



## Legal Fact Sheet for North Carolina Food Donation: Liability Protections

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Businesses (including farms) and non-profits 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 North Carolina's Immunity from Liability for Food Donations law provides additional liability protection to businesses and non-profits in the state.

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### Federal Law on Liability Protections: 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.<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 non-profit organization that distributes to the needy.<sup>2</sup> The Emerson Act protects most but not all donations of qualifying food. In order to receive protection, donors and distributors must meet the following four requirements:

1. The donor donates to a non-profit organization.<sup>3</sup>
2. The food must meet all federal, state, and local quality and labeling requirements, even if it is not “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”<sup>4</sup>

If all quality and labeling requirements are not met, the food must be reconditioned to meet all quality and labeling requirements before it can be donated,<sup>5</sup> which include:

- The donor informs the non-profit of the nonconforming nature of the product;
  - The non-profit agrees to recondition the item so that it is compliant; and
  - The non-profit knows the standards for reconditioning the item.<sup>6</sup>
3. The non-profit organization that receives the donated food must distribute it to needy individuals.<sup>7</sup> Direct donations from the donor to needy individuals are not protected by the Act.<sup>8</sup>
  4. The needy individuals receiving the food are not allowed to pay for it.<sup>9</sup> However, if one non-profit donates 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 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>
- **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>

## Liability Protection for Food Donation in North Carolina

North Carolina has passed such legislation. North Carolina's Immunity for Donated Food statute provides the same level of protections as the Emerson Act. North Carolina law provides civil and criminal liability protection to any person, "including but not limited to a seller, farmer, processor, distributor, wholesaler, or retailer of food,"<sup>15</sup> who donates food to a nonprofit organization for use or distribution by that nonprofit.<sup>16</sup> This protection applies as long as the harm resulting from "the nature, age, condition, or packaging of the donated food" was not caused by "gross negligence, recklessness, or intentional misconduct of the donor."<sup>17</sup> The law does not provide guidance on what constitutes gross negligence, recklessness, or intentional misconduct. North Carolina's Immunity for Donated Food statute also provides the same liability protection to the non-profit organizations that receive food donations for use or distribution to needy individuals.<sup>18</sup>

In addition to the federal liability protections, there are two ways in which North Carolina'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.<sup>19</sup> This means that North Carolina 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 the same or more protective of donors than the federal Emerson Act, which sets a floor on liability protection.<sup>20</sup>

## Conclusion

Federal law and North Carolina state law provide ample liability protection for food donors and the non-profits and charitable distributors to which they donate, so long as they do not act with gross negligence, intentional misconduct, or recklessness.

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<sup>1</sup> 42 U.S.C.A. §1791 (West 2017).

<sup>2</sup> *Id.* §1791(b)(5).

<sup>3</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 2017).

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

<sup>6</sup> *Id.*

<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).

<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 10.

<sup>15</sup> N.C. GEN. STAT. § 99B-10(a).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> N.C. GEN. STAT. § 99B-10(b).

<sup>19</sup> 42 U.S.C.A. §1791(b)(1-2) (West 2016).

<sup>20</sup> *Legal Guide to Food Recovery*, *supra* note 4, at 10.