

- ◆ reduce waste ◆ feed the hungry ◆ pursue sustainability ◆ improve sanitation ◆ save money ◆
- ◆ shrink environmental footprint ◆ support local jobs ◆

# Food Recovery

## a legal guide

- ◆ build corporate conscience ◆ enhance community perception ◆ receive tax breaks ◆ do the right thing ◆

### Waste Not, Want Not

Food recovery – the practice of preventing surplus foodstuffs from being dumped in the trash – takes numerous forms and provides a variety of social, economic, and environmental benefits. The highest and best form of food recovery involves collecting wholesome but unused or unsalable food for distribution to those in need. Additional food recovery efforts aim to further reduce waste and decrease resource burden by converting excess food for use in animal feed, composting, and biofuel production.

Engaging in food recovery is a straightforward and uplifting way to respond to a variety of difficult problems. Plus, by reducing disposal costs, improving worksite sanitation, and providing a way to access valuable tax credits, food recovery can provide direct and substantial benefits for participating enterprises. By implementing recovery programs, food-sector businesses can reduce the amount of material that enters into the waste stream, provide nutritious meals for hungry people in our communities, and lessen the environmental burdens associated with agricultural production, food disposal, and waste. Food recovery is consistent with a socially responsible and "green" business model. As such, it can help businesses garner good will in the community and with potential customers.

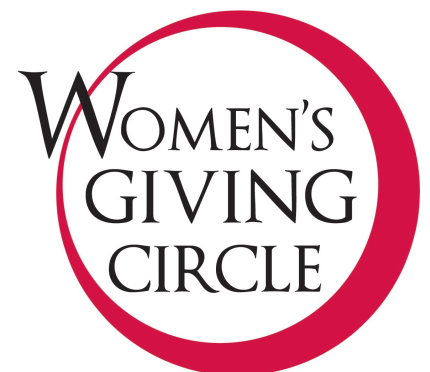
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LL.M. Program in  
Agricultural & Food Law  
at the



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SCHOOL OF LAW

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## The Food Recovery Project

This Guide explores the compelling reasons to engage in food recovery, identifies the ways in which the Bill Emerson Act removes barriers to donation of recovered food for human consumption, & highlights resources to aid businesses in developing safe, effective, & efficient food recovery programs.

The **Food Recovery Project** was initially developed by **Susan Schneider** who serves as a Professor of Law at the University of Arkansas School of Law and as the Director of the LL.M. Program in Agricultural & Food Law.

The **University of Arkansas Women's Giving Circle** funded the Food Recovery Project. Women's Giving Circle members are alumnae and friends who recognize that women as donors have the ability to make a tremendous impact on the University of Arkansas, its students, faculty, and staff. This impact grows exponentially when the contributions from women support the University through a collective voice. The group also encourages women to be philanthropic leaders.

**James Haley** served as a Research Fellow for the Project during his LL.M. candidacy. He is the author of a legal article produced for the Food Recovery Project, THE LEGAL GUIDE TO THE BILL EMERSON GOOD SAMARITAN FOOD DONATION ACT. James received his LL.M. degree in May 2013. He also received his J.D. from the University of Arkansas School of Law where he served as the Executive Editor of the Journal of Food Law & Policy and as an extern in Wal-Mart's Environmental Compliance department. James received his M.B.A. from Columbia Southern University while on active duty in the United States Marine Corps, where he served in the infantry for 20 years. James is licensed to practice in Arkansas.

**Nicole Civita** serves as the Director of the Food Recovery Project and the lead author of this Guide. Nicole is a Visiting Assistant Professor at the University of Arkansas School of Law. She received her A.B. from Columbia University (American Studies / Creative Writing) and her J.D., *magna cum laude*, Order of the Coif, from Georgetown University Law Center. She received her LL.M. degree in Agricultural & Food Law in May 2013. Prior to attending the LL.M. Program, Nicole was an Associate Attorney at the international law firm of Hogan Lovells, where she specialized in employment law.

*Appreciation is extended to Stacy Leeds, Dean of the University of Arkansas School of Law and Don Judges, Associate Dean of Graduate Programs and Experiential Learning for their support and encouragement. Appreciation is also extended to Sarah Hiatt, LL.M. Program Administrative Assistant and Steven Jarvis, Asst. Director of Communications for Web Services, for their contributions to the Project.*

The **LL.M. Program in Agricultural & Food Law** at the University of Arkansas School of Law offers the only advanced legal degree program in agricultural & food law in the United States. Each year, the Program prepares a small number of carefully selected attorneys as specialists in the complex legal issues involving agriculture and our food system. The Program attracts candidates from throughout the United States and the world. Alumni currently work in 40 different states and 17 foreign countries, serving as leaders in private practice, government, agribusiness, public policy, and academia.

<http://law.uark.edu/llm>

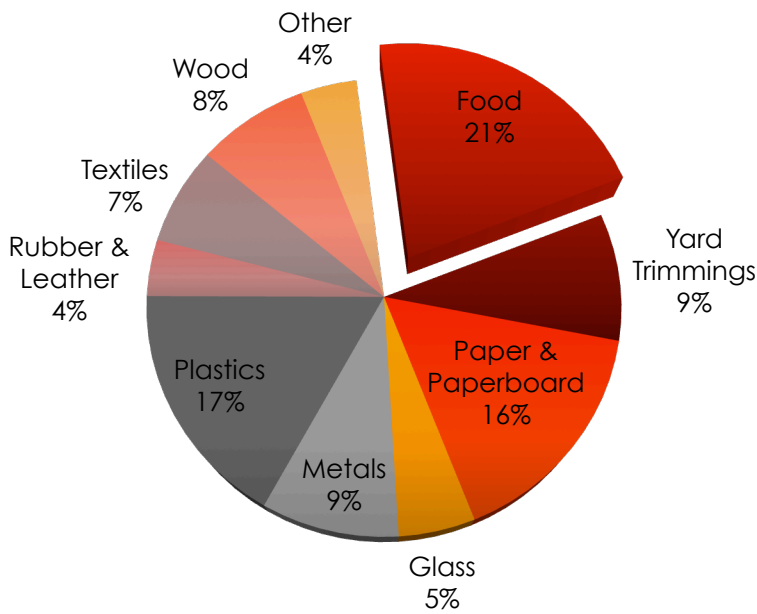
## Food Recovery: Risky Proposition or Missed Opportunity?



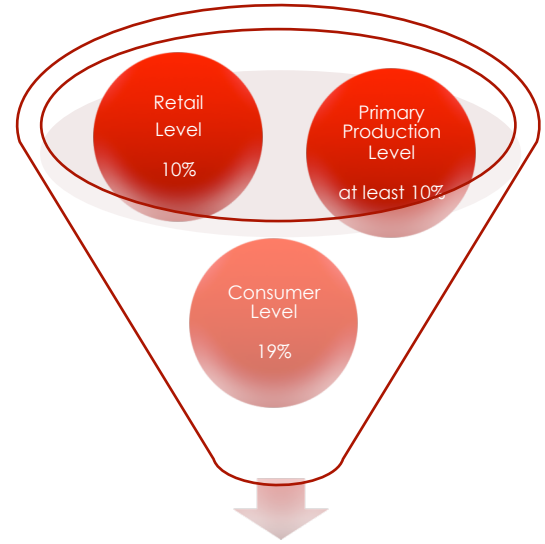
Unfortunately, many food businesses hesitate to donate their excess food because they fear that doing so will expose their enterprise to unmanageable and unnecessary risk of liability for foodborne illnesses, allergen exposure, and other negative consequences for the ultimate consumers of recovered food. That food-sector businesses want nothing to do with foodborne illness outbreaks is certainly understandable – no one wants to be the producer, retailer, or restaurant that sickened consumers or to receive the inevitable negative attention that follows. Moreover, the legal consequences for being the source of a foodborne illness are uniformly harsh: all 50 states take the position that one who distributes a defective product, including food, which causes injury because of its defect, will be strictly liable. Strict liability imposes liability even in the absence of negligence.

Fortunately, when it comes to food donation, liability-related fears are largely unfounded because a federal statute, the Bill Emerson Good Samaritan Food Donation Act (the “Bill Emerson Act” or “BEA”), absolves those who donate apparently wholesome food to nonprofit organizations for ultimate distribution to needy individuals from civil and criminal liability related to such donations. The Bill Emerson Act extends the same liability protection to the nonprofit organizations that receive and distribute donated food. Thus, except in cases of gross negligence or intentional misconduct, donors and qualified recipients of appropriately recovered food have robust protection against liability associated with their food donations. Perhaps because the Bill Emerson Act’s liability waiver is so broad – and certainly because well-intentioned persons who take the time and make the effort to provide food for the hungry make uncommonly sympathetic defendants – lawsuits arising out of the donation or provision of recovered food are extremely uncommon. Indeed, a thorough search of filings and review of reported decisions did not turn up a single case that involved food donation-related liability or any attempts to get around the protections offered by the Bill Emerson Act. Additionally, several leading food recovery experts and anti-hunger advocates report that they are unaware of any such actual or threatened lawsuits. The absence of litigation or other disputes related to food donation demonstrates that fear of lawsuits or other negative publicity related to mishaps with donated food are overstated and largely illusory barriers to food recovery.

## What We Throw Away



## Where Waste Occurs (% of total food supply)

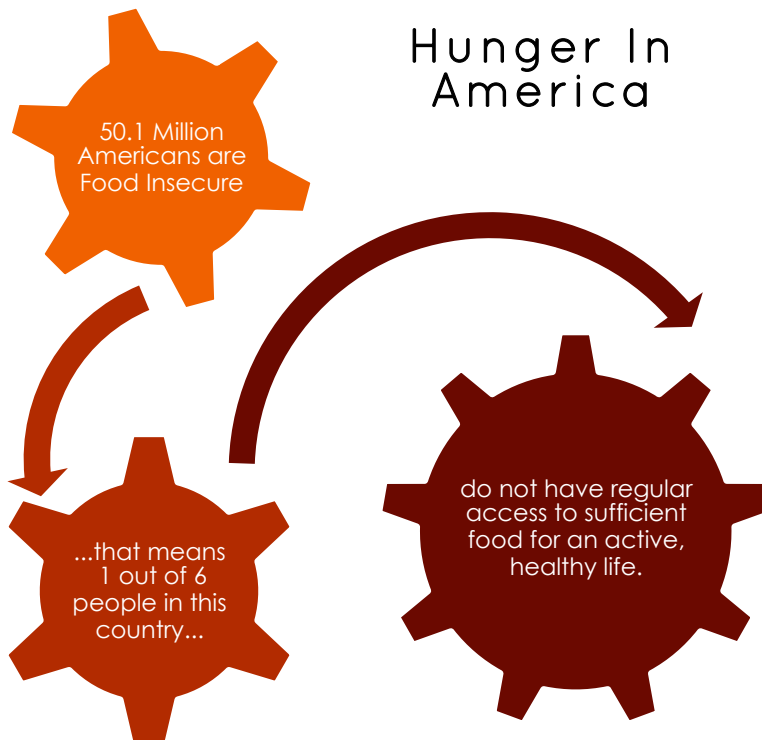


**Food makes up the largest percentage of waste put into municipal landfills.**

*2010 Municipal Solid Waste Characterization Report*

**96 Billion lbs of food is wasted in the United States annually: a loss worth approximately \$165 Billion**

## Hunger In America



## Food Recovery...





## The Bill Emerson Good Samaritan Food Donation Act of 1996

exempts those who make good faith donations of food and grocery products to nonprofit organizations that feed the hungry from liability for injuries arising from the consumption of the donated food.

For several decades, food donors have been shielded from some of the potential liability associated with their donations by a patchwork of state-level laws. But because these state laws vary widely in the type and scope of coverage, taking advantage of liability protection used to require a comprehensive survey of the law in all states where the donor was recovering and donating food and the adoption of jurisdiction-specific recovery practices. This discouraged rather than facilitated food recovery.

In 1990, Congress first addressed the issue of food donor liability by developing a federal Model Good Samaritan Food Donation Act. The Model Act failed to

improve the situation for potential donors and recipients because it lacked the force of law and was adopted by only one state. Aware that the Model Act had limited utility and that liability concerns continued to serve as a significant barrier to food donation, Congress enacted the Bill Emerson Good Samaritan Food Donation Act in 1996.

The Bill Emerson Act aims to absolve donors of potential civil and criminal liability for injuries related to the use of donated food and grocery products, except in cases of gross negligence or intentional misconduct.

With the aim of encouraging individuals and organizations to donate food for provision to those in need, the Act creates a uniform national liability floor to protect organizations and individuals who make good faith donations.

### Purposes of the Bill Emerson Act

**To establish a uniform national law to protect organizations and individuals when they donate food and grocery items in good faith**

**To encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals**

## Covered Persons: Who the BEA Protects

“Persons,” “gleaners,” and “nonprofit organizations” all receive protection from the Bill Emerson Act.

The very broad category of covered **persons** embraces individuals, corporations, partnerships, organizations, associations or governmental entities. It expressly includes retail grocers, wholesalers, hotels, motels, manufacturers, restaurants, caterers, farmers, and nonprofit food distributors or hospitals. Protection from liability extends to officers, directors, partners, deacons, trustees, council members, or other elected or appointed individuals responsible for governance of covered entities.

The BEA defines a **gleaner** as 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.”

The Act uses the term **nonprofit organization** to refer to an incorporated or unincorporated entity that (a) operates for religious, charitable, or educational purposes; and (b) 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.

## Covered Activities: What the BEA Encourages

The Bill Emerson Act provides liability protection for activities such as donating, gleaning, receiving donations, and distributing donations. Although the terms “food recovery” and “gleaning” are used interchangeably in conversation, under the Bill Emerson Act they are separate, defined activities.

The USDA has identified four basic types of food recovery: field gleaning, perishable produce rescue or salvage, perishable and prepared food rescue, and nonperishable processed food collection. The Bill Emerson Act provides liability protection for all four types of activities.

**Field gleaning:** The collection of crops from farmers' fields that have already been mechanically harvested or from fields where it is not economically profitable to harvest. Gleaning is also used to describe the donation of raw agricultural products that have already been harvested and are being stored at a farm or packing house.

**Perishable produce rescue/salvage:** The collection of perishable produce from wholesale and retail sources, including wholesale markets, supermarkets, and farmers' markets.

**Perishable and prepared food rescue:** The collection of prepared foods from the food service industry, including restaurants, hospital, caterers, and cafeterias.

**Nonperishable processed food collection:** The collection of processed foods, usually with long shelf lives, from sources such as manufacturers, supermarkets, distributors, grocery stores, and food drives.

## Liability Protection: How the BEA Works

The Bill Emerson Act states that covered parties engaged in covered activities "shall not be subject to civil or criminal liability arising from the nature, age, packaging, or condition" of the donated items as long as certain requirements are met. The requirements are:

(1) The donated items must be either *apparently wholesome food* or *apparently fit grocery products*;

(2) The covered party must donate the items in good faith;

(3) The donation must be made to a *nonprofit organization*; and,

(4) The nonprofit must distribute the donated items to needy individuals.

In order for the Bill Emerson Act's protections to apply, the items must be donated in good faith.

Covered persons "**shall not be subject to civil or criminal liability arising from the nature, age, packaging, or condition**" of the donated items so long as:

- the donated item is an *apparently wholesome food* or an *apparently fit grocery product*
- the item was donated in *good faith*
- to a non-profit organization
- which distributed the donated items to needy individuals.

The BEA expressly defines **donate** as "giv[ing] without requiring anything of monetary value from the recipient."

Nevertheless, a donor nonprofit organization is permitted to charge a donee nonprofit organization a nominal fee to defray costs associated with the donation. The end consumer or recipient of the food may not, however, be charged.

Although the statute does not specifically address what constitutes good faith, this familiar legal concept embraces conduct that is motivated by a sincere and honest intention to deal fairly with others.

### **Liability Protection for Nonprofit Donation Recipients**

Non-profit emergency feeding organizations are typically involved in an array of food recovery activities, including donation solicitation, food collection, storage, preparation, and/or distribution. Before the BEA, nonprofits received no legal protection for their food distribution activities, which come with inherent and inextinguishable risks. Now, thanks to the BEA, nonprofits are protected when they distribute donations and when they perform other covered activities.

**A nonprofit organization shall not be subject to civil or criminal liability arising from the nature, age, packaging, or condition of apparently wholesome food or an apparently fit grocery product that the nonprofit organization received as a donation.**



## Apparently Wholesome Food

Food that meets all quality & labeling standards imposed by Federal, State, & local laws & regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.

## Apparently Fit Grocery Product

A grocery product that meets all quality & labeling standards imposed by Federal, State, & local laws & regulations even though the product may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.

Includes disposable paper and plastic products, laundry detergent, cleaning products, & miscellaneous household items.

## Premises Liability: Another Way the BEA Removes Risk From Food Donations

In addition to addressing concerns about liability for foodborne illness, the Bill Emerson Act removes most of the risk associated with premises liability for injury or death arising out of collection of donations on the donor's property. For a donor to take advantage of this protection, certain conditions must be met:

(1) The property where gleaning or donation collecting occurs must be owned or occupied by a covered "person;"

(2) The "person" must permit the gleaners or representatives of a nonprofit (paid or unpaid) to enter his property;

(3) For the purpose of collecting the donations; and

(4) The collected donations must ultimately be distributed to needy individuals.



## Limitations: No Protection In Cases of Intentional Misconduct OR Gross Negligence

The Bill Emerson Act's exemptions from liability are not absolute. Acts or omissions constituting intentional misconduct or gross negligence which result in the death or injury of an ultimate user or recipient of donated items are not exempted. Covered parties remain criminally and civilly liable for acts or omissions that are found to be either gross negligence or intentional misconduct.

The BEA defines **intentional misconduct** as "conduct by a person with knowledge (at the time of the conduct) that the conduct is harmful to the health or well-being of another person."

The BEA defines **gross negligence** as "voluntary and conscious conduct (including a failure to act) by a person who, at the time of the conduct, knew that the conduct was likely to be harmful to the health or well-being of another person."



Although the statute offers no further direction regarding the type of conduct that might be deemed grossly negligent in the food donation context, House Report 104-661, which accompanied the BEA elaborates on the concept. The House Report indicates that determining whether a donor's conduct was grossly negligent requires nuanced consideration of the type of food involved and the recommended sell by date, as well as how and where the intended end-user will consume the donated food. Significantly, the House Report makes it clear that, without more, sell-by dates, which are not federally required for most products and do not indicate when a product may be safely consumed, do not function as a bright line test for gross negligence. Rather, donors and non-profits are empowered to make product and provision-specific determinations about whether, when, and for how long "expired" food may be donated and consumed.

The gross negligence liability floor also applies to the BEA's premises liability protection. If the death or injury of a collector or gleaner "result[ed] from an act or omission of the person constituting gross negligence or intentional misconduct," the BEA will not provide a safe harbor.

*Often food donations are made by grocery stores, food wholesalers, caterers, and the like, when the food has fallen below the donator's quality or appearance standards but the food is still wholesome. It may also happen that processed food is donated at or near the "freshness date" or "code date" on the box or container. However, because donated food is reconditioned and often used quickly after donation, many factors must be considered when determining what is and is not gross negligence.*

- House Report 104-661

### **Health & Safety Regulations**

The BEA does not waive or otherwise modify any applicable federal, state, or local health and safety regulations. Donors, gleaners, and nonprofit organizations must still comply with all state and local health regulations. Failure to do so may support a finding of gross negligence or intentional misconduct, taking the conduct outside the protection of the Bill Emerson Act.



## Partial Compliance: What To Do With Food That May Not Meet All Applicable Standards

The Act extends civil and criminal liability protection to products that may not meet all “quality and labeling standards imposed by Federal, State, and local laws and regulations” as long as the Act’s procedures for reconditioning are followed. This provision allows for the recovery and donation of otherwise edible and wholesome items with technical flaws, such as missing or marred product labels, open or broken packaging, and items that require washing, trimming or other cleaning before they can be provided to the ultimate recipients.

To extend the protection to nonconforming items, donors and nonprofits must follow three steps:

1. The donor must inform the nonprofit of the nonconforming nature of the item;
2. The nonprofit must agree to recondition the item so that it will compliant; and,
3. The nonprofit must know the standards for reconditioning the item.



The Bill Emerson Act  
**does not create any new liability**  
for persons engaged in food recovery.

Rather, it establishes gross negligence as the liability floor for any claims arising out of the nature, age, packaging, or condition of donated food and grocery products. In so doing, the Act **eliminates the harsh default rule of strict liability** for foodborne illnesses and **removes the possibility of liability for ordinary negligence.**



## Preemption: How the BEA Creates a Uniform National Standard

Prior to enacting BEA, numerous Congressional leaders stated that their aim was to establish a single national liability standard for the good-faith donation of food and grocery products. The legislative history of the BEA clearly and repeatedly demonstrates Congressional intent to supersede conflicting state and local laws. Therefore, the Act impliedly preempts state laws that provide less protection for donors and guarantees a minimal level of protection. States remain free to develop and enforce even more generous “Good Samaritan” laws to provide greater protection to those involved in food donation activities and further encourage donation of wholesome food.

## Engaging in Food Recovery

Food sector businesses that would like to take advantage of the Bill Emerson Act's liability protections should begin by developing a formal food recovery plan. This plan will guide and organize recovery efforts and help identify non-profit organizations to receive donations.

The process of developing a food recovery plan can aid both donating and receiving organizations envision the complete food recovery process. It can also help a participating organization develop food recovery protocol, identify staff training needs, and facilitate productive relationships with the feeding charities that will receive the recovered food.

Best management practices for food safety can be incorporated into the plan, protecting the business from engaging in conduct that might be deemed grossly negligent. Because these types of food safety practices are generally the same as those that apply to the sale and service of food, additional training and education needs should be minimal.

To be of greatest use, food recovery plans should identify and address the following matters:



1. Characteristics of suitable food distribution organizations;
2. Proposed terms of the relationship between the food business and the food distribution organization(s);
3. Types of food to be donated;
4. Protocol for and means of transportation for donated food and grocery items;
5. Qualifications of the persons in charge of overseeing donation at the donating and receiving facilities;
6. Necessary staff training regarding food safety, hygiene, defense, storage, and transportation;
7. Preferred timing and frequency of donations;
8. Communication protocols as between the donor and recipient organizations;
9. Method for addressing unsatisfactory interactions, improperly donated food or other items; and
10. Record keeping policies.

The United States Department of Agriculture and the Food and Drug Administration collaborated on a set of *Comprehensive Guidelines for Food Recovery Programs*. These Guidelines, may be useful to organizations seeking to develop a food recovery plan. They can be accessed via the Food Recovery Project's website.

<http://law.uark.edu/foodrecovery>



## The Food Recovery Project

<http://law.uark.edu/foodrecovery>

Included on the Food Recovery Project website:

- Additional information about the costs associated with food waste and the problem of domestic hunger;
- Strategies for avoiding food waste;
- Resources helpful in developing a food recovery and donation plan, and
- A more in-depth study of the Bill Emerson Act: *The Legal Guide to the Bill Emerson Act* by James Haley, J.D., LL.M. among other useful documents and links.

### Selected Sources

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EPA, Reducing Food Waste for Businesses at <http://www.epa.gov/foodrecovery/>

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J. Buzby and J. Hyman, *Total and per capita value of food loss in the United States*, Food Policy, 37 (2012) at <http://ucce.ucdavis.edu/files/datastore/234-2425.pdf>

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