

**Community Fridges:
Legal Questions and Answers**
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Who wrote this guide and what is it?

This guide was written and compiled by the Harvard Law School Food Law and Policy Clinic, the Hofstra Law School Community and Economic Development Clinic, and the UCLA School of Law Food Law and Policy Clinic, with significant input from the Sustainable Economies Law Center. It includes answers to legal questions that we repeatedly received from community fridges in New York, Boston, Chicago, Los Angeles, and Las Vegas throughout the summer and fall of 2021. Thank you to all of the community fridge organizers and volunteers who took the time to share their insight and knowledge with us. We appreciate you tremendously.

We intend for this document to be a living document that community fridge and mutual aid organizers can consult, and we will continue to add questions and answers as we receive them. This document was originally published in January 2022 and included questions 1-8 below. In December 2022, we published a new version which includes questions 9-13.

Please submit any further questions through this [link](#). If you would like to get in touch with us directly, please feel free to email flpc@law.harvard.edu. We look forward to hearing from you and hope to be able to provide legal support to your critical work.

1. Will a fridge be held liable if someone gets sick from eating food from the fridge?

Many food donors and community fridges worry they will be held liable if a consumer of donated food falls ill.

Key Takeaway: Donors to fridges, fridges themselves, and mutual aid organizations that run fridges generally will be protected from liability under the Federal Bill Emerson Good Samaritan Act (“Emerson Act”) for an illness that results from food so long as the food has met all safety requirements and the donor and/or fridge believe the food to be safe.

Deeper Analysis: The Emerson Act provides comprehensive federal civil and criminal liability protection for food donors and nonprofit distributing organizations.¹

Who is covered?

¹ See 42 U.S.C. § 1791.

The Emerson Act covers individual people, businesses, nonprofit organizations, government entities, and the officers of businesses and nonprofit organizations.² It also covers gleaners—individuals that harvest donated agricultural crops to give to the needy or to a nonprofit organization that distributes to the needy.³

The Emerson Act defines a nonprofit as either an incorporated or unincorporated entity that: 1) operates “for religious, charitable, or educational purposes”; and 2) “does not provide net earnings to, or operate in any other manner for the benefit of any officer, employee, or shareholder.”⁴ Given this expansive definition, most mutual aid organizations and community fridges will likely be considered a “nonprofit organization” under the Act, so long as they do not operate for profit and regardless of whether they are incorporated formally or whether they are exempt from federal taxes under 501(c)(3).

Food donors are protected when they donate to nonprofit organizations and nonprofit organizations are protected when they distribute the food to needy individuals, but direct donations from food businesses or individuals directly to other individuals are not protected. Protection also will not apply unless the donations are given for free.⁵

What kinds of food are covered?

In order to receive the protections of the Emerson Act, donors must donate “qualifying” types of food.⁶ Qualifying products are “apparently wholesome foods” or “apparently fit grocery products” and meet “all quality and labeling standards imposed by Federal, State, and local laws and regulations,” even if they are not “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”⁷

Food donations must be made in good faith, and protection will not apply if the food donor or nonprofit organization acts with gross negligence or intentional misconduct.⁸ Gross negligence means the donor took actions they knew were “*likely to be* harmful to the health or well-being of

² 42 U.S.C. § 1791(c).

³ 42 U.S.C. § 1791(c)(1); 42 U.S.C. §1791(b)(5).

⁴ 42 U.S.C. §1791(b)(9).

⁵ 42 U.S.C. § 1791(c). However, if one nonprofit donates food to another nonprofit for distribution, the Act allows the first nonprofit to charge the distributing nonprofit a nominal fee to cover handling and processing costs.

⁶ 42 U.S.C. § 1791(c)(1)-(2).

⁷ 42 U.S.C. § 1791(c)(1)-(2); 42 U.S.C. §1791(b)(5).

⁸ 42 U.S.C. § 1791(c)(3).

another person,”⁹ and intentional misconduct means the donor knows the conduct “*is harmful to the health or well-being of another person.*”¹⁰

It should be noted that even if a donation is not covered by the Emerson Act, it is not illegal to donate or accept that donation. It only means that the parties to the donation will not be afforded federal liability protections if someone were to pursue a legal action against them. Furthermore, state laws may provide additional liability protections.

2. Are there any liability protections for accidents unrelated to food safety, such as if someone were to slip and fall by the fridge?

The liability protections under the Emerson Act (as described above) cover illness related to the food itself. Some fridges also worry that the mutual aid organization or its volunteers will be held liable for other harms unrelated to food safety. For instance, some organizers have asked if they can be sued by someone who slips and falls by the fridge.

Key Takeaways: While the likelihood of these claims being upheld seems to be low, the answer to whether the organizers of the fridge can be held personally liable depends on what state your fridge operates in, whether your group is formally incorporated, and the specific facts of the incident. In addition, a lot will depend on the host site of the fridge, which might be more likely to be the target of such a lawsuit.

Deeper Analysis: The liability protections afforded to individuals operating your fridge will depend on whether the fridge is legally incorporated or not. Put simply, “incorporated” means that your fridge group has formed a corporation in a state and is considered a legal entity separate from its owners by that state. There are many different types of corporate entities, but most mutual aid groups that are incorporated are incorporated as nonprofit corporations, though a few have chosen to incorporate as limited liability companies (“LLCs”), cooperative corporations, or other entities. That being said, many fridges are unincorporated, meaning that they are not recognized as formal legal corporations in their state.

Unincorporated Fridges

In the majority of states, if your fridge or mutual aid group is *not* incorporated, there is no legal entity to sue.¹¹ As a result, it is possible that organizers of your fridge can be held personally

⁹ 42 U.S.C. § 1791(b)(7).

¹⁰ 42 U.S.C. § 1791(b)(8).

¹¹ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 4, 7 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

liable for the conduct of the group. The federal Volunteer Protection Act, which provides protection to volunteers of a nonprofit organization for harm they cause, likely does not apply to volunteers of unincorporated entities.¹² Therefore, someone could bring a claim against an individual fridge organizer or another person closely associated with your fridge.

In these states, the liability of individual members of an unincorporated organization will be governed by agency law, so to hold an individual liable, a court will need to find that a member of the fridge's group directed or authorized the act resulting in the harm or some causal link between a member's conduct and the harm.¹³ In assessing whether such a causal link exists, state courts have differed on how connected to a claim a person must be, but have generally required a proximate connection beyond just membership in the group.¹⁴ For example, an organizer who mainly deals with collecting food donations is not likely to be held liable for a dangerous electrical wire sticking out of the fridge and electrocuting someone, while an organizer in charge of fridge maintenance is more likely to be held liable for it.

However, some states offer greater protection for individuals participating in unincorporated groups. Eighteen states – Louisiana, North Carolina, Hawaii, Wisconsin, Delaware, Arkansas, West Virginia, Texas, Alabama, Illinois, Colorado, Wyoming, Idaho, South Carolina, Kentucky, Pennsylvania, Iowa, Nevada, as well as Washington D.C. – have passed either the 1996 Uniform Unincorporated Nonprofit Association Act or its 2014 revision,¹⁵ which provide protection for organizers of unincorporated organizations by allowing unincorporated associations to sue and be sued like an entity. In these states, members of an unincorporated organization have the same protections against personal liability that members of an incorporated entity have.¹⁶ Thus, except in extremely narrow circumstances, fridge organizers in these states cannot be held personally liable in the event that someone brings a claim against the fridge.

¹² See Michael Haber, *Covid-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOYOLA L. REV. 61, 97 (2021) (describing why a court is not likely to find that the Act applies to unincorporated entities).

¹³ Michael Haber, *Covid-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOYOLA L. REV. 61, 95 (2021).

¹⁴ Michael Haber, *Covid-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOYOLA L. REV. 61, 96 (2021).

¹⁵ See *Unincorporated Nonprofit Association Act (1992)*, UNIFORM LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=cbc066de-ba1d-4eb1-a6e2-9b6f45be9a98> (last visited Nov. 16, 2021); *Unincorporated Nonprofit Association Act (2008)*, UNIFORM LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?communitykey=40227d3a-8b5d-47c2-8cd0-b0ec12da97f9&tab=groupdetails> (last visited Nov. 16, 2021).

¹⁶ Michael Haber, *Covid-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOYOLA L. REV. 61, 94 (2021).

Incorporated Fridges

If your fridge or mutual aid group *is* incorporated, then there is a legal entity to sue, and someone can bring a claim against the organization itself.¹⁷ Except in very unusual circumstances, organizers of the fridge will not be held personally liable if someone brings a claim against your fridge.

Furthermore, the Volunteer Protection Act provides protection from negligence claims to volunteers of an incorporated nonprofit as long as the group has not engaged in certain hate crimes and is either (a) exempt from taxation as a 501(c)(3) organization or (b) “organized and conducted for public benefit” and also operated “primarily for charitable, civic, educational, religious, welfare, or health purposes.”¹⁸ This language limits the benefits of the Volunteer Protection Act to certain incorporated groups: non-profit corporations that have 501(c)(3) status and non-profit corporations that have not obtained 501(c)(3) status but that look quite a bit like 501(c)(3) public benefit organizations in how they are organized and operated.¹⁹ In addition, for the protection to apply, the harm must not have been caused by “willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the person harmed by the volunteer.”²⁰

As discussed below, avoiding personal liability may be one reason why a community fridge or mutual aid group considers becoming an incorporated entity.

Mitigating Risk

Regardless of your incorporation status, your fridge can mitigate your risk of liability by:²¹

- Developing, distributing, and publishing written safety policies
 - In addition to keeping volunteers and fridge users safe, creating a policy can provide some protection for fridge organizers against claims of negligence

¹⁷ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 7 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

¹⁸ 42 U.S.C. 14503 § 4(a); 42 U.S.C. 14505.

¹⁹ See 26 C.F.R. § 1.501(c)(3)-1 (describing the “organizational” and “operational” tests for 501(c)(3) status). The Volunteer Protection Act might be interpreted more broadly by a court than merely applying to 501(c)(3)-eligible groups, as the term “civic” seems to indicate that the statute was intended to apply at least slightly more broadly. Still, groups that do not have 501(c)(3) tax exemption that are considering incorporation in order to receive the benefits of the Volunteer Protection Act should be careful to consider these requirements, which largely mirror the requirements to obtain 501(c)(3) status as a public charity.

²⁰ 42 U.S.C. 14503 § 4(a)(3).

²¹ See *Mutual Aid Legal Toolkit*, SUSTAINABLE LAW ECONOMIES CENTER, https://www.theselec.org/mutual_aid_toolkit#h_6118206432711598469694450 (last visited Oct 8, 2021).

- Establishing a grievance policy and dispute resolution system so that individuals can file complaints directly with your fridge and mediate the issue between the parties
- Purchasing general liability insurance,²² a type of insurance policy that helps protect small businesses from claims that happen as a result of normal operations

3. Can food donors claim federal tax incentives for food donated to fridges?

In order to encourage more donations, a fridge may want to be able to inform prospective donors that their monetary or in-kind donations are tax-deductible.

Key Takeaways: Donations to fridges that are not registered as or fiscally-sponsored by a 501(c)(3) nonprofit will not be tax-deductible, whereas donations to fridges that are registered as a 501(c)(3) nonprofit will be tax deductible. In particular, donations of food are allowed to be claimed using an enhanced deduction that is larger than the tax deduction allowed for other in-kind donations, so long as the donations are made to a 501(c)(3) nonprofit. Some states offer further tax incentives designed to support donations of food by businesses and farmers in that state.

Deeper analysis: In an attempt to incentivize charitable donations, the federal tax code contains provisions to encourage contributions to nonprofit organizations. Monetary and in-kind (non-monetary) donations to a 501(c)(3) tax-exempt organization are tax-deductible. Donations of food, in particular, are also eligible for an enhanced deduction. An enhanced deduction allows donors to claim the lesser of 1) two times the cost to acquire the raw food products (the “basis” value) or 2) the basis value plus one-half the profit margin (defined as the fair market value of the food minus basis value.)²³ This is better than the normal tax deduction for other in-kind donations, which is usually just the simple basis value. Fridge donors cannot take advantage of federal charitable contribution tax deductions unless the receiving fridge is registered with the Internal Revenue Service (IRS) as a 501(c)(3) nonprofit or is fiscally sponsored by a 501(c)(3) nonprofit.²⁴ As discussed in later questions, this is one reason why a group might consider becoming a registered 501(c)(3) organization or being fiscally sponsored by one.

In addition to federal tax deductions, some states offer tax incentives to support businesses that do not benefit in a meaningful way from the federal tax incentive, like farmers and other

²² For more on general liability insurance, see *Bite Sized Legal Guide: Comprehensive Liability Insurance*, Sustainable Law Economies Center, <https://docs.google.com/document/d/1sLflmcqjzouZnA94ShhGnIVCsdU5xCvGYV6ZR7xz6hQ/edit?usp=sharing>.

²³ See 26 U.S.C. § 170(e)(3).

²⁴ See 26 U.S.C. § 170(c).

businesses with low profit margins.²⁵ These state benefits are more tailored to the unique circumstances of businesses in their state and are often easier to understand and take advantage of than the incentives available at the federal level.²⁶ To see a current map of all the states that offer state-level food donation tax incentives, visit the [ReFED Policy Finder](#) and click on “Recovery Policy” and then “Tax Incentives” on the right side of the page. Below is a brief overview of some of these state tax incentives:

- New York:
 - New York offers a tax credit to any “eligible farmer” who donates “apparently wholesome food” grown or produced within New York State to a food pantry, food bank, or other emergency food program operating within New York State that has a federal tax exemption. This credit provides a benefit of 25% of the fair market value of the food donated, up to \$5,000 per year.²⁷
- California:
 - California offers a tax credit to any “taxpayer responsible for planting, managing, and harvesting crops,” who donates fresh produce to food banks located in the state. This credit provides a benefit of 15% of the qualified value, which is equal to the wholesale market price.²⁸
 - California offers another tax credit to any “taxpayer engaged in the business of processing, distributing, or selling agricultural products,” who donates agricultural crops to nonprofits. This credit provides a benefit of 50% of transportation costs.²⁹
- Virginia:
 - Virginia offers a tax credit to “any person engaged in the business of farming” who donates crops of grains, fruits, nuts, or vegetables to a nonprofit food bank engaged in providing food to the “needy.” This credit provides a benefit of 30% of the fair market value, up to \$5,000 annually.³⁰

²⁵ See California Food Waste Policy: Tax Incentives, REFED, <https://policyfinder.refed.org/california/> (last visited Dec. 5, 2021).

²⁶ See California Food Waste Policy: Tax Incentives, REFED, <https://policyfinder.refed.org/california/> (last visited Dec. 5, 2021).

²⁷ New York Tax Law § 606(n-2)(3); See Margaret Brown, *NY Farm to Food Bank Tax Credit Aims to Help Those in Need*, NAT’L RESOURCES DEF. COUNCIL (Apr. 18, 2019), <https://www.nrdc.org/experts/margaret-brown/ny-farm-food-bank-tax-credit-aims-help-those-need>.

²⁸ Cal. Rev. & Tax. Code § 17053.88.5; See California Food Waste Policy: Tax Incentives, REFED, <https://policyfinder.refed.org/california/> (last visited Dec. 5, 2021).

²⁹ Cal. Rev. & Tax Code § 17053.12; See California Food Waste Policy: Tax Incentives, REFED, <https://policyfinder.refed.org/california/> (last visited Dec. 5, 2021).

³⁰ VA Code Ann. § 58.1-439.12:12.

4. Do fridges have to pay federal corporate income taxes?

Nonprofit entities and other groups are eligible to apply for a number of exemptions from the federal corporate income tax, including exemptions under 501(c)(3) and 501(c)(4) as well as roughly 30 other, less common exemptions. Under the federal tax code, both incorporated and unincorporated nonprofit organizations that meet all of the criteria to receive 501(c)(3) tax exemption are considered to be tax-exempt without formally applying for exemption if their annual gross receipts are “not normally” more than \$5,000.³¹ Therefore, if your fridge seems likely to have, on average, a gross annual income of less than \$5,000, it will already be considered tax-exempt as long as it is in compliance with other 501(c)(3) requirements, and submitting the required forms to register as a 501(c)(3) will not provide it with any additional tax exemptions. If your fridge has a gross annual income of \$5,000 or more, you will need to register with the IRS as a 501(c)(3) organization in order to receive the tax-exempt benefit. An organization that is exempt from the federal corporate income tax also is typically able to apply for exemption from similar state and local taxes.

Even if your fridge group does qualify for this “self-declared” 501(c)(3) status, you may be required to obtain an Employer Identification Number and submit annual informational filings (likely on the very simple Form 990-n) to the IRS.

5. What restrictions exist for 501(c)(3) organizations who want to participate in political campaigns or in lobbying activity?

Key Takeaway: The Internal Revenue Code forbids organizations that are registered as a 501(c)(3) from engaging in political campaigning. It places limits on the amount of legislative advocacy a 501(c)(3) can engage in. There are no limits on time spent engaging in activism that is not legislative advocacy, such as engaging in advocacy over matters before agencies or administrative bodies.

Deeper Analysis: Under the Code, all 501(c)(3) organizations are “absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. Contributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political

³¹ 26 U.S.C. § 508(c)(1). More specifically, “not normally” more than \$5,000 means: (a) during the group’s first tax year, it received gross receipts of \$7,500 or less; (b) during its first two tax years, it received a total of \$12,000 or less; and (c) if it is in existence for three or more years, it received \$15,000 or less in gross receipts over the immediately preceding two years plus the current year. 26 C.F.R. § 1.508-1(a)(3)(ii).

campaign activity.”³² Thus, a fridge that registers as a 501(c)(3) would be forbidden from engaging in any conduct that seeks to support or oppose a candidate for public office.

On the other hand, 501(c)(3) organizations may engage in legislative or issue advocacy, so long as they do so in a limited capacity. 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, an organization cannot qualify for 501(c)(3) status if a “substantial” portion of its work seeks to influence legislation.³³ “Legislation includes actions by Congress, any state legislature, any local council, or similar governing body, with respect to acts, bills, resolutions, or similar items (such as legislative confirmation of appointive office) or by the public in referendum, ballot initiative, constitutional amendment, or similar procedure. It does not include actions by executive, judicial, or administrative bodies.”³⁴ This means 501(c)(3) organizations have to ensure they are not spending substantial time trying to influence legislation, but they are unlimited in how much time they spend influencing administrative agencies, such as the Department of Health or other regulatory bodies.

How much legislative advocacy an organization can do depends on which of the two tests the organization chooses to measure its lobbying activity by: 1) the substantial part test; or 2) the expenditure test. The substantial part test considers a variety of factors, including the time devoted by both paid and volunteer workers and the expenditures devoted by the organization to the activity.³⁵ The expenditure test, on the other hand, looks at the organization’s expenditures and determines whether it exceeds a limit based upon the size of the organization.³⁶ For smaller entities, they should generally keep less than 20% of their effort focused on legislative advocacy to meet the expenditure test. Therefore, a fridge that incorporates as a 501(c)(3) organization can still engage in legislative or issue advocacy, but will be restricted in the amount of time, resources, and money it can devote to it.

In a broader view of politics shared by many activists, however, these restrictions on lobbying and partisan political activities only relate to a narrow universe of activities. If your group were

³² *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations>, (last visited Dec. 5, 2021).

³³ *Lobbying*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/lobbying> (last visited Dec. 5, 2021).

³⁴ *Lobbying*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/lobbying> (last visited Dec. 5, 2021).

³⁵ *Measuring Lobbying: Substantial Part Test*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/measuring-lobbying-substantial-part-test> (last visited Dec. 20, 2021).

³⁶ *Measuring Lobbying: Expenditure Test*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/measuring-lobbying-activity-expenditure-test> (last visited Dec. 20, 2021).

to issue a statement of support for the Movement for Black Lives, write something about your concerns over food apartheid in your community, or attend a demonstration in favor of police defunding, these activities would in most cases not count as lobbying or political activity--unless they were done to promote pending legislation or done in a context where they actively support or oppose a political candidate's campaign.

In summary, a 501(c)(3) organization cannot conduct advocacy for or against a political candidate and it can conduct legislative advocacy as long as it is not a "substantial" amount of the organization's time and resources. A 501(c)(3) organization is allowed and has no limits on its time spent engaging in forms of activism that fall outside of the IRS's definitions of lobbying and political activities, and it has no limits on its time spent engaging in advocacy over matters before agencies or administrative bodies.

6. What should fridges consider when determining whether to incorporate as a nonprofit and/or register as a 501(c)(3) nonprofit?

There are many reasons why community fridge and mutual aid organizers may be skeptical of incorporating as a nonprofit and/or registering as a 501(c)(3): it may seem too formal, too expensive, or too much of a long-term commitment, or you may have political concerns about what is sometimes called the "non-profit industrial complex" and how formalizing as a nonprofit can tend to push groups in the direction of becoming less political or overly reliant on money from foundations or the government.³⁷ These are important considerations and deserve your attention, but they should be measured against the potential benefits of incorporation and obtaining tax exemption.

First, it is important to note the difference between incorporating as a nonprofit corporation and registering as a 501(c)(3) tax-exempt organization. When an organization incorporates, they do so within a *state*. Incorporation provides certain benefits related to liability protections for individuals affiliated with the fridge, as described above. On the other hand, when an organization registers as a 501(c)(3), they do so with the Internal Revenue Service, which is part of the *federal* government. 501(c)(3) registration provides certain tax benefits. So, if your fridge is incorporated as a nonprofit, but is not registered as a 501(c)(3), it may benefit from liability protections of individuals affiliated with the fridge, but will not necessarily be exempt from

³⁷ For more on the non-profit industrial complex, see generally Dean Spade, *Mutual Aid: Building Solidarity During This Crisis (and the Next)* (2020); *The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex* (Incite! ed., 2007).

federal corporate income taxes (unless you fit the exception for groups that comply with the rules for 501(c)(3) organizations and you receive no more than \$5,000 in gross annual income).³⁸

In general, the more money your fridge is handling and the more complex your operations are, the more benefits your fridge may see from incorporation and/or registration as a 501(c)(3) or fiscal sponsorship by a 501(c)(3).³⁹ Please see the next question for a more detailed conversation on fiscal sponsorship.

Potential Benefits Associated with Incorporation and/or Registration as a 501(c)(3) Organization

- Nonprofit incorporation provides more protection from personal liability for members and volunteers

As discussed above, incorporating as a nonprofit corporation will provide a community fridge's organizers and volunteers with protection from personal liability in the event that a claim is brought against the fridge. As a nonprofit organization, your fridge will exist as an entity separate from you, the other organizers, or your volunteers. With very rare exceptions, this means that the fridge as an entity, not the individual people who run the fridge, would be responsible for any court-imposed judgments, taxes, or fines. Without this protection, individuals who work on the fridge may be held personally liable to pay for any injuries.

Furthermore, if your fridge is incorporated as a nonprofit, it can get additional protection by purchasing insurance.⁴⁰ If your fridge is sued for something that your insurance policy covers, your carrier should defend or pay a qualified lawyer to defend you in court, as well as pay for any damages that might be awarded at trial or in a settlement.

- Nonprofit incorporation can remove barriers to opening a bank account

Some banks and credit unions do not allow unincorporated associations to open up bank accounts, or they implement administrative barriers that make it very difficult to do so.⁴¹

³⁸ See *Mutual Aid Legal Toolkit*, SUSTAINABLE LAW ECONOMIES CENTER, https://www.theseclc.org/mutual_aid_toolkit#h_6118206432711598469694450 (last visited Oct 8, 2021).

³⁹ See *Mutual Aid Legal Toolkit*, SUSTAINABLE LAW ECONOMIES CENTER, https://www.theseclc.org/mutual_aid_toolkit#h_6118206432711598469694450 (last visited Oct 8, 2021).

⁴⁰ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 20 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

⁴¹ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 22 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

Incorporating as a nonprofit will make your fridge eligible to open up an account at almost any bank or credit union.

- 501(c)(3) registration may encourage prospective donors to contribute to your fridge because their donations will be tax deductible

Donations to fridges that are not registered as a 501(c)(3) or that are not fiscally-sponsored by a 501(c)(3) nonprofit are not tax deductible; having 501(c)(3) tax exemption either directly or through a fiscal sponsor may be helpful in garnering more donations by creating an incentive for individuals and companies who would like to be able to partially deduct their monetary contributions from their taxes, or receive the enhanced tax deduction for their food donations. If most of your donors are individuals (rather than businesses or charities), this tax benefit may sound more appealing than it actually is: in order for your donors to actually deduct donations from their taxes when they file, they must itemize their deductions, which has become uncommon for lower-income and middle-class families.⁴²

- For organizations that ordinarily receive more than \$5,000 in gross annual income, 501(c)(3) registration allows you to apply for federal tax-exempt status

Tax-exempt status through 501(c)(3) registration makes an organization eligible for exemption from paying federal corporate income tax.

Potential Costs Associated with Incorporation and/or Registration as a 501(c)(3) Organization

- Administrative and financial costs

The costs associated with incorporating as a nonprofit vary from state to state.⁴³ Corporate formation typically costs between \$75 and \$200. Once incorporated, there are ongoing requirements with which a nonprofit organization must comply.

No matter which state you incorporate in, if you want to apply for 501(c)(3) status, you would do that by applying to the IRS, the federal tax authority. Applying for tax-exempt status from the IRS requires completing an application that is either 3 pages long or 28 pages long, as well as

⁴² See Tax Policy Center, *How Did the TCJA Affect Incentives for Charitable Giving?*, <https://www.taxpolicycenter.org/briefing-book/how-did-tcja-affect-incentives-charitable-giving> (last visited Dec. 27, 2021).

⁴³ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 8 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

paying corresponding filing fees of either \$275 or \$600.⁴⁴ There is a test available in the [IRS instructions for the Form 1023-EZ](#) to determine whether an organization qualifies for the shorter and cheaper Form 1023-EZ or the longer and more expensive Form 1023.⁴⁵ For many organizations, the key factor is whether your group has annual gross receipts of \$50,000 or more—either in the past three years, or if you project having that much annual revenue in any of the next three years. Based on that factor alone, most community fridges will only need to complete the 3 page 1023-EZ application that costs \$275.

501(c)(3) organizations also must comply with ongoing requirements. These include both substantive limitations on things like your group’s ability to engage in lobbying and political campaigns, as described above, and compliance with formalities like filing an annual Form 990 information return with the IRS.⁴⁶

- Organizational and structural requirements

Once incorporated as a nonprofit, an organization must comply with its state law’s requirements in order to receive the protections associated with incorporation. For instance, nonprofit corporations generally must have a Board of Directors that holds regular meetings and keeps detailed records and, in some states, must also adopt corporate by-laws.⁴⁷ However, the nonprofit structure provides for significant flexibility in how organizations choose to comply with these requirements.⁴⁸ For a more complete discussion of what this might look like, please visit [Legal Issues in Mutual Aid Operations: A Preliminary Guide](#).

- Prohibition on participating in political campaigns and restrictions on lobbying activity

As described above, a 501(c)(3) organization cannot conduct advocacy for or against a political candidate and it can conduct legislative advocacy as long as it is not a “substantial” amount of the organization’s time and resources. A 501(c)(3) organization has no limits on its time spent engaging in forms of activism that fall outside of the IRS’s definitions of lobbying and political

⁴⁴ See *Mutual Aid Legal Toolkit*, SUSTAINABLE LAW ECONOMIES CENTER, https://www.theseclc.org/mutual_aid_toolkit#h_6118206432711598469694450 (last visited Oct 8, 2021).

⁴⁵ IRS, *Instructions for Form 1023-EZ* 13 (Rev. Jan. 2018), <https://www.irs.gov/pub/irs-pdf/i1023ez.pdf>.

⁴⁶ Again, the IRS asks for more information from groups with greater revenue. Many 501(c)(3) community fridges, with gross receipts less than \$50,000 per year, are eligible to file Form 990-N, which asks only a few very broad questions and can be filled out online. Medium-sized 501(c)(3)s, with gross annual receipts between \$50,000 and \$250,000 generally file on Form 990-EZ, and larger 501(c)(3)s with gross annual receipts over \$250,000 file on the lengthier and more detailed Form 990.

⁴⁷ See *Mutual Aid Legal Toolkit*, SUSTAINABLE LAW ECONOMIES CENTER, https://www.theseclc.org/mutual_aid_toolkit#h_6118206432711598469694450 (last visited Oct 8, 2021).

⁴⁸ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 12 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

activities, and it has no limits on its time spent engaging in advocacy over matters before agencies or administrative bodies.

7. What is fiscal sponsorship? What are the pros and cons of fiscal sponsorship?

Generally speaking, fiscal sponsorship is a contractual relationship whereby an established 501(c)(3) tax-exempt nonprofit corporation assists an individual, group, or non-exempt nonprofit in receiving donations, grants or other money, typically for a fee. The established 501(c)(3) organization essentially houses the unincorporated or junior nonprofit under its 501(c)(3) status. Fiscal sponsorship may be particularly appealing to community fridge/mutual aid groups that have limited capacity or are not interested in becoming incorporated nonprofits themselves, but who would like to manage their money through a centralized fund or take advantage of the benefits of tax-exemption.⁴⁹

Fiscal sponsorship is a commonly-employed arrangement in the nonprofit sector, and there are multiple ways to structure a fiscal sponsorship. Two common approaches are outlined below. Under either arrangement, the sponsor organization must take account of its own compliance issues and charitable purposes, and it will need to ensure that the money that passes through its bank accounts is spent in accordance with those guidelines.

- Under a “Model A” fiscal sponsorship, the community fridge/mutual aid group becomes a project of the sponsor entity and the degree of control and terms of the relationship are set out in a contract.⁵⁰ The money raised for the community fridge project is put into and then paid out of the sponsor’s bank account for the specific and previously-agreed upon purposes of the project. The sponsor will typically agree to managing tax, accounting, and legal compliance for the project.⁵¹
- Under a “Model C” fiscal sponsorship, the community fridge/mutual aid group remains independent from the sponsor.⁵² The sponsor still receives funds for the group’s work in its bank account, but unlike a “Model A” sponsorship, it then provides the money directly to the community fridge/mutual aid group. In turn, the sponsor may require

⁴⁹ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

⁵⁰ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

⁵¹ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

⁵² Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

documentation of how the money was spent or charge a fee for their work.⁵³ Additionally, the sponsor will typically agree to managing tax, accounting, and legal compliance for the project.⁵⁴

8. What are our rights when dealing with host sites? What are some best practices to avoid disagreements or conflicts with host sites?

Many fridge organizers wonder what their rights with host sites are in the event that their relationship with a site deteriorates. Specifically, organizers wonder whether the host site can evict the fridge from their property with little or no notice.

Key Takeaway: The answer to this question will look very different depending on the circumstances surrounding the fridge and its relationship with the host site. Generally, in the absence of a contract explicitly stating otherwise, a private property owner is entitled to rescind a grant of access to their property. That being said, there are numerous best practices fridge organizers may want to engage in to avoid disagreement or confusion with their host site and landlord. Having candid and honest conversations with potential host sites before entering into an agreement with them, as well as creating Memorandums of Understanding (MoUs), can help ameliorate many of these concerns. Additionally, organizers may want to speak with host site landlords, neighbors, and the surrounding businesses to ensure that their fridge will not be met with hostility or opposition.

Deeper Analysis:

A typical fridge will likely be unable to enter into a legally enforceable contract. This is because in order for a contract to exist, “consideration” must be exchanged between the parties to the contract. In other words, to be legally enforceable, each party to a contract must receive something they have bargained for. For instance, a legally enforceable contract could be created if a fridge were to agree to pay a host site in exchange for permission to place a fridge on their property. Most fridges are unable to do so, so agreements between host sites and fridge organizers do not amount to contracts and are usually unenforceable in court. *[It is important to note that even if they did create a binding contract, it would probably not offer the fridge much protection. Parties to contracts often choose to break them if the penalty is very low, as it likely would be in the case of a fridge using a portion of the host site’s land].*

⁵³ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

⁵⁴ Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* 28 (Hofstra Univ. Legal Studies Research Paper Series, Paper No. 2020-06, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736.

In the absence of a contract that your group would be realistically able to enforce in a court, fridge organizers may be interested in entering into a Memorandum of Understanding (MoU) with their host site. While these documents are typically not legally enforceable in court (because there is no consideration), they can be helpful in establishing mutually-agreed upon norms, setting out expectations, and avoiding conflict and confusion.

A MoU should: 1) explicitly state the names and contact information of the parties entering into the agreement; 2) describe the purpose or goal of the MoU; 3) clearly describe and delineate the agreed upon roles and responsibilities of each party; 4) clearly state the length or period of time that the MoU will be in effect; and 5) include the signatures of at least one representative of each party (the fridge and the host site). The MoU should also set out a procedure for discussing any conflict or concerns, in hopes of finding a resolution before the situation escalates. The MoU can also set out expectations about how much notice a host site will give to the fridge if the fridge needs to move from the site for any reason.

Below are some sample terms and language that a community fridge may want to include in a MoU.

A. Fridge organizers will:

- a. Clean the fridge and surrounding area on a regular basis
- b. Keep stock of the items in the fridge and get rid of any spoiling foods on a regular basis
- c. Promptly notify the host site of any grievances or issues involving the host site, and provide the site with a reasonable length of time and opportunity to remedy the problem before taking any further action
- d. Review, update, and renew the MoU annually with the host site

B. The host site will:

- a. Pay the electricity costs necessary to keep the fridge running
- b. Treat fridge patrons with respect and dignity at all times
- c. Provide at least 60 days notice to fridge organizers if the fridge must be relocated
- d. Promptly notify the fridge organizers of any grievances or issues they are having with the fridge, and provide the organizers with a reasonable length of time and opportunity to remedy the problem before taking any further action
- e. Review, update, and renew the MoU annually with the fridge

Finally, there may be circumstances where a potential site is committed to hosting a community fridge on their property, but their landlord, residential neighbors, or businesses in the surrounding area do not want a fridge in the community. Unfortunately, when this is the case, fridge organizers must seriously consider the possibility that those opposed to the fridge will be able to successfully shut down the fridge by pressuring the host site or filing complaints with the

city.⁵⁵ Fridges may want to have conversations with host sites about their relationship with their landlord. If a host site has a long-term lease that gives them a lot of control over the property, then a landlord may not be able to shut down a fridge even if they disapprove. But this will depend on the language of the lease between the host site and their landlord. Additionally, fridge organizers may want to reach out to surrounding neighbors and businesses and gauge their feelings towards a fridge. While having these conversations may be one way to lessen their resistance to the fridge, organizers should take these threats seriously when deciding on a location.

9. What should fridges consider when deciding where to locate a fridge?

Those interested in starting a community fridge must first decide where they would like to put it. While there are several factors organizers should consider when determining the best location for a fridge, local zoning regulations, as well as health and sanitation codes, may determine where a fridge can legally be located.

Key Takeaway: Fridge organizers should always obtain the permission of a property owner before setting up a fridge on their property. In addition to receiving permission, there may be other restrictions on where fridges can locate. In general, many cities and municipalities either forbid or make the placement of fridges on public property extremely difficult. For these reasons, it is most common to find community fridges on the property of privately-owned businesses, places of worship, or community centers with the permission of the property owner. Furthermore, even if a local government allows community fridges on public property, they will likely require that the fridge go through a formal process in order to obtain official permission.

On both public and private property, zoning regulations may prohibit or limit the types of structures that are allowed, especially in residential neighborhoods. While in some situations organizers may be able to apply for a zoning variance or exception from their local government, this process can take time and money. Finally, fridge operators should choose a location where the fridge will not create a “nuisance” or block a portion of the sidewalk or thoroughfare.

Deeper Analysis: Municipal zoning regulations and health and sanitation codes were not designed with community fridges in mind. As a result, these codes are often ill-suited to appropriately manage fridges and may be confusing to fridges at best, or at worst can be used to impose ineffective and unnecessary burdens on fridges. Either way, fridges should be sure to get permission from the land owner where they plan to locate (whether public property or private

⁵⁵ See Erika Adams, *UWS Community Fridge Shuts Down After Residents File ‘Hostile’ Complaints*, Eater New York (June 25, 2021), <https://ny.eater.com/2021/6/25/22550172/uws-community-fridge-shutdown-controversy>.

property), and should look into zoning codes to ensure they are permitted in that area. You can often find zoning maps and other information about zoning codes with a google search of your county.

Fridges on public property: Local governments often do not allow community fridges on public land. However, it is entirely up to the city (if the property is owned by the city) or the state (if the property is owned by the state) whether to allow a fridge on their land. Therefore, a fridge can always petition their local government and seek permission to place a fridge on government-owned land.

That being said, below are examples of the ways in which municipal and city regulations and codes can be used to limit the placement of community fridges on public land.

- In Boston, community fridges are expressly prohibited on public property and are only allowed on private property with the permission of the property owner. Additionally, fridges, as well as extension cords and any other items associated with the fridge, are not permitted to extend over the public way (public streets, sidewalks, etc.).⁵⁶
- A fridge in Compton, California was forced to cease operations after receiving notice of alleged violations of property maintenance and electrical codes for placing electrical and extension cords in public spaces where they could be “subject to physical damage.”⁵⁷

Fridges on private property: For private property, fridges are generally allowed unless there are zoning restrictions that pose a barrier. For example, zoning laws can often create problems for fridges located in residential areas. Below are examples of how regulations enforced against fridges located in residential areas have forced some organizers to cease operations.

- A community fridge in Madison, Wisconsin was shut down by city officials because it was placed in a residentially zoned area where food pantries are prohibited.⁵⁸
- A community fridge in Las Vegas, Nevada was shut down by city officials because it was placed on the private property of United Movement Organized Kindness’s headquarters in an area where zoning regulations prohibit the placement of objects within ten feet of property lines.⁵⁹

⁵⁶ *Community Fridges Toolkit*, City of Boston Food Access, <https://www.boston.gov/sites/default/files/file/2021/04/Community%20Fridges%20Toolkit.pdf> (last visited Apr. 11, 2021).

⁵⁷ Lil Kalish, *Officials are not Chill About the Community Fridges Popping Up Around LA*, LAist (Aug. 26, 2020), <https://laist.com/news/officials-not-chill-about-community-fridges-los-angeles>.

⁵⁸ Nicholas Garton, *Madison Shuts Down ‘Community Fridge’ After Anonymous Complaint*, The CAP Times (Apr. 7, 2021), https://captimes.com/news/local/neighborhoods/madison-shuts-down-community-fridge-after-anonymous-complaint/article_b2d47af4-4ac7-5306-976c-20942b772c20.html.

⁵⁹ Bo Brusco, *The Saga of a Community Fridge in Las Vegas*, Consider This (Mar. 21, 2020), <https://www.considerthis.one/stories/the-saga-of-a-community-fridge-in-las-vegas>.

On a separate but related note, when looking for the right host site, many fridge organizers want to ensure that potential host sites do not participate in or contribute to practices that are antithetical to mutual aid values. Los Angeles Community Fridges, a decentralized network of independent refrigerators and pantries, has put together this [questionnaire](#) that they use when speaking with potential hosts.

10. My fridge has not pursued tax exemption or fiscal sponsorship – what should we consider when deciding which money transfer platform to use to receive cash donations?

Key Takeaways: Different money transfer platforms treat gifts differently. This can have important tax implications that fridges should be aware of when deciding which platform to use.

Deeper Analysis: There are three main types of platforms that people use to transfer money from one person to another person or group right now. **Peer-to-peer systems**, such as Venmo, PayPal, and CashApp, are online platforms that allow their users to send one another money from an app or website through a linked bank account or credit card. **Crowdfunding platforms**, such as GoFundMe, Kickstarter, and Patreon, allow a project or cause to raise money through small contributions from a large number of people online.⁶⁰ Some crowdfunding platforms, like GoFundMe, do not require bank information when you first create a page, but require bank account information to distribute those funds once received by the platform. Finally, **bank-to-bank payment platforms** like Zelle allow users to directly transfer funds from one bank or credit union account to an account at another bank or credit union without going through an intermediary “third party payment processor” the way the other kinds of platforms do.

Determining which platform is best for your community fridge requires a general understanding of how tax law deals with gifts, which we describe in Section A of the answer to this question. It will be especially important to be familiar with those rules for the 2022 tax year, as there are changes to the tax code that will impact many community fridge groups starting this year, which we describe in Section B. Section C provides more specific ideas for how to select a payment platform. Finally, Section D describes what your fridge group should do if you receive a Form 1099-K showing that donations to your group are being counted as taxable income rather than as gifts.

⁶⁰ There are different models of crowdfunding, but for our discussion here, we are generally describing “donative crowdfunding” or “rewards-based crowdfunding,” where, in exchange for a contribution, a contributor either receives nothing or just gets a small token of appreciation with little or no cash value. See C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 14-27 (2012).

A. Tax Law and Gifts

Under the Internal Revenue Code, all income, regardless of its source, is taxable unless it meets the requirements of an exception.⁶¹ One particularly relevant exception for mutual aid groups is that gross income “does not include the value of property acquired by gift,” but the term “gift” is never defined in the tax code.⁶² The leading Supreme Court case on the issue defines a gift as money given with “detached and disinterested generosity . . . out of affection, respect, admiration, charity, or like impulses.”⁶³ In short, “the most critical consideration . . . is the transferor’s ‘intention’.”⁶⁴ Therefore, community fridge groups that want to ask for financial contributions that can be classified as gifts might benefit from stating clearly and in writing that any such contributions do not entitle the donor to special treatment, a free gift, or any other benefit that is not already freely available to the general public, like access to the food in the community fridge.

Money given to a fridge group that is properly designated as a gift by the person making that gift should not be classified as taxable income, but not all peer-to-peer and crowdfunding platforms do an equally good job of allowing someone to designate a payment as a gift. Venmo, for example, allows a payment to be classified as either for “friends and family” or as a “business transaction for goods and services.” These choices seem like a poor fit for many people making financial contributions to a community fridge. Imagine this typical scenario: a community fridge in Seattle makes a post on social media telling the public about the tremendous need for financial support for their fridge. A stranger who does not know anyone in Seattle sees the post and decides to make a contribution out of “detached and disinterested generosity” via Venmo to the group. Legally, this seems like it should be counted as a gift just as much as a birthday present made to a family member is, but Venmo’s choice between “business transaction” and “friends and family” does not make that clear. Other platforms use similarly inexact language.

Those who give to your fridge through an online platform should be told to classify their donation as a “friends and family” payment, rather than a “business transaction” if it meets the standard for being a gift. Similarly, if your community fridge group wants its donations to most clearly be gifts rather than part of a business transaction, it should be careful about doing things like giving “free” t-shirts or similar “thank you” gifts to donors, as those might be interpreted by the Internal Revenue Service (IRS) as a business transaction, even if the text on your website

⁶¹ 26 U.S.C. § 61 (2017).

⁶² 26 U.S.C. § 102 (1986).

⁶³ *Comm’r v. Duberstein*, 363 U.S. 278, 285 (1960) (quoting *Comm’r v. Lobue*, 351 U.S. 243, 246 (1956) and *Robertson v. Comm’r*, 343 U.S. 711, 714 (1952)).

⁶⁴ *Id.* (quoting *Bogardus v. Comm’r*, 302 U.S. 34 (1937)).

tries to construe that transaction as a “thank you” gift for a “suggested donation” or something like that.

How these kinds of payments are classified is especially important because the rules on how the IRS is going to treat money given through a peer-to-peer or crowdfunding platform are changing.

B. The Changing Rules on Form 1099-K: What is Changing and Why it Matters

Form 1099-K is a tax form that reports taxable income a person receives through peer-to-peer, crowdfunding, and certain other “third-party network” platforms. Most peer-to-peer and crowdfunding platforms will issue this form when a certain amount of money is transferred to an individual through their platform, although—and this is an important distinction—**the bank-to-bank platform Zelle does not issue 1099-Ks because it is not a third-party network platform.**⁶⁵

The 1099-K should report money that a person receives as part of a business transaction—if you baby-sit, do yard work, rent out your spare room, or sell goods or services for money that is paid into your peer-to-peer or crowdfunding account, that should be reported on the 1099-K form. On the other hand, **if you receive gifts or reimbursements through a peer-to-peer or crowdfunding platform, those amounts should not be reported at all on the 1099-K form**—whether it’s a friend reimbursing you for a meal you paid for, a birthday present from your aunt, or a gift to support the community fridge or mutual aid project you are collecting money to support. So long as those gifts meet the “detached and disinterested generosity” standard, they should not be reported as income on a 1099-K form.

When a 1099-K form is issued, one copy is sent to the IRS and one is sent to the account holder, so if an account holder receives a 1099-K—or even if they were supposed to receive a 1099-K but they moved and never updated their account information or the tax form was lost in the mail—the IRS will have received the form and is expecting the account holder to report the money listed on the form as income.

As peer-to-peer and crowdfunding platforms have become increasingly popular over the last few years, many people who use these kinds of accounts but have never received a Form 1099-K may have gotten into the habit of not reporting the money they receive through these platforms to the IRS. Congress has become aware of this and changed the rules in the American Rescue Plan of 2021 to crack down on people not paying taxes on income received through peer-to-peer and crowdfunding platforms.

⁶⁵ *Frequently Asked Questions*, ZELLE, <https://www.zellepay.com/faq/does-zelle-report-how-much-money-i-receive-irs>.

Up until these recent changes, in most states, peer-to-peer and crowdfunding platforms would issue a 1099-K only when an account received over \$20,000 in gross payments *and* that money came through more than 200 separate payments in a calendar year.⁶⁶ With the changes introduced in the American Rescue Plan Act of 2021, for 2022 taxes (the taxes due for most people in April 2023), most peer-to-peer and crowdfunding platforms are required to report any payments to an account holder who receives \$600, regardless of the number of transactions, as long as the platform believes those payments are income—not gifts or reimbursements. Section D of our answer to this question below highlights what to do in the event you are sent a 1099-K form for money that you believe should not be taxable.

C. How to Choose a Payment Platform

We do not yet know whether different peer-to-peer and crowdfunding platforms are going to adjust their services to better support their users with these new changes, but we have some guidance for how to judge which ones will be better or worse for your fridge group and how to approach using a payment platform for your fridge group.

1. *Look for a platform that allows people making a payment to classify that payment as a gift.* If someone making a payment to your group cannot designate it as a gift, the platform will very likely default to classifying that payment as taxable income and report all of it on Form 1099-K. Make sure that payments to you are properly classified, and encourage donors to your fridge group who intend for their contribution to be a gift to indicate that their contribution is a gift when they give through the platform.
2. *Look for a platform with good customer service and keep records of every transaction and what it was for so that you can advocate with the platform to make sure that any 1099-K you receive is as accurate as possible.* Ultimately, if you receive a Form 1099-K that incorrectly lists gifts or reimbursements as taxable income, you will need to ask the payment platform to correct the 1099-K and send the correction to the IRS. This requires good customer service from the platform and likely will require good record-keeping by the account holder to support their arguments to a payment platform that payments were incorrectly listed on their Form 1099-K. You should make sure that people who give gifts to your fridge mark them as gifts, and you should make a note in your own records of where a payment came from and what it was for.

⁶⁶ However, in some states, including Arkansas, Florida, Illinois, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, Pennsylvania, Vermont, Virginia, and Washington, D.C., state law lowered this threshold, and payment platforms were required to issue 1099-Ks for account holders in those states at various smaller amounts.

3. *Consider Zelle and other bank-to-bank platforms.* There is a significant difference between Zelle and peer-to-peer or crowdfunding platforms when it comes to tax treatment. As they are not technically third-party payment processors like Venmo, Paypal, Cashapp, and other popular payment platforms, Zelle and other bank-to-bank platforms do not issue 1099-Ks.

4. *Think about whether to use a platform in the name of one or more of your members or in the name of the entity itself, and plan for how you will withdraw money out of your account on the platform.* Some payment platforms will only allow a group to set up an account in the name of the group if it is connected to a bank account in the name of the group. If a group chooses not to incorporate or enter into a contract with a fiscal sponsor, it might still want to open a bank account with a bank or credit union in the name of the fridge group, which it should be able to do even if [unincorporated](#).⁶⁷ Having an account in the name of the fridge group can help your group avoid some of the risks inherent in having money stored in any one person's individual account—both the risk to the group of that person being tempted to keep money intended for the group, and the risk to that one person of being stuck with a tax bill or other liability that should be the responsibility of the group as a whole. However, one downside to operating the platform account in the name of the group is that taking these steps to set up the associated bank or credit union account can be time consuming and frustrating--banks and credit unions sometimes require a lot of paperwork and back-and-forth that might be unnecessary if your group is not using that account regularly. Typically, banks and credit unions will allow an unincorporated group to open an account with a name, Employer Identification Number ("EIN," which you can get for free from the IRS [here](#)), a resolution (a signed document the group approves) authorizing certain individual members to access the bank account, ID information for those members who have access to the account, and other documents.

5. *Remember the burden on the individuals offering their accounts to your fridge group.* If your fridge group uses payment platform accounts in the name of one or more of your members, those members will need to be attentive to the rules of each platform and to any tax forms or other tax information they receive from those platforms, the

⁶⁷ Like business entities, unincorporated associations are eligible to open Federal Deposit Insurance Corporation-insured bank accounts. 12 C.F.R. § 330.11(c) (2006). Some banks and credit unions make this easier to do than others.

IRS, or a state tax agency. Conforming with these requirements may impose time and possible financial burdens on that individual.

D. What to Do If the Fridge Group or a Member Receives a 1099-K Showing Income that Should be Classified as Gifts

Many movement projects that have used payment platforms have confronted the issue of receiving a 1099-K for income that should be classified as gifts. Unfortunately, it is almost certain that many more will face this issue in early 2023 due to the changes mentioned in Section B of the answer to this question.

The IRS Taxpayer Advocate Service has issued guidance for taxpayers who believe they have received a 1099-K form with errors in it, like if money that should have been properly classified as a gift was instead counted as part of the income reported on the 1099-K.⁶⁸ They recommend working on fixing your 1099-K as soon as you can after you receive it, because “January 31 does not give you a lot of time to fix any incorrect form at that point before filing.”⁶⁹ They are also clear that **the IRS is looking for taxpayers to sort out any errors on their 1099-Ks with their payment platforms, and not to try to plead your case to the IRS**, writing that “mistakes may happen” and that if a gift or reimbursement is wrongly reported on a taxpayer’s 1099-K, “you will have to contact the payment app company to request they send a correction to the IRS. This could be time consuming.”⁷⁰

In short, you should be prepared to contact your payment platform as soon as you can after receiving a 1099-K and you may benefit by having proof that the specific payments that were erroneously counted as income should properly be listed as gifts because the donor gave them with “detached and disinterested generosity,” rather than as part of a business transaction. The better your records are, the more helpful they will be for these kinds of disputes.

11. What are the legalities of hiring labor and paying folks through donated funds?

Key Takeaways: Community fridges can generally use donated funds to pay workers, but fridge groups should know: (1) there are substantial legal requirements that come from having employees; (2) a fridge group can attempt to classify its workers as independent contractors in order to work around those employment law requirements, but doing so requires a real

⁶⁸ IRS Taxpayer Advocate Service, *TAS Tax Tip: Use Caution When Paying or Receiving Payments from Friends or Family Members Using Cash Payment Apps* (Mar. 8, 2022), <https://www.taxpayeradvocate.irs.gov/news/tas-tax-tip-use-caution-when-paying-or-receiving-payments-from-friends-or-family-members-using-cash-payment-apps/>.

⁶⁹ *Id.*

⁷⁰ *Id.*

independent contractor relationship and companies who misclassify their workers as independent contractors can be liable for back wages and penalties; and (3) while a fridge group can make a very small payment to a volunteer in some situations, simply calling payments to workers “stipends” or “honoraria” instead of “salaries” does not mean that those payments are exempt from minimum wage and other employment laws, so the fridge should be very careful as to how and how much it pays, to ensure any volunteers will be classified as such. In addition, community fridges should be aware of restrictions on paying people that arise from their legal structure or from the donor of the funds.

Deeper Analysis:

Part I – Employment Law Rules

It probably seems like common sense that after someone spends a day volunteering for your fridge group, you could buy them a beer or give them a few dollars to pick up dinner on their trip home in recognition of all of their hard work. Unfortunately, U.S. employment law does not make such a transaction as easy as it may seem like it should be. Employment laws were created to try to prevent all of the unscrupulous behaviors that businesses might use to get out of paying their workers a fair wage and were therefore designed to not allow a lot of work-arounds; the drafters of these laws were trying to address the different schemes and scams that businesses might use to extract more labor from their workers for less money. Employment law is generally written and interpreted in a way that classifies most work as employment and most employees as entitled to earn the minimum wage and overtime. Unfortunately for a fridge group that wants to informally give a few dollars to a volunteer, there is some level of risk here.

How risky could it be to buy one beer for your volunteer? One beer on one occasion certainly seems like it has little risk. But if you start sometimes giving your volunteers \$20 after a 4 hour shift, that might start to look like a job where your employees are not being paid minimum wage. If you only make those payments sometimes, or informally, or only when a volunteer requests it, that might not be any better; if the state Department of Labor sees your workers as employees, those “informal” payments are further evidence of not complying with minimum wage laws. Imagine what you might think if you found out that a fast food chain was only paying its employees informally, only when the managers felt like it, or only if a worker specifically asked for money at the end of their shift. Your state Department of Labor might look just as critically at your payments--especially if they were to receive a complaint from a person who worked for your group who feels like they were unfairly treated. Many state Departments of Labor make the

complaint process easy in order to offer workers protection without the need to hire a lawyer or submit complex legal paperwork.⁷¹

The primary way your fridge group could offer some compensation for your workers without having them classified as employees would be to have your workers classified as independent contractors rather than employees, which provides some protection for your group from claims that you did not pay your workers minimum wage or meet other employment law rules that only apply to employment relationships. This is described in Section A, below. For groups that have 501(c)(3) status or that are operated for civic, charitable, or certain other purposes, you could also seek to be protected by the federal Volunteer Protection Act, which allows certain organizations to pay volunteers less than \$500 per year. This is described in Section B.

A. Can Your Fridge Group Pay Its Workers as Independent Contractors?

Employment law places a lot of requirements on employers of *employees*, and relatively few on businesses and others that pay *independent contractors*. Independent contractors are workers that work pursuant to a written or oral contract but are not employees. As described more fully below in Section C of this Part I, if your fridge group has workers who are classified as employees, you would need to collect work authorization and personal information from each employee, withhold both payroll and income taxes from each employee's paycheck, cover each employee with worker's compensation insurance, and meet minimum wage and overtime requirements.

Because of all of the requirements that come along with having *employees* and their associated costs, your community fridge may want to try to have your paid workers classified as independent contractors rather than employees. State and federal departments of labor and the IRS are aware that employers commonly mischaracterize their workers as independent contractors (both accidentally and intentionally), and they make their own determinations about whether or not a worker is an employee. Your fridge group, in short, does not simply get to declare that your workers are independent contractors—if your worker or any other party raises the matter with a state or federal department of labor, they will conduct their own analysis.

These agencies do their analyses on a case-by-case basis, considering the entire nature of the relationship; no one factor is determinative. Your fridge group's workers are more likely to be classified as independent contractors than employees if: (a) your group tells your workers *what*

⁷¹ See, e.g., *Wage & Hour and Contract Compliance*, N.J. Dept. of Labor and Workforce Development, <https://www.nj.gov/labor/wageandhour/claims-appeals-investigations/file/>; *Unpaid/Withheld Wages and Wage Supplements*, N.Y. Dept. of Labor, <https://dol.ny.gov/unpaidwithheld-wages-and-wage-supplements>; *File a Minimum Wage Complaint*, Ohio Dept. of Commerce, <https://com.ohio.gov/divisions-and-programs/industrial-compliance/file-a-complaint-industrial/file-a-minimum-wage-complaint>.

work needs to be done, but not *how* that work should be done; (b) your workers have flexibility to set their own hours and schedule; (c) your workers work on a “per project” basis, rather than at an hourly or monthly rate; (d) your group does not reimburse your workers for travel or business expenses; (e) your group does not require your workers to undergo any training for the work to be performed; (f) your workers are not asked to provide regular written or oral reports on the project’s status; and (g) payment is based on project completion or other convenient method of payment, rather than an hourly, weekly, or monthly pay schedule.⁷² Your workers could be found to be independent contractors even if a number of these factors lean in the direction of your workers being employees; agencies will make a case-by-case determination based on an analysis of all these factors.

Your fridge group needs to be careful here. While the test to determine whether a worker is an independent contractor or an employee might feel somewhat subjective and hard to apply to a particular worker with certainty, the penalties for misclassifying your workers as independent contractors instead of employees can be extremely serious. Criminal penalties are possible but rare unless there is a ruling that the misclassification was an intentional effort to evade taxes.⁷³ More typical penalties from the IRS in cases where the misclassification was accidental include liability for unpaid wages and benefits, back taxes, and employment taxes. Most employment law enforcement happens at the level of the states, however, where laws are quite varied. Some states impose financial penalties for misclassification by statute.⁷⁴ States where an employment relationship triggers the need to have workers’ compensation insurance in place can also effectively lead to severe sanctions for misclassification.⁷⁵

If your fridge group’s workers are independent contractors, there are much fewer, simpler rules that your group should follow. If your group has a worker that is an independent contractor, at the time they start working, your group will need to have the worker fill out the Request for

⁷² See *Independent Contractor (Self-Employed) or Employee?*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> (last updated Nov. 9, 2021); see also *Behavioral Control*, IRS <https://www.irs.gov/businesses/small-businesses-self-employed/behavioral-control> (last updated May 6, 2022); *Financial Control*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/financial-control> (last updated Apr. 6, 2022); *Type of Relationship*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/financial-control> (last updated Apr. 4, 2022).

⁷³ I.R.C. § 7201 (1982).

⁷⁴ See, e.g., 820 ILCS § 185/40 (Illinois imposes civil penalties of up to \$1,000 per violation); CA Labor § 226.8 (California imposes civil penalties of \$5,000-\$15,000 per violation).

⁷⁵ See, e.g., N.J.S.A. § 34:15-79 (New Jersey imposes a penalty of up to \$5,000 for each 10 day period when employees are not covered by workers’ compensation insurance); N.Y. Work. Comp. § 52 (New York imposes a penalty of up to \$2,000 for each 10 day period when employees are not covered by workers’ compensation insurance).

Taxpayer Identification Number and Certification, IRS Form W-9.⁷⁶ Form W-9 requires a worker's social security number. An independent contractor is legally required to be authorized to work in the U.S., but your fridge group is not required to verify the independent contractor's legal status using Form I-9, like it is required to do for employees.

The payments made to an independent contractor must be reported on the Nonemployee Compensation tax form, IRS Form 1099-NEC. If your group paid a worker \$600 or more for services provided during the year, a 1099-NEC must be completed, a copy of the 1099-NEC must be provided to the independent contractor by January 31, and another copy must be sent to the IRS by January 31.⁷⁷

Independent contractors themselves are responsible for paying their income taxes, so it is not the responsibility of the employer to withhold taxes each time the independent contractor is paid.⁷⁸ The independent contractor files and pays their annual income taxes using the information your group reported on the 1099-NEC.

In most states, you do not have to carry workers' compensation insurance coverage for independent contractors, but state laws vary on these requirements and your group may want to check with the agencies in your state that regulate workers' compensation.⁷⁹ If workers' compensation coverage is required and your group does not have it, your group could face fines or penalties even if no one is ever injured.⁸⁰

⁷⁶ *Forms and Associated Taxes for Independent Contractors*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/forms-and-associated-taxes-for-independent-contractors> (last updated Feb. 14, 2022). See also *Taxpayer Identification Number (TIN)*, IRS, <https://www.irs.gov/individuals/international-taxpayers/taxpayer-identification-numbers-tin> (last updated Mar. 14, 2022).

⁷⁷ *Id.*

⁷⁸ *Independent Contractor (Self-Employed) or Employee?*, *supra* note 13.

⁷⁹ See, e.g., *What Business Owners Must Know About Workers' Compensation*, NY WORKERS' COMP. BD. <http://www.wcb.ny.gov/content/main/TheBoard/BusinessOwners.pdf> (last visited May 10, 2022); CA DEPT INDUS. REL. <https://www.dir.ca.gov/dlse/FAQ-Workers%20Compensation.pdf> (last visited May 10, 2022); Bob Giunta, *Workers' Compensation Myth: "I Don't Need Coverage Because I Use Independent Contractors"*, NV DIV. INDUS. REL. (May 26, 2016), <https://dir.nv.gov/uploadedFiles/dirnv.gov/content/WCS/EmployersDocs/IndependentContractors.pdf>.

⁸⁰ See, e.g., *Violations of Workers' Compensation Law (Liabilities and Penalties)*, NYS WORKERS' COMP. BD., <http://www.wcb.ny.gov/content/main/Employers/violations-wclaw.jsp> (last visited May 10, 2022); *How Do I Obtain Workers' Compensation Insurance?*, NV DIV. INDUS. REL. (May 22, 2018), <https://dir.nv.gov/uploadedFiles/dirnv.gov/content/WCS/EmployersDocs/HowToObtainWC.pdf>; *Answers to Frequently Asked Questions About Workers' Compensation for Employers*, CA DEPT INDUS. REL. (June 2016), <https://www.dir.ca.gov/dwc/faqs.html>.

The only other responsibility your group has is paying the independent contractor the amount of money they were promised in the manner agreed on for the given work.

B. Can Your Fridge Group Offer Volunteer Stipends?

Just like your fridge group cannot call someone an independent contractor when they are an employee, it also cannot call someone a volunteer if they are actually an independent contractor. Simply calling low wages a “stipend” or “honorarium” does not allow you to avoid all employment law requirements.⁸¹ The U.S. Department of Labor defines a volunteer as “an individual who performs hours of service . . . for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered.”⁸²

Although this definition may appear to prohibit paying volunteers entirely, small stipends of less than \$500 per year may be permissible. The Federal Volunteer Protection Act defines a volunteer as “an individual performing services for a nonprofit organization . . . who does not receive compensation other than reasonable reimbursement or allowance for expenses actually incurred; or any other thing of value in lieu of compensation, in excess of \$500 per year.”⁸³ One issue here is the definition of “nonprofit organization” in this statute, which appears to limit its protection to organizations with 501(c)(3) tax status and organizations that could meet something similar to the standard for 501(c)(3) organizations, but which that do not have that tax designation.⁸⁴

Characterizing your payments to workers as stipends for volunteers rather than as wages for employees comes with some risk. If a worker is treated as a volunteer who should have been classified as an employee, there could be significant penalties and back wages that need to be paid. The U.S. Department of Labor has guidelines specifying that they will reclassify a worker as an employee rather than a volunteer if: (1) they are paid more than 20% of what an employer would pay an employee for the same work; (2) they are paid more than \$500 per year; or (3) if the volunteer received the same benefits that an employee would receive.⁸⁵

⁸¹ An honorarium is generally a “thank you” payment for a one-time speaking engagement at an event. Stipends are most often used to pay students, interns, and trainees, and generally are given in contexts - where the individual receiving the stipend is the beneficiary of the services performed (like an intern receiving training and instruction), not the workplace.

⁸² 29 C.F.R. § 553.101.

⁸³ Federal Volunteer Protection Act of 1997, 42 U.S.C. § 14505(6).

⁸⁴ Federal Volunteer Protection Act of 1997, 42 U.S.C. § 14505(4)(B) (defining “nonprofit organization” as “organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes” and which does not engage in activities that are classified as hate crimes).

⁸⁵ *See* Wage and Hour Opinion Letters FLSA 2006-28 (August 7, 2006); FLSA 2005-51 (Nov. 10, 2005).

C. The Legal Requirements for Employees

If your group has a worker that is classified as an employee, at the time they start working your group will need to:

- (i) *Verify the worker's eligibility to work legally in the U.S.* Employers are required to verify employees' eligibility to work legally in the U.S. by having them fill out an Employment Eligibility Verification form (commonly called an I-9 Form). Many undocumented people are not allowed to be legally employed.⁸⁶
- (ii) *Get the name and social security number of each worker.*
- (iii) *Collect the income tax withholding information for each worker and withhold certain taxes from their pay.*⁸⁷ At the start of a new job (or any time during employment if the employee's adjustments or claimed dependents change), employers ask employees to complete an Employee's Withholding Certificate (commonly called a W-4 Form). This form determines how much money you will withhold from the employee's paycheck based on filing status, dependents, anticipated tax credits, and deductions.⁸⁸ The amount the employer withholds from each paycheck is then sent to the IRS, along with the employee's name and social security number. Even if the employee is part-time or seasonal, they are still required to fill out a W-4 Form.⁸⁹
 - i. Federal Unemployment Tax (FUTA) is a tax that employers must pay—it is not withheld from employees' paychecks.⁹⁰ 501(c)(3) organizations that are exempt from paying federal income tax are also exempt from paying

⁸⁶ *I-9, Employment Eligibility Verification*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/i-9> (last updated Apr. 13, 2021).

⁸⁷ The taxes that are withheld from an employee's paycheck generally are payroll taxes (this includes Federal Insurance Contribution Act ("FICA") taxes, which consists of Social Security and Medicare taxes) and income tax (federal tax, as well as state or local taxes, if applicable). *Understanding Paycheck Deductions*, CONSUMER FIN. PROT. BUREAU (Fall 2020), https://files.consumerfinance.gov/f/documents/cfpb_building_block_activities_understanding-paycheck-deductions_handout.pdf.

⁸⁸ *Topic No. 753 Form W-4 – Employee's Withholding Certificate*, IRS, <https://www.irs.gov/taxtopics/tc753> (last updated Jan. 25, 2022).

⁸⁹ *Part Time or Seasonal Help*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/part-time-or-seasonal-help> (last updated Oct. 6, 2021).

⁹⁰ FUTA is part of the federal and state program that pays unemployment compensation to workers who have lost their jobs. *Exempt Organizations: What Are Employment Taxes?*, IRS, <https://www.irs.gov/charities-non-profits/exempt-organizations-what-are-employment-taxes> (last updated Sept. 7, 2021).

FUTA tax, but if they do not pay federal unemployment taxes, they must either pay into their state unemployment tax program or self-insure by reimbursing the state for past unemployment claims paid out to former employees.⁹¹ Certain government-chartered entities, religious corporations, and some other very small 501(c)(3) entities are exempt from those state taxes as well. All organizations and groups that do not have 501(c)(3) status must pay FUTA tax.⁹² Employers must file the Employer's Annual Federal Unemployment Tax Return (also known as Form 940).⁹³ Visit the IRS website to see if you are subject to this tax, due dates, and more.

- (iv) *In many states, the employer must pay for worker's compensation insurance, although the specific laws of each state vary.*⁹⁴ This insurance allows an employee to collect money (and possibly other benefits) if the employee becomes ill or gets injured in the course of employment. If an employee files a worker's compensation claim, the employee is typically precluded from bringing legal action against the employer.
- (v) *In some states, you may need to meet certain other state and local requirements, including reporting your hire to the state.* The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 requires you to report newly hired employees to your state within twenty (20) days of hire.⁹⁵ The state then reports the new hire to the federal government. Depending on the state, these requirements may be found on the state's labor department, tax department, child support services, or other agency websites.
- (vi) *The employer must meet minimum wage and overtime requirements, if applicable.* At the federal level, the Fair Labor Standards Act (FLSA) governs and protects employees regarding minimum wage and overtime work. Charitable organizations are generally not covered by FLSA for their charitable activities (such as

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Topic No. 759 Form 940 – Employer's Annual Federal Unemployment (FUTA) Tax Return – Filing and Deposit Requirements*, IRS, <https://www.irs.gov/taxtopics/tc759> (last updated Mar. 22, 2022).

⁹⁴ *See Workers Compensation*, CORNELL L. SCH.,

https://www.law.cornell.edu/wex/workers_compensation (last visited Mar. 15, 2022); *see also Workers' Compensation Laws by State*, FINDLAW (Sept. 30, 2019), <https://www.findlaw.com/injury/workers-compensation/workers-compensation-laws-by-state.html>.

⁹⁵ Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 § 453A(b)(2).

providing free food),⁹⁶ though they are covered for any commercial activities, like if they sell any items to raise money. However, even at charitable organizations that are not doing any commercial activity, individual employees are covered by FLSA minimum wage and overtime requirements if they engage in any interstate activities, which is defined broadly and can include things like outreach to funders in other states or processing a credit card transaction.⁹⁷

- (vii) *If applicable, the employer must ensure nondiscrimination policies and practices are in place.* Federal anti-discrimination laws only cover employers with 15 or more employees.⁹⁸ However, state anti-discrimination laws are often broader than federal law.⁹⁹ Even if your group does not meet the federal law threshold, you should still look into your state's employment discrimination laws to determine if it applies to your group.

Part II – Other Restrictions on Paying Workers

Community fridge groups should also be attentive to two other matters that are relevant to paying their workers: (A) compliance with any promises you have made to donors who give money to your group, and (B) for groups that are organized as tax-exempt non-profits, the rules on private inurement and private benefit.

A. Donor Intent

In general, a fridge group may use any funds donated to it for any purpose in furtherance of its project, including to pay its workers. However, one exception to that general rule is that if a donor gave a gift for a specific purpose, a court would uphold the donor's request that this gift be used for that purpose. This is the case if the donor who gave funds to a fridge group: (1) was told that the funds would be used for a specific purpose, (2) specifically made a written request that the funds be used for a specific purpose, or (3) if they reasonably believed that the funds would

⁹⁶ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391, 32398 (May 23, 2016) (codified at 29 C.F.R. pt. 541). *See also* DEP'T OF LAB., Fact Sheet #14: Coverage under the Fair Labor Standards Act (FLSA) (2009).

⁹⁷ An example of an interstate activity can be an out-of-state phone call, credit card transaction, or mailing letters. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391, 32398; *see also* DEP'T OF LAB., Fact Sheet #14: Coverage under the Fair Labor Standards Act (FLSA) (2009).

⁹⁸ 42 U.S.C. § 2000e(b).

⁹⁹ For example, under New York law, *all* employers are covered under the state's antidiscrimination law regardless of the number of employees. *See* N.Y. HUMAN RIGHTS LAW § 292.5 (McKinney 2021).

be used for that specific purpose—like if you have a GoFundMe that says “all funds will go directly to purchasing food” or something like that.¹⁰⁰

It is unlikely that a donor who sends a small amount would bring an action to enforce this right, but it is something that comes up sometimes for large donations to larger non-profits, and if your fridge group receives a large donation for a specific purpose, it is important to know that the donor does have a limited right to make sure that the intended purpose for the donation is satisfied.

If this is a concern for your group, you could always put a disclaimer on any websites or other places where you request money that says your group reserves the right to use any donations at their discretion.¹⁰¹ Such a disclaimer could also be helpful to ensure that the gift is a true “gift” and not income to the organization (see question 10 above).

B. Private Inurement and Private Benefit Rules for Tax Exempt Non-Profits

If your community fridge group is organized as a tax-exempt non-profit, other issues to be aware of related to paying workers are restrictions on private inurement and private benefit. Private inurement occurs when an insider to the group receives an organization’s income or uses the organization’s assets inappropriately for personal gain.¹⁰² This can come up for groups that follow the mutual aid principle that those people making decisions about the organization should be the same people the organization is serving. In particular, any time a member of a nonprofit’s board of directors (or their family) is receiving money from the nonprofit, you should make sure to follow a [conflict of interest policy](#) to avoid risks of liability to the organization and the individual.

Private benefit is very similar but refers to the group using its income or assets inappropriately for the personal gain of someone who is not technically an insider to the group.¹⁰³

One place where this comes up related to compensation is that a non-profit cannot pay an unreasonable salary to a worker, irrespective of whether they are employees or independent contractors. An exempt organization has a duty to ensure that compensation for its workers is reasonable, as measured against comparable pay for workers at comparable non-profits and

¹⁰⁰ See John K. Eason, *Motive, Duty and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 123 (2010).

¹⁰¹ See *id.*

¹⁰² OVERVIEW OF INUREMENT/PRIVATE BENEFIT ISSUES IN IRC 501(c)(3), IRS, <https://www.irs.gov/pub/irs-tege/eotopic90.pdf> (last visited May 10, 2022).

¹⁰³ See *id.*; Emily Chan, *Private Benefit Rules – Part I: Private Benefit Doctrine*, NONPROFIT L. BLOG (Sept. 27, 2012), <https://nonprofitlawblog.com/private-benefit-rules-part-i-private-benefit-doctrine>.

businesses. Tax-exempt organizations are encouraged to research what comparable workers would make at similar organizations in their region and to make sure that compensation is reasonable. This is significant because the IRS may revoke a non-profit's tax-exempt status or impose other penalties in cases of private inurement or private benefit.¹⁰⁴ This is generally not a concern if your workers are being paid less than \$100,000 per year, which is likely the case for most community fridges.

12. What are the laws around claiming public spaces or abandoned or unused property?

Some fridges wonder whether they can lawfully set up shop on property that is public, abandoned, or otherwise unused.

Key Takeaways: Co-opting public spaces like sidewalks or greenspaces for community fridges can be difficult, as fridges in public spaces—and even fridges that are on private land but publicly accessible—can trigger increased government oversight or regulation of fridge operations. However, state or local mechanisms may exist that allow community groups or non-profit organizations to legally reclaim, take ownership of, or use vacant public spaces for specific activities.

Deeper Analysis: Most laws created for the purpose of claiming abandoned or unused property are in favor of state ownership, meaning that where there is abandoned, unused, or vacant property that is not clearly and demonstrably under the control of a private person or entity, the law will view the owner of the land to be the state or local government within the state. Because a landowner—public or private—typically has the right to require removal of a fridge located on its property, placing a community fridge on abandoned or unused land may only be a short-term solution if the fridge operator(s) have no way of becoming the landowner or receiving specific permission from the landowner. There are, however, some organizing principles and discrete legal mechanisms that may allow for the public's use of such property – including for the purposes of operating a community fridge.

Sidewalks and City Permits/Programs

Sidewalks are ambiguous spaces under the law; that is, there is no bright line rule establishing whether sidewalks can be considered unused property for free and unencumbered community fridge use. Sidewalks are typically owned by the state or local governments, although adjacent landowners usually have some responsibility for upkeep. Sidewalks are not always a stable

¹⁰⁴ See OVERVIEW OF INUREMENT/PRIVATE BENEFIT ISSUES IN IRC 501(c)(3), *supra* note 28; Chan, *supra* note 29.

location for community fridges, since local regulation enforcement agencies can usually order their removal for violation of local laws and regulations.

There may exist some exceptions that allow for regular fridge operation on sidewalks. For example, some local laws/regulations or programs allow for “sidewalk vending,” and while these laws were not designed for the purpose of community fridges, fridges may be able to persuade local enforcement agencies that they fall within this definition. In California, for instance, authorities are permitted to create and deploy sidewalk food vending programs¹⁰⁵; community fridges can argue that they should be considered “stationary sidewalk vendors” within those programs.¹⁰⁶ Under the current California law, authorities can also regulate the time, place, and manner of sidewalk vending as long as any restrictions are directly related to health, safety, or welfare concerns.¹⁰⁷ Another example comes from New York City: the Green Carts program allows food carts and trucks bearing fresh fruits and vegetables to operate in designated areas.¹⁰⁸ The program does require that carts or trucks must be stored in commissaries while not in use, and must obtain a Green Cart permit. This requirement could make it difficult for community fridges to meet the Green Carts criteria; however, the program’s existence indicates interest in and support for alternative methods of food distribution.¹⁰⁹

Vacant Public Spaces

Using vacant public spaces for community fridges – or, more generally, to create “food commons”¹¹⁰ – may be a way for community organizations to reclaim vacant public land for community use and benefit. Like the use of sidewalks for community fridges, using vacant public spaces for community fridge use is likely to be shorter term than if a community organization owns the land the fridge occupies or if the organization is able to create a lease agreement with the landowner.

Vacant public spaces are often found in neighborhoods that have suffered from long-term government disinvestment; these spaces may be publicly owned, but are treated like private properties that are not open or usable by the public. The spaces may be “warehoused” and left vacant if and until market or zoning changes allow the government to sell the public land to

¹⁰⁵ Cal. Gov’t Code, Title 5, Div. 1, Pt. 1, Ch. 6.2, §51036 (Added by Stats. 2018, Ch. 459, Sec. 2. (SB 946) Effective January 1, 2019.)

¹⁰⁶ For example, in Santa Monica, sidewalk vendors are defined as “a person who sells food or merchandise from a pushcart, stand, display, pedaldriven cart, wagon, showcase, rack or other nonmotorized conveyance, or from one’s person, upon a public sidewalk or other pedestrian path”: City of Santa Monica, *Sidewalk Vending*, available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://finance.smgov.net/Media/Default/doing-business/in-santa-monica/Application-Packets/APP-Packet-Vendor-Sidewalk-English.pdf>.

¹⁰⁷ SB-948 Sidewalk Vendors, Cal. Gov’t Code, §51038(a)(2)(B).

¹⁰⁸ New York City Health, *Green Carts*, available at <https://www1.nyc.gov/site/doh/business/food-operators/green-carts.page>.

¹⁰⁹ *Id.*

¹¹⁰ David Bollier, *THINK LIKE A COMMONER: A SHORT INTRODUCTION TO THE LIFE OF THE COMMONS*, New Society Publishers 2014), defining “food commons” as “a self-organized system by which communities manage resources (both depletable and replenishable) with minimal or no reliance on the Market or State.”

developers.¹¹¹ Accessing these vacant public spaces for food distribution through community fridges can be difficult when they are treated as private property. While government actors may be hesitant to support community fridge use on vacant land, doing so would have some advantages for them, particularly since vacant lots can be costly to local governments.¹¹²

Sociology scholar Oona Morrow has explored these issues in the context of owning, operating, and conducting outreach for community fridges in New York City.¹¹³ While vacant lots are governed by municipal agencies with little to no incentive to make them available for public use, Morrow has identified some tools that could be helpful in gaining access for the purposes of distributing food.

Morrow recommends finding out which municipal agency has control of local vacant spaces and whether that agency has plans for their use. From there, she uplifts several organizing strategies to build collective power and foster opportunities to make these open-access food commons more visible and accessible. These include strategies such as mapping and sharing information about vacant spaces through social media and other online platforms and building and executing public information campaigns about the utility of food distribution in underserved communities.¹¹⁴ The goal of such awareness-raising and organizing would be to encourage local governments to allow the use of these spaces for food access practices such as community fridges. The community gardens movement, for example, has had some success in organizing for and petitioning local and state agencies for access to vacant lots or greenspaces.

Incentives for Tax-exempt Organizations

Some state and local governments provide discrete mechanisms for community organizations' use of public or government-owned land. For example, a Nebraska statute allows municipalities and government departments with title to vacant land to permit community organizations to use the land for purposes such as community gardening.¹¹⁵ Like sidewalk food vending programs in California, this land use may come with particular requirements: the local government may condition such use on the community organization obtaining liability insurance or accepting liability for injury or damage that results from their land use.¹¹⁶

Depending on the jurisdiction, obtaining 501(c)(3) tax-exempt status or fiscal sponsorship by a 501(c)(3) may give organizations more power to take control of vacant public spaces. For instance, organizations may purchase the land at foreclosure sale or auction or pursue

¹¹¹ Oona Morrow, *Community Self-Organizing and the Urban Food Commons in Berlin and New York*, 11 Sustainability 3641 (2019).

¹¹² See *Vacant Land Management in Philadelphia: The Costs of the Current System and the Benefits of Reform*, ECONSULT CORPORATION FOR URBAN RESEARCH 5 (Nov. 2010), available at <http://planphilly.com/uploads/mediaitems/httpplanphilly-com-sites-planphilly-com-files-econsult-vacant-land-full-reportpdf.original.pdf>.

¹¹³ *Supra* note 7.

¹¹⁴ *Id.*

¹¹⁵ Neb. Rev. St. § 2-304.

¹¹⁶ *Id.*

government-sponsored grants that would allow them to take over vacant land.¹¹⁷ Important resources and allies for community organizations seeking to lawfully use vacant public spaces for community fridge operations include land advocacy networks.¹¹⁸

Electricity Considerations

Another factor to consider is setting up a community fridge on abandoned, unused or otherwise vacant property: accessing electricity for the fridge. Each situation will be unique. In some situations, there will be electricity access on a vacant public space, but in other situations it will be more difficult. The use of electricity for community fridges tracks on to the issues laid out above and throughout this guidebook.

One note to consider: Increasingly, community fridges are set up using solar energy.¹¹⁹ Solar energy carries a startup cost, but long-term benefits include no need for electricity outlet costs or electrical cords that can cause an obstruction or nuisance and give rise to agency intervention.

13. Are there any models of city/local government offering funding/support to fridges?

Currently, there are few models that exist outlining strategies for city/local government funding of or support for community fridges. In general, government responses to community fridge operations range from non-involvement¹²⁰ to penalization for violation of local laws such as having no permit, creating a public nuisance (e.g., obstruction of a sidewalk), or violating other health and zoning codes.¹²¹

Some elected leaders, however, have shown a willingness – or eagerness – to embrace community fridge operations as an acknowledgment of community need (as well as an opportunity to galvanize local support during an election season.) And, there are a few

¹¹⁷ See e.g., NYC Community Planning Organizations, available at <https://a002-epic.nyc.gov/community/areas/> (the Department of Environmental Remediation provided grants to community-based organizations for the development of vacant or underutilized land.)

¹¹⁸ 596 Acres Land Access Advocacy Network, available at <https://596acres.org/land-access-advocacy-network/>.

¹¹⁹ See e.g., Patricia Escárcega, *She's Building Los Angeles' First Solar Community Fridge. Will it Help Extinguish Hunger?* (September 18, 2020).

¹²⁰ Saria Lofton et al., *Mutual Aid Organisations and their role in Reducing Food Insecurity in Chicago's Urban Communities During COVID-19*, 25 Public Health Nutr. 119 (2022).

¹²¹ See e.g., Lil Kalish, *Officials Are Not Chill About The Community Fridges Popping Up Around LA* (August 26, 2020); Andrea Lopez-Villafañá, *"Community Fridge" Will Close in North Park After Pushback from County, Property Owner* (September 2, 2020); Juliana Clark, *Why Were 3 Community Fridges Shut Down in Highland Park, Compton and Long Beach?* (September 10, 2020); Gus Saltonstall, *"Hostile" Complaints Force UWS Community Fridge To Close* (June 24, 2021); Carol Tannenhauser, *Church's 'Friendly Fridge' Forced to Close After Neighbors Complain* (June 23, 2021); Reese Gorman, *Relocated Community Fridge a Symptom of a Bigger Problem, Advocates Say* (August 11, 2021). This pattern of government non-involvement or penalization is common in some international jurisdictions, such as Germany and the Philippines: see e.g., Oona Morrow, *Sharing Food and Risk in Berlin's Urban Food Commons*, 99 Geoforum (2019); Regine Cabato, *Community Pantries Offer Reprieve from COVID-19 Hardships in the Philippines* (April 21, 2021).

indications of a nascent movement toward city and local government funding of and support for community fridges.¹²² Last year, the California legislature considered a bill that would provide funding for community fridge operations organized by mutual aid groups. The bill suggested that community fridges run through mutual aid organizations would be eligible for infrastructure investments through California's Department of Food and Agriculture.¹²³ The City of Boston created and published a community fridge toolkit, which provides guidelines and resources for community fridges in the area and demonstrates government support of their endeavors.¹²⁴

Do you have other examples of government support of community fridges? [Let us know!](#)

Please check out the following resources for further information:

- [Covid-19 Mutual Aid, Anti-Authoritarian Activism, and the Law](#), Michael Haber
- [Legal Issues in Mutual Aid Operations: A Preliminary Guide](#), Michael Haber
- [Mutual Aid Legal Toolkit](#), Sustainable Law Economies Center
- [Legal Fact Sheet: The Bill Emerson Good Samaritan Food Donation Act](#), Harvard Law School Food Law and Policy Clinic
- [Federal Enhanced Tax Deduction for Food Donation: A Legal Guide](#), Harvard Law School Food Law and Policy Clinic
- [How to be an Unincorporated Association](#), Sustainable Economies Law Center
- [How to Navigate Conflicts of Interest](#), Sustainable Economies Law Center

As a reminder, we hope to continue to update this document with questions and answers we receive from community fridges. **Please submit any further questions through this [link](#).**

¹²² See e.g., Matthew Sedacca, *Community Fridges are Not a Pandemic Fad: They've Become Entrenched in Neighborhoods as a Way to Fight Hunger*, The Counter (October 8, 2021).

¹²³ Equitable Economic Recovery, Healthy Food Access, Climate Resilient Farms, and Worker Protection Bond Act of 2022, 2021 California Assembly Bill No. 125, California 2021-2022 Regular Session, available at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB125.

¹²⁴ Available here: <https://www.boston.gov/sites/default/files/file/2021/04/Community%20Fridges%20Toolkit.pdf>