



# Food Recovery in the District of Columbia: A LEGAL GUIDE | OCTOBER 2017



FOOD LAW  
*and* POLICY CLINIC  
HARVARD LAW SCHOOL

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## About the Harvard Law School Food Law and Policy Clinic

The Harvard Law School Food Law and Policy Clinic, a division of the Center for Health Law and Policy Innovation, is an experiential teaching program at Harvard Law School that links law students with opportunities to work with clients and communities on various food law and policy issues. The clinic strives to increase access to healthy foods, assist small and sustainable farmers in breaking into new commercial markets, and reduce waste of healthy, wholesome food, while educating law students about ways to use law and policy to positively impact the food system. For more information, visit <http://www.chlpi.org/flpc>.

## About the DC Food Recovery Working Group

The DC Food Recovery Working Group was created in early 2016 to support overall food recovery efforts in Washington, D.C. and the surrounding areas. This working group focuses on all aspects of food recovery, outlined by the EPA Food Recovery Hierarchy, to include but not limited to source reduction, source reuse, food security, composting, and plant-based diets. This group is comprised of food banks, non-profits working on food recovery, government agencies, local environmental and sustainability organization, and food recovery advocates. For more information, visit <https://dcfoodrecovery.wordpress.com/>.

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# Introduction

In the United States, approximately 40 percent of food goes to waste.<sup>1</sup> This amounts to 62.5 million tons of food waste per year;<sup>2</sup> 10.1 million tons of this waste is left unharvested on farms, while 52.4 million tons end up in landfills.<sup>3</sup> In total the United States spends \$218 billion per year growing, manufacturing, processing, distributing, and disposing of food that is never eaten.<sup>4</sup> The land allocated to grow food, the use of scarce resources like water to make it grow, the fossil fuels used to ship it, and the space used to store it are all wasted when food ends up in a landfill. To illustrate, approximately 21 percent of the United States' fresh water supply<sup>5</sup> and 300 million barrels of oil are used to produce food that goes to waste.<sup>6</sup> Uneaten food is the largest contributor of solid waste in our landfills,<sup>7</sup> leading to local crises with landfills that are running out of space. And once in a landfill, food waste is a significant emitter of methane, a greenhouse gas that is 25 times more potent than carbon dioxide.<sup>8</sup>

Even as we waste approximately 40 percent of our food, many Americans are food insecure, and the problem of food insecurity is particularly pronounced in the District of Columbia.

13.2 percent of all households in the District of Columbia were food insecure from 2013 - 2015, meaning these households had limited or uncertain access to nutritionally adequate or safe food.<sup>9</sup> Additionally, 14 percent of D.C. residents reported not having enough money in the past twelve months to buy food for themselves or their families.<sup>10</sup> Furthermore, 30.5 percent of households with children in the District said they were unable to afford enough food—this striking rate of lack of access to food among families with children is the second worst in the country.<sup>11</sup>

The purpose of this Washington, D.C. legal guide is to answer some of the most common legal questions raised by businesses, schools, charities, and other stakeholders regarding food donation and food recovery in the District of Columbia. This guide describes what both Washington, D.C. and the federal government are currently doing to address the problem of food waste. It covers D.C. and federal laws and regulations relating to tax incentives incentivizing food donation, liability protections for food donors, date labeling requirements for food packages, food safety guidance for food donations, and the donation of excess food by K-12 schools.

## Proposed D.C. Legislation: The Save Good Food Amendment Act of 2017

On January 24, 2017, D.C. Councilmembers Cheh, Nadeau, Grosso, Allen, and Evans introduced the “Save Good Food Amendment Act of 2017.” The Act proposes to:

- Create a tax credit for individuals and businesses that donate food to non-profit organizations;
- Expand liability protections for food donations to cover food donors that donate food directly to individuals;
- Expand liability protections to cover charitable or non-profit organizations that charge a fee for distributed food to cover the cost of handling; and
- Mandate that the Department of Health not require date labels on food products that do not pose an increased safety risk.
- Require Department of Health and the Office of Waste Diversion to develop a food donation guide and train health inspectors on the information in the guide.

The Save Good Food Amendment Act is currently under D.C. Council review.

Source: Save Good Food Amendment Act of 2017, B22-0072, 2017 D.C. Legislative Sess., Period Twenty-Two (2017) <http://lims.dccouncil.us/Download/37273/B22-0072-Introduction.pdf>.

# I. Tax Incentives for Food Donations

Cost is a major barrier to food donation. Businesses and organizations must bear the cost of harvesting or preparing surplus food for donation, storing it, transporting it, and ensuring it complies with federal, state, and local food safety and labeling laws. Federal tax incentives have been highly successful in motivating food donation. For instance, prior to 2015, enhanced federal tax incentives for food donations were limited to C-corporations.<sup>12</sup> After the incentives were temporarily expanded to cover more businesses in 2005 in response to Hurricane Katrina, food donations across the country rose by 137% in 2006.<sup>13</sup> Congress subsequently made the expansion permanent in 2015, providing all businesses with added incentive to increase food donations and prevent food waste.<sup>14</sup> That includes the many independent restaurants, small grocery chains, smaller farms and other businesses that are not C-corporations and thus could not previously receive this incentive.

## **Proposed D.C. Legislation: Save Good Food Amendment Act Tax Credits for Individuals and Businesses**

The Save Good Food Amendment Act would create a tax credit equal to 50% of the value of eligible food donations, up to \$2,500 per year for individuals and up to \$5,000 per year for corporations. Eligible “food commodities,” would include:

- Vegetables, fruits, and other food products grown in either a D.C. urban farm or community garden;
- Prepared foods made in a certified kitchen and;
- Vegetables, fruits, fresh and frozen meat, eggs, and dairy products donated by a licensed D.C. retailer.

Source: Save Good Food Amendment Act of 2017, B22-0072, 2017 D.C. Legislative Sess., Period Twenty-Two (2017) <http://lims.dccouncil.us/Download/37273/B22-0072-Introduction.pdf>.

While some states have enacted state-level tax incentives for food donations,<sup>15</sup> as of April 7 2017, D.C. no longer has a tax credit for food donations by D.C. residents and businesses.<sup>16</sup> Prior to April 7, 2017, D.C. provided a tax credit to D.C. residents and businesses who donated food from D.C. urban farms or community gardens to D.C. food banks or shelters.<sup>17</sup> Although D.C. no longer has a tax incentive specifically for food donations, individuals and businesses in D.C. may deduct from taxable income the full value of any charitable contributions and gifts made to 501(c)(3) organizations, including food banks.<sup>18</sup> All charitable deductions are limited to 15 percent of an individual or business’s annual adjusted gross income.<sup>19</sup>

This section will provide an overview of the federal tax incentives available to residents and businesses in D.C., explain how the tax incentives are calculated, and explain the requirements that must be met to receive federal tax incentives.

## **WHAT FEDERAL TAX INCENTIVES ARE AVAILABLE FOR FOOD DONATIONS AND HOW ARE THEY CALCULATED?**

Food donors are eligible for either a general deduction or an enhanced deduction for qualified food donations.

General Tax Deduction: Businesses that donate inventory, including food, may claim a tax deduction in the amount of the property’s basis, which is usually its cost to the business.<sup>20</sup> C-corporations generally cannot deduct more than 10% of their taxable income for the year. Businesses other than C-corporations—including S-corporations,<sup>21</sup> sole proprietorships,<sup>22</sup> and some LLCs<sup>23</sup>—cannot deduct more than 30% of the business’ total taxable income each year.<sup>24</sup>

Enhanced Tax Deduction: In comparison to the general deduction, the enhanced deduction provides

a significantly higher financial benefit, allowing businesses to deduct the lesser of (a) twice the basis value of the donated food or (b) the basis value of the donated food plus one-half of the food's expected profit margin (if the food were sold at its fair market value).<sup>25</sup> There is a cap on the amount a business can deduct using the enhanced deduction each year. A C-corporation's charitable deduction cannot exceed 10% of its taxable income,<sup>26</sup> except when the corporation has donated food, in which case it can increase its deduction to up to 15%.<sup>27</sup> Non-C-corporations can also claim up to 15% of their taxable income in the enhanced deduction.<sup>28</sup> Food donors can carry forward any excess deductions beyond the 15% income limitation for up to five years.<sup>29</sup>

Example: A grocery store donates potatoes with a fair market value of \$100. The basis value of these potatoes was \$30. The expected profit from selling the potatoes is the fair market value minus the basis value (\$100 - \$30), which is \$70. Under the enhanced deduction, the grocery store is eligible to deduct the smaller of:

(a) Basis Value x 2 = \$30 x 2 = \$60, or

(b) Basis Value + (expected profit margin/2) = \$30 + (\$70/2) = \$65

The enhanced deduction would be \$60, which is substantially higher than the general deduction (the \$30 basis value).

Businesses that do not account for inventories and are not required to capitalize indirect costs<sup>30</sup> have the option to calculate the basis value at 25% of the food products' fair market value.<sup>31</sup>

Example: If a farm that does not account for inventories and is not required to capitalize indirect costs donated pears with a fair market value of \$100 the farmer could choose to calculate the basis value of the pears at \$25 (\$100 x .25).

Businesses also have the option to calculate the fair market value of certain products—i.e., those that cannot be sold because of failure to meet internal standards, lack of a market, or similar reasons—by using the price of the same or substantially similar, saleable food items.<sup>32</sup>

Example: If a farm grew an acre of crooked carrots that did not meet its distributors' cosmetic standards, provided that the fair market value for the same amount of the straight carrots is \$150, they could donate those carrots and calculate their fair market value as \$150.

## **WHAT REQUIREMENTS MUST BE MET FOR A BUSINESS TO QUALIFY FOR THE GENERAL DEDUCTION AND ENHANCED DEDUCTION?**

General Deduction: For a charitable contribution to qualify for a general federal tax deduction, the donation must be used for charitable purposes and given to a qualified organization as laid out under section 170 of the Internal Revenue Code (IRC).<sup>33</sup>

Enhanced Deduction: To claim the enhanced deduction, the food donation must meet several requirements. If any of these conditions are not met, the donation is disqualified from the enhanced deduction and is only eligible for the general deduction. The requirements are:

1. The recipient organization must be an IRC 501(c)(3) organization, a public charity, or a private operating foundation.<sup>34</sup>
2. The recipient must use the donated food solely for the care of the ill (those requiring medical care), needy (those lacking necessities of life as a result of poverty or temporary distress), or infants (a minor child, as determined by local law).<sup>35</sup>
3. The recipient may not use or transfer the food in exchange for money, property, or services. However, the recipient organization may charge another organization a nominal amount for “administrative, warehousing, or other similar costs.”<sup>36</sup>

Example: If a business donates 500 lbs. of cabbage to a food bank (the recipient organization), and the food bank accepts the cabbage in order to donate it to a soup kitchen, the soup kitchen may not charge the individuals at the soup kitchen. The food bank, however, may charge the soup kitchen a nominal fee based on the total number of pounds for reimbursement of the costs of administering and storing the food in a warehouse.

4. The donating business must receive a written statement from the recipient organization.<sup>37</sup> The statement must describe the contributed property and represent that the property will be used in compliance with the requirements outlined above.<sup>38</sup>
5. The donated property must satisfy the requirements of the Federal Food, Drug, and Cosmetic Act (FDCA) at the time of donation and for the preceding 180 days.<sup>39</sup> For food that did not exist for 180 days prior to donation, this requirement is satisfied if the food was in compliance with the FDCA for the period of its existence and at donation, and any similar property held by the donor during the 180 days prior to donation was also held in compliance with the FDCA.<sup>40</sup>

## Conclusion

Currently, D.C. does not provide a tax incentive for food donation. However, all D.C. businesses are eligible for the general and enhanced tax deductions for food donations.



## II. Liability Protections for Food Donations



Businesses (including farms) and nonprofits that provide or receive donated food are well-protected by laws designed to provide immunity from liability related to such donations. The Bill Emerson Good Samaritan Food Donation Act provides federal liability protection for food donors, and D.C.'s Good Faith Donor and Donee Act provides additional liability protection to businesses and nonprofits in the District. This section will discuss both the Emerson Act and D.C.'s Good Faith Donor and Donee Act.

### A. Federal Liability Protections

#### **WHAT IS THE BILL EMERSON GOOD SAMARITAN FOOD DONATION ACT?**

Congress passed the Bill Emerson Good Samaritan Food Donation Act (Emerson Act) in 1996 to incentivize food donations by providing civil and criminal liability protections to food donors and recipient non-profit organizations across the country.<sup>41</sup>

#### **WHO IS COVERED UNDER THE BILL EMERSON GOOD SAMARITAN FOOD DONATION ACT?**

The Act covers individuals, businesses, non-profit organizations, the officers of businesses, non-profit organizations, and gleaners, which are individuals or entities that harvest donated agricultural crops from the fields.<sup>42</sup> The Emerson Act's liability protection also extends to property owners who allow gleaners or food recovery personnel onto their property.<sup>43</sup> In this case, the property owner is protected from liability if injury or death arises due to any donation or collection activities on the owner's premises.<sup>44</sup>

#### **HOW DO FOOD DONORS AND DISTRIBUTING NON-PROFITS RECEIVE LIABILITY PROTECTION UNDER THE ACT?**

In order to receive protection, donors and distributors must meet the following four requirements:

1. The food must be donated to a nonprofit organization in good faith, meaning that the food must be donated with the honest belief that it is safe to eat,<sup>45</sup>
2. The food must meet all federal, state, and local quality and labeling requirements, even if it



is not “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”<sup>46</sup>

If all quality and labeling requirements are not met, the Act will still extend liability protection to donors and distributing non-profits if the non-conforming food is reconditioned to meet all quality and labeling requirements before it can be donated.<sup>47</sup>

To extend liability protection to non-conforming items the following steps must be followed:

1. The donor informs the non-profit of the non-conforming nature of the product;
2. The non-profit agrees to recondition the item so that it is compliant with all federal, state and local quality and labeling requirements; and
3. The non-profit knows the standards for reconditioning the item.<sup>48</sup>

This provision allows for the recovery and donation of edible and wholesome foods that are mislabeled or have technical flaws, such as missing or marred labels, or produce that requires washing or trimming prior to donation.

Example: If a food manufacturing company donates 250 bottles of mislabeled pasta sauce to a food bank and informs the food bank at the time of donation that the pasta sauce includes the incorrect net weight, and the food bank agrees and has the knowledge and resources to relabel the bottles with the correct net weight, then the donor and food bank would still receive liability protection under the Act.

3. The nonprofit organization that receives the donated food must distribute it to “needy individuals.”<sup>49</sup> Direct donations from the donor to needy individuals are not protected by the Act.<sup>50</sup>

Example: If a grocery store donates 100 cartons of milk directly to residents living at a State Housing Authority, the grocery store is not protected under the Emerson Act. If the grocery store first donates to a non-profit organization that then gives the milk cartons to the residents of the State Housing Authority, then both the grocery store and the non-profit organization are protected under the Emerson Act.

4. The end recipient must not pay anything of monetary value for the donated food.<sup>51</sup> Note, however, that if one non-profit donates food to another non-profit for distribution, the Act allows the first non-profit to charge the distributing non-profit a nominal fee to cover handling and processing costs.<sup>52</sup>

Example: If a business donates food to a food bank (the recipient organization), and the food bank donates the food to a food pantry, the food pantry may not charge the individuals eating at the soup kitchen. The food bank can, however, charge the food pantry a nominal fee for reimbursement of the costs of storing the food in a warehouse.

## **WHAT IS NOT PROTECTED UNDER THE EMERSON ACT?**

Food donors and distributing non-profits that participate in acts or omissions that constitute gross negligence or intentional misconduct resulting in injury or death to the recipients of the donated food are not protected under the Act.<sup>53</sup>

- **Gross Negligence** involves “voluntary and conscious conduct (including a failure to act)” by a person or organization that knew when the donation was made that the donated food was likely to have harmful health impacts.<sup>54</sup>
- **Intentional Misconduct** is when a person or organization donates “with knowledge...that the conduct is harmful to the health or well-being of another person.”<sup>55</sup>

In other words, one should not donate or facilitate the distribution of donated food that one knows is likely to be harmful or dangerous.

Example: If a business donates a 1,000 gallons of ice cream that had recently been recalled due to listeria contamination, the business would not be protected under the Emerson Act, because the business knew when the donation was made that the donated food was likely to have harmful health impacts.

Please Note: the Emerson Act gives little guidance on what activities qualify as gross negligence or intentional misconduct. The Emerson Act has not been challenged in court, so no judicial interpretations of its language exist.<sup>56</sup> However, the lack of court cases related to the Emerson Act suggests how protective the Act is of donors.<sup>57</sup>

## B. D.C. Liability Protections for Food Donations

**Proposed D.C. Legislation:  
Save Good Food Amendment Act  
Expanding Liability Protections in D.C.**

The Save Good Food Amendment Act would expand liability protections for food donations by:

- Providing liability protection to food donors who donate food directly to those in need;
- Providing liability protection to non-profit organizations that charge end recipients a small fee to cover the handling and preparation of food donations; and
- Explicitly allowing past-date food to be sold or donated after the date.

Source: Save Good Food Amendment Act of 2017, B22-0072, 2017 D.C. Legislative Sess., Period Twenty-Two (2017) <http://lms.dccouncil.us/Download/37273/B22-0072-Introduction.pdf>.

### **DOES D.C. OFFER ADDITIONAL LIABILITY PROTECTION FOR FOOD DONATIONS?**

Yes. States and the District of Columbia are free to enact state liability protection that is equal to or more protective of donors than the Emerson Act, which sets a minimum level of liability protection.<sup>58</sup> In 1981, the District of Columbia passed such legislation, known as the Good Faith Donor and Donee Act, which provides civil and criminal liability protection to food donors and nonprofit organizations that receive and distribute donated food free of charge or at a nominal fee.<sup>9</sup>

### **WHO IS COVERED UNDER THE GOOD FAITH DONOR AND DONEE ACT?**

The Act covers a broad range of food donors, such as individuals, businesses, non-profits and charitable organizations.<sup>60</sup>

### **HOW DO FOOD DONORS AND DISTRIBUTING NON-PROFITS RECEIVE LIABILITY PROTECTION UNDER THE ACT?**

In order to receive protection, donors and distributors must meet the following three requirements:<sup>61</sup>

1. Donors must donate food in good faith to a bona-fide charity or nonprofit organization;

2. The bona-fide charity or nonprofit organization must receive and distribute the food in good faith, meaning that the food must be donated with the honest belief that it is safe to eat; and
3. The bona-fide charity or nonprofit organization must distribute the food free of charge or for a nominal fee.

The D.C. law provides additional protection than the Emerson Act. Whereas the Emerson Act only allows charges to cover costs between non-profits, D.C. law allows a non-profit to charge a nominal fee to individual recipients, which helps encourage social enterprise. The proposed Save Good Food Amendment Act would expand on this protection even further by allowing nonprofits to charge individuals a small fee sufficient to cover the costs of food handling and preparation, which is greater than the nominal fee allowed under current D.C. law because it allows for the fee to cover the costs of recovery and redistribution.

Example: If a restaurant distributes a pallet of tomatoes with several visible signs of rot to a soup kitchen and the recipients fell ill, then the restaurant would not receive liability protection under D.C.'s Good Faith Donor and Donee Act.

### **WHAT IS NOT PROTECTED UNDER THE GOOD FAITH DONOR AND DONEE ACT?**

Food donors and distributing non-profits will not receive protection under the Act if any injury or death occurs that is the result of the donor's or the non-profit's gross negligence or intentional misconduct.<sup>62</sup>

### **Conclusion**

Federal law and D.C. law provide ample liability protection for food donors and the non-profits and charitable distributors to which they donate, so long as they do not act with gross negligence and intentional misconduct, and the food is donated and distributed in good faith.

## **III. Date Labels on Food Products**



Date labels are the dates on food packages that are accompanied by phrases such as “use by,” “best before,” “sell by,” and “enjoy by.” The dizzying array of phrases on date labels are misleading to consumers and result in safe, wholesome food being needlessly thrown away, instead of being eaten or donated.<sup>63</sup> Many consumers mistakenly believe that date labels are indicators of a food's microbial safety, but in fact for most foods the date is simply a manufacturer's best guess as to how long the product will be at its peak quality. This section will discuss the date label requirements for food products both at the federal level and in the District.

### **ARE DATE LABELS REGULATED AT THE FEDERAL LEVEL?**

No. There currently is no federal law regulating date labels on food products other than infant formula.<sup>64</sup> Congress has, however, passed legislation delegating general authority to the FDA and the USDA to ensure food safety and protect

consumers from deceptive or misleading food labeling.<sup>65</sup> As of August 2017, the FDA and the USDA have not used this authority to regulate date labels, thus:

- The FDA does not require date labels on foods other than infant formula.<sup>66</sup>
- The USDA does not require date labels on foods under its purview, including meats, poultry, and egg products.<sup>67</sup> If, however, USDA-regulated foods are dated, either as required under state law (see below) or voluntarily, they must include: (i) a day and month (and year for frozen or shelf-stable products) and (ii) an explanatory phrase, such as “sell by” or “best if used by.”<sup>68</sup> While food manufacturers are free to select which explanatory phrase to include on a date label, the USDA recommends “Best if Used By” be used for products where the date is intended as an indicator of quality.<sup>69</sup>

## **ARE DATE LABELS REGULATED AT THE STATE LEVEL?**

Yes. Because federal law is so limited, states have broad discretion to regulate date labels. As a result, inconsistent date labeling laws exist across the country.<sup>70</sup> For instance, Michigan requires date labels on pre-packaged perishable foods<sup>71</sup> and dairy products,<sup>72</sup> and restricts the sale of both of these items once the labeled date has passed,<sup>73</sup> while New York does not require date labels on any food products, and does not regulate the sale of past-date foods.<sup>74</sup>

## **HOW DOES D.C. REGULATE DATE LABELS?**

D.C. requires date labels on the following foods: pasteurized fluid milk, fresh meat, poultry, fish, bread products, eggs, butter, cheese, cold meat cuts, mildly processed pasteurized products, shellfish, and potentially hazardous foods<sup>75</sup> sold in retail establishments that are pre-wrapped and not intended to be eaten on the premises of the food establishment (like deli meat or pre-made sandwiches).<sup>76</sup>

Each of these aforementioned food products are required to have easily understood and prominently displayed “pull dates”, which is the date after which food should not be sold.<sup>77</sup> Shellfish packages containing less than 64 ounces of shellfish must include a date label with either “sell by” or “use by.”<sup>78</sup> With the exception of shellfish products, D.C. regulations do not require specific terminology or phrasing on the date labels of the aforementioned food products. However, if any food that has a pull date is rewrapped, the new package must retain the original pull date and the word “REWRAPPED” must be prominently displayed on the package.<sup>79</sup>

D.C. does not regulate food labels beyond the foods listed above. Thus, food manufacturers are free to include date labels on any other types of food products without restrictions.

### **Proposed D.C. Legislation: The Save Good Food Amendment Act of 2017 Date Labels**

The Save Good Food Act would significantly change D.C.’s food date label requirements. Under the bill, pull date labels would *only* be required for foods which are linked to a higher safety risk when consumed after the pull date.

Source: Save Good Food Amendment Act of 2017, B22-0072, 2017 D.C. Legislative Sess., Period Twenty-Two (2017) <http://lims.dccouncil.us/Download/37273/B22-0072-Introduction.pdf>.

## **CAN PAST DATE FOODS BE SOLD OR DONATED AFTER THE “PULL DATE”?**

All food products except packaged perishable foods can be sold and donated after the “pull date.” These food products can be sold as long as the products are isolated and labeled as being past the last date on which the food should be sold without a significant risk of spoilage or loss of palatability.<sup>80</sup> Additionally they can be donated after the “pull date,” so long as the food remains “fit for human consumption.”<sup>81</sup> “Fit for human consumption” is not defined in the D.C. date labeling regulations. Packaged perishable foods are explicitly not, under any circumstances, to be resold,

traded, or bartered after the pull by date.<sup>82</sup> Retailers are also prohibited from rewrapping packaged perishable foods and updating the pull date.<sup>83</sup>

## Conclusion

In sum, because there is no federal law on date labeling, regulation of these labels has been left largely to the states. D.C. follows one of the most restrictive date labeling laws in the country. In D.C., all pasteurized fluid milk, fresh meat, poultry, fish, bread products, eggs, butter, cheese, cold meat cuts, mildly processed pasteurized products, shellfish, and potentially hazardous foods sold in retail establishments that are pre-wrapped and not intended to be eaten on the premises of the food establishment must have date labels. D.C. also restricts the sale or donation of those food products after the “pull date.” With the exception of package perishable foods, which cannot be sold or donated after the date, the aforementioned food products can be sold after the date as long as the products are isolated and labeled as being past the last date on which the food should be sold without a significant risk of spoilage or loss of palatability.<sup>84</sup> Additionally they can be donated after the “pull date,” so long as the food remains “fit for human consumption.”<sup>85</sup>

## IV. Food Safety for Food Donations

Food donors and food recovery organizations must comply with food safety regulations. However, these regulations often do not directly address food donation, and can be difficult to navigate for food donors, food recovery organizations, non-profits and health inspectors alike. This section will discuss federal and D.C. food safety laws for food donations.

### DOES THE FEDERAL GOVERNMENT REGULATE FOOD SAFETY FOR FOOD ESTABLISHMENTS IN D.C.?

The federal government does not regulate food safety for food establishments such as restaurants, institutional kitchens, and retail food stores. That is because these entities sell food within states or the District, and the federal government only has the power to regulate food that is traveling in interstate commerce. As a result, states and the District are responsible for regulating and enforcing food safety regimes for food establishments within their borders and the federal government is responsible for regulating food facilities that process food for sale nationally.

However, state food safety laws and regulations are largely based on model federal food safety guidance published by the United States Food and Drug Administration (FDA), the federal agency responsible for protecting the public health by ensuring the safety of the nation’s food supply.<sup>86</sup> The FDA Food Code is the primary guidance states and localities follow when developing food safety laws.<sup>87</sup> It reflects the input of an array of experts—including regulatory officials, industry, academia, and consumers—who participate in a biennial Conference for Food Protection.<sup>88</sup>

Although the federal government provides guidance via the FDA Food Code, individual states are responsible for regulating the safety of food establishments.<sup>89</sup> The FDA Food Code is not binding

### Comprehensive Resource for Food Recovery Programs

The Comprehensive Resource for Food Recovery Programs is a guidance document for the various stakeholders involved in or impacted by food recovery on how to create a food donation program that adheres to food safety standards. It includes guidance and sample forms on the relevant food safety rules for food recovery programs. The Comprehensive Resource is not binding law and is only intended to be a supportive tool.

Source: Comprehensive Resource for Food Recovery Programs, CONF. FOR FOOD PROT., 15-16 (Apr. 2016), [http://www.foodprotect.org/issues/packets/2016Packet/attachments/I\\_011\\_content\\_b.pdf](http://www.foodprotect.org/issues/packets/2016Packet/attachments/I_011_content_b.pdf).

law unless a state or local government chooses to adopt it as such by passing a statute or by incorporating it into regulations.<sup>90</sup> All fifty states and Washington, D.C. have adopted some version of the FDA Food Code.<sup>91</sup> Unfortunately, the FDA Food Code does not specifically address food safety for food donations, meaning that states, including D.C., generally do not have language about food donations in their regulations.

### **DOES D.C. HAVE ANY FOOD SAFETY REGULATIONS THAT FOCUS ON FOOD RECOVERY?**

No. Although D.C. has food safety and sanitation standards for food establishments in D.C. (restaurants, grocery stores, etc.) the standards do not clearly indicate what safety requirements specifically govern food donations.<sup>92</sup> Nevertheless, businesses in D.C. should ensure that they are following D.C. food safety standards when starting a food recovery program, specifically any provisions that apply to the storage, transportation, handling, and packaging of food.<sup>93</sup> For example food donors should:

- Store donated food in a clean, dry location where it does not face exposure to splash, dust, or other contaminants<sup>94</sup>;
- Ensure that employees and staff handling food donations follow proper hand washing and hygiene practices by washing hands thoroughly for at least 20 seconds before handling food.<sup>95</sup>
- Monitor the time and temperature of potentially hazardous prepared food to ensure that the food does not stay in temperature danger zone (42° F - 139° F) for more than two hours.<sup>96</sup>
- Avoid cross-contamination of foods by keeping raw food, such as meats and poultry, away from cooked or ready to eat food. <sup>97</sup>

More information about the D.C. Food Code and food safety standards for food establishments in D.C. can be found here: <https://doh.dc.gov/service/food-code-frequently-asked-questions>.

### **ARE THERE ANY GUIDANCE DOCUMENTS THAT BUSINESSES CAN USE TO ENSURE FOOD IS BEING DONATED SAFELY?**

The D.C. government has not created any guidance documents to help ensure food is donated safely. However, the following states have created food safety guidelines that can be adapted by businesses and the District to help ensure safe food handling and distribution practices:

#### **Proposed D.C. Legislation: Save Good Food Amendment Act Food Safety Guidance**

The Save Good Food Amendment Act would require the D.C. Department of Health and the Office of Waste Diversion to develop a food donation guide that would include safety regulations, best practices, and a list of organizations that accept donated food. D.C. Department of Health would also have to train health inspectors on the information in the guide.

Source: Save Good Food Amendment Act of 2017, B22-0072, 2017 D.C. Legislative Sess., Period Twenty-Two (2017) <http://lims.dccouncil.us/Download/37273/B22-0072-Introduction.pdf>.

**San Diego County, California** produced a “Too Good to Waste!” guide that includes sections on food handling rules for how to donate food safely, such as required temperatures for cooling down cooked food. They also produced an easy-to-use safe food handling donation checklist.<sup>98</sup> The guide can be found here: <http://www.sandiegocounty.gov/content/sdc/dpw/recycling/Food.html>.

The **Massachusetts** Department of Environmental Protection, in partnership with the Center for EcoTechnology’s RecyclingWorks program, produced a guide for best management practices for food donation.<sup>99</sup> It has been vetted by the Massachusetts Department of Public

Health and accurately reflects Massachusetts food safety regulations, as well as best practices for donating food. This guide is disseminated to interested potential donors online and via trainings,

presentations, and direct technical assistance to help donors create well-structured food recovery programs. The guide can be found here: <https://recyclingworksma.com/donate/>.

**New York City, New York** created “Simple Steps to Donate Your Healthy Surplus: A Guide for Food Donors,” which contains food safety instructions, answers to frequently asked questions that directly address donors’ concerns, contact information for food recovery organizations in NY, and information on the liability protections donors receive.<sup>100</sup> The guide can be found here: <https://www1.nyc.gov/assets/doh/downloads/pdf/public/food-donor-resource-guide.pdf>.

## Conclusion

The federal government does not regulate food safety for food establishments such as restaurants, institutional kitchens, and retail food stores. Thus, states and the District generally regulate food safety in food establishments. Although D.C. has food safety regulations for food establishments, these regulations do not clearly indicate what safety requirements specifically apply to food donation.<sup>101</sup>

# V. Food Recovery in K-12 schools

Schools present unique and important food recovery opportunities. Food waste in schools has long been an issue, with rates mirroring larger trends in consumer food waste. It is estimated that elementary and secondary schools waste about two pounds of food per student each month.<sup>102</sup> School food waste is caused by a multitude of factors. Students generally have too little time to eat, and rushed students eat less and throw away more.<sup>103</sup> Additionally, widespread misunderstanding of school food regulations contribute to waste. This section will discuss both federal and D.C. laws and policies that pertain to the recovery and donation of excess foods from K-12 schools.

## DOES THE FEDERAL GOVERNMENT REGULATE THE RECOVERY AND DONATION OF SURPLUS FOOD FROM K-12 SCHOOLS?

The federal government plays an active role in regulating school food, particularly food procured using funds under the National School Lunch Program (NSLP) and the School Breakfast Program (SBP).<sup>104</sup> The National School Lunch Act explicitly allows schools to donate food not consumed from the NSLP and SBP as long as the unconsumed food is donated to a food bank or charitable organization.<sup>105</sup> Schools that participate in the NSLP and SBP are already required to follow certain food safety standards, including implementing a written food safety program and undergoing a health inspection twice a year.<sup>106</sup> The National School Lunch Act explicitly states that schools are protected by the same food donation liability protections set forth in the federal Emerson Act.<sup>107</sup>

The United States Department of Agriculture (USDA) also encourages schools participating in NSLP and SBP to use “share tables.” Share tables are a table or cart where students can put uneaten food still in its original wrapper or peel and another student can take the food for free, or the school

### USDA Guidance on School Food Donation

The USDA has issued guidance on school food donation. This guidance advises schools to plan menus carefully to avoid making excess food altogether, and recommends that schools, in consultation with local and state health and sanitation codes, consider incorporating leftover food into subsequent meals, or offering “share tables” where students can leave extra food to be taken by other students. The guidance only suggests donating to a food bank or 501(c)(3) charitable organization when these avenues of mitigating food waste are not possible.

Source: *Guidance on the Food Donation Program in Child Nutrition Programs*, U.S. DEP’T OF AGRIC., Feb. 3, 2012 [https://www.usda.gov/oce/foodwaste/FNS\\_Guidance.pdf](https://www.usda.gov/oce/foodwaste/FNS_Guidance.pdf)

can donate the food.<sup>108</sup> Share tables must meet the same food safety standards that schools that participate in NSLP and SBP are already required to follow and must also meet state and local health and safety standards.<sup>109</sup> More information about the USDA's policy on share tables can be found here: <https://www.fns.usda.gov/use-share-tables-child-nutrition-programs>.

### **ARE THERE ANY LAWS IN D.C. THAT PERTAIN TO THE RECOVERY AND DONATION OF EXCESS FOOD FROM K-12 SCHOOLS?**

No. There are no specific laws in D.C. pertaining to donating excess food from schools. However, the D.C. Food Code does provide guidance on share tables in D.C. The D.C. Food Code allows packaged, closed, and non-potentially hazardous foods, such as cereal packs, or bags of carrots, to be re-served.<sup>110</sup> In order to re-serve "potentially hazardous foods," such as milk, cheese or other foods requiring time and temperature control on a share table, schools must apply for a variance to the D.C. Code by contacting the D.C. Department of Health to obtain a Variance Request Form. Contact information for the D.C. Department of Health's Food Safety and Hygiene Division can be found here: <https://doh.dc.gov/service/food-safety-hygiene-and-inspection-services-division>.

Thus, the following foods are allowed and not allowed on share tables in D.C. schools:

Foods allowed on share tables in D.C.<sup>111</sup>

- Commercially pre-packaged, unopened items with the packages intact, including cereal packs, crackers, bags of carrots, and raisin boxes
- Whole uneaten fruits and vegetables with inedible skin, like bananas and oranges
- Commercially pre-packaged perishable food and beverage products, like milk and cheese, if the package is unopened and the item is stored in an ice bath, cooler, or refrigerator maintained at or below 41°F at all times.

Foods **not** allowed on share tables in D. C.<sup>112</sup>

- Fruits and vegetables with edible skin, like apples, pears, and peaches
- Open items, unpackaged items, and items in packages that are not intact, such as a salad bowl without a lid, or an opened bag of baby carrots or sliced apples
- Perishable foods when a temperature control mechanism is not in place
- Food and beverage items brought from a student's home

### **ARE THERE ANY GUIDANCE DOCUMENTS THAT SCHOOLS CAN USE TO ENSURE EXCESS FOOD IS BEING RECOVERED AND DONATED SAFELY?**

D.C. does not currently have any published guidance on food recovery in schools. However, the following states and school districts have developed helpful guidance for food donation in schools, and can serve as useful models for D.C. schools interested in adopting a school food donation program:

**Oakland Unified School District** created a food donation guide with step-by-step instructions and customizable templates that can be utilized to create a school food donation program.<sup>113</sup> The guide can be found here: [https://furtherwithfood.org/wp-content/uploads/2017/06/Food-Donation-Guide-June1\\_17.pdf](https://furtherwithfood.org/wp-content/uploads/2017/06/Food-Donation-Guide-June1_17.pdf).

**Indiana's Department of Health** created guidance documents on food donation best practices for schools. The Indiana guidance document includes distinctions between opened and unopened



packages as well as temperature control requirements, and instructs how to set up a share table system.<sup>114</sup> The guidance document can be found here: [https://in.gov/isdh/files/School\\_Sharing\\_Tables\\_and\\_Food\\_Recovery\\_12-23-2015\\_\(2\).pdf](https://in.gov/isdh/files/School_Sharing_Tables_and_Food_Recovery_12-23-2015_(2).pdf).

**Wisconsin's Department of Public Instruction** created a food safety protocol and monitoring program for schools to use when setting up a share table.<sup>115</sup> The food safety protocol can be found here: <https://dpi.wi.gov/school-nutrition/food-safety#waste>.

### **Conclusion**

The federal government plays an active role in regulating the nutrition of school food, particularly food procured using funds under the NSLP and the SBP, and explicitly allows and promotes the donation of surplus food from these programs.<sup>116</sup> The USDA supports, and has issued guidance on, school food donation for schools interested in starting a food donation program. Currently, D.C. does not have any specific laws or guidance pertaining to donating excess food from schools in the District. However, the D.C. Food Code does provide guidance on foods allowed and not allowed to be included on share tables.



# Endnotes

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