

Legal Questions & Answers

LIABILITY FOR GLEANING ORGANIZATIONS



National Agricultural Library
U.S. DEPARTMENT OF AGRICULTURE

This factsheet is presented by the National Gleaning Project and funded by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture.

Acknowledgments

This factsheet is presented by the National Gleaning Project, a partnership of the Center for Agriculture and Food Systems at Vermont Law and Graduate School and the Association of Gleaning Organizations. Thanks to Jeff Diamond MFALP'23 for initial research and drafting. We also thank Olivia Burton MFALP'21, and the organizations who shared their photographs: Salvation Farms and the Eden Gleaning Project and Garden Project affiliated with Eden Seminary.



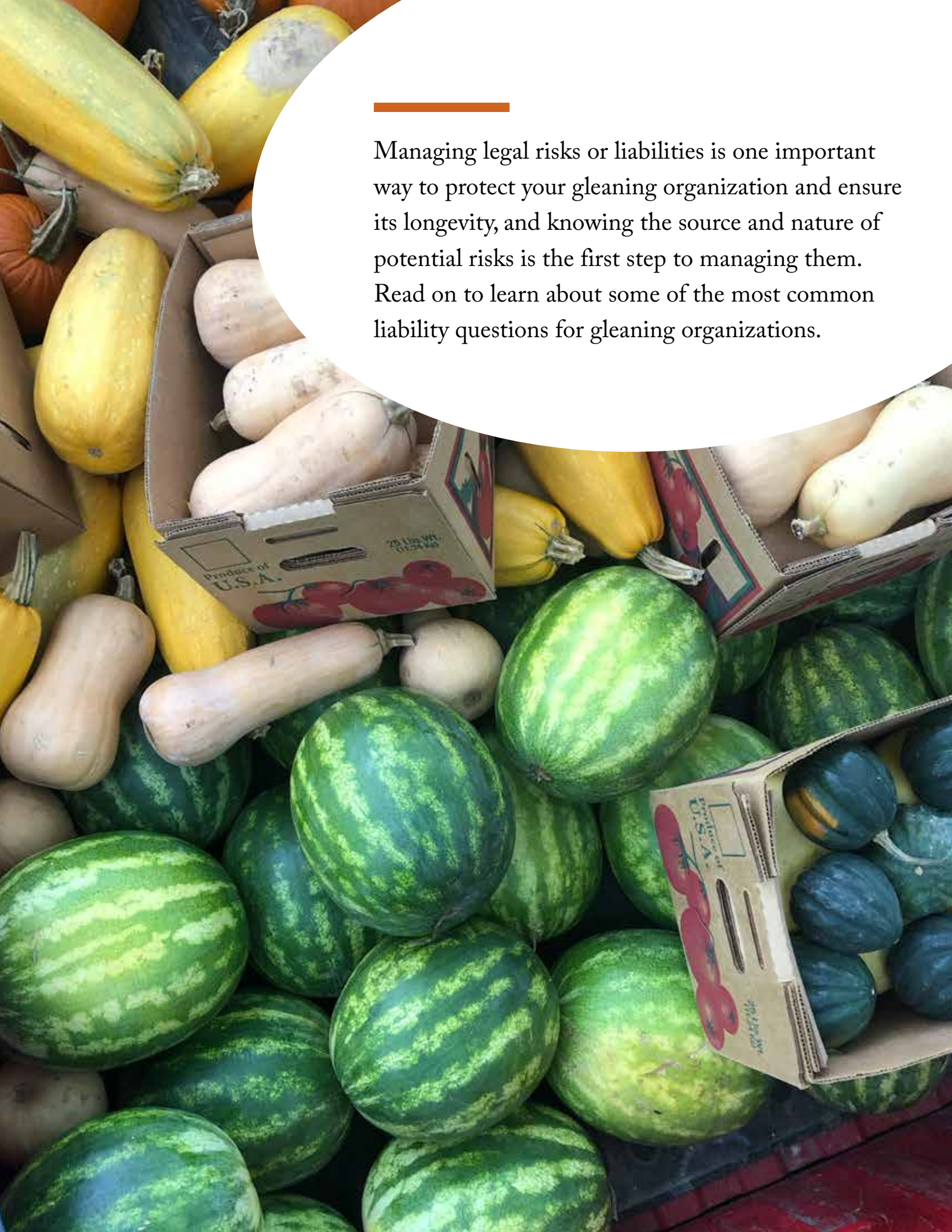
The National Gleaning Project was created in response to the need for a national network connecting modern field gleaning and food recovery organizations across the United States. The National Gleaning Project also provides access to related law and policy resources and samples of waivers, handbooks, and other documents to help support the work of these organizations.



The Association of Gleaning Organizations (AGO) works to build the capacity of other food rescue entities to provide healthy food access to vulnerable populations while reducing food waste and connecting communities. Founded in 2019, we are a member-led, member-run association composed of gleaning organizations in North America. Please visit gleaningorgs.com for more information.



The Center for Agriculture and Food Systems (CAFS) uses law and policy to build a more sustainable and just food system. In partnership with local, regional, national, and international partners, CAFS addresses food system challenges related to food justice, food security, farmland access, animal welfare, worker protections, the environment, and public health, among others. CAFS works closely with its partners to provide legal services that respond to their needs and develop resources that empower the communities they serve. Through CAFS' Food and Agriculture Clinic and Research Assistant program, students work directly on projects alongside partners nationwide, engaging in innovative work that spans the food system. To learn more, please visit www.vermontlaw.edu/cafs.



Managing legal risks or liabilities is one important way to protect your gleaning organization and ensure its longevity, and knowing the source and nature of potential risks is the first step to managing them. Read on to learn about some of the most common liability questions for gleaning organizations.

Question

Are liability protections afforded to food donors, including gleaning organizations, by the Bill Emerson Food Donation Act (Bill Emerson Act or GSFDA) still available when volunteers take home some of the produce from a gleaning event?

Answer

Yes, liability protections for gleaning organizations or donors are still available even when not all gleaned food is donated; however, the food that volunteers take home is not covered by the Bill Emerson Act.

ANALYSIS

Liability protection is offered by the GSFDA relating to “apparently wholesome food... that the person or gleaner donates in good faith to a nonprofit organization for ultimate distribution to needy individuals.”¹ Nothing in the GSFDA states that all the food collected by a gleaner must be donated for the liability protections to apply.

However, the protections of the GSFDA do not apply to any foods that do not fit the description listed above. Of course, any food that is not donated would not qualify for the liability protections of the GSFDA. “Apparently wholesome food” is described as food that “meets all quality and labeling standards imposed by Federal, state and local laws and regulations...”² A volunteer who donates food to an elderly neighbor, for example, would also not be covered, as direct giving differs from donating to a nonprofit organization for distribution (the definition of a nonprofit organization is discussed below). There is also an exception to this limit on liability for acts or omissions that constitute gross negligence or intentional misconduct.³

In addition, the GSFDA does not preempt, or take the place of, state or local laws.⁴ Many of these laws provide additional or enhanced protections relating to food donations for volunteers.

The definition of a volunteer is not entirely clear under the law. In certain statutes, it has been defined as someone who acts without expectation of compensation.⁵ However, there are instances in which some compensation is allowed.⁶ The Volunteer Protection Act (VPA), for example, allows for reasonable reimbursement of expenses as long as it does not constitute compensation or have value in excess of \$500 per year.⁷ Programs where volunteers keep a portion of gleaned foods may run into challenges regarding the question of who is a volunteer as opposed to an employee under various state and federal labor laws.

Factors to Consider When Classifying a Person as a Volunteer or an Employee



Whether the value of the food kept adds up to a living wage, because this could amount to compensation.



Whether the volunteer is dependent on the expected compensation to maintain their livelihood.⁸



Requirements in relevant state laws that govern the role of volunteers.

Question

Are liability protections afforded by the Bill Emerson Food Donation Act (Bill Emerson Act or GSFDA) impacted by the type of organization to which the food is donated?

Answer

Yes. Liability protections provided by the Bill Emerson Act are only valid for donations to a nonprofit entity as defined by that law.

ANALYSIS

Donations to organizations that do not fit the definition of a nonprofit organization established by the GSFDA, which differs from the definition of a 501(c) organization, do not qualify for its liability protections. Under the GSFDA, nonprofit organizations can be either incorporated or unincorporated and operate “for religious, charitable, or educational purposes,” but cannot provide earnings or operate in a way that results in financial benefit to officers, employees, or shareholders of the organization.⁹ In contrast, a 501(c) organization is defined in the context of tax exemption status under the law, with 29 different types of organizations included.¹⁰ The requirements for the most commonly recognized, a 501(c)(3), share some similarities with the definition of a nonprofit under the GSFDA; however, the definition of a 501(c)(3) is more restrictive.

As stated above, note that liability protections under the GSFDA only apply to donations made to a nonprofit organization for distribution to needy individuals, and not to direct giving. State and local laws may provide additional protections beyond the liability limitations of the GSFDA.



Question

What liabilities and responsibilities do gleaning organizations have when they coordinate between volunteers and farmers or homeowners, but don't themselves host a gleaning event?

Answer

Probably the same. Although liability assessment would depend on the state statutes in place where the event occurs, as well as the circumstances of the specific harms that occur, the same rules that apply to group gleaning events would likely apply to these individual gleaning events. If your group holds some gleaning events and is known as a gleaning organization, this is more important than how your group thinks about its role in this relationship.

ANALYSIS

Although the role of your organization within this gleaning event is limited, it likely would still be viewed as an event you have created. Although, as above, the definition of a volunteer is a legal gray area, the VPA states that “the term ‘volunteer’ means an individual performing services for a nonprofit organization...”¹¹ While the role of your organization in these interactions is limited, outside of this interaction you may have also retained the services of the gleaner, trained the gleaner on how to conduct their gleaning efforts, and been contacted by the homeowner to arrange a gleaning activity. This likely would be interpreted as the gleaner performing services for your organization as a volunteer under the VPA, which would afford this person the liability protections of the VPA. The volunteer, as defined in the statute, would maintain any liability for harm caused by “willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.”¹² Some states also have volunteer protection laws, to limit the liability of volunteers acting within the scope of their responsibilities for the nonprofit organization they are serving. Similarly, a state-level law that provides more protection to a volunteer will apply, while in a state with no additional law or a law that provides less protection than the federal VPA, the federal law will apply.¹³

For any food donation covered by the GSFDA, the organization does not carry any liability unless it is shown to have committed gross negligence or intentional misconduct.¹⁴ Gross negligence and intentional misconduct are a relatively high bar, defined in the GSFDA as “voluntary and conscious conduct (including a failure to act) by a person who, at the time of the conduct, knew that the conduct was likely to be harmful to the health or well-being of another person,” and “conduct by a person with knowledge (at the time of the conduct) that the conduct is harmful to the health or well-being of another person,” respectively.¹⁵

There are many state-level laws relevant here as well. All states, plus DC, have Good Samaritan laws which limit liability for food donations made to nonprofit organizations in good faith. Details vary widely, but in general, when a state law is more protective than the federal Bill Emerson GSFDA, it applies, and when a state law is less protective, the federal law applies. So a state law can provide more protection from liability, but cannot reduce the protection offered by the GSFDA.¹⁶ Liability risk to your organization may exist for any harm resulting from food donations that are made outside of the GSFDA as described above, or for injury resulting from the food that is not donated. This applies to both larger group gleaning events and for the homesite events described here.

Question

Should gleaning groups have volunteers at gleaning events sign a liability waiver, even if they are already covered by the group's insurance?

Answer

Yes. A liability waiver may limit some risk assumed by your organization where volunteers are informed of potential hazards.

ANALYSIS

Carrying general liability insurance is a best practice for gleaning organizations in case of injury to volunteers or other unforeseen incidents, but a waiver can provide additional protection in some states. A liability waiver, or even a disclaimer posted in a prominent spot or perhaps emailed to volunteers ahead of an event, is a statement that relieves the gleaning organization of liability for injury or property damage that a volunteer sustains during or related to a gleaning event. Whether and to what degree a waiver is effective—that is, whether it holds up to challenge—varies by state.

The state of Washington, for example, has a relatively moderate standard for enforcement of waivers.¹⁷ According to research by Matthiesen, Wickert & Lehrer, S.C., waivers and disclaimers are generally held to be valid unless they violate public policy, and should be written as a separate document including a title reading “WAIVER” and the sentence “Please read carefully and sign” so as to be clear and conspicuous.¹⁸

Generally, a violation of public policy depends on six factors enumerated in *Wagonblast v. Odessa School District*, a court case involving public school students required to sign waivers to participate in school sports:

- 1 Whether “the agreement concerns an endeavor that is a fit subject for public regulation.”

- 2 Whether “the endeavor is a matter of great public importance.”

- 3 Whether “the endeavor is open to any member of the public who qualifies under definite established standards.”

- 4 Whether the party offering the activity “possesses decisively greater bargaining power than a member of the public” who wishes to participate.

- 5 Whether there is an option to “pay additional reasonable fees to obtain protection against negligence.”

- 6 Whether when engaged in the activity, a risk of injury or property damage results from being “under the control of the party” offering the activity in the event of “carelessness of the party, its employees, or agents.”¹⁹

Subsequent cases citing *Wagenblast v. Odessa* have usually acknowledged the validity of its analysis, but stipulated that it applies to “essential public services—hospitals . . . housing . . . public utilities . . . and public education.”²⁰ While it could be argued that gleaning organizations provide an essential public service, the opportunity to volunteer for field gleaning or distribution does not. Gleaning might be considered as more similar to sports or outdoor activities, which Washington courts have often upheld waivers for.²¹ So although the research for this resource did not find evidence that volunteer waivers for gleaning have been litigated in Washington to date, it is likely that a waiver would be upheld as valid. Using waivers is recommended as a best practice, but may not absolve your organization of all liability.

The Center for Agriculture and Food Systems is an initiative of Vermont Law and Graduate School, and this memo provides general legal information for educational purposes only. It is not meant to substitute, and should not be relied upon, for legal advice. Each gleaner's circumstances are unique, state laws vary, and the information contained herein is specific to the time of publication. Accordingly, for legal advice, please consult an attorney licensed in your state.



THE EDEN GLEANING AND GARDEN PROJECT AFFILIATED WITH EDEN SEMINARY



Endnotes

- 1 42 U.S.C. § 1791(c)(1)
- 2 42 U.S.C. § 1791(b)(2)
- 3 42 U.S.C. § 1791(c)(3)
- 4 42 U.S.C. § 1791(f)
- 5 29 CFR § 553.101(a)
- 6 29 CFR § 553.106(b)
- 7 42 U.S.C. § 14505(6)
- 8 *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)
- 9 42 U.S.C. § 1791(b)(9)
- 10 26 U.S.C. § 501(c)
- 11 42 U.S.C. § 14505(6)
- 12 42 U.S.C. § 14503(b)(4)
- 13 Emergency volunteer toolkit, ASTHO, <https://www.astho.org/programs/preparedness/public-health-emergency-law/emergency-volunteer-toolkit/volunteer-protection-acts-and-good-samaritan-laws-fact-sheet/> (last visited Nov 16, 2021).
- 14 42 U.S.C. § 1791(c)(3)
- 15 42 (b)(5), (6) <https://www.law.cornell.edu/uscode/text/42/1791>
- 16 Jean Buzby, *GOOD SAMARITAN ACT PROVIDES LIABILITY PROTECTION FOR FOOD DONATIONS* USDA BLOG (2021), <https://www.usda.gov/media/blog/2020/08/13/good-samaritan-act-provides-liability-protection-food-donations> (last visited Nov 16, 2021).
- 17 Matthiesen, Wickert, &Lehrer, S.C., *EXCULPATORY AGREEMENTS AND LIABILITY WAIVERS CHART* (2021), <https://www.mwl-law.com/wp-content/uploads/2018/05/EXCULPATORY-AGREEMENTS-AND-LIABILITY-WAIVERS-CHART.pdf> (last visited Nov 16, 2021).
- 18 Matthiesen, Wickert, &Lehrer, S.C., *EXCULPATORY AGREEMENTS AND LIABILITY WAIVERS CHART* (2021), <https://www.mwl-law.com/wp-content/uploads/2018/05/EXCULPATORY-AGREEMENTS-AND-LIABILITY-WAIVERS-CHART.pdf> (last visited Nov 16, 2021). See p. 21.
- 19 *Wagenblast v. Odessa Sch. Dist.*, 110 Wn.2d 845. <https://plus.lexis.com/api/permalink/61238f95-d23c-4d06-a8d7-71741c8068bd/?context=1530671>.
- 20 *Morse v. Bullseye Mktg.*, 2004 Wash. App. LEXIS 2302. <https://plus.lexis.com/api/permalink/c7d593a6-5efe-465d-ae9c-735a40642292/?context=1530671>.
- 21 See *Broderson v. Rainier Nat'l Park Co.*, 187 Wash. 399, 60 P.2d 234 (1936), *Hewitt v. Miller*, 11 Wn. App. 72, 521 P.2d 244 (1974), *Blide v. Rainier Mountaineering, Inc.*, 30 Wn. App. 571, 636 P.2d 492 (1981), *Conradt v. Four Star Promotions, Inc.*, 45 Wn. App. 847, 728 P.2d 617 (1986), *Garretson v. United States*, 456 F.2d 1017 (9th Cir. 1972).

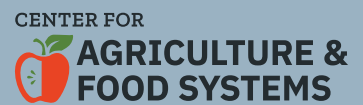


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