



FACT SHEET

RECOMMENDATIONS TO STRENGTHEN THE BILL EMERSON GOOD SAMARITAN ACT

Food donation provides a critical link between organizations with wholesome, surplus foods and the 42 million Americans who are food insecure today. Unfortunately, many food manufacturers, retailers, and restaurants cite fear of liability as a primary deterrent to donating food. A 2016 survey by the Food Waste Reduction Alliance, a joint food industry task force, found that 44 percent of manufacturers, 41 percent of restaurants, and 25 percent of retailers identified liability concerns as a barrier to donation.¹ There are strong federal and state liability protections for food donations, but some small changes could help extend and strengthen those protections.

THE EMERSON ACT

In 1996, Congress passed the Bill Emerson Good Samaritan Food Donation Act (Emerson Act), which provides a federal floor of civil and criminal liability protection to food donors and nonprofit organizations that receive food donations and distribute those donations to those in need.² The Emerson Act protects a broad range of food donors, including individuals, businesses, and government entities, as well as gleaners (an individual or entity that harvests donated agricultural crops) and food recovery organizations. The Emerson Act protects donors and nonprofit recipients from civil and criminal liability for injury caused by the donated food unless either acts with gross negligence or intentional misconduct. Donors and distributors must meet the following four requirements to receive protection under the Act:

1. The food must be donated to a nonprofit organization in good faith.
2. The food must meet all federal, state, and local quality and labeling requirements; 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.
3. The donated food must be distributed by the receiving nonprofit to needy individuals.
4. The needy individuals receiving the food may not pay for it.

This broad base of liability protection was intended to encourage food donations, yet donors are often unaware of it. Further, several provisions in the Act should be broadened to better align with the current food recovery landscape. Clarifying the Emerson Act's coverage and expanding its protections, as described below, can boost more food donations. Most of our suggestions would require Congressional action to modify the Act's language. However, a federal agency can take action immediately to clarify the Emerson Act by providing interpretive guidance.

1. AN EXECUTIVE AGENCY SHOULD BE RESPONSIBLE FOR IMPLEMENTING AND INTERPRETING THE EMERSON ACT

Unlike many statutes which delegate power to an agency to interpret and enforce them, Congress never assigned the Emerson Act to a particular federal agency for interpretation and enforcement. Thus, no agency is responsible for providing federal guidance or raising awareness of the Act. Further, the Emerson Act has not been challenged in court, so there are no judicial interpretations of it. Given the dearth of judicial or administrative interpretations, potential donors can only refer to the 1996 statutory language to determine whether or not they are protected. As a result, donors do not know how to interpret some of the Act's more ambiguous terms, such as "apparently wholesome," "needy individual," and "gross negligence" and are unclear on the Act's requirements.

In response, Congress should designate an executive agency to be in charge of implementing and interpreting the Emerson Act. The U.S. Department of Agriculture (USDA) is best positioned to assume oversight due to the authority granted to it in the Child Nutrition Act of 1966 and its track record of reducing food waste and supporting food recovery. If Congress does not act, the USDA could likely use this authority to oversee the Emerson Act regardless.

2. CONGRESS SHOULD BROADEN THE LANGUAGE OF THE EMERSON ACT TO PROTECT NONPROFIT ORGANIZATIONS THAT SELL FOOD AT A DISCOUNTED PRICE AND THE DONORS THAT DONATE TO THESE NONPROFITS

The Emerson Act only provides liability protections to donors and nonprofit food recovery organizations when the needy individual receiving the food “is not required to give anything of monetary value.”³ This means that the Emerson Act does not extend liability protection when the ultimate recipient pays, even at a reduced rate, for the food. This is problematic because innovative new approaches, such as nonprofit grocery stores that sell surplus food at a very low cost, are excluded from coverage. These organizations can fill a need for food insecure individuals who, for various reasons, are not willing or able to qualify for government assistance or use a food pantry or soup kitchen.

Currently, the Emerson Act’s “no-charge” provision deters donations to innovative nonprofits and discourages traditional food recovery organizations from testing out new models. By contrast, a few states provide liability protection to nonprofits that sell food at a low cost and the donors that donate to them.⁴ Congress should amend the Emerson Act to explicitly state that a nonprofit organization and its donors retain liability protection even if the ultimate recipient pays for the food. Requiring that the recipient organization be a nonprofit ensures that food and any profits will be used for a charitable purpose.

3. CONGRESS SHOULD MODIFY THE LANGUAGE OF THE EMERSON ACT TO INCLUDE DONATIONS MADE BY FOOD SERVICE ESTABLISHMENTS AND RETAILERS DIRECTLY TO INDIVIDUALS

The Emerson Act only covers donations made to “a nonprofit organization for ultimate distribution to needy individuals,” but does not protect donations directly from a donor to needy individuals.⁵ Extending protections to direct donations will increase efficiency, reduce costs, and enable timely use of perishable food. Individuals in need will be able to pick up food from more accessible locations right at the source, such as local restaurants and grocery stores. This provision should be limited to food service establishments and retail stores because they already have

to comply with food safety requirements like training and inspections, which ensures that these direct donations will be made safely.

4. CONGRESS SHOULD MODIFY THE EMERSON ACT TO COVER FOOD MISLABELED IN WAYS THAT ARE IRRELEVANT TO FOOD SAFETY. THE EXECUTIVE AGENCY DESIGNATED TO INTERPRET THE ACT SHOULD ISSUE GUIDANCE ON WHICH LABELS ARE RELEVANT TO FOOD SAFETY

The Emerson Act only protects donations of foods that comply with or are reconditioned to comply with all federal, state, and local “quality and labeling standards.”⁶ Federal law includes several such requirements, such as name of the food, manufacturer’s address, net quantity of contents, and an ingredient list (including allergen information); however, some of these labels are not necessary to ensure that donated food is safe.

For example, ingredient lists or allergen warnings are important for safety, but the net weight is not. Often food goes to waste precisely because of a labeling deficiency and it’s too costly and time-consuming to recondition it. Protecting the donation of food that is mislabeled in a way not relevant to safety could help prevent this unnecessary waste. Congress should amend the Emerson Act to cover all foods that comply with or are reconditioned to comply with *safety*-related federal, state, and local labeling standards. In order to determine which labels are needed for safety, Congress should direct the executive agency designated to interpret to the Act to issue guidance.

5. CONGRESS SHOULD MODIFY THE LANGUAGE OF THE EMERSON ACT TO EXPLICITLY COVER PAST-DATE FOOD

Date labels on food are generally indicators of peak freshness, yet, many consumers, potential food donors, and state and local governments misinterpret these labels as indicators of safety. The Emerson Act does not explicitly state that donations of past-date foods are protected from liability, raising fears among donors that donating past-date food will place them outside the Act’s protection.

When Congress passed the Emerson Act, they did not perceive past-date foods as inherently unsafe to donate. In fact, Congress indicated in the House Committee report attached to the Emerson Act that the donation of near or past-date food would not automatically constitute “gross negligence” for purposes of determining the liability protection. However, the Committee report is not part of the statutory text and is fairly inaccessible to typical food donors. Congress should amend the Emerson Act to explicitly state that donations of past-date foods are protected from liability.

ENDNOTES

1 Food Waste Alliance, Analysis of U.S. Food Waste Among Food Manufacturers, Retailers, and Restaurants, 13, 16 (2014) http://www.foodwastealliance.org/wp-content/uploads/2014/11/FWRA_BSR_Tier3_FINAL.pdf.

2 42 U.S.C.A. § 1791.

3 42 U.S.C.A. § 1791(b)(3).

4 See, e.g., Mass. Gen. Laws Ann. 94 § 328 (West 2016); Or. Rev. Stat. Ann. § 30.890 (West 2016).

5 42 U.S.C.A. § 1791(c)(1).

6 42 U.S.C.A. § 1791 (b).