

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

**BILL:** CS/SB 276

**INTRODUCER:** Judiciary Committee, Senator Rich and others

**SUBJECT:** Food Donation by Public Food Service Establishments

**DATE:** February 7, 2008      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	<b>Favorable</b>
2.	Daniell	Maclure	JU	<b>Fav/CS</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

The bill amends provisions of law that currently limit liability for canned or perishable food distributed free of charge by expanding the definition of “perishable food” to include foods that have been prepared at a licensed public food service establishment.

The bill provides that this act may be cited as the “Jack Davis Florida Restaurant Lending a Helping Hand Act.”

This bill substantially amends section 768.136, Florida Statutes.

**II. Present Situation:**

**Food Insecurity**

Food insecurity defines individuals who have ““limited or uncertain availability of nutritionally adequate foods, including involuntarily cutting back on meals, food portions or not knowing the

source of the next meal.”<sup>1</sup> In 2006, 35.5 million Americans lived in food insecure households.<sup>2</sup> America’s Second Harvest<sup>3</sup> provides the following statistics regarding food insecurity:

- In 2006, 3.3% of all U.S. households (3.8 million households) accessed emergency food from a food pantry one or more times, or 21% of all food-insecure households.
- In 2006, food insecure (low food security or very low food security) households were 19 times more likely than food-secure households to have obtained food from a food pantry, an increase in likelihood from 17 times in 2005.
- In 2006, food insecure (low food security or very low food security) households were 15 times more likely than food-secure households to have eaten a meal at an emergency kitchen, [a] decrease in likelihood from 19 times in 2005.
- In 2006, 55.5% of food-insecure households participated in at least one of the three major Federal food assistance programs – Food Stamp Program, The National School Lunch Program, and the Special Supplemental Nutrition Program for Women, Infants, and Children, remaining unchanged from 55.6% in 2005.<sup>4</sup>

### **Good Samaritan Food Donation Laws**

Studies show that between 20 to 27 percent of food produced in America is thrown away and that recovering the lost food through food recovery programs could feed 49 million people.<sup>5</sup> The main barrier to donation is the threat of liability. In one survey, more than 80 percent of the 250 companies surveyed said that “the most significant factor for their dumping food, rather than donating it to nonprofit organizations, was the threat of liability for injuries later caused by that food.”<sup>6</sup> In 1977, California attempted to solve this problem by enacting the first Good Samaritan food donation law.<sup>7</sup> These laws attempt to limit criminal and civil liability for the donation of food. At this time, all 50 states have adopted some form of a Good Samaritan food donation

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<sup>1</sup> Jessica A. Cohen, *Ten Years of Leftovers with Many Hungry Still Left Over: A Decade of Donations Under the Bill Emerson Good Samaritan Food Donation Act*, 5 SEATTLE J. FOR SOC. JUST. 455, 456 (2006) (quoting Julie Brewer et al., *A Blueprint to End Hunger*, NAT’L ANTI-HUNGER ORG., 8 (June 3, 2004), available at <http://www.hungercenter.org/NAHO%20Blueprint.pdf>) (last visited Jan. 30, 2008).

<sup>2</sup> AMERICA’S SECOND HARVEST, THE NATION’S FOOD BANK NETWORK, *Learn About Hunger*, [http://www.secondharvest.org/learn\\_about\\_hunger/fact\\_sheet/](http://www.secondharvest.org/learn_about_hunger/fact_sheet/) (follow “Hunger and Poverty Statistics” hyperlink) (last visited Jan. 23, 2008).

<sup>3</sup> America’s Second Harvest is the “nation’s largest charitable hunger-relief organization” and is comprised of more than 200 member food banks and food-rescue organizations throughout the 50 states and Puerto Rico. See AMERICA’S SECOND HARVEST, THE NATION’S FOOD BANK NETWORK, *About Us*, [http://www.secondharvest.org/about\\_us/](http://www.secondharvest.org/about_us/) (last visited Jan. 23, 2008).

<sup>4</sup> AMERICA’S SECOND HARVEST, *supra* note 2.

<sup>5</sup> Cohen, *supra* note 1, at 468.

<sup>6</sup> David L. Morenoff, *Lost Food and Liability: The Good Samaritan Food Donation Law Story*, 57 FOOD & DRUG L.J. 107, 107 (2002).

<sup>7</sup> *Id.* at 108.

law.<sup>8</sup> (See the “Liability for Canned or Perishable Food Distributed Free of Charge” section of this analysis for a description of Florida’s Good Samaritan food donation law.)

The first attempt for federal regulation came in 1990, when Congress passed the Model Good Samaritan Food Donation Act (Model Act).<sup>9</sup> The Model Act encouraged states to adopt uniform standards to protect food donors against civil and criminal liability.<sup>10</sup> When only one state adopted the Model Act in the five ensuing years, Congress passed the Bill Emerson Good Samaritan Food Donation Act in 1996 (Good Samaritan Act).<sup>11</sup>

The Good Samaritan Act promotes food recovery by creating a uniform minimum level of protection from liability for donors and gleaners nationwide. This minimum level is set at gross negligence.<sup>12</sup> At first it was unclear whether Congress intended to replace state measures with the uniform national law or, alternatively, whether Congress intended to establish greater consistency by creating a liability floor of gross negligence.<sup>13</sup> The U.S. Department of Justice investigated this issue and “concluded that the law only partially preempted state laws and that states could, therefore, choose a liability floor higher than that of the Emerson Act.”<sup>14</sup> In other words, states may provide protection above and beyond that guaranteed in the federal statute.<sup>15</sup>

### **Liability for Canned or Perishable Food Distributed Free of Charge**

Florida’s Good Samaritan food donation law provides protection from criminal and civil liability to a good faith donor or gleaner<sup>16</sup> of any canned or perishable food apparently fit for human consumption to a charitable or nonprofit organization for free distribution.<sup>17</sup> This immunity does not apply if an injury is caused by the gross negligence, recklessness, or intentional misconduct of the donor or gleaner.

The provisions of this section apply to the good faith donation of canned or perishable food regardless of whether the food is readily marketable due to appearance, freshness, grade, surplus, or other similar considerations.<sup>18</sup> These provisions are not to be construed to restrict the authority of any lawful agency to otherwise regulate or ban the use of food for human consumption, and the immunity from liability does not relieve a donor of its duty to comply with any law regulating the donor with respect to health or sanitation.<sup>19</sup>

<sup>8</sup> For a list of the statutes see U.S. DEP’T OF AGRICULTURE, *A Citizen’s Guide to Food Recovery*, Appendix D, <http://www.usda.gov/news/pubs/gleaning/appd.htm> (last visited Jan. 30, 2008).

<sup>9</sup> 42 U.S.C. §§ 12671-12673 (1996) (repealed by Pub.L. 104-210, § 1(a)(1), Oct. 1, 1996, 110 Stat. 3011).

<sup>10</sup> Cohen, *supra* note 1, at 471.

<sup>11</sup> 42 U.S.C. § 1791 (1996).

<sup>12</sup> *See id.* The federal law establishes that immunity is not available for donors or gleaners who act with gross negligence or intentional misconduct, causing injury to a recipient of the food. Gross negligence is the lesser of the two standards; accordingly, the minimum national standard is gross negligence.

<sup>13</sup> Morenoff, *supra* note 6, at 126.

<sup>14</sup> *Id.* at 127.

<sup>15</sup> U.S. DEP’T OF AGRICULTURE, *A Citizen’s Guide to Food Recovery*, *Legal Issues*, <http://www.usda.gov/news/pubs/gleaning/seven.htm> (last visited Jan. 30, 2008).

<sup>16</sup> A “gleaner” is a “person who harvests for free distribution an agricultural crop that has been donated by the owner.” Section 768.136(1)(b), F.S.

<sup>17</sup> Section 768.136(2), F.S.

<sup>18</sup> Section 768.136(4), F.S.

<sup>19</sup> Section 768.136(5), F.S.

This same criminal and civil liability protection is provided for bona fide charitable or nonprofit organizations, their representatives or volunteers, or any uncompensated persons acting in a philanthropic manner providing services similar to those of such an organization, which accept, collect, transport, or distribute any canned or perishable food, apparently fit for human consumption, from a good faith donor or gleaner for free distribution.<sup>20</sup>

The term “donor,” which appears to include public food service establishments, is defined as:

[A] person, business, organization, or institution which owns, rents, leases, or operates:

1. Any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure, that is maintained and operated as a place where food is regularly prepared, served, or sold for immediate consumption on or in the vicinity of the premises; or to be called for or taken out by customers; or to be delivered to factories, construction camps, airlines, locations where catered events are being held, and other similar locations for consumption at any place;
2. Any public location with vending machines dispensing prepared meals; or
3. Any retail grocery store.<sup>21</sup>

Section 768.136(1)(c), F.S., defines the term “canned food” to mean:

[A]ny food which has been commercially processed and prepared for human consumption and which has been commercially packaged in such a manner as to remain nonperishable without refrigeration for a reasonable length of time.

Section 768.136(1)(d), F.S., defines the term “perishable food” to mean:

[A]ny food that may spoil or otherwise become unfit for human consumption because of its nature, type, or physical condition. “Perishable food” includes, but is not limited to, fresh or processed meats, poultry, seafood, dairy products, bakery products, eggs in the shell, fresh fruits or vegetables, and foods that have been noncommercially packaged or that have been frozen or otherwise require refrigeration to remain nonperishable for a reasonable length of time.

### **Regulation of Public Food Service Establishments**

The Division of Hotels and Restaurants within the Department of Business and Professional Regulation (DBPR) is the state agency charged with enforcing the provisions of ch. 509, F.S., and all other applicable laws relating to the inspection and regulation of public lodging establishments and public food service establishments for the purpose of protecting the public

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<sup>20</sup> Section 768.136(3), F.S.

<sup>21</sup> Section 768.136(1)(a), F.S.

health, safety, and welfare. According to DBPR, there are more than 43,000 licensed public food service establishments in Florida.<sup>22</sup>

A public food service establishment is defined in ch. 509, F.S., as follows:

- (5)(a) “Public food service establishment” means any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered to another location for consumption.
- (b) The following are excluded from the definition in paragraph (a):
1. Any place maintained and operated by a public or private school, college, or university:
    - a. For the use of students and faculty; or
    - b. Temporarily to serve such events as fairs, carnivals, and athletic contests.
  2. Any eating place maintained and operated by a church or a religious, nonprofit fraternal, or nonprofit civic organization:
    - a. For the use of members and associates; or
    - b. Temporarily to serve such events as fairs, carnivals, or athletic contests.
  3. Any eating place located on an airplane, train, bus, or watercraft which is a common carrier.
  4. Any eating place maintained by a hospital, nursing home, sanitarium, assisted living facility, adult day care center, or other similar place that is regulated under s. 381.0072.
  5. Any place of business issued a permit or inspected by the Department of Agriculture and Consumer Services under s. 500.12.
  6. Any place of business where the food available for consumption is limited to ice, beverages with or without garnishment, popcorn, or prepackaged items sold without additions or preparation.
  7. Any theater, if the primary use is as a theater and if patron service is limited to food items customarily served to the admittees of theaters.
  8. Any vending machine that dispenses any food or beverages other than potentially hazardous foods, as defined by division rule.
  9. Any vending machine that dispenses potentially hazardous food and which is located in a facility regulated under s. 381.0072.
  10. Any research and development test kitchen limited to the use of employees and which is not open to the general public.<sup>23</sup>

### III. Effect of Proposed Changes:

The bill provides that this act may be cited as the “Jack Davis Florida Restaurant Lending a Helping Hand Act.”<sup>24</sup>

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<sup>22</sup> For Fiscal Year 2006-2007, there were 43,971 licensed public food service establishments. DIVISION OF HOTELS AND RESTAURANTS, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, *Annual Report, Fiscal Year 2006-2007*, [http://www.myfloridalicense.com/dbpr/hr/reports/annualreports/documents/ar2006\\_07.pdf](http://www.myfloridalicense.com/dbpr/hr/reports/annualreports/documents/ar2006_07.pdf) (last visited Jan. 24, 2008).

<sup>23</sup> Section 509.013(5), F.S.

<sup>24</sup> Senator Rich’s office reported that Jack Davis is the youth responsible for proposing the idea behind this legislation.

The bill amends s. 768.136, F.S., which limits liability for food donations to a nonprofit or charitable organization. The bill expands the definition of “perishable food” under the statute to include foods that have been prepared at a public food service establishment licensed under ch. 509, F.S. The food donation statute’s current definition of “donor” could be read to include public food service establishments; however, the bill clearly provides that the term “perishable food” includes foods that have been prepared at a public food service establishment licensed under ch. 509, F.S.

It appears that, under the current law, perishable food donations that receive this immunity include those foods “that have been frozen or otherwise require refrigeration to remain nonperishable for a reasonable length of time.”<sup>25</sup> Currently, it is not clear whether non-refrigerated restaurant prepared foods would receive immunity. The bill clarifies this uncertainty by ensuring that the protection from criminal or civil liability extends to *all* foods that have been prepared at a public food service restaurant establishment licensed under ch. 509, F.S. The bill does not require that the public food service establishments refrigerate or freeze the prepared food in order to maintain the food nonperishable. However, any donor must comply with laws regulating health or sanitation under ch. 509, F.S., such as temperature, storage, or cleanliness.<sup>26</sup>

The bill has an effective date of July 1, 2008.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Under the bill, a public food service establishment licensed under ch. 509, F.S., is granted limited immunity from criminal or civil liability if the establishment donates perishable foods to persons in need. By limiting liability the bill could be subject to a constitutional challenge under the access to courts provision of the Florida Constitution. Article I, section 21, of the Florida Constitution provides: “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” This right of access “protects only rights that existed at common law or by statute

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<sup>25</sup> Section 768.136(1)(d), F.S.

<sup>26</sup> See s. 768.136(5), F.S.

prior to the enactment of the Declaration of Rights of the Florida Constitution.”<sup>27</sup> Under the Florida Supreme Court case *Kluger v. White*:

[W]here a right of access ... has been provided ... the Legislature is without power to abolish such a right without providing a reasonable alternative ... unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.<sup>28</sup>

Although possible, it is unlikely that an access to courts issue would succeed. To date, there have been no reported court cases under Florida’s Good Samaritan food donation law and no cases were found that involved the donation of food.<sup>29</sup> Additionally, a *Kluger v. White* claim may not be successful because there is still an avenue for redress of injury. The immunity provided under s. 768.136(2), F.S., does not apply if an injury is caused by the donor’s gross negligence, recklessness, or intentional misconduct. However, if the law is challenged, it may pass constitutional muster because there exists a high public interest in feeding the hungry.<sup>30</sup>

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

The bill is designed to encourage the donation of food to charitable organizations and eliminate unnecessary food waste by public food service establishments. The bill should not have a direct fiscal impact on the private sector; however, it does provide limited immunity to a public food service establishment licensed under ch. 509, F.S., which may prohibit a citizen from bringing a lawsuit should he or she incur injury or death from the consumption of the donated food.

### C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

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<sup>27</sup> 10A FLA. JUR 2D *Constitutional Law* § 360 (2007). When analyzing an access to courts issue, the Florida Supreme Court clarified that 1968 is the relevant year in deciding whether a common law cause of action existed. *Eller v. Shova*, 630 So. 2d 537, 542 n. 4 (Fla. 1993).

<sup>28</sup> *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

<sup>29</sup> Committee staff conducted Westlaw searches on s. 768.136, F.S., as well as on food donation in general. *See also* Morenoff, *supra* note 6, at 131 (stating that none of the state Good Samaritan food donation laws have ever been challenged in court); Cohen, *supra* note 1, at 474 (same).

<sup>30</sup> *See generally* Morenoff, *supra* note 6, at 116 (“[e]ach state concluded that the social benefits of feeding hungry people did indeed outweigh the ability of people to sue for any injury incurred in consuming food donated to charity”).

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on February 6, 2008:**

The committee substitute changes the short title to the “Jack Davis Florida Restaurant Lending a Helping Hand Act” from the “Florida Restaurant Lending a Helping Hand Act.”

- B. **Amendments:**

None.