
ACHIEVING ZERO FOOD WASTE

A State Policy Toolkit: Opportunities to Promote Food Donation

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This is a product of the Zero Food Waste Coalition. ZFWC brings consumers, businesses, and government together to build momentum and alignment on food waste policy.

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About the Harvard Law School Food Law and Policy Clinic FLPC serves partner organizations and communities in the United States and around the world by providing guidance on cutting-edge food system issues, while engaging law students in the practice of food law and policy. FLPC is committed to advancing a cross-sector, multi-disciplinary and inclusive approach to its work, building partnerships with academic institutions, government agencies, non-profit organizations, private sector actors, and civil society with expertise in public health, the environment, and the economy. FLPC's work focuses on increasing access to healthy foods, supporting sustainable and equitable food production, reducing waste of healthy, wholesome food, and promoting community-led food system change. For more information, visit www.chlpi.org/FLPC.

About NRDC (Natural Resources Defense Council) NRDC is an international nonprofit environmental organization with more than 3 million members and online activists. Since 1970, our lawyers, scientists, and other environmental specialists have worked to protect the planet's wildlife and wild places and to ensure the rights of all people to clean air, clean water, and healthy communities. NRDC has offices in New York City, Washington, D.C., Los Angeles, San Francisco, Chicago, Montana, and Beijing. Visit us at www.nrdc.org.

About ReFED ReFED is a national nonprofit working to end food loss and waste across the food system by advancing data-driven solutions to the problem. We leverage data and insights to highlight supply chain inefficiencies and economic opportunities; mobilize and connect supporters to take targeted action; and catalyze capital to spur innovation and scale high-impact initiatives. Our goal is a sustainable, resilient, and inclusive food system that optimizes environmental resources, minimizes climate impacts, and makes the best use of the food we grow. To learn more about solutions to reduce food waste, please visit www.refed.org.

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This report is one of six sections from *Achieving Zero Food Waste: A State Policy Toolkit*. The full version of the report is available at <https://zerofoodwastecoalition.org/state-toolkit/>. The chart below includes the full list of the policies in the master report, with the policies contained within this report highlighted.

Policy	Model State
<i>Building and Broadening Organic Waste Bans and Beyond</i>	
Organic Waste Bans	Vermont
Food Donation Requirements	California, New York
Mandatory Reporting	NRDC model legislation
Disposal Surcharge Fees	ILSR model legislation
<i>Opportunities to Promote Food Donation</i>	
Liability Protection	New Jersey
Tax Incentives	California
Food Safety	Texas
<i>Supporting Organic Waste Processing Infrastructure</i>	
Permitting and Zoning Composting Facilities	Maryland, Ohio
Animal Feed	—
<i>Developing End Markets for Compost</i>	
Compost Procurement	Washington
Compost Application	California
<i>Preventing Food Waste Upstream</i>	
Date Labeling	—
<i>Other Governmental Action to Address Food Waste</i>	
K-12 Schools	Rhode Island, Maryland
Climate and Solid Waste Plans	New Jersey
Other Government Support	—

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INTRODUCTION

Approximately 38% of food in the United States goes unsold or uneaten.¹ The mountain of wasted food totals 91 million tons annually,² which is equivalent to the weight of approximately 219 Empire State Buildings.³ Most of this wasted food goes to landfills, incinerators, or sewers or is left on farm fields to rot.⁴ Households, food producers, and other businesses in the United States spend \$444 billion each year to grow, process, transport, and dispose of food that ultimately is never eaten.⁵

Food is wasted at all levels of the food system—in farms, grocery stores, restaurants, and homes—and this waste has serious environmental and societal consequences. Producing food that ends up uneaten consumes 22% of all freshwater, 19% of all fertilizer, and 16% of all cropland in the United States.⁶ Food waste generates about 270 million metric tons of CO₂ equivalent greenhouse gas emissions each year, roughly equivalent to the annual emissions from 58 million passenger vehicles.⁷ But the negative consequences of wasting food extend beyond the environmental impacts and loss of resources that could have been otherwise allocated. More than 1 in 10 Americans suffer from food insecurity despite the abundance produced by our farms and factories.⁸

With the Nation's goal of cutting food waste by 50% by the year 2030,⁹ state leaders are at the vanguard of the movement, crafting policies to address food waste and reaping the environmental, social, and economic benefits. Further, though the federal government can take many vital steps to reduce food waste through regulations and funding, state governments, as the primary regulators of municipal solid waste, have at their disposal several unique policy

options which would be difficult to implement under federal law.

State governments have sought to address food waste by banning organic waste from landfills, mandating or promoting surplus food donation, supporting food recovery and composting infrastructure, and re-evaluating how schools handle food waste. States that have implemented these policies have done so through processes of identifying local problems and rigorous experimentation to craft effective and innovative solutions. While the methods employed by states vary, they provide an array of experiences with food waste reduction upon which other states and the federal government can now draw.

CONTENTS OF THE TOOLKIT

State leaders are advancing efforts to tackle food waste across the United States—responding to consumer demand, creating jobs and economic opportunities, ensuring food makes it to those experiencing food insecurity, and addressing environmental harms and climate change. This toolkit seeks to similarly embolden officials and advocates from across the country to learn from others' successes and accelerate their own leadership and impact. To do so, this toolkit contains a range of tried and tested policy opportunities that states can use to prevent food waste and keep food out of landfills and incinerators. The target audience for this toolkit is state policy-makers and advocates—whether their interest stems from concerns around climate change and environmental sustainability, financial responsibility, increasing food rescue, or finding opportunities to support local farmers,

all of which can be achieved through policies described in this toolkit. While this toolkit was drafted with this audience in mind, it may also be helpful to a wide range of individuals and

groups interested in enacting legislation to tackle food waste at the local, state, or federal level (see Federal Actions on Food Waste text box below for recent federal activity around food waste).



FEDERAL ACTIONS ON FOOD WASTE

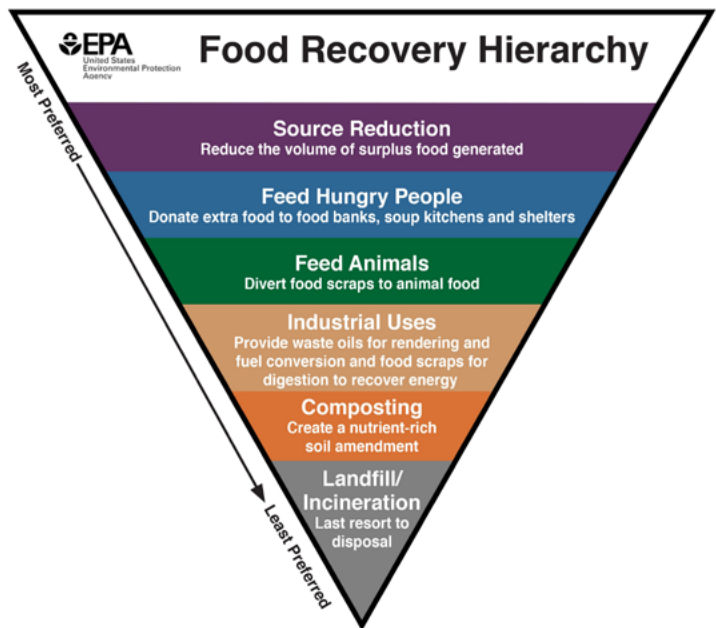
In addition to advocacy on the state and local level, the Harvard Law School Food Law & Policy Clinic (FLPC), NRDC (Natural Resources Defense Council), ReFED, and World Wildlife Fund (WWF) have done significant joint work on federal policies to prevent and reduce food waste. In April 2023, FLPC, NRDC, ReFED, and WWF formalized their partnership and created the Zero Food Waste Coalition.¹⁰ The Coalition builds momentum and alignment on food waste policy. In April 2021, the four organizations, along with many private sector supporters, local government agencies, and non-profit organizations—published the U.S. Food Loss & Waste Policy Action Plan for Congress & the Administration (Action Plan).¹¹ The Action Plan calls upon Congress and the Biden administration to take ambitious action to achieve the goal of cutting U.S. food loss and waste in half by 2030. It recommends five key policy actions ranging from investing in infrastructure and programs that measure and prevent food waste to standardizing date labeling at the federal level. For more details, please see the U.S. Food Loss and Waste Action Plan for Congress & the Administration.¹²

In April 2022, FLPC, NRDC, ReFED, and WWF followed up on the Action Plan with Opportunities to Reduce Food Waste in the 2023 Farm Bill, a report which contains 22 detailed recommendations for how the 2023 Farm Bill can curb food waste, with a focus on opportunities to prevent food waste, recover surplus food, promote food waste recycling, and enhance coordination in food waste prevention efforts. The report includes legislative priorities such as standardizing date labels, creating a national education campaign around food waste, funding policies and programs to support organic waste recycling, and funding new positions to promote food waste prevention efforts at USDA and across government agencies. Many of the recommendations in the report are federal corollaries to state policies included in this toolkit; for example, improving federal tax incentives for food donation, and incentivizing compost application. Federal, state, and local governments must work together to tackle food waste. State and local governments can work together to serve as innovators, testing initiatives on small scales and tackling policies under their control. While the federal government can legislate in areas where uniform standards are essential, as with date labeling.

HOW TO USE THIS TOOLKIT

The toolkit introduces a wide range of policies that states can implement to address food waste. For each policy, it includes background on the issue, explains the need for the policy, describes any relevant federal legislation, outlines best practices for the state policy, and offers an example of existing or proposed state law that incorporates many of these best practices. The Appendix includes model legislative language for each featured policy that states can use as a starting point to develop and pass their own policies. Some models are completely finalized, whereas others include options and comments to help guide states to tailor the policy to fit their unique circumstances while still achieving the policy goals. In some instances, our organizations have drafted the legislation together, while in other instances we have included model legislation drafted by other organizations. This toolkit was designed to enable users to jump to the sections that will be most useful to them. The toolkit makes frequent use of cross-references to refer readers to other sections of the toolkit that cover related information.

The toolkit begins with the policies that are most effective at reducing food waste disposal—organic waste bans and related policies that restrict the disposal of food waste in landfills or incinerators. Organic waste disposal bans result in significant economic, social, and environmental benefits, including the reduction of food waste generation and increase in food donation, in addition to the expected increase in organic waste recycling.¹³ While all the policies introduced in this toolkit are beneficial, policies that ban organic waste from going into landfills will likely be the most impactful at diverting food waste from disposal.



It also takes significant effort to get these policies passed and implemented, while also ensuring that compliance includes food waste prevention and food rescue and does not focus solely on organics recycling. For states that are not ready to pass organic waste bans, there are still significant steps they can take to move the needle on food waste, including promoting food donation, supporting composting infrastructure and compost end markets, and addressing food waste in schools.

While reading and using this toolkit, readers should keep the Environmental Protection Agency's (EPA) food recovery hierarchy in mind.¹⁴ The hierarchy focuses on different management strategies for food waste, starting with a base built on food waste prevention. It then moves to feeding hungry people, feeding animals, diverting food waste to industrial uses, and lastly diverting food waste for composting. Readers should consider how the hierarchy aligns with various policies and how to shape policies according to the hierarchy to maximize impact.

Each policy will have different impacts on different aspects of the food system, including environmental and social aspects. The types of impacts and outcomes of the policy will change who the natural constituencies and advocates are for a particular policy as well as the strategies for coalition building to inform and support that policy. For example, tax incentives for food donations will increase food rescue, meaning that food recovery organizations, food banks, and anti-hunger advocates are likely to be natural allies, and it will also reduce the financial costs associated with disposing of surplus food, meaning that food businesses, such as retailers, restaurants, processors, and distributors, may also support the efforts. Wherever possible, states should involve potentially affected stakeholders in crafting legislation and amending policies.

This toolkit is composed of six sections that each contain a range of potential policy solutions that a state could pass and implement to address food waste. While each section deals with a specific category of policies, these policies do at times intersect, and the toolkit includes cross-references to other sections to highlight this overlap.



Section I: Building and Broadening Organic Waste Bans and Beyond

This section introduces policies to eliminate food waste from landfills. These policies include organic waste bans and mandatory organics recycling laws, food donation requirements, mandatory reporting laws that require entities to report on food waste generation to help develop data to support organic waste bans or planning for recycling

infrastructure, and disposal surcharge fees that raise revenue for food waste diversion efforts like organic waste bans. This section includes:

- **Organic Waste Bans:** This subsection explores state laws that ban disposal of food scraps in landfills and incinerators, looking to Vermont as a model.
- **Food Donation Requirements:** This subsection explores state laws that ban disposal of food scraps in landfills and incinerators and require surplus food be donated as a way to reduce food waste. It looks specifically to the organic waste bans in California and New York as models.
- **Mandatory Reporting Laws:** This subsection outlines the potential for laws that require reporting by food waste generators, highlighting NRDC and the Environmental Law Institute's model legislation.
- **Disposal Surcharge Fees:** This subsection explores disposal surcharges that charge fees per ton of waste landfilled or incinerated to generate revenue for food waste diversion and other recycling efforts, relying on model legislation drafted by the Institute for Local Self-Reliance and using an introduced Maryland bill as a model.



Section II: Opportunities to Promote Food Donation

This section introduces policies that can promote and incentivize the donation of food (aside from donation requirements highlighted in Section 1), including tax incentives, liability protection, and food safety for food donation. This section includes:

- **Liability Protections for Food Donation:** This subsection describes the federal Bill Emerson Good Samaritan Food Donation Act,¹⁵ as amended by the Food Donation Improvement Act,¹⁶ which provides liability protections to food donors, and suggests methods for states to expand liability protection for food donations, using New Jersey's law as a model.
- **Tax Incentives for Food Donation:** This subsection presents current federal tax incentives for food donors and delves into opportunities for states to expand tax incentives as a mechanism to spur food donation, looking specifically at the tax incentives adopted in California as an example.
- **Food Safety Guidance for Food Donation:** This subsection explores the complexity of food safety regulations and the roles of federal and state governments in breaking down barriers to food donation presented by unclear food safety regulations, using Texas regulations as a model policy.



Section III: Supporting Organic Waste Processing Infrastructure

This section introduces a policy that can help states support and develop composting infrastructure to ensure there is sufficient capacity to recycle food scraps. This section includes:

- **Permitting and Zoning for Composting and Anaerobic Digestion Facilities:** This subsection explores opportunities for states to improve composting infrastructure by directing regulatory agencies to streamline permitting and zoning for composting facilities, using

Maryland and Ohio EPA guidance as a model for some of the key components.

- **Recycling Food Scraps into Animal Feed:** This subsection briefly walks through the history of how this beneficial practice has become heavily regulated. This section suggests eliminating state laws that restrict or unnecessarily burden those who wish to develop businesses that repurpose food scraps into profitable animal feeds, and further recommends providing informational and monetary support to those businesses.



Section IV: Developing End Markets for Compost

This section introduces policies that can help states support end markets for finished compost products resulting from composting food scraps, to make the financial case for increased recycling of food scraps. This section includes:

- **Compost Procurement:** This subsection explores compost procurement policies where states commit to purchasing local compost for their needs in order to support the market for compost, using Washington State's compost procurement law and the NRDC and Environmental Law Institute's drafted model as examples.
- **Incentivize Compost Application:** This subsection highlights opportunities for states to incentivize the application of compost to improve soil health, sequester greenhouse gases, and support compost end markets, using California's Healthy Soils Program as a model.



Section V: Preventing Food Waste Upstream

This section outlines policies to prevent food waste upstream, including reforming date labels to prevent safe, wholesome food from being thrown away due to confusion. This section includes:

- **Date Labeling:** This subsection explains what date labels mean and suggests how state governments can strengthen their date labeling laws to reduce consumer confusion and prevent food waste, using a bill introduced in Massachusetts as a model.



Section VI: Other Governmental Action to Address Food Waste

This section outlines other governmental policies and actions that states can take to reduce food waste, including food waste efforts in K-12

schools, climate and solid waste action plans, and government grants and support. This section includes:

- **Food Waste Reduction in K-12 Schools:** This subsection discusses the policies that states, municipalities, school districts, and schools can implement to decrease food waste, using Rhode Island's legislation related to food waste in K-12 schools to demonstrate legislative steps taken to enact such change.
- **Climate and Solid Waste Plans:** This subsection explores the potential to include food waste reduction targets and actions in climate action plans and solid waste management plans, using New Jersey's climate plan as a model.
- **Government Support for Food Waste Reduction:** This subsection explores federal and state government support for food waste reduction via funding and education.



SECTION II

OPPORTUNITIES TO PROMOTE FOOD DONATION

While organic waste bans and food donation requirements are the strongest steps states can take to keep food out of landfills and incinerators, there are many other less intensive policies that states can enact to promote food rescue and food donation to ensure that surplus food goes to people and not to landfills. These policies include creating tax incentives to help financially support businesses that choose to donate food, enacting liability protections to shield businesses who donate food from potential lawsuits, and clarifying food safety guidelines to ensure that food safety rules do not serve as a barrier to food donation and that businesses better understand what food safety rules apply to food donations.

Liability protections, tax incentives, and guidance around food safety for food donations are well established, strong policy options for states, and they have all been implemented successfully in various regions of the country. All 50 states have some form of liability protection, and as of the time of this toolkit, 11 states have tax incentives for food donation, and 12 states have some sort of guidance around food safety for food donation, though much state guidance is quite narrow.¹⁷ Each of these policies can operate independently or concurrently, and aside from tax incentives, all are essentially no-cost to the government. These policies can also serve as steppingstones, as liability protection and food safety for food donations are necessary components to Food Donation Requirements.

LIABILITY PROTECTIONS FOR FOOD DONATION

INTRODUCTION

As discussed in the Food Donation Requirement section, donating safe, surplus food can significantly reduce the amount of food sent to disposal while simultaneously supporting food security goals. Despite the many benefits of food donation, potential donors cite fear of liability as a major deterrent to donating food. For example, a 2016 survey conducted by the Food Waste Reduction Alliance, a joint industry task force comprised of leading companies and trade associations in the food industry, found that 25% of retailers and wholesalers, 39% of restaurants, and 50% of food manufacturers cite liability concerns as one of the main barriers to food donation.¹⁸

Although fear of liability is common, there has been no known litigation related to food donation liability, and both federal and state law provide robust liability protections for food donors. A 2013 survey of filings and reported decisions, conducted by the Food Recovery Project at the University of Arkansas School of Law, found no cases or pending litigation involving food donation liability.¹⁹ Even if there was litigation, on the national level, the federal Bill Emerson Good Samaritan Food Donation Act (the “Emerson Act”) provides comprehensive civil and criminal liability

protections to food donors and recipient nonprofit organizations.²⁰ On the state level, all 50 states offer food donor liability protection laws. While states cannot offer anything less than the liability protections provided under the Emerson Act (any existing laws that provide less protection are likely preempted and void²¹), they can provide stronger protections than those guaranteed by federal law. Additionally, states should at least amend their laws to be up to par with the protections offered by the Emerson Act so that protections are clear to potential donors. This section of the toolkit provides an overview of federal liability protections for food donors and then highlights best practices for state liability protection laws with a focus on New Jersey's law as a model.

FEDERAL LAW

The Emerson Act, originally passed in 1996 and amended by the Food Donation Improvement Act (FDIA)²² in 2022 (hereinafter collectively referred to as “the Emerson Act”), provides comprehensive civil and criminal liability protection against federal and state claims to encourage food donation to individuals experiencing food insecurity.²³ The Emerson Act covers both donors and intermediaries that distribute food, including all individuals (including home and community gardeners), government entities, schools,²⁴ businesses (including retailers, restaurants, farmers, and wholesalers), nonprofit organizations, the officers of businesses and nonprofit organizations, and gleaners (individuals that harvest donated agricultural crops for a nonprofit organization that distributes the food to individuals²⁵).²⁶

To receive protection under the Emerson Act, the donation must comply with the following conditions:

1. **Qualifying foods and grocery products:** The donor must donate “apparently wholesome food” or an “apparently fit grocery product” that meets food safety standards imposed by federal, state, and local laws and regulations, even if they contain flaws that make them unmarketable (for example, food products that contain aesthetic flaws or are the wrong size or grade).²⁷
2. **Direct Donations or Donations Through Non-Profits:** Unless the donor is a “qualified direct donor,” all donations must be made through a nonprofit organization, such as a food bank or food recovery organization,²⁸ to needy individuals. A “qualified direct donor” may donate through a nonprofit organization or directly to needy individuals. Organizations that qualify as direct donors are retail grocers; wholesalers; agricultural producers, processors, and distributors; restaurants; caterers; school food authorities; and higher educational institutions.²⁹
3. **Free or Good Samaritan Reduced Price:** When donors donate food or grocery products to nonprofit organizations, such as food banks and other food recovery organizations, liability protections will apply where the nonprofit offers the product to end recipients for free or at a “Good Samaritan Reduced Price,”³⁰ which is a price not greater than the cost of handling and distributing the food.³¹ When a “qualified direct donor” donates directly to individuals, liability protections will apply only if donations are made free of charge.³²
4. **Good faith:** Protection extends to donations made in good faith and does not extend to liability arising from “gross negligence or intentional misconduct.”³³

If the above requirements are met, both the food donor and the nonprofit food recovery organization will be shielded from both civil and criminal liability related to the donated food.

Despite its protections, the Emerson Act has several important limitations, including:

- **Compliance with labeling standards:** Food must comply with all federal, state, and local quality and labeling standards,³⁴ including those standards which are not linked to safety (e.g., net weight). Although food recovery organizations can recondition food to comply with labeling requirements,³⁵ this additional step may discourage potential donors.
- **Past-date foods:** The Emerson Act does not explicitly permit donations of past-date foods. However, the original House Committee report attached to the Emerson Act indicated that the donation of near or past-date food would not automatically constitute “gross negligence,”³⁶ and both the U.S. Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA) acknowledge that date labels are usually intended as a measure of quality rather than safety.³⁷ As such, ideally donors would be protected when donating safe, wholesome foods even past the quality date.

Lastly, while it is not a shortcoming of the legislation itself, many food businesses are not aware of the Emerson Act. This is in part because no federal agency is directly responsible for its implementation or oversight, and thus there are no regulations or detailed guidance explaining it.³⁸

MODEL STATE LAW

While the Emerson Act serves as a nationwide floor for liability protection, states can and do provide additional liability protections to food donors. All 50 states offer food donor liability protection laws, and some of these go beyond the federal protections.³⁹ Liability protections vary substantially across states, but ideally, a state food donor liability protection law would offer the following protections to build on the federal protections:

- **Including past date foods:** The law would expressly protect the donation of past date foods. For example, the New Jersey law expressly permits the donation of perishable or prepared foods “which [are] not readily marketable due to...passage of the ‘best by’ or other open date.”⁴⁰ Similarly, Washington’s law covers “perishable food that is fit for human consumption, but that has exceeded the labeled shelf-life date recommended by the manufacturer.”⁴¹
- **Permitting donation regardless of non-safety labeling:** It would not require donated food to comply with labeling requirements other than those linked to food safety (see Food Safety for Food Donations for more detail), as the need to comply with labeling requirements can increase donation costs and reduce food donation. Thus, food should only need to meet labeling requirements that are needed for safety. For example, Oregon protects donors “regardless of compliance with any laws, rules or ordinances regulating the packaging or labeling of food.”⁴²
- **Requiring guidance on protection offered:** Lastly, the law would mandate that the relevant state agency publish guidance about food donation liability protections, both to express

government’s support for food donation and to clarify any ambiguities, including the fact that federal protection also applies to state-law claims. Guidance should list any limitations on liability protection. For example, in Massachusetts, the Department of Environmental Protection and its RecyclingWorks program developed guidance and best practices around food donation, including FAQs and flowcharts.⁴³

New Jersey’s law is an example of a successful state liability protection policy, as it includes many best practices outlined above. The law:

- **Extends protection to past-date food:** The law extends liability protection to the donation of past-date food by extending protection to perishable and nonperishable foods’ best-by or other open dates.⁴⁴
- **Permits donation regardless of non-safety labeling:** The law’s protections apply “regardless of compliance with any laws, rules, regulations, or ordinances regulating the quality or labeling of food.”⁴⁵

See Appendix E for a model liability protection law.

TAX INCENTIVES FOR FOOD DONATION

INTRODUCTION

Because it is often cheaper to dump food than donate it, cost is a main reason that businesses fail to donate excess food. Donation costs include the time and money associated with sorting, packaging, storing, and transporting surplus food. In the United States, manufacturers, retailers, and restaurants often cite such logistical costs as the main barriers to food donation.⁴⁶ To offset these

financial barriers, governments can implement specific tax incentives for food donation and related expenses.⁴⁷ In doing so, tax incentives can increase food donation by supporting businesses, like farms, to recover some of their production costs by donating wholesome but unsellable food. Furthermore, tax incentives are a cost-effective policy because the government only pays them out after food is donated.

In the United States, there are two main types of tax incentives: tax deductions and tax credits. A tax deduction reduces the taxpayer’s taxable income, which is then used to calculate the amount of taxes owed.⁴⁸ By contrast, a tax credit is a direct reduction in the amount of taxes owed.⁴⁹

Tax Deduction	Tax Credit
$\text{Taxes} = (\text{Income} - \text{Tax Deduction}) \times \text{Tax Rate}$	$\text{Taxes} = (\text{Income} \times \text{Tax Rate}) - \text{Tax Credit}$

The federal government and several states offer tax incentives for food donation. The federal deduction can be a strong incentive; however, its structure as a deduction may not sufficiently serve some food producers, like farmers and small businesses. This is because tax deductions primarily benefit taxpayers in higher income brackets, while many food producers operate in lower income brackets. Alternatively, tax credits are relatively more generous to low-income businesses. Some states target these entities with tax credits to fill in the gaps and further spur food donation. Currently, 11 states—Arizona, California, Iowa, Maryland, Mississippi, Missouri, New York, Pennsylvania, Oregon, South Carolina, and West Virginia—offer tax incentives specifically targeted to increase food donation.⁵⁰ The following section

provides an overview of federal tax incentives for food donation and then highlights best practices for state tax incentives with a focus on California's laws as a model.

FEDERAL LAW

Section 170 of the federal tax code lays out two types of tax deductions for food donations: the general deduction for all types of in-kind donations⁵¹ and the enhanced deduction which is specifically for food.⁵² The general deduction allows a donor to deduct the basis value of the donated food,⁵³ which is a business' cost of producing or acquiring the donated food. The enhanced deduction is more generous, allowing a donor to deduct as much as double the basis value of the food,⁵⁴ but it also imposes additional requirements on the donor.⁵⁵

To qualify for the general tax deduction, the donation must be given to a qualified nonprofit organization and used for charitable purposes.⁵⁶ In contrast, to qualify for the enhanced deduction, a donation must satisfy four additional requirements. It must (1) be used to care for the ill, needy, or infants;⁵⁷ (2) be provided at no charge;⁵⁸ (3) be accompanied by a written statement confirming requirements are met;⁵⁹ and (4) comply with the Food, Drug, and Cosmetic Act.⁶⁰ If the donation does not meet all of these requirements, a donor cannot claim the enhanced deduction but may use the general deduction instead.⁶¹

Federal tax incentives have been successful in motivating food donation. For example, in the wake of Hurricane Katrina in 2005 when the enhanced deduction for food donations was temporarily expanded by the Katrina Emergency Tax Relief Act

to cover more donor businesses, food donations across the country rose by 137% the following year.⁶² The success of the 2005 expansion led Congress to make the enhanced deduction permanent for all businesses in December 2015.⁶³ Despite this positive development, opportunities remain to enact complementary state tax laws to further curb food waste.

MODEL STATE LAW

Though the federal tax deduction is strong, it does not and cannot reach all potential food donors. States can improve the reach of tax incentives by tailoring them to the needs of local businesses and farmers. 11 states have tax incentives that go beyond the federal tax deductions. While these laws vary widely, best practices include:

- **Structuring as a tax credit (versus a deduction):** Most states structure their tax incentives for food donation as tax credits rather than deductions.⁶⁴ As described above, a tax credit is a dollar-for-dollar reduction in tax burden, regardless of tax bracket. In contrast, tax deductions reduce taxable income, providing little or no benefit to low-margin businesses, which have less income and fall into lower tax brackets. Because many farms and food businesses operate with low margins, tax credits can be more effective at spurring donation than tax deductions.⁶⁵ By using tax credits, states can target businesses that would not benefit from the federal tax deduction, supporting a wider community of donors.
- **Tailoring the tax incentive to meet the state's needs:** State tax incentives vary significantly in terms of the types of foods covered and the types of entities eligible to claim the incentives. In designing tax incentives, states

should identify which taxpayers are most in need of additional incentives to donate—for example, entities like farms that may struggle to benefit from the federal enhanced tax deduction.⁶⁶ States should also consider what food items the state would like to see donated.⁶⁷ California (discussed in more detail below) offers two separate tax incentives, one for the donation of food and one for transportation costs associated with donated food.⁶⁸

- **Placing only reasonable limits on the amount of tax incentive each year:** States limit the size of their tax incentives by setting a percentage of the value of the donated food that can be claimed (ranging from 10% to 75%), setting caps on the annual amount that can be claimed by a business (ranging from \$1,000 to no cap), and limiting the total state-wide value of credits offered in a year.⁶⁹ While larger benefits will better incentivize donations, states must also consider their fiscal situation when creating tax incentives. If a state chooses to cap the amount a given taxpayer can claim or the overall amount annually for the credit, these limits should be reasonable, as should the percentage value of the donated food that can be claimed. For example, Mississippi's tax credit is capped at 50% of the taxpayer's total tax liability, and the total amount of tax credits that can be allocated among taxpayers by the Department of Revenue is capped at one million dollars.⁷⁰
- **Basing credit value on fair market value:** Basing the value of the donated food on its fair market value rather than basis value is better for businesses, as it is both more generous (the market value will almost always exceed its cost) and less cumbersome to calculate (costs can be more difficult to track and calculate).⁷¹ New York's incentive is structured this way and

provides a tax credit for 25% of the fair market value of the donation.⁷²

- **Permitting tax incentives when end recipients pay for food:** Some food banks and other non-profit organizations charge end users nominal fees to cover food handling costs. States should structure tax incentives to cover donations even when end recipients pay a fee. For example, Virginia's law (which expired in 2022) permitted tax incentives even when food banks or nonprofit organizations charged for the food, stating that donated food may be given away for free or "sold to the needy, other nonprofit food banks, or organizations that intend to use the food crops to provide food to the needy."⁷³
- **Offering an additional tax credit for transportation and processing costs:** Beyond the costs of producing or acquiring the food, costs associated with transporting food can be a particularly significant barrier to food donation. To be most effective, state tax credit should specifically target transportation costs in addition to covering the value of the food.

California's two tax incentive laws⁷⁴ are good models for state efforts to increase food donation by supplementing federal tax incentives as they include many best practices outlined above. For example, the laws:

- **Provide multiple tailored credits, covering a broad range of entities:** California has a broad donated food tax credit⁷⁵ and a more specific food donation transportation tax credit.⁷⁶ The food donation credit, passed in 2011, initially covered only farmers and fresh produce but was updated and expanded in 2016 and 2019 to include additional donors, such as processors, and additional agricultural products,

such as meat and processed foods.⁷⁷ The law allows donors to claim a tax credit worth 15% of the wholesale market price of food donated to California food banks.⁷⁸ There is no cap on the amount of credits a taxpayer can claim.⁷⁹ In 2021, the legislature extended the sunset date of the food donation tax credit to 2026.⁸⁰

- **Target transportation costs:** California's transportation-specific tax credit is also generous, allowing a taxpayer in "the business of processing, distributing, or selling agricultural products"⁸¹ to claim a tax credit equal to 50% of the transportation costs associated with donating an "agricultural product" to a nonprofit organization.⁸² As with the food donation tax credit, there is no cap.⁸³

Data shows that food donors are benefiting from these tax credits, and their numbers are increasing over time: 66 taxpayers claimed the food donation tax credit in tax year 2017,⁸⁴ and three years later this number had nearly doubled.⁸⁵

See Appendix F for model state legislation around tax incentives for food donations.

FOOD SAFETY GUIDANCE FOR FOOD DONATION

INTRODUCTION

Lack of clear food safety guidance poses a challenge to potential food donors. The food safety laws that apply to food establishments—like restaurants, cafeterias, and retail stores—vary by state and locality. Food donors and food recovery organizations often have trouble determining which food safety regulations apply to the food they wish to donate or distribute, particularly if they operate in multiple

locations. Meanwhile, health inspectors, who serve as the liaison between food establishments and food safety regulations, are typically unable to answer questions due to their own lack of awareness and training on food donation.⁸⁶ When they do answer questions, they may be risk-averse and discourage donations entirely. Uncertainty related to food safety coupled with lack of guidance means potential donors are unwilling to donate. As a result, safe and wholesome food is dumped instead of donated. Though it is crucial that donated food be safe, there are no known examples of recipients becoming ill due to donated food (see Liability Protection, for more information).

While the federal Food and Drug Administration (FDA) Food Code, which states can use as the basis for their statewide food codes, now includes a provision related to the legality of food donation,⁸⁷ there are several actions that state legislators and regulators can take to remove the barriers to food donation erected by food safety regulations. States can modify their food safety regulations to be more donation-friendly, develop guidance to support potential food donors, and train health inspectors to support food donations. The following section provides an overview of the federal FDA Food Code and then highlights best practices for state food safety policies for food donation with a focus on Texas's regulations as a model.

FEDERAL LAW

The FDA inspects food manufacturing facilities but leaves regulation and inspection of food establishments, such as restaurants, institutional kitchens, and retail food stores, to states.⁸⁸ However, the FDA drafts and publishes the FDA Food Code, which serves as a model that many

states and localities use in writing their own food safety regulations.⁸⁹ The FDA Food Code has a brief section specific to donations explaining that food that complies with the Food Code can be donated.⁹⁰ The Code's reference section then points to federal law, detailed guidance from the Conference for Food Protection (CFP), and a Food Safety and Inspection Service guidance document about donating meat and poultry products.⁹¹ CFP's guidance covers topics such as which foods are and are not safe for donation and how foods past their quality-based dates may be safely donated.⁹²

MODEL STATE LAW

Individual states are responsible for regulating the safety of food establishments and food donation from such entities. Many states and localities model their food safety requirements on the FDA Food Code. Because the FDA Food Code did not include information specific to food safety for food donations until 2023 and because the information therein is still limited, few states have legislation or regulations that address the issue. Texas is the only state with a comprehensive section in its regulations addressing all types of donated food, which includes topics such as temperature, packaging, labeling, and shelf life.⁹³ One nationwide survey found that only 12 states had legislation or regulations around food safety for donations, and many of these are quite narrow, for example, mentioning only food safety for share tables at schools or donating hunted game meat.⁹⁴

To minimize confusion and increase food donation, states should incorporate a uniform, specific food donation section into their food safety legislation or regulations and this section should

outline requirements in explicit terms to provide clarity to potential food donors and food recovery organizations. For maximum impact, relevant agencies should also train health inspectors on food safety for donations and disseminate guidance to potential food donors. Successful state legislation or regulation on food safety for food donations would:

- **Create a specific section on food donation:** For ease of use, states should create a specific section around food donation in their food safety requirements. Having one designated area where all the relevant food safety rules are compiled sends a powerful message that the state government supports food donation, removes the burden from the donor to hunt down the relevant regulations, and provides a roadmap to health inspectors about how to address food donations.⁹⁵
- **Provide clarity over which foods may be donated:** The law should outline which foods may be donated, with different requirements based on the safety risk posed by the type of food. In order to avoid confusion about which foods may or may not be donated, the law should list which foods cannot be donated and state clearly that all other foods not listed may be donated. States should also explicitly permit the donation of food past quality indicator date labels. States should also allow the donation of food with certain labeling flaws, such as food without the name of the food product; foods lacking proper statement of identity claims; a food product that does not have a country-of-origin label; in juices, a product that does not mention the percentage of juice; food products with incorrect net quantity information; food products missing or with flaws in the Nutrition Facts panel; and food products

with flawed health claims that do not raise safety risks. Often foods with labeling flaws go to waste because they cannot be sold but are still safe to donate. Food safety guidance can clarify that only labeling necessary for safety reasons is required on donated food.

- **Outline which foods may not be donated:**

The law should also explicitly state which foods may not be donated. Again, the Texas food code serves as a strong model, as it prohibits the donation of several items including unpackaged temperature controlled for safety (TCS) foods previously served to a consumer, damaged foods (such as heavily dented cans), foods without labels, and distressed foods.⁹⁶ States can also consider prohibiting donation of food past a safety-based date label, further solidifying the distinction between safety-based and quality-based date labels to promote donation of foods beyond their quality-based date.

- **Require training for health inspectors:**

As noted above, health inspectors can play a crucial role in educating food donors and promoting food donation. The law should require that health inspectors receive training on food donation to educate them about food donation and give them agency to guide food establishments.

- **Circulate additional guidance documents:**

Guidance documents can disseminate best practices, encourage potential food donors, and express government's support for food donation.⁹⁷ State law can also require that state or local health departments publish guidance documents explaining food safety for food donation. For example, in Washington DC, the Department of Health works in conjunction with the Office of Waste Diversion within the Department of Public Works to provide such guidance to food donors.⁹⁸



FOOD SAFETY FOR SHARE TABLES

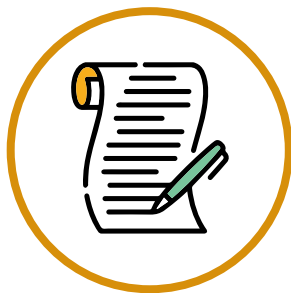
“Share tables” are school programs that allow students to leave uneaten school lunch components, such as unpeeled fruits or unopened snacks, at a communal “share table” for other students to consume. Of the 12 states with verified guidance on food safety for donation, six have developed guidance only related to food safety at share tables.⁹⁹ This guidance is crucial as share tables can be a key element to reducing school food waste. However, it is only applicable in the school food context and not helpful to other institutions. State guidance around food safety for food donation must address broader food safety concerns across a variety of food businesses. For more information on tackling school food waste, see Food Waste Reduction in K-12 Schools.

Texas state regulations¹⁰⁰ provide an example of a comprehensive policy regarding food safety for food donation because they include some of the best practices outlined above:

- **Outlining which foods may not be donated:** The regulations outline which foods may not be donated, including damaged food and food previously served to consumers. Publishing a list of foods that cannot be donated may ease potential donors' fears that they are or are not allowed to donate certain foods.

- **Requiring limited labeling:** Lastly, the regulations require that donated foods must have a label with the name of the food, the source of the food, and the food's preparation date.¹⁰¹ These labeling requirements for prepared food are relatively limited, which can increase food donation because full labeling requirements can serve as a barrier.

See Appendix G for model state legislation around food safety for food donations.



APPENDICES

MODEL STATE LEGISLATION

Note on definitions: throughout this document we use different definitions based on the models we pulled from and the implications of different words in different contexts. Of course, it is within the discretion of states using this toolkit to opt for different definitions or more standardized definitions as they see fit.

APPENDIX E: LIABILITY PROTECTIONS FOR FOOD DONATION

As discussed in the toolkit, federal law offers comprehensive liability protection for food donation, including against state law claims. Given this federal baseline, the protections outlined in sections 1-3 & 5-6, below, are duplicative of existing federal protections and are not strictly necessary to protect food donation. However, if passed, they may ease donor confusion. The model law also builds off the federal baseline by protecting the donation of past-date foods, requiring state agencies to offer liability protection guidance, and defining the rules that must be met to receive liability protection more narrowly to only ensure food safety.

Section 1. Definitions

- a. “Apparently fit grocery product” means a grocery product that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the product may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.
- b. “Apparently wholesome food” means food that is fit for human consumption at the time it was donated so long as it meets all safety rules and safety-related labeling standards required by federal, state, and local laws regardless of compliance with any laws, rules, or ordinances regulating the packaging or labeling of food which are not linked to food safety. Apparently wholesome food includes food that is not readily marketable due to appearance; age; freshness, including bearing a past-date quality date, sell-by date, or other date; grade; size; surplus; or other condition.
- c. “Donate” means to give without requiring anything of monetary value from the recipient, except that the term shall include giving by a nonprofit organization to another nonprofit organization, notwithstanding that the donor organization has charged a nominal fee to the donee organization, if the ultimate recipient or user is not required to give anything of monetary value.
- d. “Food” means any raw, cooked, processed, or prepared edible substance, ice, beverage, or ingredient used or intended for use in whole or in part for human consumption.

- e. “Gleaner” means a person who harvests for distribution to food insecure individuals, or for donation to a nonprofit organization for ultimate distribution to such individuals, an agricultural crop that has been donated by the owner.
- f. “Good Samaritan Reduced Price” means with respect to the price of an apparently wholesome food or apparently fit grocery product, a price that is an amount not greater than the cost of handling, administering, harvesting, processing, packaging, transporting, and distributing the apparently wholesome food or apparently fit grocery product.
- g. “Grocery product” means a nonfood grocery product, including a disposable paper or plastic product, household cleaning product, laundry detergent, cleaning product, or miscellaneous household item.
- h. “Gross negligence” means voluntary and conscious conduct by a person with knowledge, at the time of the conduct, that the conduct is likely to be harmful to the health or well-being of another person.
- i. “Intentional misconduct” means 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.
- j. “Nonprofit organization” means an incorporated or unincorporated entity that:
 - 1. Is operating for religious, charitable, or educational purposes; and
 - 2. 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.
- k. “Person” means an individual, corporation, partnership, organization, association, or governmental entity, including a retail grocer, wholesaler, hotel, motel, manufacturer, restaurant, caterer, farmer, school food authority, institute of higher education, and nonprofit food distributor or hospital. In the case of a corporation, partnership, organization, association, or governmental entity, the term includes an officer, director, partner, deacon, trustee, councilmember, or other elected or appointed individual responsible for the governance of the entity.
- l. “Qualified direct donor” means a retail grocer, wholesaler, agricultural producer, agricultural processor, agricultural distributor, restaurant, caterer, school food authority, or institution of higher education (as defined in section 102 of the Higher Education Act of 1965 (20 U.S.C. § 1002)).
- m. “Safety-related labeling standards” means standards for labeling or branding intended to communicate information to a consumer related to a food product’s safety, including but not limited to allergen information and ingredients.

Section 2. Liability Protection for Food Donors

Both (a) a person or gleaner who donates apparently wholesome food or an apparently fit grocery product in good faith to a nonprofit organization for ultimate distribution to needy individuals or (b) a qualified direct donor that donates apparently wholesome food or an apparently fit grocery product in good faith directly to needy individuals shall not be subject to civil or criminal liability arising from the nature, age, packaging, or condition of the apparently wholesome food or apparently fit grocery product except that this section does not apply to an injury to or death of an ultimate user or recipient

of the food that results from an act or omission of the donor constituting gross negligence or intentional misconduct.

Section 3. Liability Protection for Nonprofit Organizations

A nonprofit organization which distributes or serves apparently wholesome food or an apparently fit grocery product without charge or at a Good Samaritan Reduced Price shall not be subject to civil or criminal liability arising from the nature, age, packaging, or condition of the apparently wholesome food or apparently fit grocery product except that this section does not apply to an injury to or death of an ultimate user or recipient of the food that results from an act or omission of the donor constituting gross negligence or intentional misconduct.

Section 4. Liability Protection for Past-Date Foods

The donation of food that is fit for human consumption, but that has exceeded the labeled shelf-life date, is an activity covered by the exclusion from civil or criminal liability under this section if the person that distributes the food to the end recipient makes a good faith evaluation that the food to be donated is wholesome.

Section 5. Liability Protection for Gleaners

A person who allows the collection or gleaning of donations on property owned or occupied by the person by gleaners, or paid or unpaid representatives of a nonprofit organization, for ultimate donation to food insecure individuals or distribution to food insecure individuals by a nonprofit organization without charge or at a Good Samaritan Reduced Price, is not subject to civil or criminal liability that arises due to the injury or death of the gleaner or representative, except that this subsection does not apply to an injury or death that results from an act or omission of the person constituting gross negligence or intentional misconduct.

Section 6. Reconditioning

If some or all of the donated food or grocery product does not meet safety rules or safety-related labeling standards imposed by federal, state, and local laws and regulations, the person or gleaner who donates the food or grocery product is not subject to civil or criminal liability in accordance with this section if the nonprofit organization that receives the donated food or grocery products:

- a. Is informed by the distributor of the distressed or defective condition of the donated food or grocery products;
- b. Agrees to recondition the donated food or grocery products to comply with all safety and safety-related labeling standards prior to distribution; and
- c. Is knowledgeable of the standards to properly recondition the donated food or grocery product.

Section 7. Guidance

In order to support food donations and increase awareness of available liability protections, the Department shall publish guidance about liability protections for food donation, including the liability protections covered in sections 2 through 6 of this act and the liability protections provided in the Bill Emerson Good Samaritan Food Donation Act, as modified by the Food Donation Improvement Act, codified at 42 U.S. Code § 1791. The guidance should explain the limitations on liability protection and any steps a person must take to receive liability protection when donating food or when transporting, processing, or distributing donated food.

APPENDIX F: TAX INCENTIVES FOR FOOD DONATION

Section 1. Definitions

- a. “Apparently wholesome food” means food that is fit for human consumption at the time it was donated so long as it meets all “safety and safety-related” standards required by federal, state, and local laws regardless of compliance with any laws, rules, or ordinances regulating the packaging or labeling of food which are not linked to food safety. Apparently wholesome food includes food that is not readily marketable due to appearance; age; freshness, including bearing a past-date quality date, sell-by date, or other date; grade; size; surplus; or other condition. Apparently wholesome food does not include canned goods that are leaking, swollen, dented on a seam, or no longer airtight.
- b. “Donate” means to give without requiring anything of monetary value from the recipient.
- c. “Department” means *[Insert relevant state tax agency]*.
- d. “Nonprofit organization” means an incorporated or unincorporated entity that:
 - 1. Is operating for religious, charitable, or educational purposes; and
 - 2. 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.
- e. “Qualified taxpayer” means an individual, corporation, partnership, organization, association, or governmental entity, including a producer, retail grocer, wholesaler, hotel, motel, manufacturer, restaurant, caterer, farmer, school food authority, institute of higher education, nonprofit food distributor, or hospital.

Section 2. Credit for Food Donation

- a. For taxable years beginning on or after *[insert date]*, any qualified taxpayer that donates apparently wholesome food shall be allowed a credit against the tax levied pursuant to *[insert cross reference to relevant provisions of state's income tax law]* for the taxable year of the donation. The qualified taxpayer shall be allowed a credit in an amount equal to 75 percent of the fair market value* of such apparently wholesome food. This credit shall not exceed \$5,000 per tax year.**

**The most generous credits are over 75% but some states offer as little as 15%. You will need to decide what amount is right for your state.*

***Caps range from \$1,000 to unlimited.*

- b. In the case of a qualified taxpayer who transports any apparently wholesome food donated in accordance with section 2(a) for taxable years beginning on or after *[insert date]*, there shall be allowed as a credit against tax levied pursuant to *[insert cross reference to relevant provisions of state's income tax law]* for the taxable year of the donation. The qualified taxpayer shall be allowed a credit in an amount equal to 50 percent *[or set amount]* of the transportation costs (or any portion thereof) paid or incurred by the qualified taxpayer with respect to the conveyance of a donated food, including the coordination or arrangement of transportation services, in connection with the transportation of that qualified donated food item. This credit shall not exceed \$5,000 per tax year *[or amount decided]*.
- c. Credits shall be allowed under this section only if
 1. The use of the donated food by the donee nonprofit organization is related to providing food to the needy; and
 2. The donated food, if sold by the donee nonprofit organization, is sold to the needy or other nonprofit organizations that intend to use the food to provide food to the needy at a charge sufficient only to cover the cost of transporting and handling such food.
- d. Upon receipt of the donated food, the nonprofit organization shall provide a certificate to the qualified taxpayer, which shall contain the name of the qualified taxpayer, the name and address of the donee nonprofit organization, the date of the donation, the type and quantity of donated food, and, as provided by the qualified taxpayer, the fair market value of the donated food. The certificate shall also include a statement by the donee nonprofit organization that its use and disposition of the donated food complies with the requirements under section 2(c).
- e. For every taxable year for which a qualified taxpayer seeks a tax credit under section 2, the person shall apply to the Department in accordance with the forms, instructions, dates, and procedures prescribed by the Department.
- f. The amount of the credit claimed under sections 2(a) and 2(b) shall not exceed the total amount of tax imposed by the *[insert cross reference to relevant provisions of state's income tax law]* upon the qualified taxpayer for the taxable year. Any credit not usable for the taxable year for which the credit was first allowed may be carried over for credit against the income taxes of the qualified taxpayer in the next five succeeding taxable years or until the total amount of the tax credit has been taken, whichever is sooner.
- g. Credits granted to a partnership, limited liability company, or electing small business corporation (S corporation) shall be allocated to the individual partners, members, or shareholders, respectively, in proportion to their ownership or interest in such business entities.
- h. *[The strongest policies will not have a statewide annual cap. Some states chose to include an annual cap, using language like: "In no case shall the Department issue more than \$X in tax credits pursuant to this section in any taxable year.]*

- i. The Department shall be authorized to develop guidelines or regulations implementing the provisions of this section. The guidelines or regulations shall include procedures for the allocation of tax credits among qualified taxpayers.
- j. Using information available to the Department and as provided pursuant to section 2(e), the Department shall report to the legislature annually regarding the use of the credit authorized under section 2. The report shall include, at a minimum, the credits generated in the taxable year, the credits claimed in the taxable year, and the number of qualified taxpayers claimed credits.

APPENDIX G: FOOD SAFETY GUIDANCE FOR FOOD DONATION

Food safety for food donation is one of the most complex topics, and legislation will largely depend on a state's existing food safety laws and regulations. Given the complexity and variation in food safety regimes, this section includes two different options. First, the legislation can require the relevant state agency to promulgate food safety regulations specific to food donation. Alternatively, states can issue regulations based on the FDA Food Code to include provisions around food safety for food donation. It is recommended that states using the FDA Food Code as the basis for their food safety laws and regulations use the second option.

LEGISLATION THAT REQUIRES GUIDANCE

Section 1. Purpose

Over one-third of the United States' food supply is wasted, resulting in significant environmental and social harms. Donating wholesome food is a logical way to prevent food waste and feed those experiencing food insecurity. It is the intent of the state to promote food donation. However, it is crucial that any donated food not only be wholesome but also safe and hygienic to prevent foodborne illness. Currently, there is significant confusion around which food safety requirements apply to food donation. This statute requires *[insert relevant state agency information for the state health department]* to promulgate regulations and clarifying guidance on food safety for donated food.

Section 2. Definitions

- a. "Surplus food," for the purpose of this section, means food that is not sold or used by the food donor and is still safe to be consumed.
- b. "Department" means *[insert relevant state agency information for the state health department]*.
- c. "Food donor" means any individual, corporation, partnership, organization, association, or governmental entity, including a retail grocer, wholesaler, hotel, motel, manufacturer, restaurant, caterer, farmer, school food authority, institute of higher education, and nonprofit food distributor or hospital that donates food. In the case of a corporation, partnership, organization, association, or governmental entity, the term includes an officer, director, partner, deacon, trustee, councilmember, or other elected or appointed individual responsible for the governance of the entity.

- d. “Food recovery organization” means a nonprofit organization that provides food to individuals without charge or at a charge sufficient only to cover the cost of handling such food,* including but not limited to, a food pantry, food bank, soup kitchen, shelter, or other community-based organization.

**Including organizations that charge a small fee to cover transportation and handling costs enables organizations to provide significantly more food. Some states may not yet recognize these organizations, but we encourage their inclusion.*

- e. “TCS food” means food that requires time/temperature control for safety (TCS) to limit pathogenic microorganism growth or toxin formation.

Section 3. Regulations

- a. The Department, in consultation with other state and municipal agencies, shall adopt regulations outlining food safety requirements for food donors and food recovery organizations. Such regulations shall outline the responsibilities of food donors and food recovery organization to ensure that donated food is kept safe during transportation, storage, re-heating, and distribution, including specific requirements related to TCS food or previously served food.
- b. The Department, in consultation with other state and municipal agencies, shall adopt regulations outlining food labeling requirements. Such regulations shall clarify that food with a labeling flaw can be donated and that food past quality-based dates can be donated.
- c. Nothing in this regulation shall prohibit food donors from donating and food recovery organizations from distributing food even if it bears a past-due expiration date so long as the food donor determines that the food is safe. *Confirm that this provision does not conflict with your state's laws.*
- d. Nothing in this regulation shall prohibit food donors from donating commercially prepackaged food that fails to comply with any laws, rules, or ordinances regulating the packaging or labeling of food which are not linked to food safety.

Section 4. Guidance and Training

- a. The Department *[and any other relevant local departments]* shall ensure that health inspectors are trained annually on the regulations promulgated pursuant to Section 2 and on food safety for food donations more generally.
- b. The Department shall publish guidance documents outlining the requirements in the regulations promulgated pursuant to Section 2.
- c. The Department shall perform outreach to educate businesses on food safety for food donations and the benefits of food donation.

REGULATION INCORPORATING A FOOD DONATION SECTION TO THE FDA FOOD CODE LANGUAGE

This regulation would create an additional section of the state food code that deals with food safety for food donation. States that currently model their food safety rules on the FDA Food Code, either completely or in

part, should be able to incorporate this section relatively seamlessly, though the section includes several comments noting where states must include the correct cross reference to state law. For ease, we have included the current reference to the section of the FDA Food Safety code that states can use to determine the correct cross reference to their food safety laws or regulations.

Section 1. Purpose

Over one-third of the United States' food supply is wasted, resulting in significant environmental and social harms. Donating wholesome food is a logical way to prevent food waste and feed those experiencing food insecurity. It is the intent of the state to promote food donation. However, it is crucial that any donated food not only be wholesome but also safe, and hygienic to prevent foodborne illness. The intent of this section is to provide food safety standards to support persons and organizations that wish to donate surplus food. This section applies to donating, preparing, cooking, and transporting donated food to recipients.

Section 2. Lawful Food Donation

- a. The practice of donating food to another party, for ultimate distribution to needy individuals, is a lawful practice for a food establishment.
- b. The following categories of food shall not be donated:
 1. Food that is unsafe, adulterated, or otherwise required to be discarded as specified under *[insert rules regulating contaminated food—FDA Food Code § 3-701.11. You will need to find the relevant provisions in your state regulations that correspond to this requirement]*;
 2. Food that has not been protected from contamination as specified under *[insert reference to food safety requirements—FDA Food Code §§ 3-301 – 3-307. You will need to find the relevant provisions in your state regulations that correspond to these requirements]*;
 3. Food that is not from an approved source as specified under *[insert section about complying with food laws—FDA Food Code § 3-201.11; You will need to find the relevant provisions in your state regulations that correspond to this requirement]*;
 4. Food that does not comply with the standards for food donation as specified in this section.

Section 3. Previous Service Food

- a. Except as specified in subsection (b) of this section, exposed food which has been previously served to a consumer may not be donated.
- b. Food that has been offered for consumer self-service may be donated if the food establishment can verify that the food has been protected from contamination in accordance with *[insert food safety rules—FDA Food Code §§ 3-305, 3-306 and 3-307. You will need to find the relevant provisions in your state regulations that correspond to these requirements]*.

Section 4. Time/temperature Control for Safety Foods

- a. Time/temperature control for safety (TCS) food that has been heated, cooked, or hot held in a food establishment may be donated if:
 1. The food has been maintained at or above 57 degrees Celsius (135 degrees Fahrenheit) up until the time of donation; or
 2. The food
 - A. Has been kept at or above 57 degrees Celsius (135 degrees Fahrenheit) during hot holding and service, and subsequently cooled in accordance with time and temperature requirements under *[insert regulations related to cooling and cooling methods—FDA Food Code §§ 3-501.14 and 3-501.15. You will need to find the relevant provisions in your state regulations that correspond to these requirements]*; and
 - B. Has a temperature at or below 5 degrees Celsius (41 degrees Fahrenheit) at the time of donation.
 3. Food transported by a food establishment for donation shall be maintained and delivered at or below 5 degrees Celsius (41 degrees Fahrenheit) for cold foods or above 57 degrees Celsius (135 degrees Fahrenheit) for hot foods.
 - A. Foods received at a temperature between 5 and 57 degrees Celsius (41 and 135 degrees Fahrenheit) that have been within that range for less than four hours must be immediately served.
 - B. Foods received at a temperature between 5 and 57 degrees Celsius (41 and 135 degrees Fahrenheit) that have been within that range for more than four hours may not be donated.

Section 5. Labeling

- a. Except as specified in subsection (b) and (c) of this section, donated packaged foods shall be labeled consistent with federal law and with *[insert regulations related to packaging and segregation—FDA Food Code § 3-302.11; You will need to find the relevant provisions in your state regs that correspond to this requirement]*.
- b. Nutrition labeling is not required on donated foods pursuant to 21 CFR 101.9. Labels on donated prepackaged foods need only include the following information:
 1. Name and location (address, city, state, zip code) of the producer/manufacturer;
 2. Name of the product;
 3. An allergens list; and
 4. An ingredients list.
- c. Donated prepared foods should be labeled consistent with federal law. Labels on donated prepared foods need only include the following information:
 1. Name and location of the donor and of the recipient organization;

2. Description of the food;
 3. Date the food was donated;
 4. Any pertinent disclaimers that the food may contain or have come into contact with a major food allergen.
- d. Donated fresh produce does not require any labeling.

Section 6. Past-date food products

- a. Ready-to-Eat food may not be donated after the passage of the manufacturer's "use by" date or other such safety-based date intended as a safety indicator unless it was frozen prior to that date and has remained in a frozen state.
- b. Foods that are not Ready-to-Eat may be donated after the passage of the manufacturer's "best if used by" date or other such quality-based date that is intended as a quality indicator.

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25. 42 U.S.C. § 1791(b)(5). With respect to gleaners, the Act not only protects against liability arising from the consumption of donated food, but also protects the property owner from liability related to injuries the gleaner might sustain while on the property. 42 U.S.C. § 1791(d).
26. 42 U.S.C. § 1791(b)(10)–(11), (c).
27. 42 U.S.C. § 1791(b)(1)–(2) (food or grocery products may be apparently wholesome even if they are not “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”).
28. The Act defines a non-profit as an incorporated or unincorporated entity that satisfies these requirements: (1) operates “for religious, charitable, or educational purposes” and (2) “does not provide net warnings to, or operate in any other manner for the benefit of any officer, employee, or shareholder.” 42 U.S.C. § 1791(b)(10).
29. 42 U.S.C. § 1791(b)(12), (c)(1), (c)(3).

30. 42 U.S.C. § 1791(c)(1). Further, if one nonprofit donates food to another nonprofit for distribution, the Act allows the first nonprofit to charge the distributing nonprofit a nominal fee to cover handling and processing costs. 42 U.S.C. § 1791(b)(3).
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