

# Legal Fact Sheet

## New Hampshire Food Donation: Food Scraps for Animals

Created by the Harvard Food Law and Policy Clinic, October 2018

Societies have incorporated food waste into animal feed for centuries.<sup>1</sup> This practice declined in the 1980s, when state and federal laws tried to limit the feeding of food waste to animals following several disease outbreaks linked to animal products in livestock feed. Recently, there has been renewed interest in the practice of feeding safe, properly treated food waste to animals.

Using food scraps as animal feed in a safe, resource-efficient way can be an environmentally friendly and energy-efficient alternative to exclusively feeding livestock crops grown for that purpose. Repurposing otherwise wasted food has multiple benefits for regional farmers and food waste generators, such as retailers, restaurants, and educational institutions. These entities can partner to enhance the sustainability of their operations and reduce feed and disposal costs. Incorporating food scraps into animal feed can also reduce the demand for commercial feeds and the land, water, and other resources needed to produce them.

Federal and New Hampshire laws regulate the use of food waste in animal feed. This guide will examine both types of law.

### Federal Laws on Feeding Food Scraps to Animals

The federal government regulates the use of food scraps in animal feed by setting requirements which largely concern the type of animals that may be fed food scraps and the kind of food scraps that may be fed to animals. The federal regulations function as a floor that allows state regulations to go beyond them. Relevant federal laws include:

- The Federal Swine Health Protection Act (SHPA)**<sup>2</sup> mandates that, before being fed to swine, food waste containing meat and animal byproducts must be heat-treated (212 degrees Fahrenheit/100 degrees Celsius at sea level) for at least 30 minutes by a licensed facility.<sup>3</sup> Food waste containing only certain processed items—including industrially processed and rendered animal products, bakery waste, candy, eggs, domestic dairy products, and certain types of fish—need not be heat-treated.<sup>4</sup> SHPA requires feeders to keep swine away from untreated food waste, and to keep treated food separate from untreated food.<sup>5</sup> But SHPA does not prevent a household from feeding kitchen scraps to its own pigs, including those scraps containing untreated meat.<sup>6</sup>
- Transmissible Spongiform Encephalopathy (TSE)/Ruminant Feed Ban Rule**<sup>7</sup> prohibits the feeding of any protein-containing portion of mammalian animals to ruminants in order to prevent TSE (“Mad Cow Disease”).<sup>8</sup> Ruminants are animals that have a stomach with four chambers, such as cattle, sheep, and goats.<sup>9</sup>
- The Preventive Controls Rule for Animal Food in the Food Safety Modernization Act (FSMA)**<sup>10</sup> regulates animal feed that consists of human food byproducts,<sup>11</sup> which are defined as foods fit for animal but not human consumption, such as culls, peels, trimmings, and pulp from vegetable manufacturing or processing.<sup>12</sup> In general, facilities processing food that will be fed to animals must (1) establish current good manufacturing practices (CGMPs), (2) develop and implement Hazard Analysis and Risk-based Preventive Controls (HARPC), and, if the facility receives food from a supply chain, (3) coordinate with other entities in the chain to control identified hazards.<sup>13</sup> But not all facilities must comply with all three requirements. Some facilities are completely exempt from the rule, including certain farms and other facilities that are not required to register with the Food and Drug Administration (FDA).<sup>14</sup> Other facilities, such as those in compliance with the Preventive Controls rule for human food, are subject to modified requirements.<sup>15</sup>
- The Food, Drug, & Cosmetic Act (FDCA)**<sup>16</sup> asserts that animal feed,<sup>17</sup> like human food, cannot be filthy or decomposed, packaged or held under unsanitary conditions, or contain any poisonous or deleterious substance.<sup>18</sup> Moreover, food labels cannot be false or misleading in any way, and they must comply with certain, sometimes product-specific, requirements.<sup>19</sup> In general, an animal feed label must include the common or usual name(s) of the animal feed<sup>20</sup> and the name and place of the feed manufacturer, packer, or distributor.<sup>21</sup>

**Example Scenario:** *I own a small microbrewery. What practices should I follow when distributing byproducts from my business as animal feed?*

*A: Breweries produce spent grain, brewery mash, fruit or vegetable peels, and liquid whey as byproducts. They commonly distribute this waste as animal feed. Because these byproducts are not derived from meat or animal products, they do not fall under the other SHPA or the Ruminant Feed Ban Rule. Under the Preventive Controls rule, brewers must (1) be in compliance with the human food processing CGMPs, (2) not further process the brewing byproducts, and (3) follow those specified CGMPs for preventing physical and chemical contamination when holding and distributing brewing byproducts.<sup>22</sup>*

## Preventing Liability

Donating food to feed animals is not covered under the federal Bill Emerson Good Samaritan Act. Thus, businesses that donate food to feed animals are not protected from liability under federal law. However, in New Hampshire, food donated for feeding of animals is protected from liability, if the donation is made in good faith and without gross negligence, recklessness, or intentional misconduct.<sup>23</sup>

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### New Hampshire Law on Feeding Food Scraps to Animals

New Hampshire state law regulating feeding food scraps to animals only pertains to the feeding of swine. In particular, New Hampshire mirrors the SHPA by allowing the feeding of animal-derived food waste to swine provided that it has been heat-treated to at least 212 degrees Fahrenheit for 30 minutes or longer<sup>24</sup> and is fed by a permitted individual.<sup>25</sup> Individuals feeding animal-derived food scraps to swine must be permitted annually by the New Hampshire Department of Agriculture, Markets & Food.<sup>26</sup> These requirements do not apply to food waste that does not contain animal-derived scraps.<sup>27</sup> Individuals feeding household food waste to their own swine are also exempt from these requirements.<sup>28</sup>

Any farmer or animal feed producer that does not meet the above requirements risks revocation of his or her permit,<sup>29</sup> quarantine of his or her hogs,<sup>30</sup> and/or a misdemeanor violation for each day the violation occurs.<sup>31</sup> Farmers and animal feed producers must still follow all applicable federal laws even when there is no state law that applies to their practices.

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## Conclusion

Feeding food waste to animals has many economic and environmental benefits when done responsibly and in conformity with state and federal law. Individuals or businesses interested in the practice can learn more by consulting the New Hampshire Department of Agriculture, Markets, Food.

<sup>1</sup>See TRISTRAM STUART, *WASTE: UNCOVERING THE GLOBAL FOOD SCANDAL* 243–44 (First American Edition 2009).

<sup>2</sup> 7 U.S.C. § 3801 et seq. (2016); 9 C.F.R. § pt. 166 (2016).

<sup>3</sup> 7 U.S.C. § 3803(b); 9 C.F.R. §§ 166.2, 166.7.

<sup>4</sup> 9 C.F.R. §§ 166.1, 166.2.

<sup>5</sup> See e.g., 9 C.F.R. §§ 166.3(a), 166.4(a).

<sup>6</sup> 9 C.F.R. § 166.1.

<sup>7</sup> 21 C.F.R. §§ 589.1, 589.2000.

<sup>8</sup> 21 C.F.R. § 589.2000.

<sup>9</sup> 21 C.F.R. § 589.2000.

<sup>10</sup> 21 C.F.R. § 507.

<sup>11</sup> 21 C.F.R. § 507.12(a).

<sup>12</sup> Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Food for Animals, Final Rule, 80 Fed. Reg. 56169 - 56356 (Sept 17, 2015) (to be codified at 21 C.F.R. chapter undefined), <https://www.federalregister.gov/articles/2015/09/17/2015-21921/current-good-manufacturing-practice-hazard-analysis-and-risk-based-preventive-controls-for-food-for>, (last visited Jun. 9, 2016).

<sup>13</sup> 21 C.F.R. § 507.

<sup>14</sup> See 21 C.F.R. §§ 117.3, 117.5, 507.3, 507.5(d).

<sup>15</sup> 21 C.F.R. §§ 507.12(a), 507.12(b).

<sup>16</sup> 21 U.S.C. § 301 et seq..

<sup>17</sup> 21 U.S.C. § 321(f).

<sup>18</sup> 21 U.S.C. § 342(a)(1).

<sup>19</sup> 2 U.S.C. § 343.

<sup>20</sup> 21 C.F.R. § 501.3(a)(2).

<sup>21</sup> 21 C.F.R. § 501.5.

<sup>22</sup> 21 C.F.R. §§ 507.12(a), 507.12(b).

<sup>23</sup> N.H. Rev. Stat. Ann. § 508.15 (2016).

<sup>24</sup> N.H. REV. STAT. ANN. § 435:36 (1985).

<sup>25</sup> *Id.* § 435:33.

<sup>26</sup> *Id.* § 435:34; *Application for Permit to Feed Garbage to Swine*, DEPARTMENT OF AGRICULTURE, MARKETS & FOOD, DIVISION OF ANIMAL INDUSTRY, <https://www.agriculture.nh.gov/publications-forms/documents/feed-garbage-swine.pdf> (last visited Oct. 30, 2018).

<sup>27</sup> *Id.* § 435:32(I).

<sup>28</sup> *Id.* § 435:33(II).

<sup>29</sup> *Id.* § 435:35.

<sup>30</sup> *Id.* § 435:36-a.

<sup>31</sup> *Id.* § 435:40.



# Legal Fact Sheet

## New Hampshire Food Donation: Liability Protections

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Businesses (including farms) 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 New Hampshire state law provides some additional liability protection to food donors in the state.

### The Bill Emerson Good Samaritan 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 Emerson 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 the needy or to a nonprofit organization that distributes to the needy.<sup>2</sup> Donating individuals and businesses are protected when 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 be protected by the Emerson Act if (s)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.

The Emerson Act protects most but not all donations of qualifying food. In order to get protection, the transaction must be structured such that:<sup>5</sup>

- 1) The donor donates to a non-profit organization.<sup>6</sup>
- 2) The non-profit organization that receives the donated food distributes it to needy populations. Direct donations from the donor to needy individuals do not seem to be protected by the Act.
- 3) The ultimate recipients do not pay for this donated food. 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.

If these criteria are met, 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>7</sup>

- **Gross Negligence** involves “voluntary and conscious conduct (including a failure to act)” by a person or organization that knew at the time of donation that the food was likely to have harmful health impacts.
- **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.”

Essentially, an individual or organization should not donate or facilitate the distribution of donated food that the individual or organization knows is likely to be harmful or dangerous. Unfortunately, the Act gives little guidance on what activities are gross negligence or intentional misconduct. However, the House of Representatives Report associated with the Emerson Act indicates 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 generally does not correspond to food safety.<sup>8</sup> The lack of court cases interpreting the Emerson Act suggests how protective the Act is of donors; research does not reveal a single case related to food donation liability.<sup>9</sup>

### Liability Protection for Food Donation in New Hampshire

In addition to the federal liability protections, there are several ways in which New Hampshire’s state law is relevant to liability protection for food donations.

- **The Emerson Act:** The Emerson Act indicates that donated food must meet all applicable state and local

food quality and labeling standards in addition to federal requirements.<sup>10</sup> Therefore, state laws regarding food labeling and safety must be followed for a food donor to receive protection under the federal 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. New Hampshire has passed such legislation, codified in N.H. Rev. Stat. Ann. § 508:15.

### Overview of New Hampshire State Law

New Hampshire's state law provides civil and criminal liability protection to individuals and organizations that donate, in good faith, to a "needy individual or individuals or to a bona fide charitable or non-profit organization."<sup>11</sup> Thus, protections apply to direct donations and donations to a food distributor, which is defined as a non-profit or charitable organization. This provision is very similar to federal law but goes beyond federal law by allowing for donation directly to needy individuals.

Donated food includes "food not readily marketable due to appearance, freshness, grade, or surplus."<sup>12</sup>

Furthermore, in New Hampshire, liability protections apply when the end recipient pays for the food, if the cost "covers the cost of handling and administering such food and the distribution thereof."<sup>13</sup>

### Exceptions to Liability Protection Under New Hampshire State Law

Neither donors nor organizations that distribute food are protected if an injury results from "the gross negligence, recklessness, or intentional conduct of the organization."<sup>14</sup> The New Hampshire requirements for knowledge of harm vary slightly from the federal law by including "recklessness."<sup>15</sup>

Donors are liable for harm if, at the time of the distribution or serving of the food, the food is knowingly misbranded or adulterated or has been manufactured, processed, prepared, handled, or stored in violation of applicable rules of the Department of Health and Human Services.<sup>16</sup>

## Conclusion

Federal law and New Hampshire state law provide ample liability protections for food donors, so long as the donated food complies with federal and state safety and labeling rules, and it is donated in good faith and without the donor acting with gross negligence or intentional misconduct. New Hampshire state law bolsters federal liability protections by extending liability protection to donors that 1) donate food directly to the end recipient and 2) charge end consumers a fee to cover the cost of administering and distributing the food.

<sup>1</sup> 42 U.S.C. §1791 (1996).

<sup>2</sup> 42 U.S.C. § 1791(c)(1); 42 U.S.C. §1791(b)(5).

<sup>3</sup> 42 U.S.C. § 1791(c)(1); 42 U.S.C. §1791(b)(5). There is an exception for mislabeled food products that are "not readily marketable," which can also be protected if the donor explains the mislabeling to the donee, and the donee has sufficient knowledge to and does recondition the product to meet applicable standards. *Id.*

<sup>4</sup> 42 U.S.C. § 1791 (e).

<sup>5</sup> 42 U.S.C. § 1791(c).

<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).

<sup>7</sup> 42 U.S.C. §1791(c)(3).

<sup>8</sup> U.S. GPO, House Report 104-661, Committee Views, E (July 9, 1996); Legal Guide to Food Recovery, U. ARK. L.L.M. DEPT OF AGRIC. & FOOD LAW 10 (2013), available at <http://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf>. AKA: Legal Guide to Food Recovery, *supra* note 4, at 10.

<sup>9</sup> Legal Guide to Food Recovery, U. ARK. L.L.M. DEPT OF AGRIC. & FOOD LAW 10 (2013), available at <http://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf>. AKA: *Id.*

<sup>10</sup> 42 U.S.C. § 1791(c); 42 U.S.C. §1791(b)(1-2).

<sup>11</sup> N.H. Rev. Stat. § 508:15 (II).

<sup>12</sup> N.H. Rev. Stat. § 508:15 (IV).

<sup>13</sup> N.H. Rev. Stat. § 508:15 (II).

<sup>14</sup> N.H. Rev. Stat. § 508:15.

<sup>15</sup> N.H. Rev. Stat. § 508:15; 42 U.S.C. § 1791(c)(3).

<sup>16</sup> N.H. Rev. Stat. § 508:15(III).



# Legal Fact Sheet

## New Hampshire Food Donation: Date Labels

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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 across the supply chain. Consumers may discard food after the date on the package due to confusion about product safety and retailers or manufacturers may discard food due to confusion about selling or donating the past-date food.

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### Federal Law on Date Labels

There is currently no federal law regulating date labels,<sup>1</sup> with the exception of infant formula.<sup>2</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>3</sup> To date, 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>4</sup>
- The USDA does not require date labels on foods under its purview, including meats, poultry, and egg products.<sup>5</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 “best if used by.”<sup>6</sup> USDA revised its date labeling guidance in December 2016 to encourage food manufacturers and retailers to use “best if used by” to describe a date meant to communicate the time of peak product quality.<sup>7</sup> USDA guidance of this kind does not carry the force of law and is merely a recommendation to industry.<sup>8</sup>

In the absence of federal date labeling laws, two major trade associations for retailers and consumer products manufacturing, the Food Marketing Institute (FMI) and Grocery Manufacturers Association (GMA), launched a voluntary initiative to encourage retailers and manufacturers to only use one of two standard phrases on consumer facing food packaging.<sup>9</sup> The initiative encourages retailers and manufacturers to adopt the phrase “BEST if Used By” to describe dates meant to communicate freshness/quality and the phrase “USE By” for the few products that carry an increased food safety risk if consumed past a certain date.<sup>10</sup>

Though non-binding, government guidance and industry initiatives help to clarify date labels and indicate industry support for specific labeling regimes. Currently, because federal law is so limited, states have broad discretion to regulate date labels.<sup>11</sup>

### New Hampshire Law on Date Labels

As a result of broad state discretion in the absence of federal law, states have enacted inconsistent date labeling laws.<sup>12</sup> In response to this patchwork regulatory landscape, food manufacturers label foods with conservative dates based on optimal food quality and freshness,<sup>13</sup> rather than on food safety.<sup>14</sup> Despite this practice, many consumers continue to mistakenly believe date labels are related to food safety,<sup>15</sup> however, there is no evidence linking post-date consumption to foodborne illnesses.<sup>16</sup> Many states are working to standardize dates to alleviate consumer confusion.

As of 2018, New Hampshire regulates date labels on only one category of food products: prepackaged sandwiches.<sup>17</sup> With the exception of prepackaged sandwiches,<sup>18</sup> New Hampshire does not require date labels on food products and it does not regulate the sale of food products past the labeled date. For prepackaged sandwiches alone, New Hampshire requires all sandwiches not intended or expected to be eaten within 36 hours of packaging to be labeled with “expiration date” or “sell by” followed by the date.<sup>19</sup> The expiration date of the sandwich may not exceed 7 days beyond the date the sandwich was made.<sup>20</sup> The statute prohibits the sale of such sandwiches after the date has passed.<sup>21</sup>

New Hampshire does not expressly preempt local and municipal labeling laws.<sup>22</sup> Therefore, it is important for manufacturers and retailers to ensure compliance with any local or municipal laws that impose additional restrictions on food date labeling.

Individuals and businesses may only donate food that complies with federal and New Hampshire law. Neither federal nor New Hampshire law require date labels on most foods, except prepackaged sandwiches. Therefore, businesses, organizations, and individuals should feel free to donate past-date food. These donations should receive liability protection; see our Liability Protection Fact Sheet for more information.

## Conclusion

In sum, because there is no federal law on date labeling, regulation of these labels has been left largely to the states. New Hampshire date labeling law applies only to prepackaged sandwiches, but otherwise does not regulate date labeling. However, municipalities within the state may impose additional restrictions on date labeling; it is therefore important for manufacturers and local retailers to be aware of local laws.

<sup>1</sup> See FOOD PRODUCT DATING, U.S. DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating> (last visited October 22, 2018).

<sup>2</sup> 21 CFR § 107.20(c) (2018).

<sup>3</sup> 21 U.S.C. § 331(b); 21 U.S.C. § 343; 21 U.S.C. § 463(a); 21 U.S.C. § 607(c); 21 U.S.C. § 1043.

<sup>4</sup> See FOOD PRODUCT DATING, U.S. DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating> (last visited October 22, 2018); 21 C.F.R. § 107.20 (2018); 21 CFR § 107.20(c).

<sup>5</sup> See FOOD PRODUCT DATING, U.S. DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating> (last visited October 22, 2018). The USDA does, however, require a "pack date" for poultry and a "lot number" or "pack date" for egg products certified by the USDA. See U.S. DEP'T OF AGRIC., AGRIC. MKTG. SERV., AMS PY INSTRUCTION NO. 910, SHELL EGGS GRADING HANDBOOK, SECTION 5 (2012).

<sup>6</sup> 9 C.F.R. § 317.8(b)(32) (2018).

<sup>7</sup> See Press Release, Food Safety & Inspection Serv., U.S. Dep't of Agric., USDA Revises Guidance on Date Labeling to Reduce Food Waste (Dec. 14, 2016), <https://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating> (last visited October 22, 2018).

<sup>8</sup> See, e.g., *P. Gas & Elec. Co. v. Fed. Power Commn.*, 506 F.2d 33, 38 (D.C. Cir. 1974) (holding that an "agency cannot apply or rely upon a general statement of policy as law").

<sup>9</sup> See *Grocery Industry Launches New Initiative to Reduce Consumer Confusion on Product Date Labels*, GROCERY MANUFACTURERS ASSOC. (Feb. 15, 2017), <http://www.gmaonline.org/news-events/newsroom/grocery-industry-launches-new-initiative-to-reduce-consumer-confusion-on-pr/>.

<sup>10</sup> See *Grocery Industry Launches New Initiative to Reduce Consumer Confusion on Product Date Labels*, GROCERY MANUFACTURERS ASSOC. (Feb. 15, 2017), <http://www.gmaonline.org/news-events/newsroom/grocery-industry-launches-new-initiative-to-reduce-consumer-confusion-on-pr/>.

<sup>11</sup> See, e.g., U.S. CONST. amen. X.

<sup>12</sup> See, e.g., 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 14 fig. 4. (2013) (chart showing the substantial variations between state laws).

<sup>13</sup> See FOOD PRODUCT DATING, U.S. DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating> (last visited October 22, 2018); EASTERN RESEARCH GROUP, INC., CURRENT STATE OF FOOD PRODUCT OPEN DATES IN THE U.S. 3-2 (2003), [http://foodrisk.org/files/Food\\_Open\\_Dating.pdf](http://foodrisk.org/files/Food_Open_Dating.pdf).

<sup>14</sup> See EASTERN RESEARCH GROUP, INC., CURRENT STATE OF FOOD PRODUCT OPEN DATES IN THE U.S. 3-2 (2003), [http://foodrisk.org/files/Food\\_Open\\_Dating.pdf](http://foodrisk.org/files/Food_Open_Dating.pdf); THEODORE P. LABUZA & LYNN M. SZYBIST, CURRENT PRACTICES AND REGULATIONS REGARDING OPEN DATING OF FOOD PRODUCTS 20 (The Retail Food Industry Ctr., Working Paper No. 01, 1999), <http://ageconsearch.umn.edu/record/14318/files/tr99-01.pdf>.

<sup>15</sup> See EASTERN RESEARCH GROUP, INC., CURRENT STATE OF FOOD PRODUCT OPEN DATES IN THE U.S. 4-11 (2003); Katherine M. Kosa et al., *Consumer Knowledge and Use of Open Dates: Results of a Web-Based Survey*, 70 J. FOOD PROTECTION 1213, 1218 (2007).

<sup>16</sup> See, e.g., BUSINESS REFERENCE PANEL, BETTER REGULATION OF "USE BY" DATE LABELLED FOODS: A BUSINESS REVIEW 19 (2011), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/262575/11-1474-use-by-dates-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/262575/11-1474-use-by-dates-report.pdf) (study finding no direct evidence linking foodborne illness in the United Kingdom to consumption of food past its expiration date).

<sup>17</sup> N.H. REV. STAT. ANN. § 438:26-b (2018). In 2018, New Hampshire repealed its requirement to date label cream. Previously, New Hampshire required dairies to label cream with a date before which the cream could be reasonably assumed to not be sour, as determined by the manufacturer. N.H. L. Ch. 323 (S.B. 491) (2018, Regular Session); N.H. REV. STAT. ANN. § 184:30-g (2018).

<sup>18</sup> N.H. REV. STAT. ANN. § 438:26-b (2018).

<sup>19</sup> N.H. REV. STAT. ANN. § 438:26-b (2018); N.H. CODE ADMIN. R. AGR. 1412 (2018).

<sup>20</sup> N.H. CODE ADMIN. R. AGR. 1412.04 (2018).

<sup>21</sup> N.H. REV. STAT. ANN. § 438:26-b (2018).

<sup>22</sup> See, e.g., *Forster v. Town of Henniker*, 118 A.3d 1016, 1024 (N.H. 2015) (detailing limited circumstances in which New Hampshire state law preempts local law).

# Legal Fact Sheet

## New Hampshire Food Donation: Tax Incentives

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Federal tax incentives provide important financial incentives that make food donation more cost-effective and economically beneficial. These tax incentives have been extraordinarily successful in motivating food donation. In the past, federal tax incentives for food donations were limited to C-corporations.<sup>1</sup> Tax incentives for donations were temporarily expanded to cover more businesses in 2005. Following a series of temporary extensions, Congress subsequently made the expansion permanent in 2015,<sup>2</sup> providing all businesses with added incentive to increase food donations and prevent food waste. At the federal level, tax incentives are available in the form of general or enhanced deductions, each of which are discussed in this fact sheet.

In addition to the federal tax incentives, a number of states have enacted state-level tax incentives. As of October 2018, New Hampshire state law does not provide a state-level tax credit for food donations. However, New Hampshire has adopted most of the Internal Revenue Code, as in effect on December 31, 2016, for the calculation of business income and deductions.<sup>3</sup> The provisions that cover the federal food donation tax deductions are included within those adopted by New Hampshire.<sup>4</sup> New Hampshire businesses are therefore eligible to count federal tax deductions for food donations in the calculation of their income for both federal and state purposes.<sup>5</sup>

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### Federal Tax Incentives

#### How are the tax incentives calculated?

**General (non-enhanced) tax deduction:** Businesses that donate inventory may claim a tax deduction in the amount of the property's basis,<sup>6</sup> which is usually the value of the property's cost to the business, and is often lower than the fair market value (the value at which goods can be sold). Businesses other than C-corporations—including S-corporations,<sup>7</sup> sole proprietorships,<sup>8</sup> and some LLCs<sup>9</sup>—cannot deduct more than either 30% or 50% of the business' total taxable income each year, depending on the type of organization to which the business is donating.<sup>10</sup> C-corporations generally cannot deduct more than 10% of their taxable income each year.<sup>11</sup>

**Enhanced tax deduction:** The enhanced tax deduction provides an extra incentive for donation by allowing the donating business to deduct the lesser of (a) twice the basis value of the donated food or (b) the basis value of the donated food plus one-half of the food's expected profit margin (if the food were to be sold at fair market value).<sup>12</sup> Under the enhanced deduction, all businesses may deduct up to 15% of their taxable income for food donations.<sup>13</sup>

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

*(a) Basis Value x 2 = \$30 x 2 = \$60, or (b) Basis Value + (expected profit margin / 2) = \$30 + (\$70 / 2) = \$65*

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

Businesses that do not account for inventories and are not required to capitalize indirect costs will have the option to calculate the basis value at 25% of the products' fair market value.<sup>14</sup> Businesses also have the option to calculate the fair market value of certain products—i.e., those that cannot be sold because of failure to meet internal standards, lack of a market, or similar reasons—by using the price of the same or substantially similar, saleable food items.<sup>15</sup>

#### How can a donating business know if they are eligible for a tax deduction?

**General tax deduction requirements:** In order for a charitable contribution to qualify for a federal tax deduction, the donation must be used for charitable purposes and given to a qualified organization as laid out under section 170 of the Internal Revenue Code (IRC).<sup>16</sup>

**Enhanced tax deduction requirements:** In order to qualify for the enhanced 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 IRC.<sup>17</sup> Additionally, the donor and recipient must meet the following requirements:<sup>18</sup>

(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 money, other property, or services; however, the recipient organization may charge another organization a nominal amount for "administrative, warehousing, or other similar costs."

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

(D) The donating business must receive a written statement from the recipient organization. The statement must describe the contributed property and represent that the property will be used in compliance with the requirements outlined above; and

(E) 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. 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.

All but three states with corporate income tax conform to the Internal Revenue Code calculation of corporate income tax in lines 1 through 28 of IRS Form 1120.<sup>19</sup> In states with I.R.C. conformity, businesses may be eligible to also count the federal food donation tax deduction in the calculation of their state income taxes. Businesses claim the charitable contribution deduction on Line 19 of IRS Form 1120.<sup>20</sup> The Income amount used for the calculation of state taxes is already reduced by the amount of federal deductions, including charitable contributions, when it is transferred from Line 28 or Line 30 of IRS Form 1120 to state corporate income tax return forms.<sup>21</sup>

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## New Hampshire Tax Incentives

Over ten states currently offer state level tax incentives specifically for food donations.<sup>22</sup> New Hampshire has not created its own food donation tax incentive. However, New Hampshire has adopted nearly all of the federal Internal Revenue Code provisions related to the calculation of federal corporate income and deductions for the purposes of calculating state corporate income.<sup>23</sup> Therefore, New Hampshire corporations are eligible to use federal tax deductions for food donations in the calculation of their incomes for both federal and state taxes.

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## Conclusion

As of October 2018, New Hampshire does not have its own state tax incentive for food donations. However, New Hampshire businesses are eligible for the federal general and enhanced tax deductions for food donation. Because New Hampshire has adopted the Internal Revenue Code provisions covering food donation deductions, eligible businesses also may claim the deduction when calculating their New Hampshire State taxes.



<sup>1</sup> See I.R.C. § 170(e)(3)(C) (2017).

<sup>2</sup> See I.R.C. § 170(e)(3)(C) (2017); Protecting Americans Against Tax Hikes (PATH) Act of 2015, H.R. 2029, 114th Cong. § 113(a) (2015).

<sup>3</sup> N.H. REV. STAT. ANN. § 77-A:3-b.

<sup>4</sup> N.H. REV. STAT. ANN. § 77-A:3-b; 26 U.S.C. § 170(e)(3)(C) (2017); telephone Interview with Dianna, Senior Auditor, New Hampshire Department of Revenue Administration (Oct. 2, 2018).

<sup>5</sup> Note that farmers who allow gleaning organizations to harvest and donate surplus crops are eligible to benefit from applicable tax incentives provided they meet all other eligibility criteria.

<sup>6</sup> I.R.C. § 170(e)(1); 26 C.F.R. § 1.170A-4(a)(1) (2018); *Charitable Contributions: For Use in Preparing 2017 Tax Returns*, I.R.S., DEPT OF THE TREASURY 11, (Jan. 24, 2018), <http://www.irs.gov/pub/irs-pdf/p526.pdf> (noting the amount of the deduction is the fair market value minus the amount of income gained had the product been sold at fair market value).

<sup>7</sup> I.R.C. § 170(b)(1)(B)(i); I.R.C. § 1363(b).

<sup>8</sup> I.R.C. § 170(b)(1)(B)(i); *Sole Proprietorships*, I.R.S., <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Sole-Proprietorships> (last visited Oct. 29, 2018).

<sup>9</sup> I.R.C. § 170(b)(1)(B)(i); *Single Member Limited Liability Companies*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies> (last visited Oct. 29, 2018). Whether an LLC will be treated as an individual for tax purposes—and hence be subject to the 30% total charitable contribution cap—depends on the number of members in the LLC. *Id.*

<sup>10</sup> I.R.C. § 170(b)(1)(A).

<sup>11</sup> *Id.* § 170(b)(2)(A).

<sup>12</sup> See *id.* § 170(e)(3)(B); 26 C.F.R. § 1.170A-4A(b)(4) (2017).

<sup>13</sup> See *id.* § 170(e)(3)(C)(ii).

<sup>14</sup> See *id.* § 170(e)(3)(C)(iv).

<sup>15</sup> See *id.* § 170(e)(3)(C)(v).

<sup>16</sup> See *id.* § 170(b),(c), (e)(3)(c).

<sup>17</sup> See *id.* § 170(e)(3)(A).

<sup>18</sup> I.R.C. § 170(e)(3)(A); 26 C.F.R. § 1.170A-4A(b).

<sup>19</sup> Federal Tax Reform and the States, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 1, 2018), <http://www.ncsl.org/research/fiscal-policy/federal-tax-reform-and-the-states.aspx>. Arkansas, Mississippi, and New Jersey do not conform to federal income tax calculations.

<sup>20</sup> See I.R.S FORM 1120, U.S. CORPORATION INCOME TAX RETURN (2017).

<sup>21</sup> See I.R.S FORM 1120, U.S. CORPORATION INCOME TAX RETURN (2017).

<sup>22</sup> See e.g., Arizona, see Ariz. Rev. Stat. Ann. §§ 42-5074, 43-1025 (West 2016); California, see Cal. Rev. & Tax Code §§ 17053.12, 17053.88 (West 2016); Colorado, see Colo. Rev. Stat. Ann. § 39-22-301 (West 2016); Iowa, see Iowa Code §§ 190B.101–190B.106, 422.33(30) (West 2016); Maryland, see Md. Tax-Gen. Code Ann. § 10-745 (West 2018); Missouri, see Mo. Rev. Stat. § 135.647 (West 2016); New York, see N.Y. Tax § 210-B(52) (McKinney 2018); Oregon, see Or. Rev. Stat. §§ 315.154, 315.156 (West 2016); South Carolina, see S.C. Code Ann. § 12-6-3750 (West 2016); Virginia, see Va. Code Ann. § 58.1-439.12:12 (West 2016); and West Virginia, see W. Va. Code § 11-13DD (West 2017).

<sup>23</sup> N.H. REV. STAT. ANN. § 77-A:3-b.