

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HB 99 Food Donation by Public Food Service Establishments

**SPONSOR(S):** Safety & Security Council; Porth and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 276

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Constitution &amp; Civil Law</u>	<u>9 Y, 0 N</u>	<u>Thomas</u>	<u>Birtman</u>
2) <u>Safety &amp; Security Council</u>	<u>15 Y, 0 N, As CS</u>	<u>Thomas/Davis</u>	<u>Havlicak</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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**SUMMARY ANALYSIS**

The bill creates the "Jack Davis Florida Restaurant Lending a Helping Hand Act."

The bill amends existing provisions regarding 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 protection from criminal and civil liability to public food service establishments that donate perishable foods apparently fit for human consumption to a bona fide charitable or nonprofit organization for free. This immunity from criminal penalty or civil damages does not apply if an injury is caused by the gross negligence, recklessness, or intentional misconduct of the donor or gleaner.

This bill does not appear to have a fiscal impact on state or local government.

The bill takes effect on July 1, 2008.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Promote personal responsibility** - The bill provides protection from criminal and civil liability to public food service establishments that donate perishable foods apparently fit for human consumption to a bona fide charitable or nonprofit organization for free.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### Food Insecurity

The following national statistics were provided by American Second Harvest<sup>1</sup> regarding food insecurity (food security is a situation in which people do not live in hunger or fear of starvation):

- 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, an 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.

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

Florida's law regarding liability for canned or perishable food that is distributed free of charge provides protection from criminal and civil liability to a good faith donor or gleaner<sup>2</sup> of any canned or perishable food apparently fit for human consumption to a charitable or nonprofit organization for free distribution.<sup>3</sup> This immunity does not apply if an injury is caused by the gross negligence, recklessness, or intentional misconduct of the donor or gleaner.<sup>4</sup>

The provisions of this section apply to the good faith donation of canned or perishable food regardless of whether such food is readily marketable due to appearance, freshness, grade, surplus, or other such considerations.<sup>5</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 any donor of its duty to comply with any law regulating such donor with respect to

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<sup>1</sup> America's Second Harvest states that they are the nation's largest charitable hunger-relief organization and they include a network of more than 200 member food banks and food-rescue organizations. See [http://www.secondharvest.org/about\\_us/](http://www.secondharvest.org/about_us/) (last visited on Jan. 15, 2008).

<sup>2</sup> Section 768.136(1)(b), F.S., defines "gleaner" as "a person who harvests for free distribution an agricultural crop that has been donated by the owner."

<sup>3</sup> Section 768.136(2), F.S.

<sup>4</sup> *Ibid.*

<sup>5</sup> Section 768.136(4), F.S.

health or sanitation.<sup>6</sup> This same criminal and civil liability protection is provided for bona fide charitable or nonprofit organizations, or any representatives or volunteers acting on behalf of such organizations or 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>7</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>8</sup>

The term “canned food” is defined as:

[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.<sup>9</sup>

The term “perishable food” is defined as:

[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.<sup>10</sup>

There have been no reported court cases under this section of law and no cases were found that involved the donation of food.

### Regulation of Public Food Service Establishments

The Division of Hotels and Restaurant (Division) 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 health, safety, and welfare. According to the DBPR, there are over 43,000 licensed public food service establishments in Florida.

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

- (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

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<sup>6</sup> Section 768.136(5), F.S.

<sup>7</sup> Section 768.136(3), F.S.

<sup>8</sup> Section 768.136(1)(a), F.S.

<sup>9</sup> Section 768.136(1)(c), F.S.

<sup>10</sup> Section 768.136(1)(d), F.S.

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>11</sup>

## Other States and Federal Law

Laws providing immunity from criminal and civil liability for the donation of food are referred to as "Good Samaritan" food donation laws. All fifty states prior to 1990 had adopted some form of these laws.<sup>12</sup>

The first attempt to legislate in this area by Congress resulted in the passage of the Good Samaritan Food Donation Model Act that became part of Title IV of the National and Community Service Act, which President Bush signed into law on November 16, 1990.<sup>13</sup> This Act did not mandate that the states follow its provisions, but it was an effort to give the states an opportunity to take a uniform approach to this issue.

When only one state adopted the Model Act in the five ensuing years, Congress adopted the Bill Emerson Good Samaritan Food Donation Act of 1996 which President Clinton signed into law on October 1, 1996.<sup>14</sup> The key provisions of the 1996 Act provide:

- Protection for donors from liability when donating to a non-profit organization.
- Protection for donors from civil and criminal liability should the product donated in good faith later cause harm to the needy recipient.
- Standardization across the states of donor liability exposure.

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<sup>11</sup> Section 509.013(5), F.S.

<sup>12</sup> LOST FOOD AND LIABILITY: THE GOOD SAMARITAN FOOD DONATION LAW STORY, David L. Morenoff, Food and Drug Law Journal (2002). For a list of these statutes, see <http://www.usda.gov/news/pubs/gleaning/appd.htm> (last visited on Jan. 15, 2008).

<sup>13</sup> 42 U.S.C §§ 12671-12673.

<sup>14</sup> 42 U.S.C § 1791.

- A liability floor of "gross negligence" or intentional misconduct for persons who donate grocery products.<sup>15</sup>

It is unclear if Congress intended to replace the various state measures with a uniform national law, in which case the state laws would have no further effect. Alternatively, Congress may have intended to establish greater, but not complete, consistency in this area of the law by making a liability floor of gross negligence a minimum national standard. If so, state laws that set a higher liability floor than that of the federal law, such as those holding food donors liable only for recklessness or intentional misconduct, would retain their force even after Congress acted.

### **Effect of Proposed Changes:**

The bill creates the "Jack Davis Florida Restaurant Lending a Helping Hand Act."

The bill amends s. 768.136, F.S., to expand the definition of "perishable food" to include foods that have been prepared at a public food service establishment licensed under ch. 509, F.S. While it appears that the current definition of "donor" includes public food service establishments, 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. This change ensures that the protection from criminal and civil liability to a good faith donor or gleaner of any canned or perishable food apparently fit for human consumption to a charitable or nonprofit organization for free distribution includes all foods that have been prepared at a public food service establishment licensed under ch. 509, F.S. Under the present law, it may include restaurant prepared meals only if the meals require refrigeration to remain nonperishable for a reasonable period of time.

Any donor operating under the provisions of this bill must comply with laws regulating health or sanitation.<sup>16</sup>

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

### **C. SECTION DIRECTORY:**

Section 1: Provides that the Act may be cited as the "Jack Davis Florida Restaurant Lending a Helping Hand Act."

Section 2: Amends s. 768.136, F.S., relating to liability for canned or perishable food distributed free of charge.

Section 3: Provides that the bill becomes effective on July 1, 2008.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

#### **2. Expenditures:**

The bill does not appear to have any impact on state expenditures.

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<sup>15</sup> *Ibid.*

<sup>16</sup> Section. 768.136(5), F.S. This would likely include food sanitation and safety laws under chapter 509, F.S., such as temperature, storage, cleanliness, and the like.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill is designed to encourage the donation of more food to charitable organizations. This should not have a direct impact on the private sector, however, the bill does provide limited immunity should a food service establishment choose to make donations as provided under the bill.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this joint resolution does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

#### Access to Courts

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." The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."<sup>17</sup> In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the people of Florida and, if so, that it has not provided a reasonable alternative for redress and that there is not an "overpowering public necessity" for eliminating the right.<sup>18</sup> This right could be implicated if a court were to find that the bill abolishes a right of access to the courts that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution.<sup>19</sup>

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

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<sup>17</sup> Fla. Jur. 2d., s. 360.

<sup>18</sup> Kluger v. White, 281 So.2d 1, 4 (Fla. 1973).

<sup>19</sup> The enactment of the Declaration of Rights of the Florida Constitution was part of Florida's new constitution of 1968 and occurred when it was ratified by the electorate on November 5, 1968.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No Statement Submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 19, 2008, the Safety & Security Council adopted an amendment that changed the title of the act to the "Jack Davis Florida Restaurant Lending a Helping Hand Act."