

## Legal Fact Sheet for Massachusetts Food Donation: Liability Protections - July 2015

Businesses 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 Massachusetts' Good Samaritan law provides additional liability protection to businesses in the state.

### The Emerson Good Samaritan Act

The Bill Emerson Good Samaritan Food Donation Act (the Emerson Act) provides a federal baseline of protection for food donors.<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 a nonprofit organization that distributes to the needy.<sup>2</sup> These individuals and businesses are protected so long as 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 still be protected by the Emerson Act as long as (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.<sup>5</sup>

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

- 1) The donor donates to a non-profit organization.<sup>6</sup>
- 2) This nonprofit organization that receives the donated food distributes it to needy populations.<sup>7</sup> Direct donations from the donor to needy individuals do not seem to be protected by the Act.<sup>8</sup>
- 3) The ultimate recipients do not pay for this donated food.<sup>9</sup> 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.<sup>10</sup>

So long as 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>11</sup>

- **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.<sup>12</sup>

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<sup>1</sup> 42 U.S.C.A. §1791 (West 2015).

<sup>2</sup> *Id.* §1791(b)(5).

<sup>3</sup> There is an exception for mislabeled food products that are “not readily marketable,” which can also be protected so long as the donor explains the mislabeling to the donee, and the donee has sufficient knowledge to and does recondition the product to meet applicable standards. *Id.* §1791(b)(1-2).

<sup>4</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>5</sup> *Id.*

<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.A. §1791(b)(9) (West 2015).

<sup>7</sup> *Id.* §1791(c).

<sup>8</sup> *See id.*

<sup>9</sup> *Id.* §1791(b)(3).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* §1791(c)(3).

- **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.”<sup>13</sup>

In other words, one should not donate or facilitate the distribution of donated food that one knows is likely to be harmful or dangerous. Unfortunately, the Act gives little guidance on what activities qualify as gross negligence or intentional misconduct. However, 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.<sup>14</sup> The lack of court cases interpreting the Emerson Act suggests how protective the Act is of donors; research does not turn up a single case related to food donation liability.<sup>15</sup>

### Liability Protection for Food Donation in Massachusetts

In addition to the federal liability protections, there are two ways in which Massachusetts 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>16</sup> This means that 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.<sup>17</sup> Massachusetts has passed such legislation.

The Massachusetts Good Samaritan Law protects donors who donate food, including food that is past date, to a nonprofit corporation for distribution as long as two requirements are met.<sup>18</sup>

- 1) The food cannot be misbranded or adulterated at the time of donation and must have been manufactured, processed, prepared, handled or stored in compliance with all applicable public health regulations.<sup>19</sup> This means that donated food must comply with the Massachusetts laws on date labeling in order to receive liability protection. These requirements are laid out in *Best Management Practices around Food Donation: Date Labeling Laws*.
- 2) Any injury resulting from such donation cannot be the result of “gross negligence, recklessness or intentional misconduct.”<sup>20</sup> Like the Emerson Act, the state law does not provide additional guidance on what constitutes gross negligence, recklessness, or intentional misconduct.

The state law also clarifies the requirements for nonprofits that accept donated food for distribution. No nonprofit can distribute or serve donated food unless the relevant establishment has been inspected and is in compliance with all inspection or permit requirements.<sup>21</sup> It cannot be charged a fee for these permits.<sup>22</sup> Additionally, whereas the federal Emerson Act only allows charges to cover costs between nonprofits, the state law allows a nonprofit to charge a fee to *individual recipients* that is sufficient to cover the cost of handling the food, in order to encourage social enterprise.<sup>23</sup>

### Conclusion

Federal law and Massachusetts state law provide ample liability protections for food donors, so long as the donated food is in compliance with state safety and labeling rules, and it is donated in good faith and without the donor acting with gross negligence, recklessness, or intentional misconduct.

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<sup>12</sup> *Id.* §1791(b)(7).

<sup>13</sup> *Id.* §1791(b)(8).

<sup>14</sup> *Legal Guide to Food Recovery*, *supra* note 4 at 9.

<sup>15</sup> *Id.*

<sup>16</sup> 42 U.S.C.A. §1791(b)(1-2) (West 2015).

<sup>17</sup> *Legal Guide to Food Recovery*, *supra* note 4 at 10.

<sup>18</sup> MASS. GEN. LAWS ch. 94, § 328 (2015).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* One notable exception is that food prepared in private homes to go to nonprofit organizations is not subject to such licensing and inspection requirements.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*