

Federal Liability Protection For Food Donation LEGAL FACT SHEET

Businesses and nonprofits that donate or distribute donated food or grocery products are well-protected by laws designed to provide immunity from liability related to food donations. The Bill Emerson Good Samaritan Food Donation Act, originally passed in 1996 and amended by the Food Donation Improvement Act (FDIA)¹ in 2022 (hereinafter collectively referred to as “the Emerson Act”), provides comprehensive federal liability protection to encourage food donation to individuals experiencing food insecurity.² Furthermore, the risk of liability for food and grocery product donation is already very low; no court case exists to date related to food donation liability.



The Emerson Act provides civil and criminal liability protection for liability that might arise due to harm from donated food or grocery products.

The Emerson Act covers both donors and intermediaries that distribute food, including:³

- All individuals
- Government entities
- Schools⁴
- Businesses (including retailers, restaurants, and wholesalers)
- Nonprofit organizations
- The officers of businesses and nonprofit organizations
- Gleaners (individuals that harvest donated agricultural crops for a nonprofit organization that distributes the food to individuals⁵)

Conditions Required to Receive Liability Protections Under the Emerson Act

1. Qualifying foods and grocery products:

The donor must donate “apparently wholesome food” or an “apparently fit grocery product” that meets food safety standards imposed by Federal, State, and local laws and regulations, even if they contain flaws that makes them unmarketable (for example, food products that contain aesthetic flaws or are the wrong size or grade).⁶



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, which include:⁷

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,” protected donations must be made through a nonprofit organization, such as a food bank or food recovery organization,⁸ to needy individuals. A “qualified direct donor” may receive protection if they donate through a nonprofit organization or directly to needy individuals. Organizations that can be qualified direct donors are retail grocers; wholesalers; agricultural producers, processors, and distributors; restaurants, caterers, school food authorities, and higher educational institutions.⁹

3. Food Offered for Free or at a Good Samaritan Reduced Price



When donors donate food or grocery products to nonprofit organizations, such as food banks and other food recovery organizations, liability protections will apply where the nonprofit offers the food to end recipients for free or at a “Good Samaritan Reduced Price,”¹⁰ which is a price not greater than the cost of handling and distributing the food.¹¹ When a “qualified direct donor” donates directly to individuals, liability protections will apply only if donations are made free of charge.¹²

4. Good Faith

Donations must be made and distributed in “good faith.”¹³ While “good faith” is not explicitly defined in the Act, it will likely be satisfied provided all other elements of the Act are met, meaning that the donation meets the requirements for “apparently fit grocery product” or “apparently wholesome food.”



Further, protection is not available for donations made or distributed with “gross negligence” or “intentional misconduct.”¹⁴

- **Gross Negligence** involves “voluntary and conscious conduct (including a failure to act)” by a person or organization that knew when the donation was made or distributed that the donated food was likely to have harmful health impacts.¹⁵
- **Intentional Misconduct** is when a person or organization donates or distributes food “with knowledge . . . that the conduct is harmful to the health or well-being of another person.”¹⁶

In other words, one should not donate or facilitate the distribution of donated food that one knows is likely to be harmful or dangerous.

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

Preemption

The Emerson Act protects against both federal and state law claims. The Act partially preempts state liability laws by creating a floor for liability protection for food donation. States cannot provide less liability protection than the Emerson Act, but remain free to enact state level liability protections that are more protective of food donors or that expand the covered activities and personnel beyond the Emerson Act's protections. For example, New Jersey provides additional liability protection against state law claims by explicitly protecting food donated past a quality-based label date and regardless of compliance with regulations on the quality or labeling of food that are not required for safety.¹⁷



Endnotes

1 The FDIA, Public Law No. 117-362 (to be codified at 42 U.S.C. 1791), built on the original Emerson Act by extending liability protection for direct donations by qualified direct donors and for donations offered by nonprofit organizations at a Good Samaritan Reduced Price.

2 42 U.S.C. § 1791.

3 42 U.S.C. § 1791(b)(10)–(11), (c)(1)–(2).

4 42 U.S.C. § 1758 (l)(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.”).

5 42 U.S.C. § 1791(b)(5). 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. 42 U.S.C. § 1791(d).

6 42 U.S.C. § 1791(b)(1)–(2) (food or grocery products may be apparently wholesome even if they are not “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”).

7 42 U.S.C. § 1791(e).

8 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).

9 42 U.S.C. § 1791(b)(12); Food Donation Improvement Act of 2021, Pub. L. No. 117-362.

10 42 U.S.C. § 1791(c)(1). Further, 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. 42 U.S.C. § 1791(b)(6).

11 42 U.S.C. § 1791(b)(6) (“The term ‘good Samaritan reduced price’ means, with respect to the price of an apparently wholesome food or apparently fit grocery product, a price that is an amount not greater than the cost of handling, administering, harvesting, processing, packaging, transporting, and distributing the apparently wholesome food or apparently fit grocery product.”).

12 42 U.S.C. § 1791(b)(12), (c)(3). Pub. L. No. 117-362.

13 42 U.S.C. § 1791(c)(1).

14 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. 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, offering substantial protection for donors and nonprofit distributors. See Neal D. Fortin, *Food Regulation: Law, Science, Policy, and Practice* 606–07 (2009). See also Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (Am. Law Inst. 2005); Restatement (Second) of Torts § 402A (Am. Law Inst. 1964); 63 Am. Jur. 2d Products Liability §§ 506, 515 (2019) (noting that Delaware, Virginia, Massachusetts, Michigan, and North Carolina have rejected strict liability).

15 42 U.S.C. § 1791(b)(8).

16 42 U.S.C. § 1791(b)(9).

17 N.J. Stat. Ann. § 24:4A-1–A5.