

## **TERMS AND CONDITIONS**

By accepting the contract and by using this program in any way you acknowledge that you have read, understood and agreed to the terms of these Terms and Conditions (the "Terms and Conditions") and that it shall form a valid agreement between you ("User") and PerkPlans. If you do not fully understand and/or agree, do not use this program in any context. This license is effective while you use and continue to make use of this program. You agree that these Terms and Conditions are enforceable like any written negotiated agreement signed by you and or your company.

### **1.0 DEFINITIONS**

Terms used in this Agreement which are capitalized shall have the definitions set forth below or elsewhere in this Agreement.

**1.1** "Affiliates" means any owner or subsidiary of User; any person or entity controlled by, under common control with or controlling User or User's owner; any joint venture, partnership, limited liability company, or other entity in which User or its owners are a joint venturer, partner, member or controlling shareholder; any owned, managed, or licensed property of any person or entity set forth in the immediately foregoing clauses.

**1.2** "Agreement" shall mean these Terms and Conditions, and any attached Exhibits, as may be amended from time to time in a writing signed by an authorized representative of PerkPlans and User.

**1.3** "Intellectual Property Rights" shall mean all existing and future patents and other patent rights, utility models, mask works, designs, algorithms, and other industrial property rights, copyrights, and moral rights and trade secrets, trademarks, trade names and similar rights, including all applications and registrations with respect thereto. All rights not specifically granted herein to User are exclusively reserved to PerkPlans.

### **2.1 OBLIGATIONS**

**2.1.** Subject to Section 3.0 below, and the other terms and conditions of this Agreement, PerkPlans hereby grants to User and User's Affiliates, under PerkPlans's Intellectual Property Rights, the following non-exclusive license to install, copy, reproduce, distribute among Affiliates, use, execute and operate the PerkPlans site (the "Site") for User's and User's Affiliates' internal needs.

**2.0** User agrees that it will not itself, or through any parent, subsidiary, Affiliate, agent or other third party, during the term of this Agreement: (a) sell, lease, license, sublicense, encumber or otherwise deal with any portion of the Site except as provided for in this Agreement, (b) decompile, disassemble, or reverse engineer any portion of the Site; (c) write or develop any derivative software or any other software program based on the Site or any Intellectual Property Rights of PerkPlans except as otherwise agreed to by PerkPlans; and (d) except as provided for in this Agreement, provide, disclose, divulge or make available to, or permit use of the Site by persons other than the employees or authorized contractors of User, without the advance written consent of PerkPlans.

### **3.0 INDEMNIFICATION**

**3.1** PerkPlans represents, warrants and covenants that it is the owner of the PerkPlans Intellectual Property Rights and that PerkPlans has the absolute right to license the Site to User for the uses contemplated under this Agreement free and clear of any liens, claims and encumbrances. PerkPlans will indemnify, defend and hold User harmless, at PerkPlans's expense, from any claims, demands, actions, suits, damages, losses, liabilities, costs or expenses of any nature, including, without limitation, attorney's fees, incurred by User as a result of any breach of its representation set forth in this Section 3.1

**3.2** User will defend, at its own expense, any action against PerkPlans brought by a third party to the extent that the action is based upon a breach of the obligations of User under this Agreement, User will pay those costs (including reasonable attorney's fees) and damages finally awarded against PerkPlans in any such action that are specifically attributable to such claim or those costs and damages agreed to in a settlement of such action.

**3.3** Conditions. In the event a party seeks indemnity as provided in this Section 3, such indemnified party should: (i) notify the indemnifying party in writing promptly of a claim; and, (ii) grant the indemnifying party the sole control of the settlement, compromise, negotiation, and defense of any such action, except that the indemnifying party shall not enter into any settlement that affects the indemnified party's rights or interests without the indemnified party's

prior written consent; and (iii) provide the indemnifying party with all reasonably available information relating to the action that is reasonably requested by the indemnifying party. The parties agree to cooperate in good faith in the defense of any legal action or suit that causes one party to invoke its indemnification rights under this Section 34.

**3.4 EXCEPT AS OTHERWISE EXPRESSLY WARRANTED IN THIS AGREEMENT, PERKPLANS DISCLAIMS ALL WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE (EVEN IF PERKPLANS HAD BEEN INFORMED OF SUCH PURPOSE), OR ANY WARRANTIES ARISING FROM COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE OF TRADE.**

### **3.4 LIMITATION OF LIABILITY**

PERKPLANS AND USER WILL NOT BE LIABLE FOR ANY INDIRECT, EXEMPLARY, SPECIAL, CONSEQUENTIAL, OR INCIDENTAL DAMAGES OF ANY CHARACTER, INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR COMPUTER MALFUNCTION, LOSS OF INFORMATION, LOST PROFITS AND BUSINESS INTERRUPTION, AND THE COST TO OBTAIN SUBSTITUTE SOFTWARE, ARISING IN ANY WAY OUT OF THIS AGREEMENT OR THE USE OF (OR INABILITY TO USE) THE SOFTWARE, HOWEVER CAUSED, AND WHETHER ARISING UNDER A THEORY OF CONTRACT, TORT OR ANY OTHER LEGAL THEORY, EVEN IF PERKPLANS WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES; SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL, CONSEQUENTIAL OR SPECIAL DAMAGES, SO THE ABOVE LIMITATIONS MAY NOT APPLY TO USER; PROVIDED, HOWEVER, PERKPLANS IS LICENSING THE SOFTWARE TO USER ON THE EXPRESS CONDITION THAT USER AGREES TO THE "DISCLAIMER OF WARRANTIES" AND "LIMITATION OF LIABILITY" PROVISIONS IN THIS AGREEMENT.

**4.0 TERM AND TERMINATION OF AGREEMENT.** This Agreement shall be for a term of one month, and shall continue thereafter from month to month unless and until terminated by either party upon written notice thereof to the other party.

### **5.0 GENERAL PROVISIONS**

**5.1** Neither party may assign this Agreement, in whole or in part, without prior written notice to the other, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, either party may assign this Agreement in the event of a merger, sale of substantially all of the stock, assets or business, or other reorganization involving the assigning party in which the assigning party is not the surviving entity, and the other party's prior written consent shall not be required in such instance. Without limiting the foregoing, this Agreement will bind and inure to the benefit of each party's permitted successors and assigns.

**5.2** Each party acknowledges that it may be furnished with or may otherwise receive or have access to information or material of the other party that the disclosing party deems to be confidential, including, without limitation, the terms and existence of this Agreement, information that relates to past, present or future products, software (including Source Code and Object Code), research development, inventions, processes, techniques, designs or technical information and data, employee information, and marketing plans (collectively, the "Confidential Information"). Each party agrees to preserve and protect the confidentiality of the other party's Confidential Information and all physical forms, whether disclosed to the other party before this Agreement is signed or afterward. In addition, neither party will use or disclose the Confidential Information of the other party except as specifically required to perform its obligations under this Agreement. The foregoing obligations do not apply to any information that: (1) is publicly known at the time of disclosure or becomes publicly known thereafter through no act or fault of the receiving party; (2) is given to a party by a third party who is not obligated to maintain confidentiality; (3) is already known by the receiving party prior to the date on which this Agreement is signed, as evidenced by written documentation, or (4) is independently developed by the receiving party without reference to Confidential Information of the disclosing party. Neither party will take, nor cause to be taken, any physical forms of Confidential Information (nor make copies of same) without the other party's prior written permission.

**5.3** Notwithstanding the other provisions herein, the parties acknowledge and agree that it is necessary for the User to share its confidential member information ("Confidential Member Information") to meet its obligations under this Agreement. With respect to the disclosure, use and protection of this Confidential Member Information, PerkPlans agrees that it will not disclose Confidential Member Information, in any form or medium, to any nonaffiliated person, firm or corporation except as necessary to perform services under this Agreement or as may be permitted by law. To the extent that PerkPlans contracts with a nonaffiliated third party that obtains Confidential Member

Information, PerkPlans agrees to seek contractual confidentiality protections to require the third party to hold Confidential Member Information in strict confidence and not disclose except as provided herein. PerkPlans agrees that it will not use Confidential Member Information to solicit or market products and services to the User's members. PerkPlans agrees to use a high degree of care to protect the security of the Confidential Member Information and comply with all applicable state and federal laws, including, but not limited to the Gramm-Leach-Bliley Act and its implementing rules, e.g., 12 CFR Part 716 and 12 CFR Part 748. The obligations of PerkPlans set forth in this Section 10.5 are a material term of this Agreement and shall survive the termination of this Agreement. PerkPlans agrees that a breach of this Section 10.5 may result in damages to User that are difficult to ascertain with certainty and, accordingly, User is entitled to seek equitable relief. Notwithstanding any other provisions of this Agreement, the requirements of this Section 6.5 will survive termination of this Agreement.

User covenants and agrees that during the period of this Agreement, and for a period of two (2) years immediately following the termination of this Agreement (hereinafter the "Restricted Periods") , User shall not in any capacity (including, but not limited to, as an individual, owner, partner, member, shareholder, employee, officer, director, manager, contractor or otherwise) directly, or indirectly, perform any services or solicit any other users of the Site or in any capacity offer any direct services to any of the users or providers of the Site. User further covenants and agrees that during the Restricted Periods User shall not in any capacity (including, but not limited to, as an individual, owner, partner, member, shareholder, employee, officer, director, manager, contractor or otherwise) directly, or indirectly, for the purpose of providing the same services performed by PerkPlans on behalf of User or any other user of the Site or similar or related services as provided by PerkPlans, and regardless of location, solicit, contract with, engage, retain, divert, induce or accept business from or otherwise take away or interfere or negotiate with, or be engaged or employed by any user or partner of the Site.

User acknowledges and agrees that the restrictions contained herein are supported by good and valuable consideration, and are reasonable and necessary in order to protect the legitimate and legal interests of PerkPlans and that any violation thereof would result in irreparable injuries to PerkPlans. User acknowledges and agrees that the aforesaid protectable legal interest of PerkPlans survives the termination of any agreement between User and any customer, client or service recipient in view of the goodwill created during the term of such terminated agreement and the investment made by either, or both, of PerkPlans in developing and staffing such customer, client or service recipient. User therefore acknowledges and agrees that, in the event of violation of any of these restrictions, PerkPlans, as an intended third party beneficiary, shall be entitled to obtain from any Court of competent jurisdiction preliminary and permanent injunctive relief, damages, and an equitable accounting of all earnings, profits and other benefits arising from such violation, which rights shall be cumulative and in addition to any other rights or remedies to which PerkPlans A may be entitled. If the period of time or the scope specified in this Section 6.6 should be adjudged unreasonable in any proceeding, then the period of time shall be reduced by such number of months or the scope shall be reduced by the elimination of such portion thereof or both, so that such restrictions may be enforced as is adjudged to be reasonable. If User violates any of the restrictions contained in this Section 6.6, the Restricted Periods shall not run in favor of User from the time of the commencement of any such violation until such time as such violation shall be cured by User to the satisfaction of PerkPlans. If the PerkPlans enforces this Section 6.6, then the running of the restricted period shall be suspended during the pendency of such action, including all appeals.

**5.4** Nothing contained in this Agreement will be deemed to place the parties in the relationship of an employer / employee, partners, or joint venturers. Neither party will have any right to obligate or bind the other in any manner except as specifically provided for in this Agreement. Each party agrees and acknowledges that it will not hold itself out as an authorized agent with the power to bind the other party in any manner. Each party will be responsible for any withholding taxes, payroll taxes, disability insurance payments, unemployment taxes, and other similar taxes or charges with respect to its activities in relation to performance of its obligations under this Agreement.

**5.5** Any specific right or remedy provided in this Agreement will not be exclusive, but will be cumulative upon all other rights and remedies set forth in this Agreement and allowed under applicable law.

**5.6.** This Agreement will be governed by the laws of the State of New Jersey.

**5.7** The parties acknowledge that this Agreement and its attached Exhibits express their entire understanding and agreement, and that there have been no warranties, representations, covenants or understandings made by either party to the other except such as are expressly set forth in this Agreement. The parties further acknowledge that this Agreement supersedes any and all prior agreements, written or oral, between the parties with respect to the matters set forth herein.

**5.8** Both parties agree to comply with all applicable federal, state, and local laws and regulations in performing their duties.

**5.9** In the event that any provision of this Agreement is found invalid or unenforceable pursuant to judicial decree or decision, the remainder will remain valid and enforceable according to its terms. Without limiting the foregoing, it is expressly understood and agreed that each and every provision of this Agreement that provides for a limitation of liability, disclaimer of warranties, or exclusion of damages is intended by the parties to be severable and independent of any other provision and to be enforced as such. Further, it is expressly understood and agreed that in the event any remedy in this Agreement is determined to have failed of its essential purpose, all other limitations of liability and exclusion of damages set forth herein will remain in full force and effect.

**5.10** All notices, demands or consents required or permitted in this Agreement will be in writing and will be hand delivered, or mailed certified return receipt requested to the respective parties at the addresses stated above or at any other address the party will specify to the other party in writing. Any notice required or permitted to be given by the provisions of this Agreement will be conclusively deemed to have been received on the day it is delivered to that party by U.S. Mail with acknowledgment of receipt or by any commercial courier providing equivalent acknowledgment of receipt.

**5.11** The parties agree that in the event of a breach or threatened breach of Section 5.3 of this Agreement, the non-breaching party will be entitled to seek from any court of competent jurisdiction preliminary and permanent injunctive relief, which remedy will be cumulative and in addition to any other rights and remedies to which the non-breaching party may be entitled, without necessity of posting bond or other security. Each party acknowledges that its breach of any of the covenants set forth in such Section would result in immediate and irreparable injury to the other party.