

# The Legal Facts of Food Donation in Ohio

*“Don(ate) worry, Be Happy!”*

**Key Takeaway: Federal law and Ohio State law provide liability protection for food donors, non-profits that distribute donated food, and gleaners and owners of gleaned property.**

## The Bill Emerson Good Samaritan Act Limits Food Donor Liability

Under the Bill Emerson Good Samaritan Act (the “Act”)<sup>1</sup>, named in honor of Missouri representative Bill Emerson who fought for an Act that would standardize limited liability for food donations, individuals, businesses, non-profits and gleaners are protected from civil and criminal liability for donated food if:

- Qualifying food is donated and distributed in good faith
- The food is donated to a non-profit and distributed to needy individuals at no charge
- The food is not donated or distributed with gross negligence or intentional misconduct

## Protected Entities: Who does the Act Apply to?

The Act applies to individuals, businesses, non-profits, officers of businesses and non-profits, gleaners<sup>2</sup>, and property owners that allow gleaning on their property so long as they meet the other requirements of the Act. Non-profits include both those that donate and those that receive and distribute the donated food.

## Qualifying Food

For the Act to apply, the food must be “qualifying food.” Qualifying 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<sup>3</sup>,” even if it is not “readily marketable due to appearance, age, freshness, grade, size, surplus or other conditions.”<sup>4</sup> Food and grocery products that do not meet all Federal, State, and local laws can still be protected by the Emerson Act as long as all of the Act’s reconditioning procedures<sup>5</sup> are followed, which include:

- Donor informing non-profit of the nonconforming nature of the product
- Non-profit agreeing to recondition the item so that it is compliant; and
- Non-profit knowing the standards for reconditioning the item.

<sup>1</sup> 42 U.S.C.A § 1791

<sup>2</sup> a gleaner is a person who harvests for free distribution to the needy, or for donation to a nonprofit organization for ultimate distribution to the needy, an agricultural crop that has been donated by the owner.

<sup>3</sup> See 412 Food Rescue/Trellis Legal handout on Food Date Labeling

<sup>4</sup> Mislabeled food products that are “not readily marketable,” are an exception, 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>5</sup> U.S. House Report 104-661, <https://www.congress.gov/congressional-report/104th-congress/house-report/661/1>

<sup>6</sup> 42 U.S.C.A. § 1791(e)(1-3)

<sup>7</sup> A non-profit is defined in the Act 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)

<sup>8</sup> 42 U.S.C.A. §1791(c)(1). Direct donor to needy individuals is not directly covered by the Act.

<sup>9</sup> 42 U.S.C.A. §1791(b)(3)

## Qualifying Transaction

In order for the Act to protect a donor or gleaner from liability, the transaction must be structured so that:

- The donor donates to a non-profit organization.<sup>7</sup>
- The receiving non-profit distributes the food to needy populations.<sup>8</sup>
- The recipients of the food do not pay for the donated food. However, if one non-profit donates the food to another non-profit for distribution, the Act allows the first non-profit to charge the distributing non-profit a nominal fee to cover costs.<sup>9</sup>

## Donations Must be Made in Good Faith

If a donor donates in good faith and meets all the other criteria, a donor is not liable for any incidents arising from the donated food. However, the Act does not cover **gross negligence or intentional misconduct**.

**Gross Negligence** involves “voluntary and conscious conduct (including a failure to act) by a person or organization that knew at the time the donation was made that the food was likely to result in harmful health impacts.”<sup>10</sup>

**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>11</sup>

FOOD THAT SOMEONE KNOWS IS LIKELY TO BE HARMFUL OR DANGEROUS SHOULD NOT BE DONATED. It is important

to note, however, that research has shown a *lack of court cases* addressing liability under the Act, indicating **the act is very protective of donors**.<sup>12</sup>

**Ohio Law Addressing Food Donations** In addition to the Bill Emerson Act, which establishes a federal “floor” in terms of donor protection (States can provide more protection but not less than that provided in the federal law),

Ohio’s Donated Food Limited Liability Act<sup>13</sup> protects food donors and gleaners, including food not readily marketable due to considerations not affecting its fitness for human consumption, against liability so long as:

- The donor determines that the food will be fit for use at the time of donation—a presumption favoring liability does not arise because packaging has been damaged. reasonably inspects the food at the time of donation and finds the food fit for human consumption; and
- The donor does not make the determination that the food will be fit for human consumption in a manner that constitutes gross negligence or willful or wanton misconduct.

The law also states that the accepting agency who in good faith distributes food to a person in need is not liable as long as:

- The agency determines that the the food is fit for human consumption at the time of the distribution and
- The agency does not make the determination that the food will be fit for human consumption in a manner that constitutes gross negligence or willful or wanton misconduct.

<sup>10</sup> 42 U.S.C.A. §1791(b)(7)

<sup>11</sup> 42 U.S.C.A. §1791(b)(8)

<sup>12</sup> Legal Guide to Food Recovery, supra note 3 at 10

<sup>13</sup> ORC #2305.37