



*This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.*

## **Can My Nonprofit Be Sued Over Donated Food?**

**By Ashley Pruitt and Lukas Alfen**

Food donations support many in need, but nonprofits must not overlook their legal risks and obligations in distributing donated items. Every day, food is wasted by restaurants, growers and stores. This is in part because potential donors fail to understand food donation policy or fear possible liability. Fortunately, a federal law known as the Bill Emerson Good Samaritan Act provides fairly broad protections to food donors and nonprofits distributing donated food. Applicable in all fifty states, the Act protects donations of wholesome food fit for consumption. However, donations exhibiting gross negligence or intentional misconduct will expose donors and nonprofit distributors to liability.

For nonprofits currently engaged in or considering engaging in food donations, the following provides an overview of the Good Samaritan Act and some factors to consider.

### **The Bill Emerson Good Samaritan Act:**

#### **✓ *What protections are provided by the Good Samaritan Act?***

The Good Samaritan Act sets a national standard of liability protection for both food donors and nonprofit organizations receiving donations. The Act aims to encourage food donations by clarifying when a nonprofit may or may not be liable. If donated food causes any harm, this federal law protects food donors and nonprofits from civil and criminal liability in most situations. Generally, donors and nonprofits receiving food are protected from lawsuits for food or product related injuries unless they engaged in gross negligence, intentional misconduct, or a violation of government regulations.

#### **✓ *Does the Good Samaritan Act apply to my organization?***

The Good Samaritan Act applies to a broad set of food donors: corporations, individuals, partnerships, organizations, nonprofits, government entities, and all sectors of the food industry. In addition, the law applies to those receiving or distributing food donations, as well as those “gleaning” food. “Gleaning” is a form of food recovery that harvests donated crops for future distribution to the needy.

#### **✓ *How do I know if my organization is protected from liability?***

Generally, there are four points to consider in determining your liability exposure. Under the Act, there is no criminal or civil liability for food donations if:

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1. The donation is an “**apparently wholesome food**” or an “**apparently fit grocery product.**” Those donating the food must reasonably believe that the food is **fit for consumption** and would not result in harm or sickness if consumed.
2. The food is **donated in “good faith.”** Donating in “good faith” means that you have a good, honest intention or belief that the donated food is *fit for consumption*.
3. The food is **donated without an expectation of monetary gain.**
4. The **donated items are distributed to individuals in need.** In addition, the recipients of donated food cannot be charged a fee or pay anything of monetary value to those distributing the donation.

✓ **What types of donations qualify for liability protection?**

The Good Samaritan Act applies to a broad range of donated food and grocery products. This includes food donations that may not be “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.” However, donations must still meet the quality standards imposed by regulatory agencies.

In addition, the Act will cover donated food and grocery products recovered through the following methods:

1. “Field gleaning”: collecting or harvesting crops from farmers. This includes fruits and vegetables that may not have the aesthetic appeal to be sold in grocery stores, but are still fit for consumption.
2. Perishable produce rescue: collecting perishable produce from wholesale and retail sources, including supermarkets and farmers’ markets.
3. Perishable and prepared food rescue: collecting prepared foods from the food service industry, including restaurants, hospitals, caterers, and cafeterias.
4. Nonperishable processed food collection: collecting processed foods from sources such as manufacturers, supermarkets, distributors, grocery stores, and food drives.

✓ **When is an organization not protected from liability?**

Under the Good Samaritan Act, organizations lose their liability protection for *gross negligence* or *intentional misconduct*. *Gross negligence* is a “voluntary and conscious” act or failure to act that is likely to be harmful to the health or well-being of another person. Gross negligence can also be a willful blindness to ensuring that donated items of questionable quality do not make their recipients sick when consumed. However, differentiating between gross negligence and basic negligence depends on the facts of any particular case. Typically, mere negligent conduct will not expose an organization to civil or criminal liability.

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By contrast, *intentional misconduct* is acting “with knowledge” that your “conduct is harmful to the health or well-being of another person.” This includes donating food with the intent to harm or in bad faith. Organizations exhibiting intentional misconduct in donating food will be exposed to criminal and civil liability for the resulting harm.

✓ ***When is my organization liable for the conduct of volunteers handling food donations?***

The Good Samaritan Acts protects both organizations and their volunteers from liability. However, if volunteers exhibit gross negligence or intentional misconduct while they are working at the nonprofit’s direction, then they will be exposed to liability. For example, if a volunteer receives milk from a donor and stores it in a warm car trunk for a few days, then the volunteer will not be protected if the milk is later distributed and makes its recipients ill. This exposure to liability is due to the volunteer’s gross negligence.

### **Evaluating Donated Food and Grocery Products:**

✓ ***How do I determine whether a food donation is apparently wholesome and fit for consumption?***

Donated food that is wholesome and fit for consumption is protected by the Good Samaritan Act. Therefore, organizations should consider the following factors with any donated item:

- 1. Type of food:** Different foods have different timelines affecting whether they are still fit for consumption. For example, a banana may ripen quicker than an apple and this could impact the produce’s fitness to eat or donate.
- 2. Recommended sell by date:** These are dates manufacturers list on food and grocery products to tell stores when to sell or display items. Although these dates have importance, they are not definitive in establishing food health safety. For example, there could be a number of reasons behind a sell by date on a box of cereal, such as it being last day before its packaging changes or a new promotion starts. Generally, organizations have some discretion when considering the product dates of donated food and grocery items. More details about these dates are below.
- 3. End user of donated item:** It is crucial for organizations to consider the end user of a donated item. If the donated item will not be distributed for several weeks, it may be inappropriate to donate given its sell by date or storage conditions. For example, milk donated the day after its sell by date is likely unfit for consumption if distributed many weeks later. Similarly, if the milk was not refrigerated prior to being donated, it may have already spoiled despite its listed sell by date.

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✓ ***Are all food product dates the same?***

Product dates are not all the same and convey different pieces of information to different individuals. These dates should be considered for all donations, but are not the sole factor determining food safety. For example, food safety can be impacted by an item's packaging or storage, as well as its product date. However, an understanding of the following product dates is helpful for determining whether donated food is fit to consume:

1. **Sell by** = this date tells stores how long to **display a particular item**. These dates are made for a number of reasons including those unrelated to food safety, such as marketing and advertising.
2. **Best if Used by** = this lets consumers know the date of **peak flavor** for the product. If the product is consumed after this date it may have a less appealing taste.
3. **Use by** = this date deals with the **peak quality** of a product. Following this date, the product may not be as fresh or have the same consistency.

✓ ***What if a donated item seems fit for consumption, but is dented or mislabeled?***

The Good Samaritan Acts extends protection to products that may not meet all “quality and labeling standards imposed by Federal, State, and local laws and regulations,” such as a dented or mislabeled can. Generally, donations will be protected if partially compliant to labeling or packaging regulations, as long as your organization follows the three steps outlined in the next paragraph. However, there are no protections afforded for partial compliance with *food health* and *safety* regulations.

So, what should your nonprofit do if you would like to distribute items that are only partially compliant with labeling or packaging regulations? The Act requires 1) donors to inform the recipient of the nonconforming nature of the donated items; 2) the recipient should agree to recondition the items following appropriate reconditioning standards; and 3) make sure the recipient knows the reconditioning standards. Your nonprofit should have a written agreement to cover these 3 steps if you will be distributing partially compliant items. For help navigating regulation compliance and reconditioning standards, organizations such as [Feeding America](#) are a useful source of information.

**Conclusion:**

Organizations will not be exposed to liability for food donations absent a showing of gross negligence, intentional misconduct, or a violation of food health and safety regulations. However, avoiding liability requires that nonprofits do their best to ensure donated items are wholesome and fit for consumption. For further information on food donation liability, please check out Pro Bono Partnership of Atlanta's related [webcast](#).

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