

Legal Fact Sheet

New Hampshire Food Donation: Liability Protections

Created by the Harvard Food Law and Policy Clinic, November 2018

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 such donations. The federal Bill Emerson Good Samaritan Food Donation Act provides liability protection for food donors, and New Hampshire state law provides some additional liability protection to food donors in the state.

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.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 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 Hampshire

In addition to the federal liability protections, there are several ways in which New Hampshire’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 Hampshire has passed such legislation, codified in N.H. Rev. Stat. Ann. § 508:15.

Overview of New Hampshire State Law

New Hampshire's state law provides civil and criminal liability protection to individuals and organizations that donate, in good faith, to a "needy individual or individuals or to a bona fide charitable or non-profit organization."¹¹ Thus, protections apply to direct donations and donations to a food distributor, which is defined as a non-profit or charitable organization. This provision is very similar to federal law but goes beyond federal law by allowing for donation directly to needy individuals.

Donated food includes "food not readily marketable due to appearance, freshness, grade, or surplus."¹²

Furthermore, in New Hampshire, liability protections apply when the end recipient pays for the food, if the cost "covers the cost of handling and administering such food and the distribution thereof."¹³

Exceptions to Liability Protection Under New Hampshire State Law

Neither donors nor organizations that distribute food are protected if an injury results from "the gross negligence, recklessness, or intentional conduct of the organization."¹⁴ The New Hampshire requirements for knowledge of harm vary slightly from the federal law by including "recklessness."¹⁵

Donors are liable for harm if, at the time of the distribution or serving of the food, the food is knowingly misbranded or adulterated or has been manufactured, processed, prepared, handled, or stored in violation of applicable rules of the Department of Health and Human Services.¹⁶

Conclusion

Federal law and New Hampshire state law provide ample liability protections for food donors, so long as the donated food complies with federal and state safety and labeling rules, and it is donated in good faith and without the donor acting with gross negligence or intentional misconduct. New Hampshire state law bolsters federal liability protections by extending liability protection to donors that 1) donate food directly to the end recipient and 2) charge end consumers a fee to cover the cost of administering and distributing the food.

¹ 42 U.S.C. §1791 (1996).

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). There is an exception for mislabeled food products that are "not readily marketable," which can also be protected if 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.*

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. DEPT 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, *supra* note 4, at 10.

⁹ Legal Guide to Food Recovery, U. ARK. L.L.M. DEPT OF AGRIC. & FOOD LAW 10 (2013), available at <http://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf>. AKA: *Id.*

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

¹¹ N.H. Rev. Stat. § 508:15 (II).

¹² N.H. Rev. Stat. § 508:15 (IV).

¹³ N.H. Rev. Stat. § 508:15 (II).

¹⁴ N.H. Rev. Stat. § 508:15.

¹⁵ N.H. Rev. Stat. § 508:15; 42 U.S.C. § 1791(c)(3).

¹⁶ N.H. Rev. Stat. § 508:15(III).

