

THE TECH CONTRACTS HANDBOOK

Software Licenses and Technology Services Agreements for Lawyers and Businesspeople

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www.TechContractsHandbook.com

Form Contract

Software as a Service – Terms of Service

You may use the form contract below, subject to the “Terms of Use” found at <http://www.techcontractshandbook.com/html/disclaimer.html>. In addition to the Terms of Use, PLEASE READ THE FOLLOWING DISCLAIMER BEFORE USING THE FORM CONTRACT:

The form contract below is general in nature and may not be sufficient for a specific contractual, technological, or legal problem or dispute. THE FORM IS NOT PROVIDED WITH ANY GUARANTY, WARRANTY, OR REPRESENTATION AS TO QUALITY OR SUITABILITY FOR ANY PARTICULAR PURPOSE. Publication of the form does not constitute the practice of law and is not legal counsel or advice. Neither the author nor the publisher of The Tech Contracts Handbook, nor anyone affiliated with the book’s Website, is rendering a legal or other professional service. The form should not be relied upon as a substitute for consultation with an experienced attorney.

TERMS OF SERVICE

PLEASE READ THESE TERMS OF SERVICE CAREFULLY. BY CLICKING “ACCEPTED AND AGREED,” EACH CUSTOMER AGREES TO THESE TERMS OF SERVICE.

These Terms of Service constitute an agreement (this “Agreement”) by and between _____, a _____ (“Provider”) and each customer of Provider’s online _____ service (“Recipient”).

1. **Definitions.**

- (a) "Account" refers to the Service plans and features selected by Recipient through Provider's customer portal at the time of enrollment and accepted by Provider, as such plans and features may change by mutual consent of the parties, as recorded by Provider through such portal.
- (b) "AUP" refers to Provider's acceptable use policy, posted at [www._____](#), as such policy may change from time to time.
- (c) "Authorized Representative" refers to _____.
- (d) "Data Policy" refers to Provider's standard data deletion policy, posted at [www._____](#), as such policy may change from time to time.
- (e) "Effective Date" refers to the date of commencement of the Service as listed in Recipient's Account.
- (f) "Materials" refers to written and graphical content provided by or through the Service, including, without limitation, text, photographs, illustrations, and designs, whether provided by Provider, another customer of the Service, or any other third party.
- (g) "Recipient Data" refers to data in electronic form input or collected through the Service by or from Recipient.
- (h) "Privacy Policy" refers to Provider's privacy policy, posted at [www._____](#), as such policy may change from time to time.
- (i) "Service" refers to Provider's _____ service. The Service includes such features as are set forth on Provider's website ([www._____](#)), as Provider may change such features from time to time, in its sole discretion.
- (j) "SLA" refers to Provider's service level agreement, posted at [www._____](#), as such service level agreement may change from time to time.

2. **Service & Payment.**

- (a) *Service.* Provider will provide the Service to Recipient pursuant to its standard policies and procedures then in effect.
- (b) *Payment.* Recipient will pay Provider such monthly Service fees as are required in Recipient's Account, due on the day before the start of the calendar month of Service.

3. **Service Level Agreement.** In the event of any "Service Failure," as that term is defined in the SLA, Provider will issue Recipient such credits as are required by the SLA. Credits issued pursuant to the SLA apply to outstanding or future payments only and are forfeited upon termination of this Agreement. Provider is not required to issue refunds or to make payments against such credits under any circumstances, including without limitation termination of this Agreement. Credits issued pursuant to the SLA are Recipient's sole remedy for the Service Failure in question. The SLA is hereby incorporated into this Agreement.

4. Materials, Software, & IP.

- (a) *Materials.* Recipient recognizes and agrees that: (i) the Materials are the property of Provider or its licensors and are protected by copyright, trademark, and other intellectual property laws; and (ii) Recipient does not acquire any right, title, or interest in or to the Materials except the limited and temporary right to use them as necessary for Recipient's use of the Service.
- (b) *IP in General.* Provider retains all right, title, and interest in and to the Service, including without limitation all software used to provide the Service and all logos and trademarks reproduced through the Service, and this Agreement does not grant Recipient any intellectual property rights in or to the Service or any of its components.

5. Online Policies.

- (a) *AUP.* Recipient will to comply with the AUP. In the event of Recipient's material breach of the AUP, including without limitation any copyright infringement, Provider may suspend or terminate Recipient's access to the Service, in addition to such other remedies as Provider may have at law or pursuant to this Agreement. Neither this Agreement nor the AUP requires that Provider take any action against Recipient or any other customer for violating the AUP, but Provider is free to take any such action it sees fit.
- (b) *Privacy Policy.* The Privacy Policy applies only to the Service and does not apply to any third party site or service linked to the Service or recommended or referred to through the Service or by Provider's employees.

6. Each Party's Warranties.

- (a) *Recipient's Identity.* Recipient warrants: (i) that it has accurately identified itself through its Account and will maintain the accuracy of such identification; and (ii) that it is a corporation or other business entity authorized to do business pursuant to applicable law or an individual 18 years or older.
- (b) *Right to Do Business.* Each party warrants that it has the full right and authority to enter into, execute, and perform its obligations under this Agreement and that no pending or threatened claim or litigation known to it would have a material adverse impact on its ability to perform as required by this Agreement.
- (c) *Disclaimers.* Except for the express warranties specified in this section 4, THE SERVICE IS PROVIDED "AS IS" AND AS AVAILABLE, AND PROVIDER MAKES NO WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS. Without limiting the generality of the foregoing, (i) PROVIDER HAS NO OBLIGATION TO INDEMNIFY OR DEFEND RECIPIENT AGAINST CLAIMS RELATED TO INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS; and (ii) Provider does not warrant that the Service will perform without error or immaterial interruption.

7. Limitation of Liability. IN NO EVENT: (a) WILL PROVIDER'S LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED \$_____ ; AND (b) WILL PROVIDER BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES. THE LIABILITIES LIMITED BY THIS SECTION 7 APPLY: (i) TO LIABILITY FOR NEGLIGENCE; (ii) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, STRICT PRODUCT LIABILITY, OR OTHERWISE; (iii) EVEN IF PROVIDER IS ADVISED IN ADVANCE OF THE POSSIBILITY OF THE DAMAGES IN QUESTION AND EVEN IF SUCH DAMAGES WERE FORESEEABLE; AND (iv) EVEN IF RECIPIENT'S REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE. If applicable law limits the application of the provisions of this Section 7, Provider's liability will be limited to the maximum extent permissible.

8. Data Management.

- (a) *Access, Use, & Legal Compulsion.* Unless it receives Recipient's prior written consent, Provider: (i) will not access or use Recipient Data other than as necessary to facilitate the Service; and (ii) will not give any third party access to Recipient Data. Notwithstanding the foregoing, Provider may disclose Recipient Data as required by applicable law or by proper legal or governmental authority. Provider will give Recipient prompt notice of any such legal or governmental demand and reasonably cooperate with Recipient in any effort to seek a protective order or otherwise to contest such required disclosure, at Recipient's expense.
- (b) *Recipient's Rights.* Recipient possesses and retains all right, title, and interest in and to Recipient Data, and Provider's use and possession thereof is solely as Recipient's agent.
- (c) *Retention & Deletion.* Provider will retain all Recipient Data until erased pursuant to the Data Policy.
- (d) *Injunction.* Provider agrees that violation of the provisions of this Section 8 might cause Recipient irreparable injury, for which monetary damages would not provide adequate compensation, and that in addition to any other remedy, Recipient will be entitled to injunctive relief against such breach or threatened breach, without proving actual damage or posting a bond or other security.

9. Term & Termination.

- (a) *Term.* This Agreement will continue for _____ following the Effective Date (a "Term"). Thereafter, this Agreement will renew for subsequent terms ("Terms") of _____, unless either party notifies the other of its intent not to renew _____ or more days before the beginning of the next Term.
- (b) *Termination for Cause.* Either party may terminate this Agreement for material breach by written notice, effective in 30 days, unless the other party first cures such breach.
- (c) *Effects of Termination.* The following provisions will survive termination of this Agreement: (i) any obligation of Recipient to pay for Service rendered before termination; (ii) Sections 4, 5(b), 6(c), and 7 of this Agreement; and (iii) any other

provision of this Agreement that must survive termination to fulfill its essential purpose.

10. Miscellaneous.

- (a) *Notices.* Provider may send notices pursuant to this Agreement to Recipient's contact points listed in Recipient's Account, and such notices will be deemed received _____ after they are sent. Recipient may send notices pursuant to this Agreement to _____, and such notices will be deemed received _____ after they are sent.
- (b) *Amendment.* Provider may amend this Agreement (including the SLA and Data Policy) from time to time by posting an amended version at its website and sending Recipient written notice thereof. Such amendment will be deemed accepted and become effective 30 days after such notice (the "Proposed Amendment Date") unless Recipient first gives Provider written notice of rejection of the amendment. In the event of such rejection, this Agreement will continue under its original provisions, and the amendment will become effective at the start of Recipient's next Term following the Proposed Amendment Date (unless Recipient first terminates this Agreement pursuant to Section 9 above). Recipient's continued use of the Service following the effective date of an amendment will confirm Recipient's consent thereto. This Agreement may not be amended in any other way except through a written agreement executed by Authorized Representatives of each party. Notwithstanding the foregoing, Provider may amend the AUP or Privacy Policy at any time by posting a new version at its website and sending Recipient notice thereof, and such amended version will become effective __ business days after such notice is sent.
- (c) *Independent Contractors.* The parties are independent contractors and will so represent themselves in all regards. Neither party is the agent of the other and neither may bind the other in any way.
- (d) *No Waiver.* Neither party will be deemed to have waived any of its rights under this Agreement by lapse of time or by any statement or representation other than (i) by an Authorized Representative and (ii) in an explicit written waiver. No waiver of a breach of this Agreement will constitute a waiver of any prior or subsequent breach of this Agreement.
- (e) *Force Majeure.* To the extent caused by force majeure, no delay, failure, or default will constitute a breach of this Agreement.
- (f) *Assignment & Successors.* Neither party may assign this Agreement or any of its rights or obligations hereunder without the other's express written consent, except that either party may assign this Agreement to the surviving party in a merger of that party into another entity. Except to the extent forbidden in the previous sentence, this Agreement will be binding upon and inure to the benefit of the respective successors and assigns of the parties.
- (g) *Choice of Law & Jurisdiction.* This Agreement will be governed solely by the internal laws of the State of _____, without reference to such State's

principles of conflicts of law. The parties consent to the personal and exclusive jurisdiction of the federal and state courts of _____, _____.

- (h) *Severability*. To the extent permitted by applicable law, the parties hereby waive any provision of law that would render any clause of this Agreement invalid or otherwise unenforceable in any respect. In the event that a provision of this Agreement is held to be invalid or otherwise unenforceable, such provision will be interpreted to fulfill its intended purpose to the maximum extent permitted by applicable law, and the remaining provisions of this Agreement will continue in full force and effect.
- (i) *Certain Notices*. Pursuant to 47 U.S.C. Section 230(d), Provider hereby notifies Recipient that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist in limiting access to material that is harmful to minors. Information regarding providers of such protections may be found on the Internet by searching “parental control protection” or similar terms. _____.
[insert any notices required by state law]
- (j) *Conflicts among Attachments*. In the event of any conflict between the terms of this main body of this Agreement and those of the SLA or Data Policy, the terms of this main body will govern. In the event of any conflict between this Agreement and any Provider policy posted online, including without limitation the AUP and Privacy Policy, the terms of this Agreement will govern.
- (k) *Entire Agreement*. This Agreement sets forth the entire agreement of the parties and supersedes all prior or contemporaneous writings, negotiations, and discussions with respect to the subject matter hereof. Neither party has relied upon any such prior or contemporaneous communications.