

## Legal Fact Sheet for Massachusetts Food Donation: Date Labeling Laws - Working Draft March 2015

Date labels are the dates on food packaging that are accompanied by phrases such as “use by,” “best before,” “sell by,” “enjoy by,” and “expires on.” Date labels can lead to food waste because they are often misleading to consumers and result in safe, wholesome food being needlessly thrown away. Furthermore, date labels impact food donation in Massachusetts, because Massachusetts state law sets additional conditions on the sale or donation of any food once the labeled date has passed.

### Federal Law on Date Labels

There currently is no federal law regulating date labels.<sup>1</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>2</sup> Unfortunately, the FDA and the USDA have not interpreted this authority to allow them to regulate date labels, thus:

- The FDA does not require date labels on foods, other than infant formula.<sup>3</sup>
- The USDA does not require date labels on foods under its purview, including meats, poultry, and egg products.<sup>4</sup> If, however, USDA-regulated foods are dated, either as required under state law (see below) or voluntarily, they must include: (1) a day and month (and year for frozen or shelf-stable products) and (2) an explanatory phrase, such as “sell by” or “use before.”<sup>5</sup>

### Massachusetts State Law on Date Labels

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>6</sup> What has been consistent, however, is food manufacturers’ practice of basing these dates not on food safety but on optimal food quality and freshness.<sup>7</sup> Despite this fact, many consumers continue to believe date label are related to food safety.<sup>8</sup> However, no link has been shown between eating food after its labeled date and foodborne illness.<sup>9</sup>

Massachusetts state law on date labels is among the strictest in the country. Many states have chosen either not to regulate date labels at all or to regulate only one or two foods, such as milk or shellfish.<sup>10</sup> In contrast, Massachusetts generally requires all prepackaged “perishable” (a shelf life of 60 days or less) or “semi-perishable” (a shelf life greater than 60 days but less than 90 days) foods to have date labels.<sup>11</sup> Despite that general requirement, the following categories of foods are exempt from Massachusetts’ date labeling requirements:<sup>12</sup>

- Fresh meat, poultry, fish, fruits, and vegetables that are sold either unpackaged or in a container allowing “sensory examination” (for example, raw chicken or fish selected from a display case);
- Salt and crystallized refined sugar;

---

<sup>1</sup> See *Food Product Dating*, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating> (last visited February 25, 2015).

<sup>2</sup> See *What We Do*, FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/WhatWeDo/default.htm> (last visited February 25, 2015); *Labeling/Labeling Approval*, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling> (last visited February 25, 2015).

<sup>3</sup> See *Food Product Dating*, *supra* note 1.

<sup>4</sup> See *id.*; *Labeling/Labeling Approval*, *supra* note 2. The USDA does, however, require a “pack date” for poultry and a “lot number” or “pack date” for egg products certified by the USDA. HARVARD FOOD LAW & POLICY CLINIC AND NAT’L RES. DEF. COUNCIL, *THE DATING GAME: HOW CONFUSING FOOD DATE LABELS LEAD TO FOOD WASTE IN AMERICA* 11 (2013).

<sup>5</sup> *Food Product Dating*, *supra* note 1.

<sup>6</sup> HARVARD FOOD LAW & POLICY CLINIC AND NAT’L RES. DEF. COUNCIL, *supra* note 4, at 14 fig. 4.

<sup>7</sup> See *id.* at 17.

<sup>8</sup> *Id.* at 19.

<sup>9</sup> See *id.* at 19-20.

<sup>10</sup> See *id.* at 14 fig. 4.

<sup>11</sup> See 105 Mass. Code Regs. 520.119 (2013).

<sup>12</sup> *Id.*

- Bulk foods to be used in the manufacture of other foods, not to be distributed to consumers;
- Individually-packaged foods that are prepackaged as part of a larger food item, so long as the date labels are no sooner than the date label applied to the larger food item (for example, the granola in a yogurt parfait kit);
- Prepackaged foods for retail sale weighing less than 1.5 ounces; and
- Foods manufactured, processed, or stored for sale outside Massachusetts.

In Massachusetts, date labels on prepackaged perishable and semi-perishable foods, as well as any foods that are labeled voluntarily, must meet specific requirements. For example, these foods must have a “sell by date” or “best if used by date” determined by the manufacturer, processor, or whoever packaged them.<sup>13</sup> The date must be accompanied by a description of “recommended storage conditions,” if storage conditions would impact the date on the label.<sup>14</sup> Once a date is applied to perishable and semi-perishable foods, it cannot be changed (“recoded”).<sup>15</sup> Date labels can be recoded for foods that are voluntarily labeled, but only by the party who applied the original date.<sup>16</sup>

Despite the evidence that date labels are unrelated to food safety, Massachusetts (along with nineteen other states and the District of Columbia) sets additional conditions on the sale or donation of any food once the labeled date has passed.<sup>17</sup> Specifically, in order to sell or donate a food that is “past date” in Massachusetts, the food must satisfy three criteria:<sup>18</sup>

- It must be “wholesome,” and its sensory qualities must not have “significantly diminished”;
- It must be separated from foods which are not past date; and
- It must be clearly marked as being offered for sale after its sell by or best if used by date.

Only if these criteria are met will the food donor or seller be eligible for protection from liability under The Emerson Act and Massachusetts’ Good Samaritan statute.<sup>19</sup> To ultimately be afforded protection, however, the food donor or seller must meet the additional requirements of those laws, as described in *Massachusetts Best Management Practices around Food Donation: Liability Protections*.

## Conclusion

In sum, because there is no federal law on date labeling, its regulation has been left largely to the states. Massachusetts follows one of the most restrictive date labeling laws in the country. In Massachusetts, all prepackaged perishable and semi-perishable foods must have date labels; once applied by the manufacturer, processor, or whoever packaged the food, the date label cannot be recoded. Further, Massachusetts is one of twenty states that set additional conditions on the sale or donation of foods after the labeled date. Past date food may only be sold or donated in Massachusetts if it meets three criteria regarding wholesomeness, separation from other foods, and identification as past date.

---

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Telephone interview with Joan L. Gancarski, Food Protection Program of the Mass. Dep’t. of Public Health (Nov. 2, 2011).

<sup>16</sup> *Id.*

<sup>17</sup> See HARVARD FOOD LAW & POLICY CLINIC AND NAT’L RES. DEF. COUNCIL, *supra* note 4, at 12, 22; Mass. Gen. Laws ch. 94, § 328 (2011).

<sup>18</sup> 105 Mass. Code Regs. 520.119 (2013).

<sup>19</sup> See 42 U.S.C.A §1791 (b)(2), (c) (West 2011); Mass. Gen. Laws ch. 94, § 328 (2011).

## Legal Fact Sheet for Massachusetts Food Donation: Liability Protections - Working Draft March 2015

Businesses and nonprofits that provide or receive donated food are generally well-protected by laws designed to provide immunity from liability related to such donations. The federal Bill Emerson Good Samaritan Food Donation Act provides liability protection for food donors; and Massachusetts' Good Samaritan law provides additional liability protection to businesses in the state.

### The Emerson Act

The Bill Emerson Good Samaritan Food Donation Act (the Emerson Act) provides a federal baseline of protection for food donors.<sup>1</sup> The Act covers individuals, businesses, non-profit organizations, and the officers of businesses and non-profit organizations. It also covers gleaners—individuals that harvest donated agricultural crops to a nonprofit organization that distributes to the needy.<sup>2</sup> These individuals and businesses are protected so long as they donate qualifying types of food in good faith.

- **Qualifying Food:** The donated food must be “apparently wholesome” or an “apparently fit grocery product” and meet “all quality and labeling standards imposed by Federal, State, and local laws and regulations,” even if it is not “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”<sup>3</sup>
- **Exception for Reconditioned Food:** Even if a food does not meet all applicable standards, the donor can still be protected by the Emerson Act as long as he follows all of the Act’s reconditioning procedures,<sup>4</sup> which include:
  - 1) The donor informs the nonprofit of the nonconforming nature of the product;
  - 2) The nonprofit agrees to recondition the item so that it is compliant; and
  - 3) The nonprofit knows the standards for reconditioning the item.<sup>5</sup>

The Emerson Act protects many but not all donations of qualifying food. In order to get protection, the transaction must be structured such that:

- 1) The donor donates to a non-profit organization.<sup>6</sup>
- 2) This nonprofit organization distributes the donated food to needy populations.<sup>7</sup> Direct donations to needy individuals do not seem to be protected by the Act.<sup>8</sup>
- 3) The ultimate recipient does not pay for this donated food.<sup>9</sup> However, 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.<sup>10</sup>

The Emerson Act is quite protective of donors, and does not hold a donor liable unless the donor acts with gross negligence or intentional misconduct.<sup>11</sup>

---

<sup>1</sup> 42 U.S.C. §1791 (2012).

<sup>2</sup> 42 U.S.C. §1791(b)(5) (2012).

<sup>3</sup> There is an exception for mislabeled food products that are “not readily marketable,” which can also be protected so long as the donor explains the mislabeling to the donee, and the donee has sufficient knowledge do and does recondition the product to meet applicable standards. 42 U.S.C. §1791(b)(1-2) (2012).

<sup>4</sup> *Legal Guide to Food Recovery*, U. ARK. L.L.M DEP’T OF AGRIC. & FOOD LAW 10 (2013), available at <http://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> 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 earnings to, or operate in any other manner for the benefit of any officer, employee, or shareholder.” 42 U.S.C. §1791(b)(9) (2012).

<sup>7</sup> 42 U.S.C. §1791(b)(9) (2012).

<sup>8</sup> *Id.*

<sup>9</sup> 42 U.S.C. §1791(b)(3) (2012).

<sup>10</sup> *Id.*

<sup>11</sup> 42 U.S.C. §1791(c)(3) (2012).

- **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>12</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>13</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. Unfortunately, the Act gives little guidance on what activities qualify as gross negligence or intentional misconduct. However, the House of Representatives Report associated with the Emerson Act has indicated that each case must be analyzed individually, and that, for example, donating food past the sell-by date generally will not impact liability protections because such labeling is not federally required and often does not correspond to food safety.<sup>14</sup> The lack of court cases interpreting the Act is an indication of how protective the Act is of donors; research does not turn up a single case related to food donation liability.<sup>15</sup>

### Liability Protection for Food Donation in Massachusetts

There are two ways that state law is relevant to liability protection for food donations.

- **The Emerson Act:** The Act indicates that donated food must meet all applicable state and local food quality and labeling standards in addition to federal requirements.<sup>16</sup> This means that state law regarding food labeling and safety must be followed for a food donor to receive protection under the Emerson Act.
- **State Authority:** States are free to enact laws that are more protective of donors than the federal Emerson Act, which sets a floor on liability protection.<sup>17</sup>

The Massachusetts Good Samaritan Law protects donors who donate food, including food that is past date, to a nonprofit corporation for distribution as long as two requirements are met.<sup>18</sup>

- 1) The food cannot be misbranded or adulterated at the time of donation and must have been manufactured, processed, prepared, handled or stored in compliance with all applicable public health regulations.<sup>19</sup> This means that donated food must comply with the Massachusetts laws on date labeling in order to receive liability protection. These requirements are laid out in *Best Management Practices around Food Donation: Date Labeling Laws*.
- 2) Any injury resulting from such donation cannot be the result of “gross negligence, recklessness or intentional misconduct.”<sup>20</sup> Like the Emerson Act, the state law does not provide additional guidance on what constitutes gross negligence, recklessness, or intentional misconduct.

The state law also clarifies the requirements for nonprofits that accept donated food for distribution. No nonprofit can distribute or serve donated food unless the relevant establishment has been inspected and is in compliance with all inspection or permit requirements.<sup>21</sup> It cannot be charged a fee for these permits.<sup>22</sup> Additionally, whereas the federal Emerson Act only allows charges to cover costs between nonprofits, the state law allows a nonprofit to charge a fee to *individual recipients* that is sufficient to cover the cost of handling the food, in order to encourage social enterprise.<sup>23</sup>

---

<sup>12</sup> 42 U.S.C. §1791(b)(7) (2012).

<sup>13</sup> 42 U.S.C. §1791(b)(8) (2012).

<sup>14</sup> *Legal Guide to Food Recovery*, *supra* note 4 at 9.

<sup>15</sup> *Id.*

<sup>16</sup> 42 U.S.C. §1791(b)(1-2) (2012).

<sup>17</sup> *Legal Guide to Food Recovery*, *supra* note 4 at 10.

<sup>18</sup> MASS. GEN. LAWS ch. 94, § 328 (2015).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* One notable exception is that food prepared in private homes to go to nonprofit organizations is not subject to such licensing and inspection requirements.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

## Legal Fact Sheet for Massachusetts Food Donation: Tax Incentives - Working Draft March 2015

Federal tax incentives provide important financial incentives to businesses that make food donation more cost-effective and economically beneficial. These tax incentives have been extraordinarily successful in incentivizing food donation; when federal tax incentives for food donations were temporarily expanded to cover more businesses in 2006, food donations across the country rose by 137%.<sup>1</sup>

While in some states, federal tax incentives may be augmented by state level tax incentives,<sup>2</sup> Massachusetts has no such state-level policy. Therefore, businesses in Massachusetts are only eligible for federal tax incentives, which are available in the form of a standard tax deduction or an enhanced tax deduction. A standard tax deduction allows a business to deduct the basis of the donated food (the cost that the business paid to acquire it), while an enhanced deduction is more desirable because businesses can deduct an amount that is higher than the basis of the donated food (see below for more details). This guide will focus on how business structure affects eligibility for federal tax incentives, how to calculate federal tax incentives, and what restrictions there are on these incentives.

### Who is eligible?

**C-Corporations:** Under Section 170(e)(3) of the Internal Revenue Code, C-corporations are eligible for an enhanced tax deduction for the donation of certain property, including food (see below for details on the calculation of the enhanced and non-enhanced deductions).<sup>3</sup> This is a permanent provision of the tax code and C-corporations are therefore always eligible for the enhanced deduction.

**Businesses other than C-Corporations (LLC, S-Corporation, Sole Proprietorship, etc.):** At this time, businesses other than C-corporations are only eligible for a standard deduction. However, tax benefits can change from year to year and in the past Congress has extended the enhanced deduction to other businesses. In 2005, Congress passed the Katrina Emergency Tax Relief Act (KETRA), which extended the availability of the enhanced tax deduction to all businesses that donate food.<sup>4</sup> This provision was re-authorized multiple times, but it expired on December 31, 2014.<sup>5</sup> There is currently a bill in Congress that would permanently extend the enhanced deduction to businesses other than C-corporations.<sup>6</sup>

### How is the tax incentive calculated?

**Standard tax deduction:** In general, businesses that donate inventory may claim a tax deduction in the amount of the property's basis, which is usually its cost to the business and is often lower than the fair market value of the property.<sup>7</sup> A donating business' total annual deductions cannot exceed 10% of the business' taxable income for the year.<sup>8</sup>

**Enhanced tax deduction:** The enhanced deduction allows for the donating business to deduct more than its basis value. The donating business may deduct the lesser of (a) twice the basis of the donated food or (b) the basis

---

<sup>1</sup> *Feeding America Urges Swift Vote On Expired Tax Provisions*, FEEDING AMERICA (June 8, 2012), <http://www.feedingamerica.org/hunger-in-america/news-and-updates/press-room/press-releases/feeding-america-urges-swift-vote-on-expired-tax-provisions.html>.

<sup>2</sup> Currently Arizona, California, Colorado, Iowa, Kentucky, Missouri, and Oregon have tax incentives for food donation while Maryland and New York are considering such legislation. California law also provides a tax credit for 50% of the costs of transporting donated food. See Cal. Rev. & Tax. Code § 17053.12.

<sup>3</sup> See I.R.C. § 170(e)(3) (2014), available at <http://www.law.cornell.edu/uscode/text/26/170>.

<sup>4</sup> *United States Tax Benefits*, FOOD DONATION CONNECTION, <http://www.foodtodonate.com/Fdcmain/TaxBenefits.aspx> (last visited March 17, 2015).

<sup>5</sup> See H.R. 644, *Fighting Hunger Incentive Act of 2015*, CONGRESSIONAL BUDGET OFFICE (Feb. 5, 2014), <https://www.cbo.gov/publication/49932>.

<sup>6</sup> See *id.*

<sup>7</sup> See RONALD FOWLER & AMY HENCHEY, EXEMPT ORGANIZATIONS – CONTINUING PROFESSIONAL EDUCATION ARTICLES: IN-KIND CONTRIBUTIONS (1994), available at <http://www.irs.gov/pub/irs-tege/eotopice94.pdf>.

<sup>8</sup> See I.R.C. § 170(b)(2)(A), available at <http://www.law.cornell.edu/uscode/text/26/170>.

of the donated food plus one-half of the food's expected profit margin, had it been sold at its fair market value.<sup>9</sup> The 10% of taxable income limitation still applies.<sup>10</sup>

For example, let's say that a grocery store donates \$100 worth of potatoes. The basis value of these potatoes, or the cost that the grocery store paid to acquire them, was \$30. Under the enhanced deduction, the grocery store is eligible to deduct the smaller of:

- (a) \$60 – this is the basis-times-two calculation ( $\$30 \times 2$ ) **OR**
- (b) \$65 – this is the basis plus one-half of the profit margin ( $\$30 + 1/2[\$100 - \$30]$ )

The enhanced deduction would be \$60. The enhanced deduction is substantially higher than the standard deduction, which is limited to the basis value of \$30.

### **What restrictions and requirements are there on tax deductions for food donations?**

**Recipient:** In order to qualify for a federal tax deduction, a business must donate to a recipient organization that meets several criteria. First, the recipient must be a qualified 501(c)(3) not-for-profit as defined by the Internal Revenue Code.<sup>11</sup> Additionally, the recipient must adhere to the following guidelines:

- (A) The recipient must use the donated food in a manner consistent with the purpose constituting that organization's exempt status under IRC 501(c)(3), which means that the donated food must be used exclusively for charitable purposes;
- (B) The food must be used for the care of the ill, needy or infants;
- (C) The food may not be transferred by the recipient organization in exchange for payment of any kind.<sup>12</sup> For example, if a business donates food to a food bank (the recipient organization), the food bank may not charge a soup kitchen or individuals eating at a soup kitchen for the food.

**Record keeping:** In order to receive its tax deduction, the donating business must receive a written statement from the recipient organization.<sup>13</sup> The statement must describe the contributed property and represent that the property will be used in compliance with the requirements outlined above.<sup>14</sup>

**Quality:** 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>15</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>16</sup>

### **Conclusion**

Due to the absence of a Massachusetts state tax incentive for food donations, Massachusetts businesses are only eligible to receive federal tax incentives. Non C-Corporations are currently only eligible for a standard tax deduction, while C-Corporations are eligible for an enhanced tax deduction. The enhanced tax deduction improves the cost-effectiveness of donating food and encourages entities to donate surplus food rather than dispose of it.

---

<sup>9</sup> See I.R.C. § 170(e)(3)(B), *supra* note 3.

<sup>10</sup> See I.R.C. § 170(b)(2)(A), available at <http://www.law.cornell.edu/uscode/text/26/170>.

<sup>11</sup> See I.R.C. § 170(e)(3), *supra* note 3.

<sup>12</sup> See I.R.C. § 170(e)(3), *supra* note 3; see also FOWLER & HENCHEY, *supra* note 7.

<sup>13</sup> *Id.*

<sup>14</sup> 26 CFR 1.170A-4A(b)(4), available at <http://www.law.cornell.edu/cfr/text/26/1.170A-4A>; see also FOWLER & HENCHEY, *supra* note 7.

<sup>15</sup> See 26 CFR 1.170A-4A, *supra* note 14.

<sup>16</sup> See *id.*