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REDUCING FOOD INSECURITY AND FOOD WASTE

Improving the National Framework to Support Gleaning Operations

THE NATIONAL GLEANING PROJECT

VERMONT LAW SCHOOL

CENTER FOR AGRICULTURE & FOOD SYSTEMS

USDA United States Department of Agriculture
National Agricultural Library

Acknowledgments and Authors

BOSTON AREA GLEANERS

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INTRODUCTION

In 2014, the United States Department of Agriculture National Agricultural Library (USDA-NAL) supported the launch of the National Gleaning Project (NGP), housed at the Center for Agriculture and Food Systems (CAFS) at Vermont Law School, for the purposes of researching and reporting on gleaning efforts around the nation. The NGP's goal is to address both the legal and non-legal barriers that gleaning organizations encounter. In doing so, NGP has explored ways to incentivize food donations and address liability concerns of growers, gleaners, and nonprofit distributors (e.g., food banks, food shelves, or food pantries).[1]

Consistent with that purpose, this Report recommends programs and policies that would increase fresh food donations from gleaning organizations to nonprofit distributors. Improved financial, administrative, and legal support for gleaning operations will result in increased fresh food donations to food insecure families and reduced food waste in the United States.

1 One organization may perform at all or some of these roles. For instance, the Bellingham Food Bank in Washington also gleans over 100,000 pounds of produce a year. Laurie J. Beyranevand., Amber Leasure-Earnhardt, & Carrie Scrufari, Nat'l. Gleaning Project, Models for Success: A Set of Case Studies Examining Gleaning Efforts Across the United States 34 (2017).

Methodology

The term "gleaning" can encompass a variety of food recovery practices. The NGP adopts the definition of gleaning that is consistent with the Bill Emerson Good Samaritan Food Donation Act (Bill Emerson Act)—harvesting donated agriculture crops for a nonprofit food distributor or the needy.[2] The NGP conducted extensive primary and secondary research, interviewing and surveying over 60 gleaning organizations that conceptualize the term "gleaning" differently depending on their operations. In each case, however, the organization harvested fresh produce from farm fields, gardens, or fruit trees.

Between 2014 and 2016, the NGP interviewed 40 gleaning organizations around the country to learn about different operational models, as well as the legal and non-legal challenges organizations face. In addition, the NGP received survey responses from 87 gleaning organizations around the country. The survey measured: (1) pounds and types of produce gleaned or recovered in 2016, (2) volunteer involvement, (3) staffing capacity, (4) challenges to gleaning efforts, and (5) interest level in educational resources and collaborative opportunities.

In addition to contacting gleaning organizations directly, the NGP also conducted a legal analysis of the laws that affect gleaners, such as the Bill Emerson Act, the Food Safety Modernization Act, national and state tax incentive programs, and food donation liability laws in each of the 50 states. This white paper will first provide background information on the current legal landscape and the work that gleaning organizations conduct. Then this white paper will discuss the challenges gleaning organizations face and provide recommendations to address those challenges.

Between 2014 and 2016, the National Gleaning Project interviewed 40 gleaning organizations around the country to learn about the work they do and their current legal landscape. This white paper discusses the challenges these organizations face and offers recommendations for the future.

2 Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791(b)(5) (1996).

BACKGROUND


AFTER THE HARVEST

FEDERAL LAW[3]

The Bill Emerson Act

Except in cases of gross negligence or intentional misconduct, the Bill Emerson Act protects the following parties from civil and criminal liability:

- Good faith donors, including gleaners, who donate apparently wholesome food to nonprofit distributors responsible "for ultimate distribution to needy individuals";
- Donors, including gleaners, who donate unsafe food for human consumption so long as the receiving nonprofit distributor can and does recondition the food;
- Nonprofit distributors who receive good faith food donations and are responsible for donating that food "for ultimate distribution to needy individuals"; and
- Persons (growers)[4] who allow gleaners to collect or harvest food on their property.[5]

This intended protection could be more effective if the Act was clearer about the applicable laws and standard of care that it imposes on growers, gleaners, and nonprofit distributors. First, the Bill Emerson Act fails to define what a "good faith" donation entails. The Bill Emerson Act states that it does not "supersede State or local health

3 This Report addresses laws which gleaning organizations have cited as areas of concern and which most affect gleaning. A full list and description of federal (and state) laws related to gleaning is found on the NGP website: www.nationalgleaningproject.org.

4 Throughout this Report, the NGP refers to this category of "persons who allow gleaners" as "growers" because it is most applicable to gleaning. However, this category can include managers or owners of all types of property including: stores, restaurants, gardens, and markets.

5 Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. §1791 (1996).

regulations."[6] Therefore, it is unclear whether gleaners must comply with local, state, and federal food safety laws for a donation to be made in "good faith." In addition, the Act provides that apparently wholesome food must meet "quality and labeling standards imposed by Federal, State, and local laws and regulations."[7] However, the Department of Justice has interpreted the Bill Emerson Act as setting a national floor of liability protection for those involved in food donation above which the states are free to legislate.[8] It is unsettled whether growers or non-profit distributors would lose the protection of the Bill Emerson Act if they were out of compliance with state or local laws. Notably, the opinion's interpretation has never been litigated.

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Second, the scope of protection is unclear because the Bill Emerson Act protects food donors who donate to a "nonprofit organization for *ultimate distribution* to the needy," and nonprofit organizations when they receive good faith donations for "*ultimate distribution* to the needy," (emphasis added).[9] A court could interpret the text narrowly to protect only those who donate food to organizations directly responsible for ultimate distribution. Alternatively, a court could interpret the text broadly to apply to anyone who donates food that ultimately is distributed to the needy, even through intermediary organizations.

Third, the Bill Emerson Act leaves some practices unprotected. If a court interprets the term *ultimate distribution* narrowly, then the Bill Emerson Act would not protect growers who donate to an intermediate distributor from liability for injuries the end recipient may receive from the donated food.[10] The grower would be protected only if he or she donated directly to the final nonprofit distributor in the distribution chain.[11] The Act also fails to protect gleaning organizations from liability for injuries its volunteers might receive while gleaning.[12] As a result, gleaning organizations must purchase liability insurance. But, as the NGP Case Study Report revealed, liability insurance is costly and can be difficult to obtain.[13] Thus, while the Bill Emerson Act provides important protection for gleaning organizations, the scope of its protections is unclear.

6 42 U.S.C. § 1791(f).
7 42 U.S.C. § 1791(b)(2).
8 Memorandum from the Dep't of Justice to the Gen. Counsel at the U.S. Dep't of Agric. 55–59 (Mar. 10, 1997) (on file with author), https://www.justice.gov/sites/default/files/olc/opinions/1997/03/31/op-olc-v021-p0055.pdf.
9 42 U.S.C. § 1791(c)(1),(2).
10 42 U.S.C. § 1791(d) (protecting a "person who allows the collection or gleaning of donations on property owned or occupied by the person" from "civil or criminal liability that arises due to the injury or death of the gleaner or representative" but not from any injury to the end-recipient).
11 42 U.S.C. § 1791(c)(1).
12 *See* 42 U.S.C. § 1791(d) (limiting protection from liability due to the injury of gleaners to the "person who allows the collection or gleaning of donations on property owned or occupied by the person" but providing no protection for the gleaning organization).
13 Laurie J. Beyranevand, Amber Leasure-Earnhardt, & Carrie Scrufari, Nat'l. Gleaning Project, Models for Success: A Set of Case Studies Examining Gleaning Efforts Across the United States 10, 24 (2017), http://forms.vermontlaw.edu/farmgleaning/GleaningReport_2017.pdf [hereinafter Models for Success].

The Food Safety Modernization Act (FSMA)

Congress delegated authority to the Food and Drug Administration (FDA) to promulgate and enforce rules under FSMA.[14] The FDA does not explicitly regulate gleaning organizations or nonprofit distributors. However, if gleaning organizations or nonprofit distributors harvest produce directly from the field, they operate within the FDA's definition of a primary farm.[15] Gleaning organizations and nonprofit distributors that collect and distribute only surplus produce do not meet the FDA's definition of a primary or secondary farm.[16]

Even though field gleaning organizations and some nonprofit distributors may fall under the definition of a primary farm, they are likely exempt from the FSMA regulations. The FDA exempts farms with a three-year average of less than $25,000 in annual produce sales as well as certain raw agricultural commodities.[17] Most gleaning organizations probably will not average produce sales in excess of $25,000 annually, and therefore, will be exempt from the FSMA.

> **Gleaning organizations and nonprofit distributors should take care to donate food that was grown in compliance with the FSMA regulations.**

However, FSMA may inadvertently apply to some nonprofit distributors who also sell the produce that they harvest at reduced prices. For instance, Daily Table is a nonprofit retail store that sells food from its "large network of growers, supermarkets, manufacturers, and other suppliers who donate their excess, healthy food."[18] FSMA would cover Daily Table and other nonprofits with similar business models if those nonprofits have a three-year average of produce sales that exceeds $25,000.

Nevertheless, gleaning organizations and nonprofit distributors should still take care to donate food that was grown in compliance with the FSMA regulations.[19] The Bill Emerson Act protects food donations as long as they meet "quality and labeling standards imposed by Federal, State, and local laws and regulations."[20] Arguably, FSMA is a federal food quality law even though FSMA contains the word "safety" and not "quality."[21] In sum, gleaning organizations should familiarize themselves with FSMA's requirements as a general best practice even if they are not strictly required to follow the requirements in their own operating procedures.

14 Food and Drug Admin. Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2012) (codified as amended in scattered sections of 21 U.S.C.).
15 21 C.F.R. § 112.3 (2016).
16 21 C.F.R. § 112.3 (2016).
17 Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 80 Fed. Reg. 74410 (proposed Nov. 27, 2015) (codified at 21 C.F.R 112).
18 *About Us*, Daily Table, http://dailytable.org/about-us/our-story/ (last visited Mar. 4, 2017).
19 Some raw-agricultural commodities are exempt from FSMA regulations though, and gleaners donating those food items would not have to ensure FSMA compliance. 21 C.F.R. § 112.2.
20 Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791(b)(2) (1996).
21 Congress has previously used quality and safety interchangeably. *See* Food Quality Protection Act of 1996, Pub. L. No. 104-170, §405, 110 Stat. 1489 (setting tolerances for pesticide use in food and directing Congress to consider safety standards when setting tolerances level).

Federal Tax Incentives

The federal tax code encourages food donations to nonprofit distributors by providing a tax deduction. Under section 170(e)(3) of the Internal Revenue Service (IRS) code, food donors, such as growers, can receive a tax deduction of up to 15% of the food donor's annual income.[22] The deduction is determined by the lesser value of either: "(a) twice the basis of the donated food; or (b) the basis value of the donated food plus one half of the food's expected profit margin, if it were sold at fair market value."[23]

If a food donor's deduction exceeds their taxable income, the federal code allows the donor to apply the remainder to subsequent years, up to five years.[24] Generally, smaller growers do not have a high enough income to make a one-time deduction worthwhile.[25] Thus, the ability to roll the deduction over to future years is vital for growers to realize a monetary incentive to donate agriculture crops and products.


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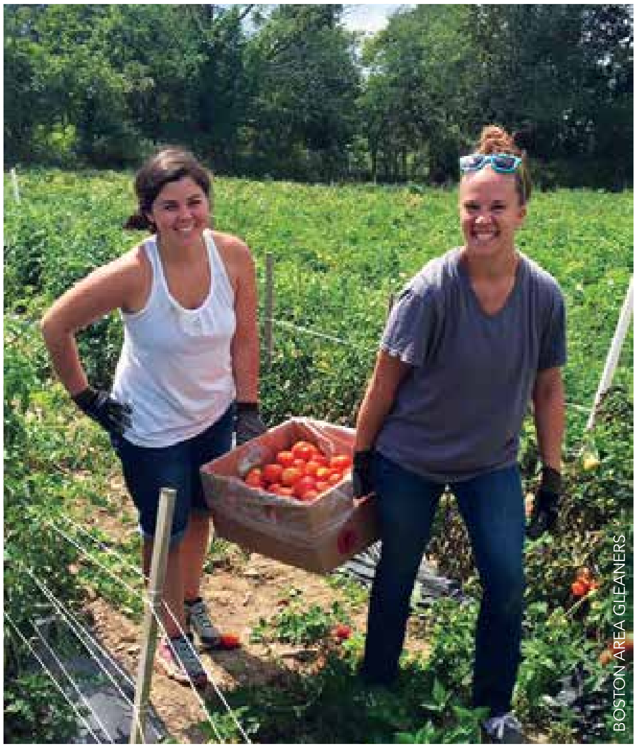
The federal tax code encourages food donations to nonprofit distributors by providing a tax deduction. Food donors, such as growers, can receive a tax deduction up to 15% of the food donor's annual income.

22 *See* National Gleaning Project, Federal Enhanced Tax Deduction for Food Donations (2016), http://forms.vermontlaw.edu/farmgleaning/factsheets/EnhancedTaxDeductionGuideForFarmers.pdf (summarizing 26 U.S.C. § 170(e)(3) (2012)).
23 *Id.*
24 *Id.*
25 *Federal Tax Policy Issues*, United States. Dep't. Agric., https://www.ers.usda.gov/topics/farm-economy/federal-tax-issues/federal-tax-policy-issues/ (last updated Jan. 27, 2017).

STATE LAW

State Liability Statutes



Prior to the passage of the Bill Emerson Act, each state had its own law regarding food donations, and these laws are still on the books.[26] The laws reflect a full spectrum of liability protection or vulnerability. With the passage of the Bill Emerson Act, it is unclear whether all state laws are still valid or whether the Act preempts those state laws that provide less protection than the national floor.[27]

If the Bill Emerson Act sets a national floor for liability protection, it would be difficult to determine which state's laws the Act preempts because most states do not use the same terminology as the Act. For example, the Bill Emerson Act protects parties unless they act with "gross negligence or intentional misconduct,"[28] but Colorado protects parties unless the donation constitutes a "willful, wanton, or reckless act."[29] Similarly, Connecticut protects food donors from liability unless they "knew or had reasonable grounds to believe that the food was … adulterated."[30]

In contrast, only Arizona uses the Bill Emerson Act's language to protect the gleaner, nonprofit distributor, and grower (liability protection is afforded unless one acted with gross negligence or intentional misconduct).[31] Washington, D.C., uses the same language to protect the gleaner and nonprofit distributor,[32] and Virginia and Washington State use the same language to protect growers and gleaners.[33]

Most states employ language that is similar to gross negligence or intentional misconduct. For instance, Iowa protects food donors from liability unless they acted

26 For a list of all applicable state laws regarding liability for food donations, visit State Laws and Regulations, National Gleaning Project, at http://forms.vermontlaw.edu/farmgleaning/indexnew.cfm?id=cat&&no=2

27 Memorandum from the Dep't of Justice to the Gen. Counsel at the U.S. Dep't of Agric. 55–59 (Mar. 10, 1997) (on file with author), https://www.justice.gov/sites/default/files/olc/opinions/1997/03/31/op-olc-v021-p0055.pdf.

28 42 U.S.C. §1791(c)(3).

29 Col-Rev-Stat. §13-21-113 (2016).

30 Conn. Gen. Stat. § 52-557 (2016).

31 ARIZ. REV. STAT. § 36-916 (1991).

32 D.C. Mun. Regs. tit. 48, §301 (2017).

33 WASH. REV. CODE § 69.80.031 (1994); VA. CODE ANN. § 3.2-5144 (2008).

recklessly.[34] In Indiana, the food donor cannot be held liable unless the donor acted knowingly.[35] Wyoming, like Colorado, protects food donors unless they acted willfully, wantonly, or recklessly.[36] Different jurisdictions could interpret these terms to provide less, more, or the same protection as the Bill Emerson Act.[37]

Still other states are outliers to the general pattern described above. For instance, California, provides no liability protection to nonprofits that donate "agricultural products."[38] In sum, because public health and safety—which historically included food safety prior to the passage of the Federal Food Drug and Cosmetic Act[39]—has typically been a traditional state police power,[40] Congress should clarify whether it intended to preempt state law with the Bill Emerson Act.[41]

State Tax Incentives

Seven states and Washington, D.C., currently provide either a state tax credit or tax deduction to those who donate food to nonprofit organizations that distribute food to needy or low-income individuals and families (nonprofit distributors). Most states use a tax credit rather than a deduction. When a tax credit is available, states require a certification from the nonprofit distributor that details: the quantity of received food, the type of food, the name and address of the donor, origin of the food, and date of donation.[42]

All states that offer tax credits also allow the credit to roll over to the next year if the credit exceeds the food donor's taxable income. A tax credit allows the tax payer to reduce the total taxes due, and a tax deduction reduces the taxpayer's taxable income.[43] The greater the income, the greater the deduction.[44] Therefore, a credit could be more beneficial if a taxpayer does not have a high taxable income. Already, most farmers in the United States have a low taxable income and pay almost no taxes.[45] As such, tax credits are more useful, especially when the credit can roll over to subsequent years. The following table describes how the tax credit operates within each state currently offering this incentive.

34 Iowa § 672.1 (2008).
35 Ind. Code Ann. §34-30-5-1 (LexisNexis 2016).
36 Wyo. Stat. Ann. §35-7-1301 (2017).
37 These terms' definitions have mostly been examined in criminal law. See generally C.T. Foster, Annotation, *Test or criterion of term "culpable negligence," "criminal negligence," or "gross negligence," appearing in statute defining or governing manslaughter*, 16 A.L.R. 10 (1946) (reviewing the novel interpretations each state has to different culpability terms).
38 Cal. Food & Agric. Code § 5806 (Deering 1977).
39 Federal Food, Drug, and Cosmetic Act, 50 Stat. 1040 (1938) (codified at 21 U.S.C. 301 (2012)).
40 *Medtronic, Inc v. Lohr*, 418 U.S. 470, 475 (1996).
41 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
42 Each of the states that provide a tax credit require a certification with similar language. See e.g., Ky. Rev. Stat. § 141.392 (2017) (The receiving nonprofit must provide a form to the donor stating: "The type and quantity of product donated; the name, address, and taxpayer identification number of the donor or donors; the name and address of the donee nonprofit food program; and the estimated value of the donated edible agricultural products, as provided by the donor.").
43 The Tax Policy Center, *Individual Taxes*, http://www.taxpolicycenter.org/briefing-book/whats-difference-between-tax-deductions-and-tax-credits (last visited Feb. 27, 2017).
44 *Id.*
45 *Federal Tax Policy Issues*, United States. Dep't. Agric., https://www.ers.usda.gov/topics/farm-economy/federal-tax-issues/federal-tax-policy-issues/ (last updated Jan. 27, 2017).

CURRENT STATES WITH TAX CREDITS FOR FOOD DONORS

State	Credit Amount[46]	Roll-over Period	Category of Food[47]	Expires
Colorado[48]	**25%** up to $5,000	5 years	If a corporation: Crops harvested or livestock raised by the donor	NA
			If an individual: All food products fit for human consumption	Jan. 2, 2025
Iowa[49]	**15%** up to $2,500	5 years	Agriculture products	NA
Kentucky[50]	**10%**	4 years	Agriculture products	Jan. 1, 2018
Oregon[51]	**15%**	3 years	Agriculture crops[52]	NA
Virginia[53]	**30%** up to $5,000[54]	5 years	Agriculture crops	Jan. 1, 2022
Washington, D.C.[55]	**50%** up to $2,500	5 years	Crops from urban farms or community gardens	NA

Currently California also allows a tax credit, but it applies to the cost of transporting the donated food.[56] The transporter may receive a credit up to 50% of the cost of transportation, and there are code provisions that apply equally to the individual transporter or a corporation.[57] Unlike the above credits that relate to the value of the food donated, this credit does not expire within a certain time; the transporter may roll over the credit for subsequent years until exhausted.[58]

46 This value is measured by the fair market value had the food been sold. If a food donor could have sold the food, that value would be the price set in an existing contract. If the food never would have been sold, that value would represent the food's market value on the day of the donation. *See e.g.*, Or. Rev. Stat. § 315.154(a)-(c) (2016) (describing the different ways to calculate the fair market value of donated food).
47 Except for Colorado, each of remaining states apply the credit equally to individuals and corporations.
48 Colo. Rev. Stat. § 39-22-301(3) (2016); Colo. Rev. Stat. § 39-22-536 (2016).
49 Iowa Code § 190B (2016)
50 Ky. Rev. Stat. § 141.392 (2017).
51 OR. REV. STAT. § 315.156 (2016).
52 The term "agriculture crop" generally refers to "grains, vegetables, and fruits." Va. Code Ann. § 58.1-439.12:12 (2017). It is narrower than "agriculture product", which generally refers to "fruits, vegetables, beef, poultry, pork, fish, or any other edible product." Ky. Rev. Stat. § 141.392 (2017).
53 Va. Code Ann. § 58.1-439.12:12 (2017).
54 Virginia also sets a cap on the total amount of credits that may be awarded each year. The state may not award more than $250,000 in tax credits in any year. Va. Code Ann. § 58.1-439.12:12 (D) (2017).
55 62 D.C. Reg. 1504 (March 4, 2015)
56 *See* Cal. Rev. & Tax. Code § 17053.12 (2016) (applying to individuals); *See also* Cal. Rev. & Tax. Code § 23608 (2016) (applying to corporations).
57 *Id.*
58 *Id.*

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Although only a handful of states currently offer tax incentives for food donations to nonprofit distributors, other states are attempting to follow suit. Since the start of the 2017 legislative session, five states have proposed to offer tax credits.

In addition to a tax credit, Colorado permits a tax deduction, although the taxpayer may not receive both.[59] The deduction may equal the amount available under section 170(e) of the federal IRS code.[60] Right now, Maryland offers only a tax deduction.[61] However, Maryland has proposed expanding the program to include tax credits.[62] The food donor may receive a deduction equal to the fair market value of the food that was not deductible under section 170(e) of the IRS code.[63]

California, Maryland, Kentucky, and Washington, D.C., have proposed updates to expand and improve their existing tax incentives. California proposes to amend code sections 17053.88 (a tax credit for an individual) and 23688 (a tax credit for a corporation), which expired on January 1, 2017.[64] If passed, the bill would allow a 10% tax credit against the net tax for farmers when they donate crops to a California foodbank, and the credit would be available until January 1, 2024.[65] Unused credit may roll over for up to six years.[66]

59 Colo. Rev. Stat. § 39-22-104 (2016)
60 *Id.*
61 Md. Code Ann. Tax-Gen. § 10-208(G)(1) (2017).
62 2017 Maryland Senate Bill No. 416.
63 *Id.*
64 Cal. Rev & Tax Code § 17053.88 (2011); Cal. Rev & Tax Code § 23688 (2011).
65 2017 California Senate Bill No. 140
66 *Id.*

Kentucky proposes to expand its tax credit from 10% of the fair market value of the donated food to 20%,[67] and Washington, D.C., proposes to expand its credit to those who donate food other than crops from urban gardens or community gardens.[68] Finally, Maryland's bill would create a tax credit system.[69] A farmer who donates conventional crops could receive a credit of 50% of the fair market value of the crops up to $5,000, with a five-year rollover period for unused credit.[70] Maryland is also the first state to propose to distinguish between organic and conventional crops. When a farmer donates certified organic crops, Maryland would offer a tax credit of 75% of the fair market value of the crops up to $5,000, with a five-year rollover period for unused credit.[71]


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Although only a handful of states currently offer tax incentives for food donations to nonprofit distributors, other states are attempting to follow suit. Since the start of the 2017 legislative session, five states—New York, Illinois, Missouri, Connecticut, and Massachusetts—have proposed to offer tax credits. New York's tax credit would apply only to restaurants who donate prepared food.[72] Illinois's and Missouri's proposals model existing states' trend to offer a tax credit with a dollar amount cap and the ability to roll remaining credit over to subsequent years.[73] So far, Massachusetts, and Connecticut have not specified the details of their proposed tax credit.[74]

The trend among states is to offer a tax credit instead of a deduction for those who donate food to nonprofit distributors. Most states that offer or propose to offer tax credits limit the number of years that the credit may be applied. All states that offer a tax credit limit the credit to a percentage of the fair market value of the donated food. Some states further restrict the credit amount by limiting the credit to a certain dollar amount. Another trend is to set an expiration for the tax credit program, which gives states an opportunity to amend their program. Overall, there is growing interest in supporting farm donations to nonprofit distributors to reduce food waste and feed food-insecure individuals and families. Still, a majority of states do not have any incentive programs.

67 2017 Kentucky House Bill No. 214.
68 2017 Washington DC Legislative Bill No. 72
69 2017 Maryland Senate Bill No. 416.
70 *Id.*
71 *Id.*
72 2017 New York Assembly Bill No. 2648
73 2017 Missouri House Bill No. 488; 2017 Illinois House Bill No. 3301.
74 2017 Massachusetts Senate Bill No. 1495; 2017 Connecticut House Bill No. 5886.

Scope of Gleaning Organizations

The United States showcases a robust variety of gleaning organizations working to significantly reduce food waste and ameliorate food insecurity. Based on 87 responses to the National Gleaning Project (NGP) survey, organizations gleaned over 11 million pounds of food in 2015 alone. As discussed above, gleaning organizations define the scope of their work differently. The NGP categorized gleaning organizations as:

- *Field gleaning organizations* that partner with nonprofit distributors;
- *Nonprofit distributors*, like food banks, that have their own farms;
- Groups dedicated to *fruit tree gleaning* that partner with nonprofit distributors; and
- Groups with diversified operations that engage in *fresh food recovery* from farmers markets, wholesale markets, and grocery stores.

11
million
POUNDS OF FOOD GLEANED IN THE U.S. IN 2015

Through case study interviews, the NGP identified a common set of traits that successful organizations exhibit. Organizations with limited resources are more successful when they collaborate with groups to maximize cold storage and distribution.[75] Food hubs, typically in the form of food banks, also make transportation more efficient by serving as a central pick-up location for small nonprofit distributors.[76] Other infrastructure success factors include the ability to preserve fresh food for a longer shelf life through packaging or preservation (e.g. turning apples into apple sauce).[77]

In addition to strategic partnerships and collaborations, organizations employing a full-time gleaning coordinator experience added stability and strength.[78] Gleaning coordinators who serve as an organization's main contact are able to build relationships with food growers and nonprofit distributors.[79] These relationships connect local growers and distributors and build the trust necessary to create a sustainable gleaning network.[80]

Successful organizations also have enough capacity (both in terms of paid staff and volunteers) to conduct food safety training.[81] Such trainings create knowledgeable volunteers and add legitimacy to the gleaning organizations.[82] In addition to food safety training, organizations that track where food was harvested and donated increase food safety and minimize associated risks.[83] Notably, growers also appear more likely to continue allowing gleaners on their property when they are provided information regarding how their community distributes the donated surplus.[84]

75 Models for Success, *supra* note 13, at 8.
76 *Id.* at 8, 43.
77 *See Id.* at 28-29 (discussing the repackaging and processing efforts of Salvation Farm's Vermont Commodity Program).
78 *Id.* at 13.
79 *See Id.* at 34, 36-37 (discussing examples of gleaning organizations that employ a full-time gleaning coordinator and those coordinators' role as a main contact for farmers).
80 *Id.*
81 *See Id.* at 18 (discussing the Downeast Maine Gleaning Initiative's food safety program).
82 *Id.* at 10, 18.
83 *See Id.* at 14, 31, 35, 46 (providing examples of gleaning organizations that track produce).
84 *Id.* at 7-9.

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CHALLENGES GLEANING ORGANIZATIONS FACE

Based on case study interviews and survey responses, NGP identified several challenges that gleaning organizations face. Organizations most frequently noted capacity challenges, followed by infrastructure and funding hurdles.[85] Other key areas of concern included a lack of incentives for growers, training resources for growers, and questions regarding liability.[86]

Challenges pertaining to capacity, infrastructure, and funding are interrelated, and all affect the vitality of gleaning organizations. The main staffing challenge is the inability to pay for a full-time coordinator, which results from a lack of funding. Without full-time coordinators, the organization depends upon part-time staff and volunteers who, while well-intentioned, lack the time and commitment necessary to cultivate long-term relationships with growers. A lack of permanent staff also affects the organization's long-term success because there is no consistent institutional memory.

Scarce funding also affects infrastructure. When organizations lack space or funding for cold storage, they must distribute the produce the same day they receive it, which requires consistent transportation and staff or volunteer availability. Even if organizations have resources for cold storage, they also need space and equipment to package or preserve food to extend its shelf life. In addition, it can be time intensive and costly for organizations that are already strapped for resources to develop and maintain a system to track food donations.

85 *Id.* at 7.
86 *Id.* at 7-11, 41.

Even before organizations can begin thinking about storing and distributing gleaned crops, however, their gleaners must partner with growers willing to donate crops. Organizations need staff and volunteers to cultivate these critical relationships and to maintain them over time. They also need resources such as educational materials about food safety laws as they relate to the produce that will be harvested and donated.

> **Even before organizations can begin thinking about storing and distributing gleaned crops, they must partner with growers willing to donate crops.**

Gleaning organizations identified potential legal liability arising from injuries sustained by food recipients or by their volunteers as a major concern. As discussed above, the scope of the Bill Emerson Act's protection is unclear and incomplete—gleaning organizations are unsure of the law's requirements and protections.[87] In the face of this uncertainty, gleaning organizations must figure out how to pay for and maintain their own liability insurance, especially to cover injuries to gleaning volunteers, because the Bill Emerson Act does not provide that protection. Finally, organizations are unsure how FSMA affects their operations and their potential liability.

Recommended Actions to Address Identified Challenges

One of the most important things the USDA could do to support and encourage gleaning is to allocate funds to provide gleaning organizations with greater resources and more administrative support. A grant program would support gleaning efforts and create enduring infrastructure by allowing organizations to increase cold storage capacity, transportation, food preservation equipment and space,[88] as well as improving technology for food tracking software programs. Such grant funds could also allow organizations to hire full-time staff and avail themselves of educational resources.

The 2002 Farm Bill and its successors authorized the USDA to make one-time grants to "community food projects. . . to become self-sustaining" (community food projects include gleaning organizations),[89] and allocated funding to support gleaning efforts. This year the USDA may award up to $9,000,000 in grants.[90] If USDA includes infrastructure and capacity-building grants necessary to become a *self-sustaining* gleaning organization, then more gleaning organizations will be eligible for grants. Congress does not define self-sustaining even though it limits grants to self-sustaining organizations. However, Congress specifies that eligible organizations must demonstrate "competency to implement a project, provide fiscal accountability, collect data, and prepare reports

87 Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. §1791 (1996).
88 This could also include renting or building commercial kitchen facilities.
89 Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §4125, 116 Stat. 134 (codified as amended at 7 U.S.C.A. §2034 (2014)).
90 Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §4125, 116 Stat. 134 (codified as amended at 7 U.S.C.A. §2034 (2014)).

FOOD FORWARD

One of the most important things the USDA could do to support and encourage gleaning is to allocate funds to provide gleaning organizations with greater resources and more administrative support.

and other necessary documentation."[91] USDA should advertise this grant opportunity through its website and social media to widely disseminate information to potential applicants.

Beyond one-time grants to gleaning organizations, USDA grants could also support national or regional gleaning networks. A network of gleaning organizations could receive better insurance rates through its collective purchasing power.[92] A network could also create resource-hubs to share list-serves, webinars, and conferences.[93] The NGP survey revealed that gleaning organizations have an overwhelming need for additional educational resources. Of 87 respondents, 66 said that a toolkit to educate growers about food liability and tax incentives would be useful. Furthermore, 54 of those 66 responded that a toolkit to educate volunteers about labor liability and best gleaning practices would be useful. A network would be an effective means to disseminate this information.

Funding for such a network could come from existing budgets in the community-based food project program.[94] Congress specifies examples of noteworthy projects including "long-term planning activities, and multisystem, interagency approaches with multi-stakeholder collaborations, that build the long-term capacity of communities to address the food and agricultural problems of the communities, such as food policy councils and

91 Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §4125, 116 Stat. 134 (codified as amended at 7 U.S.C.A. §2034 (2014)).
92 Models for Success, *supra* note 13, at 27.
93 *Id.* at 7, 9.
94 Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §4125, 116 Stat. 134 (codified as amended at 7 U.S.C.A. §2034 (2014)).

food planning associations."[95] The NGP has created a resource and information hub for gleaning organizations to address their concerns and challenges.[96] A gleaning network would expand beyond the NGP to support a sustained medium for communication and collaborations among organizations. As negotiations commence in preparation for the 2018 Farm Bill, USDA should maintain its current grant allocations, and provide additional resources to implement the grant program.

Other legislative initiatives could include proposing amendments to the Bill Emerson Act to protect gleaning organizations from liability for injuries sustained by volunteers while gleaning. This would allow gleaning organizations to redistribute funds spent on maintaining liability insurance towards operational advancements. Overall, the Bill Emerson Act should be amended to clarify whether organizations must follow local, state, and/or federal food safety and handling laws when they donate food.[97]

Growers are already eligible for a federal tax deduction when they donate crops for harvest to gleaning organizations.[98] The crops must be apparently wholesome food, as defined by the Bill Emerson Act.[99] Some states, like California, also provide state tax credits for the transportation of those donated agriculture products.[100] Currently though, fewer than ten states provide tax credits for donating food to nonprofit distributors.[101] Equipping gleaning organizations with the tools to educate their partner growers about federal and state tax deductions can increase donations. Additionally, educating gleaning organizations and growers about how to lobby their own states to authorize tax credits or deductions would further increase donations. Such educational resources could be made available and shared through a national gleaning network.

95 Congress does not define food policy council or food planning association. *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §4125, 116 Stat. 134 (codified as amended at 7 U.S.C.A. §2034 (2014)). However, organizations with food policy boards or council self-describe as "[a]dvisory body. . .concerning the need to improve the availability of safe, nutritious, locally, and sustainably-grown food at reasonable prices for all residents." *See* Austin Travis County Food Policy Board, City of Austin, http://www.austintexas.gov/atcfpb (last visited Mar. 10, 2017).

96 National Gleaning Project, http://www.nationalgleaningproject.org (last visited Mar. 10, 2017).

97 *See also* The Natural Resource Defense Council and Harvard Food Law and Policy Clinic, Recommendations to Strengthen the Bill Emerson Good Samaritan Act, 2016 (providing summaries of proposed amendments).

98 21 U.S.C.A. §170(e)(3) (2015).

99 21 U.S.C.A. §170(e)(3) (2015); *See also* 42 U.S.C. §1791(b)(2) (defining "apparently wholesome food" as "food that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions").

100 CAL. REV. & TAX. CODE § 17053.12 (1996).

101 *See e.g*. Colo. Rev. Stat. § 39-22-301(3) (2016); Iowa Code § 190B (2016); Ky. Rev. Stat. § 141.392 (2017); OR. REV. STAT. § 315.156 (2016); Va. Code Ann. § 58.1-439.12:12 (2017); 62 D.C. Reg. 1504 (Mar. 4, 2015).

CONCLUSION

In an effort to address food insecurity, support local communities, and reduce food waste, gleaning organizations around the nation are at the forefront of developing innovative ways to partner with growers, connect with food hubs, and work with limited resources. Successful gleaning organizations share transportation, educational, and storage resources within their region. However, gleaning organizations face common challenges regarding the uncertainty of their legal duties and protections, as well as strained resources for infrastructure and capacity-building despite collaborations.

Amendments to existing laws can resolve many of these challenges and support the vital efforts of gleaning organizations. Importantly, those amendments must be paired with educational resources so organizations, their volunteers, and partner growers are aware of the applicable standard of care, their legal protection against liability, and the availability of tax incentives to support their work. In addition, focused grants can address both education and infrastructure needs for individual organizations, as well as the broader gleaning community.