activities qualify as gross negligence or intentional misconduct.¹²

So long as these criteria are met, the Emerson Act is quite protective of donors and nonprofit organizations.¹³

Liability Protection for Food Donation in Ohio

In addition to the federal liability protections, there are two ways in which Ohio'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.¹⁴ Therefore, state laws regarding labeling and safety must be followed for a food donor to receive protection under the federal Emerson Act.¹⁵
 - **State Authority:** States are free to enact laws that are more protective of donors and nonprofit organizations than the federal Emerson Act, which sets a floor on liability protection. Ohio has passed such legislation.
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Overview of Ohio State Liability Protection Law

Ohio's food donation liability protection law is more protective than the Emerson Act in one respect. Ohio law explicitly states that a presumption of liability does not arise solely because the donor donated a food item on or after an applicable sale date,¹⁶ or because an agency distributes a food item to an individual on or after an applicable sale date.¹⁷

¹² Legal guide to Food recovery, U. ARK. L.L.M. DEP'T OF AGRIC. & FOOD LAW 10 (2013), available at <https://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf>. The House of Representatives Report associated with the Emerson Act has indicated that each case must be analyzed individually, and that, for example, donating food past the sell-by date generally will not impact liability protections because such labeling is not federally required and generally does not correspond to food safety.

¹³ 42 U.S.C. § 1791(c)(3). Legal guide to Food recovery, U. ARK. L.L.M. DEP'T OF AGRIC. & FOOD LAW 10 (2013), available at <https://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf>.

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

¹⁵ For packaged perishable food and shellfish, Ohio requires sell-by dates. Ohio Admin. Code 901:3-8-03(F)(1)(d)(ii).

¹⁶ The Code defines "Sale date" as the date that the manufacturer, processor, or packager of a packaged food product recommends the product be sold for consumption based on the food product's quality assurance period. Ohio Rev. Stat § 2305.37 (A)(10).

¹⁷ Ohio Rev. Stat § 2305.37 (B)(1); Ohio Rev. Stat § 2305.37 (D)(1).



Conclusion

Federal law and Ohio state law provide ample liability protections for both food donors and distributors who donate food and grocery products, so long as the donated items comply with federal, state, and local safety rules and are donated or distributed in good faith and without gross negligence or intentional misconduct. Ohio state law bolsters federal liability protections by explicitly protecting the donation or distribution of food past its sale date.