food recovery project

produces resources & legal information designed to encourage & support businesses in developing & implementing food recovery programs

at the University of Arkansas School of Law
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Barriers to Food Recovery

Expectation of ILLEGALITY
"It's against the law to give away the food we don't sell."

Path of Least RESISTANCE
- Planning
- Training
- Oversight

Perceived vs. Actual Risk
- Foodborne Illness
- Negative Attention
- Legal Liability
Missouri Representative Bill Emerson worked tirelessly during his legislative career to secure bi-partisan support for anti-hunger initiatives.

Before the BEA, liability protections varied state-by-state.

50 states = 50 standards

This made it difficult for businesses to develop low-risk, consistent food recovery programs & protocols.

Representative Emerson died of lung cancer on June 22, 1996, before final passage of the bill, which he co-sponsored & fought for despite failing health.

After his passing, Congress wanted to honor him & mark his legacy, so they amended the bill's title to be “The Bill Emerson Good Samaritan Food Donation Act”
Federal Liability Protection

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.

How It Works

The BEA creates a powerful exemption from liability for negligently caused harm arising from the nature, age, packaging, or condition of donated items as long as the following 4 requirements are met:

1. The donated item must be either: "apparently wholesome food" or "apparently fit grocery product"

2. The covered party must donate the items in good faith

3. The donation must be made to a nonprofit organization &

4. The nonprofit must distribute the donated items to needy individuals.
What Can Be Donated

Food & grocery products that meet all quality & labeling standards imposed by federal, state, & local laws & regulations even though not readily marketable.

Grocery Products include:
disposable paper & plastic products,
laundry detergent, cleaning products, & miscellaneous household items
Who Is Protected?

- "Person" = very broadly defined
- "Gleaner" = one who harvests for donation an agricultural product grown by another
- "Non-profit" = charitable purpose

Persons, Gleaners & Non-Profits
Field gleaning
Perishable produce rescue/salvage
Perishable & prepared food rescue
Nonperishable processed food collection

Covered Activities
1. Honesty in belief or purpose

2. Faithfulness to one's duty or obligation;

3. Observance of reasonable commercial standards of fair dealing

4. Absence of intent to defraud or to seek unconscionable advantage

Good Faith
GROSS NEGLIGENCE:
“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.”

INTENTIONAL MISCONDUCT:
Presently knowing & purposefully harmful conduct

everyone involved must still comply with applicable federal, state, or local health and safety regulations

[Sell by / Use by / Expiration Dates are NOT NECESSARILY Determinative]
Case-specific, multi-factor inquiry

Often food donations are made by grocery stores, food wholesalers, caterers, & 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 & often used quickly after donation, many factors must be considered when determining what is and is not gross negligence.

- House Report 104-661

Legislative History
Why not eliminate ALL potential liability?

- ordinary negligence
- gross negligence
- recklessness &
- intentional misconduct

Maximum recovery?  Protect the vulnerable?
Other Details

Premises Liability

exempts (negligence) liability associated with accidents that occur while gleaning/recovering

Partial Compliance

Food/grocery items that don't meet all applicable standards may be donated

- notify the receiving nonprofit about the nonconformity
- nonprofit knows how to recondition & agrees to do so

Model Consumer Commodity Salvage Code

National Standard?

Intent was to create a national MINIMUM standard for liability protection.

No state can provide less protection than the BEA.

Individual states can -- & do -- go further.
[Rules of Engagement Vary by Location]

- specific types of food that can / not be recovered
- food rescue / food recovery / food salvage
- labeling / disclosure / allergen declarations
- crossing borders (city, county, state)

look for variation regarding treatment of:
"out-of-date" products
"offered for sale"
"served"
Best Advice: Develop & Implement a Comprehensive Food Recovery Plan

- Develop a productive & proactive relationship with your local regulators/inspector (Contact your Dept. of Health for guidance)

- USDA/FDA: Comprehensive Guide to Food Recovery

- Food Recovery: A Legal Guide
  [http://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf](http://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf)

  More detailed legal research

- EPA Model Plan
  (forthcoming, hopefully!)
• Slopping bans / laws pertaining to animal feed

• Tax Code & permanence of the Sec. 170(e)(3)(C) enhanced deduction // State tax benefits

• School Food Recovery

• State/Local organic waste bans & limits

Beyond Liability
(Other Legal Dimensions)
Food Product Dating: Too Little Law, Too Much Waste

**HISTORY LESSON**

widening gulf between consumers & food sources / closed dating [1940s-70s]

leads to consumer concern about freshness & safety rise of OPEN DATING [1970s]

(1975-1976) lots of legislative effort at the federal level (for regulation & preemption); no bills pass

States all develop their own laws creating another unhelpful patchwork of regulation 1970s-Present: What a MESS!

**sell by - use by - best before**

- perception vs. reality: food product dating is not regulated in the way the public generally thinks it is
- almost none of the dates on food packaging indicate when food is (un)safe
- promotes unnecessary discarding: avg household = discards $275-455/year bc of dating
- most stamped dates are suggestions by the manufacturer re: peak quality

"The Dating Game"
NRDC & Harvard Food Law & Policy Clinic

**Current Law**

No federally mandated date labeling regime, despite implicit existing agency authority

Only product with federally reg’d date label = infant formula

USDA limits wording when a state-required or voluntary date is used

Of states with dating laws: 20 restrict sale of post-date products; 30 do not

USDA & FDA mission: food safety & protecting consumers from false/misleading label information (misbranding); FTC relevant also because of deception prevention authority

Not because it will cause foodborne illness after the date, but because nutrients & texture degrade over time

But USDA does not clearly define terms, leaving lots of room for error

Do these restrictions apply to food recovery & donation???
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Current Law
The only product for which this phrase is federally regulated is infant formula, and that's because the nutrients decline, not because it spoils.

There is not a legal definition for this phrase in most states, and it is almost never legally distinguished from "best before" or even "sell by".

Some products don’t have any words to explain the date. In those cases, how are you to know whether the date is telling the store to sell it by then, or telling you it is at its best quality until then?

This is typically used to indicate the "manufacturer suggestion for peak quality" of the product, not the food's safety.

Several different methods could have been used to determine this date, from lab tests to consumer satisfaction assessments. There’s no way for you to tell which method was used.

20 states restrict stores from selling products after these dates; 30 states don’t. Are people in those 20 states better off?

Some non-perishable foods have a date even though they’ll be fine long after. Think of a box of mac-n-cheese.

http://www.nrdc.org/food/files/dating-game-1B.pdf
Another Solvable Problem

- Make product circulation dates retailer-facing (i.e., not visible to consumers)
- Establish a coherent & consistent consumer-facing dating system
  - Standardize language & location of food safety information.
  - Provide on-label information about proper storage & preservation
    - Suggest "Freeze-by" Dates
  - Limit use of quality dates to avoid diluting the effect of true safety dating
  - Phrase quality dating in more clear terms:
    - "best within -- days of opening"
    - "peak quality -- [time] after [pack date]"
- Explore the role of emerging technologies
  - i.e., smart labels, time/temp indicators & QR codes
- Public education / Food literacy
an opportunity for...

industry development
of
responsible waste-reducing
best practices
&
self regulatory frameworks
The Food Resilience Initiative (FRI) conducts multi-disciplinary research grounded in law and proposes innovative, full-scope policy solutions to the challenges facing our food system, producers & policy makers. We work at the intersections between food & public health, resource allocation & conservation, disaster-preparedness, business & economics, land tenure, fair labor standards, community development & planning, sovereignty, & social justice.

We convene experts in diverse fields to support responsible and resilient agri-food systems that are able to reliably provide access to adequate supplies of health-promoting food and, in turn, nourish strong, capable individuals & communities.

The LLM. Program in Agricultural & Food 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 & our food system. The Program attracts candidates from throughout the United States & the world. Alumni currently work in 40 different states & 17 foreign countries, serving as leaders in private practice, government, agribusiness, public policy, & academia. [now offering part-time & distance options]

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http://foodrecoveryproject.com/
http://law.uark.edu/foodrecovery

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