

CHARTING NEW DIRECTIONS IN FOOD RECYCLING AND DONATIONS

By
Anna Wiand, Esq.



FOOD LAW DEPARTMENT
GRAY | **ROBINSON**
ATTORNEYS AT LAW

While California's recent commitment to a statewide \$15/hour minimum wage currently dominates news headlines, the state continues to lead by example in a variety of other areas. One key example of California's progressive leadership is in the area of recycling and greenhouse gas (GHG) emission goals.

Effective April 1, 2016, California businesses that generate eight cubic yards of organic waste per week must arrange for organic waste recycling services.¹ This mandatory recycling responsibility includes food waste produced by restaurants and other food establishments.

The new California recycling requirements present an opportunity for food operations to explore avenues to donate food. Donating edible, but unsaleable, food product allows food service operations to help the hungry while complying with state law.

Food waste is a growing concern in the United States. In 2012, Americans threw out roughly 70 billion pounds of food.² Food donations have been historically hampered by the donor's concerns of liability for injuries and death from foodborne illnesses. However, both federal and state laws provide protections for good faith food donations

Federal Law: Bill Emerson Good Samaritan Food Donation Act (42 U.S.C. § 1791)

To combat these liability concerns, the Bill Emerson Good Samaritan Food Donation Act ("Act") was signed into law in 1996. The Act promotes food donations by limiting the liability of donors and recipient nonprofit organizations to instances of gross negligence or intentional misconduct. Absent intentional misconduct or gross negligence, persons and organizations involved in a good faith food donation efforts are shielded from criminal and civil liability for damages arising out of issues with the nature, age, packaging or condition of wholesome food or fit grocery products received as donations.

¹ See CalRecycle, Mandatory Commercial Organics Recycling (MORe), <http://www.calrecycle.ca.gov/recycle/commercial/organics/> (last visited March 29, 2016).

² Roberto A. Ferdman, Americans throw out more food than plastic, paper, metal, and glass, *The Washington Post*, Sept. 23, 2014, available at: <https://www.washingtonpost.com/news/wonk/wp/2014/09/23/americans-throw-out-more-food-than-plastic-paper-metal-or-glass/> (last visited March 29, 2016).

Generally, the Act affords protection when: (1) the donated items are either “apparently wholesome food” or “apparently fit grocery products;” (2) the covered party donates the items in good faith; (3) the donation is made to a nonprofit organization; and (4) the nonprofit distributes the donated items to needy individuals.

The Act defines “apparently wholesome food” as “food that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”³ The Act also covers “food” which is broadly defined as “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.”⁴ Thus, generally, if the donated product is meant to be eaten, it is covered.⁵

The Act provides protection from liability for persons involved in good faith donation activities.⁶ Under the Act, to “donate” means to “give without requiring anything of monetary value from the recipient” and includes a donation from one nonprofit to another even if the donor organization charges a nominal fee to the donee organization, as long as the final recipient is not required to give anything of monetary value.⁷ The Act does not define “good faith;” however, it generally is considered to require honesty or sincerity of intention and observance of reasonable commercial standards.⁸

The relevant parties protected by the Act include a “nonprofit organization” and a “person.” The Act defines “nonprofit organization” an entity that is operating for religious, educational or charitable purposes and “does not provide net earnings to, or operate in any other manner that inures to the benefit of, any officer, employee, or shareholder of the entity.”⁹ A “person” is very broadly defined by the Act to include an “individual, corporation, partnership, organization, association, or governmental entity, including a retail grocer, wholesaler, hotel, motel, manufacturer, restaurant, caterer, farmer, and nonprofit food distributor or hospital” and even specifically protects officials or other representatives one of the enumerated entities.¹⁰

³ 42 U.S.C. § 1791(b)(2) (2015).

⁴ 42 U.S.C. § 1791(b)(4) (2015).

⁵ The Act also protect the donation of “grocery products” including non-food products like paper plates and cleaning supplies.

⁶ 42 U.S.C. § 1791(c) (2015).

⁷ 42 U.S.C. § 1791(b)(3) (2015).

⁸ See generally, Black’s Law Dictionary 307 (2nd pocket ed. 2001). See also *R.R. Comm’n of Texas v. Gulf Energy Expl. Corp.*, No. 14-0534, 2016 WL 363771, at *5-7 (Tex. Jan. 29, 2016) (discussing good faith in the context of a defense of good faith).

⁹ 42 U.S.C. § 1791(9) (2015).

¹⁰ 42 U.S.C. § 1791(10) (2015).

In some instances, the Act extends protection from civil and criminal liability to the donation of products that may not meet all “quality and labeling standards imposed by Federal, State, and local laws and regulations.” In particular, the partial compliance provision, Section 1791(e), allows for the donation of otherwise edible and wholesome items with flaws like open or broken packaging, missing or damaged labels, or items that must be washed, trimmed or otherwise cleaned before they can be provided to the ultimate recipients.

To comply with the partial compliance provision, the donor and the recipient nonprofit organization must follow three steps. First, the donor must inform the recipient nonprofit organization of the nonconforming nature of the food. Next, recipient nonprofit organization must agree to recondition the food. Finally, the recipient nonprofit organization must know the standards for reconditioning the food.

State Law Food Donation Protections

In addition to the Bill Emerson Good Samaritan Food Donation Act, most states have adopted similar good Samaritan protections for food donors.

For example, California food donation efforts are guided by Section 114433 of the California Retail Food Code, Section 1714.25(a) of the California Civil Code, and Section 58505 of the California Food and Agriculture Code. Each of these provisions limits the liability of the donating entity for damages and injuries resulting from the donation activity.

In Texas, the state Good Faith Donor Act protects food donors from liability.¹¹ However, section 228.83 of the Texas Food Establishment Regulations provides food donation requirements that ensure food safety.¹² For example, this provision provides specific guidance for the donation of time/temperature control for safety food, like prepare meals, and requires that donated foods are “labeled with the name of the food, the source of the food, and the date of preparation.”¹³

Similarly, in Illinois, the Illinois Good Samaritan Food Donor Act limits the liability of the donating entity for damages and injuries resulting from the food donation activity.¹⁴ A notable nuance in the Illinois Good Samaritan Food Donor Act is that protection from liability is limited to specified types of donors.¹⁵ Protected donors include food retailers, like restaurants and “any other person (if that other person donates food that has been inspected by either a State or federal authority and has not been altered after that inspection).”¹⁶

¹¹ Tex. Civ. Prac. & Rem. Code Ann. § 76.001 *et. seq.* (2015).

¹² 25 Tex. Admin. Code § 228.83(2016).

¹³ 25 Tex. Admin. Code § 228.83(b) & (c) (2016).

¹⁴ 745 Ill. Comp. Stat. Ann. 50/1 *et. seq.* (2015).

¹⁵ 745 Ill. Comp. Stat. Ann. 50/3(a) (2015).

¹⁶ 745 Ill. Comp. Stat. Ann. 50/3(a) (2015).

Although the federal Bill Emerson Good Samaritan Food Donation Act provides ample protection to food donors, food establishments should review state law and contact local regulators for guidance before implementing a food donation program. This is particularly important because, as a general matter, the good Samaritan laws do not alter or supersede state or local health regulations.¹⁷ Also, local regulators may be able to assist food establishments seeking a suitable donee organization.

In 2014, 17.5 million American households were food insecure. In contrast, over 35 million tons of food goes to waste each year in the United States. Food establishments throughout the country can help alleviate these issues by developing food donation programs. Donating edible, but unsaleable, food product diverts food waste from landfills and puts food on the table for families in need.

¹⁷ For example, Bill Emerson Good Samaritan Food Donation Act provides “Nothing in this section shall be construed to supersede State or local health regulations.” 42 U.S.C. § 1791(f) (2015).