

The Legal Facts of Food Donation in Pennsylvania

“Don(ate) worry, Be Happy!”

Key Takeaway: Federal law and Pennsylvania 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”)¹, 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, gleaners², 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 regulations³,” even if it is not “readily marketable due to appearance, age, freshness, grade, size, surplus or other conditions.”⁴ 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 procedures⁵ 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.⁶

¹ 42 U.S.C.A § 1791

² 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.

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

⁴ 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)

⁵ U.S. House Report 104-661, <https://www.congress.gov/congressional-report/104th-congress/house-report/661/1>

⁶ 42 U.S.C.A. § 1791(e)(1-3)

⁷ 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)

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

⁹ 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.⁷
- The receiving non-profit distributes the food to needy populations.⁸
- 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.⁹

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.”¹⁰

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.”¹¹

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**.¹²

Pennsylvania 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), Pennsylvania’s Donated Food Limited Liability Act¹³ protects food (inclusive of wildlife game) donors and gleaners, including food not readily marketable due to considerations not affecting its fitness for human consumption¹⁴, against liability so long as:

- The donor reasonably inspects the food at the time of donation and finds the food fit for human consumption;¹⁵
- The food does not include any canned goods that are rusted, leaking or swollen, or defective so they cannot, for health reasons, be offered for sale to members of the general public.¹⁶
- Any subsequent health or other damages are not the result of gross negligence, intentional misconduct, recklessness or if the donor has, or should have had, actual or constructive knowledge that the food is tainted, contaminated or harmful to the health or well-being of the ultimate recipient. The state statute does not specifically define gross negligence, intentional misconduct or recklessness.¹⁷

The law also states that the accepting charitable or religious organization shall be exempt from liability if the organization:

- Reasonably inspects the food at the times of donation and distribution and finds it fit for human consumption, reasonably processes, prepares, and distributes any wildlife, and requests local health authorities to inspect the food at regular intervals.

The Judiciary and Judicial Procedure Title of the Pennsylvania Statutes also addresses liability for donated food. The statute states that a person is not subject to civil or criminal liability arising from the nature, age, packaging, or condition of apparently wholesome food or grocery products donated in good faith to a non-profit organization that will distribute them to needy individuals. Mirroring the Bill Emerson Act, Pennsylvania releases from liability any person who permits gleaning on property owned or occupied by him/her for the injury or death of any individual involved in the collection of agricultural crops for donation as well as the actual gleaned donations unless injury or death is the result of gross negligence, intentional misconduct, or recklessness.¹⁸

¹⁰ 42 U.S.C.A. §1791(b)(7)

¹¹ 42 U.S.C.A. §1791(b)(8)

¹² Legal Guide to Food Recovery, supra note 3 at 10

¹³ 10 P.S. §§ 351-358

¹⁴ Considerations not affecting a food’s fitness for human consumption includes, but not limited to, appearance, freshness, grade or surplus

¹⁵ 10 P.S. § 354

¹⁶ 10 P.S. § 353

¹⁷ *Id.*

¹⁸ 42 Pa. Cons. Stat. §8338