



# Liability Protection for Food Donation

Each year, over 100 billion pounds of food are thrown away in the United States,<sup>1</sup> with estimates suggesting that up to 40 percent of America's edible food supply ends up as food waste during the farm-to-table lifecycle.<sup>2</sup> Meanwhile, there are 49 million people, including more than 16 million children, who are at risk of going hungry or lack adequate access to wholesome food (referred to as "food insecurity").<sup>3</sup> A large portion of this waste comes from commercial and retail sources and is thrown away in significantly greater quantities than the average person's table scraps. This food may be excess food made for cafeterias or catering services, or food that did not meet the retailer's quality control standards (such as sell by dates, appearance, dented or damaged containers, etc.). One way to simultaneously improve the issues of mounting landfills and food insecurity in America is to encourage these corporate donors, as well as individuals and smaller retailers, to donate their surplus food.

Unfortunately, many prospective food donors have been hesitant to participate. In a national survey conducted by America's Second Harvest,<sup>4</sup> more than 80 percent of the companies surveyed responded that the threat of liability for food related injuries was the greatest deterrent for donating excess food.<sup>5</sup> Starting with California in 1977, states began adopting "Good Samaritan" statutes to protect food

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donors from potential liability.<sup>6</sup> In the absence of a Good Samaritan law, a donor would likely be held strictly liable for any harm caused by the food or products they donate.<sup>7</sup> However, discrepancies in both liability protection and coverage from state to state made understanding liability risks too great of a legal burden for many national corporations.<sup>8</sup> The Bill Emerson Good Samaritan Act provides one national standard to overcome this hurdle and allow donors to reap the benefits of donating food without fear of liability for unforeseen injuries.<sup>9</sup>

### What is the Bill Emerson Good Samaritan Food Donation Act?

The Bill Emerson Good Samaritan Food Donation Act (“Good Samaritan Act”) is a federal law aimed at “encouraging the donation of food and grocery products to nonprofit organizations for distribution to needy individuals”<sup>10</sup> by providing a national standard of liability protection for both food donors and the nonprofits accepting these donations.

### Who is covered?

The federal law covers a broad set of both donors and donees:

**Donor.** Any person donating grocery or food products, with “persons” encompassing: individuals, corporations, partnerships, organizations, associations, governmental entities, retail grocers, wholesalers, hotels, motels, manufacturers, restaurants, caterers, farmers, non-profit good distributor, or hospitals.<sup>11</sup> Donors also include “gleaners.” A “gleaner” is defined as “a person who harvests for free distribution to the needy, or for donations to a non-profit organization for ultimate distribution to the needy, an agricultural crop that has been donated by the owner.”<sup>12</sup> The Federal Food Donation Act of 2008 extended the definition of donor to include both executive agencies and contractors hired by those agencies.<sup>13</sup>

**Donee.** Any nonprofit organization receiving food donations, including those “operating for religious, charitable, or educational purposes.”<sup>14</sup>

### What may be donated?

The Good Samaritan Act covers both food and grocery products, with the condition that the items be “apparently fit.”<sup>15</sup> To meet this standard, the item “must meet all quality and labeling standards imposed by Federal, State, and local law and regulations even though the [item] may not be readily marketable due to appearance, freshness, grade, size, surplus, or other conditions.”<sup>16</sup>

**Food.** “Any raw, cooked, processed, or prepared edible substance, ice, beverage, or ingredient used or intended for use in whole or in part for human consumption.”<sup>17</sup>

**Grocery Product.** “A nonfood grocery product, including a disposable paper or plastic product, household cleaning product, laundry detergent, cleaning product, or miscellaneous household item.”<sup>18</sup>

### What kind of protection does the Good Samaritan Act offer?

Both donors and donees are generally protected from criminal and civil liability related to the donation of food and grocery products covered under the Good Samaritan Act. A donor or donee will only be liable for acts of gross negligence or intentional misconduct.<sup>19</sup> Donors are protected against strict liability, the typical standard for food products, or mere negligent conduct.

**Gross negligence.** Gross negligence is more serious and harmful than basic negligence. It is a voluntary or conscious act or failure to act by a person who knew, at the time of his or her conduct, that the conduct was likely to cause harm to another.<sup>20</sup> The facts of a particular situation will generally determine if negligence is basic or gross.<sup>21</sup>

TABLE 1: Comparison of the Good Samaritan Act with Existing State Laws<sup>27</sup>

	State Law <sup>28</sup>	Federal Law
Who It Protects	Varies by state; may only protect donors, not nonprofit organizations.	Protects both the donor and the donee.
What It Protects	Products and foods covered vary by state.	Uniform definition of “food” and “grocery product.”
Type of Liability	May only protect against civil liability.	Protects against civil and criminal liability.
Liability Threshold	Varies by state.	Sets minimum liability standard of gross negligence.

**Intentional misconduct.** Intentional misconduct occurs when a person acts with knowledge that his or her actions will be harmful to others.<sup>22</sup>

In order to receive protection under the law, donations must also be made in good faith. “Good faith” is acting with good, honest intention or belief.<sup>23</sup>

### How does the federal law impact state Good Samaritan laws?

The Department of Justice has interpreted the federal law to partially preempt state laws by setting a base floor of liability protection.<sup>24</sup> The states, however,

are free to exceed this floor and offer higher levels of liability protection for donors and donees (Table 1).<sup>25</sup> While gross negligence is the most common liability standard, some states set the bar slightly higher at “willful, wanton, or reckless” conduct.<sup>26</sup>

### What impact does the Good Samaritan Act have on the person receiving the donated product?

Absent gross negligence, intentional misconduct, or a violation of food or product regulations, the Good Samaritan Act prevents the donation’s recipient from bringing a lawsuit against the donor or donee for food-or product-related injuries.

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## Endnotes

- <sup>1</sup> U.S. Dep't of Agric., *Let's Glean! United We Serve Toolkit* (2010), [http://www.usda.gov/documents/usda\\_gleaning\\_toolkit.pdf](http://www.usda.gov/documents/usda_gleaning_toolkit.pdf).
- <sup>2</sup> Kevin D. Hall et al., *The Progressive Increase of Food Waste in America and Its Environmental Impact*. 4 PLoS ONE 11, at e7940 (2009).
- <sup>3</sup> U.S. Dep't of Agric. Economic Research Service, *Food Security in the United States: Key Statistics and Graphics* (2010), [http://www.ers.usda.gov/briefing/foodsecurity/stats\\_graphs.htm#food\\_secure](http://www.ers.usda.gov/briefing/foodsecurity/stats_graphs.htm#food_secure).
- <sup>4</sup> America's Second Harvest is now Feeding America and is the country's largest domestic charitable food bank.
- <sup>5</sup> David. L. Morenoff, *Lost Food and Liability: The Good Samaritan Food Donation Law Story*, 57 Food & Drug L.J. 107, 2002, at 116-17.
- <sup>6</sup> H.R. Rep. No. 104-661, at 3. (1996).
- <sup>7</sup> *Id.*
- <sup>8</sup> *Id.*
- <sup>9</sup> The benefits of donating food include tax benefits, public relations and reputational benefits, as well as reducing landfill and waste disposal costs. See Env'tl. Prot. Agency, *Food Donation: Feed People — Not Landfills* (2012), <http://www.epa.gov/osw/conserva/materials/organics/food/fd-donate.htm>.
- <sup>10</sup> H.R. Rep. No. 104-661, at 2 (1996).
- <sup>11</sup> 42 U.S.C.A. § 1791 (b)(10) (West 2012).
- <sup>12</sup> 42 U.S.C.A. § 1791 (b)(5) (West 2012).
- <sup>13</sup> 48 C.F.R. § 26.403 (a)(3) (2012).
- <sup>14</sup> 42 U.S.C.A. § 1791 (b)(9)(A)-(B) (West 2012). These entities cannot “provide net earnings to, or operate in any other manner that inures to the benefit of, any officer, employee, or shareholder of the entity.”
- <sup>15</sup> 42 U.S.C.A. § 1791 (b)(1)-(2) (West 2012).
- <sup>16</sup> *Id.*
- <sup>17</sup> 42 U.S.C.A. § 1791 (b)(4) (West 2012).
- <sup>18</sup> 42 U.S.C.A. § 1791 (b)(6) (West 2012).
- <sup>19</sup> 42 U.S.C.A. § 1791 (c)(3) (West 2012).
- <sup>20</sup> 42 U.S.C.A. § 1791 (b)(7) (West 2012).
- <sup>21</sup> There are no cases on record in which the defendant has raised the Good Samaritan Act as a defense, thus no judicial guidance on what constitutes “gross negligence” within the context of food and grocery product donations.
- <sup>22</sup> 42 U.S.C.A. § 1791 (b)(8) (West 2012).
- <sup>23</sup> Black's Law Dictionary (9th ed. 2009).
- <sup>24</sup> Preemptive Effect of the Bill Emerson Good Samaritan Food Donation Act, 21 Op. Off. Legal Counsel 55 (1997), <http://www.justice.gov/olc/bressman.htm>.
- <sup>25</sup> *Id.*
- <sup>26</sup> See Am. L. Prod. Liab. 3d § 80:6.
- <sup>27</sup> Morenoff, *supra* note 5; 42 U.S.C.A. § 1791 (West 2012).
- <sup>28</sup> For a comprehensive list of state statutes, see Am. L. Prod. Liab. 3d § 80:6-7.