

Terms of Service for Daxko Future of Membership

Last Update: January 28, 2015

URL: <http://www.daxko.com/futureofmembershipterms>

DAXKO, LLC (“we”, “us”, or “our”) provides Daxko Future of Membership (“Service”) to you (“you” or “your”). By using the Service you are agreeing to be bound by the following terms and conditions (“Terms of Service”). Any new features that augment or enhance the current Service, including the release of new tools and resources, shall be subject to the Terms of Service. We reserve the right to update and change the Terms of Service from time to time. If we make changes to the Terms of Service then we shall notify you and change the “last updated” date above. Continued use of the Service after any such changes shall constitute your consent to such changes. You can review the most current version of the Terms of Service at any time at <http://www.daxko.com/futureofmembershipterms>.

If you are using the Service on behalf of an organization, company or other legal entity, you represent and warrant that you have the authority to bind that organization, company or other legal entity to these Terms of Service and, in such event, “you” will refer and apply to that organization, company or other legal entity.

In the event of a conflict between these Terms of Service and a service agreement between us then such service agreement shall take precedence over these Terms of Service.

1. YOUR ACCOUNT

- a. **Secure Your Account:** You are responsible for maintaining the security of your account and password. We cannot and will not be liable for any loss or damage from your failure to comply with this security obligation. You will be solely responsible and liable for any activity that occurs with your account.
- b. **Respect Laws:** You must not use the Service for any abusive or illegal purposes. You must not violate any laws in your jurisdiction (including but not limited to copyright laws).
- c. **Respect Intellectual Property:** You may not attempt to modify, translate, adapt, edit, copy, decompile, disassemble, or reverse engineer any software used or provided by us in connection with the Service.

2. USE OF NON-DAXKO PRODUCTS

- a. **Non-Daxko Products and Services:** We or third parties may make available to you third-party products or services, including, but not limited to, fitness activity trackers, insurance policies, social media networks, and content providers, that are intended to work with the Service (“Non-Daxko Applications”). Any acquisition by you of such Non-Daxko Applications, and any exchange of data between you and any non-Daxko provider, is solely between you and the applicable non-Daxko provider. We do not warrant or support Non-Daxko Applications except as specified in a service agreement between you and us.
- b. **Non-Daxko Applications and Your Data:** If you install or enable a Non-Daxko Application for use with the Service, you grant us permission to allow the

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provider of that Non-Daxko Application to access your data in the Service (“Your Data”) as required for the interoperation of that Non-Daxko Application with the Service. We are not responsible for any disclosure, modification or deletion of Your Data resulting from access by a Non-Daxko Application.

- c. **Integration with Non-Daxko Applications:** The Service may contain features designed to interoperate with Non-Daxko Applications. To use such features, you may be required to obtain access to Non-Daxko Applications from their providers, and may be required to grant us access to your account(s) on the Non-Daxko Applications. If the provider of a Non-Daxko Application ceases to make the Non-Daxko Application available for interoperation with the corresponding Service features on reasonable terms, we may cease providing those Service features without entitling you to any refund, credit, or other compensation.
- d. **Access to Individual Data:** Your employees, staff, and/or constituents (“Your Associates”) will have access to the Service through individual accounts maintained by Your Associates. Your Associates may install or enable access to such individual accounts through Non-Daxko Applications. We are not responsible for any disclosure, modification or deletion of data in such individual accounts resulting from access by Non-Daxko Applications.

3. BILLING AND PAYMENTS

- a. **Late Fees:** We will charge interest of one and a half percent (1.5%) per month (or the highest rate permissible under applicable law, if less) on all undisputed amounts not paid by you to us when due. We may also block your access to the Service without terminating the Service or affecting your obligation to make payments if you are more than thirty (30) days delinquent on any undisputed invoices. Under no circumstances shall you have any right to offset your payments.
- b. **Taxes:** You will pay any and all applicable international, federal, state, and local sales, use, value-added, excise, duty, and any other taxes, fees, or duties not based on our net income that are assessed on or as a result of the Service. Any such taxes, fees, and duties collected by us from you on behalf of a governmental agency shall not be considered a part of, a deduction from, or an offset against, payments due to us for the Service.

4. CONFIDENTIAL INFORMATION

- a. **Protection of Confidential Information:** From time to time one of us (the “Receiving Party”) may receive from the other of us (the “Disclosing Party”) proprietary and confidential information (“Confidential Information”), including, without limitation, the terms and conditions of using this Service, employee information, financial information, business plans, Daxko Technology, and any information that is marked as “confidential” or should be reasonably understood to be confidential or proprietary to the Disclosing Party. The Receiving Party agrees that it will not disclose the Confidential Information to any third party without permission of the Disclosing Party, nor use the Confidential Information for any purpose not permitted under this Agreement. The nondisclosure

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obligations set forth in this paragraph shall not apply to information that the Receiving Party can document is generally available to the public (other than through breach of a service agreement between us), or was already lawfully in the Receiving Party's possession at the time of receipt of the information from the Disclosing Party, or was obtained by the Receiving Party from a third party without a breach by the third party of any obligation owed to the Disclosing Party. "Daxko Technology" means our proprietary technology, including hardware designs, algorithms, software, software tools, user interface designs, architecture, class libraries, objects, documentation, know-how, trade secrets, and any related intellectual property rights, and also including any derivatives, improvements, enhancements or extensions of any of the foregoing conceived, reduced to practice, or developed by or on behalf of us, whether during the term of a service agreement between us or otherwise. We grant you a nonexclusive, limited, royalty-free license, during the term of the service agreement between us, to use the Daxko Technology solely for purposes of using the Service. Both of our obligations described in this paragraph shall survive indefinitely.

- b. **Compelled Disclosure:** The Receiving Party may disclose Confidential Information of the Disclosing Party to the extent compelled by law to do so, provided the Receiving Party gives the Disclosing Party prior notice of the compelled disclosure (to the extent legally permitted) and reasonable assistance, at the Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure. If the Receiving Party is compelled by law to disclose the Disclosing Party's Confidential Information as part of a civil proceeding to which the Disclosing Party is a party, and the Disclosing Party is not contesting the disclosure, the Disclosing Party will reimburse the Receiving Party for its reasonable cost of compiling and providing secure access to that Confidential Information.

5. NON-U.S. USERS

- a. If you are located outside the United States of America then by using the Service, you understand and consent to the processing of personal information in the United States.

6. INTELLECTUAL PROPERTY

- a. **Respect Copyrights:** All information that you post to the Service must comply with applicable copyright laws.
- b. **Your Intellectual Property:** We claim no intellectual property rights over the data you provide to the Service. We may share aggregated information that does not include personally identifiable information nor is tagged with your organization's name with third parties for industry analysis, demographic profiling, and other purposes. Any aggregated information shared in these contexts will not contain your organization's name or personally identifiable information.
- c. **Our Intellectual Property:** Subject to the limited rights expressly granted hereunder, we and our licensors reserve all of our/their right, title and interest in

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and to the Service, including all of our/their related intellectual property rights. Except for the licenses we explicitly grant by these Terms of Service or a service agreement between us, you have no right, title, or interest in or to the Service. Unauthorized use of the Service, or the resale of the Service without our prior written consent, is expressly prohibited. You shall not copy, sell, transfer, distribute, publish, or assign your license to our Service in any format to any third party.

7. NO WARRANTIES OR REPRESENTATIONS

- a. You understand and agree that the Service is provided “as is” and we expressly disclaim warranties of any kind, express or implied, including without limitation any warranty of merchantability or fitness for a particular purpose. We make no warranty or representation regarding the results that may be obtained from the use of the Service, the correctness of the data, the security of the Service, or that the Service will meet any user’s requirements. Use of the Service is at your sole risk. You will be solely responsible for any damage to you resulting from the use of the Service. The entire risk arising out of use, security, or performance of the Service remains with you. You understand that we use third party vendors and hosting partners to provide the necessary hardware, software, networking, storage, and related technology required to run the Service. We reserve the right to modify the Service from time to time at any time, including adding or removing features. Without limiting the foregoing, the service is not designed or licensed for use in hazardous environments requiring fail-safe controls.

8. LIMITATIONS OF LIABILITY

- a. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY OR ANY THIRD PARTY FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, INDIRECT, SPECIAL, PUNITIVE, OR EXPLEMARY DAMAGES FOR LOSS OF BUSINESS, LOSS OF PROFITS, BUSINESS INTERRUPTION, LOSS OF DATA, OR LOSS OF BUSINESS INFORMATION) ARISING OUT OF OR CONNECTED IN ANY WAY WITH USE OF OR INABILITY TO USE THE SERVICE, OR FOR ANY CLAIM BY ANY OTHER PARTY, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE EXCLUSION OF DAMAGES UNDER THIS SECTION IS INDEPENDENT OF YOUR EXCLUSIVE REMEDY AND SURVIVES IN THE EVENT SUCH REMEDY FAILS OF ITS ESSENTIAL PURPOSE OR IS OTHERWISE DEEMED UNENFORCEABLE. THESE LIMITATIONS AND EXCLUSIONS APPLY WITHOUT REGARD TO WHETHER THE DAMAGES ARISE FROM (1) BREACH OF CONTRACT, (2) BREACH OF WARRANTY, (3) NEGLIGENCE, OR (4) ANY OTHER CAUSE OF ACTION, TO THE EXTENT SUCH EXCLUSION AND LIMITATIONS ARE NOT PROHIBITED BY APPLICABLE LAW. IF YOU ARE DISSATISFIED WITH THE SERVICE OR YOU HAVE ANY OTHER DISPUTE OR CLAIM WITH OR AGAINST US WITH RESPECT TO THIS CONTRACT OR THE SERVICE, THEN YOUR SOLE AND EXCLUSIVE REMEDY IS TO DISCONTINUE USING THE SERVICE BY PROVIDING US WITH A

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NOTICE OF TERMINATION FOR CAUSE. In the event that, notwithstanding the foregoing disclaimers, we are found responsible to you for any reason whatsoever, our responsibility shall be limited to the amounts actually paid by you for the Service during the one month immediately preceding such event, and shall not include punitive damages or consequential or resulting damages of any nature.

9. INDEMNIFICATION

- a. **Indemnification by You:** Except as provided below, you agree to indemnify and hold us harmless from any claim, demand or cause of action and all damages, judgments, decrees, costs and expenses, including attorneys' fees, arising from your failure to use the Service as permitted under these Terms of Service or a service agreement between us, provided that we (a) give you written notice of any such claim within fifteen (15) days of our receipt of such claim, (b) permit you to have sole control and authority with respect to the defense or settlement of any such claim, and (c) provide you all reasonable cooperation, information, and assistance in connection with the defense or settlement of any such claim. We reserve the right to assume, at our sole expense, the exclusive defense and control of any matter subject to indemnification by you, in which event you will fully cooperate with us in asserting any available defenses.
- b. **Indemnification by Us:** Except as provided below, we agree to defend, indemnify, and hold harmless you and your directors, members, officers, employees, and agents, from and against any and all claims, losses, damages, suits, fees, judgments, costs, and expenses, including reasonable attorneys' fees, arising out of any and all third party claims that the Daxko Future of Membership system infringes a valid patent or copyright or misappropriates a trade secret of a third party provided that you (a) give us written notice of any such claim within fifteen (15) days of your receipt of such claim, (b) permit us to have sole control and authority with respect to the defense or settlement of any such claim, and (c) provide us all reasonable cooperation, information, and assistance in connection with the defense or settlement of any such claim. If the Daxko Future of Membership system becomes, or in our opinion, is likely to become the subject of any injunction preventing its use as contemplated herein, we may, at our option and expense, (i) procure the right to allow you to continue to use the Daxko Future of Membership system or (ii) modify or replace the Daxko Future of Membership system or infringing portions thereof to become non-infringing, without loss of material functionality. If we are unable to provide one of the remedies in (i) or (ii) within forty-five (45) days of notice of the claim, we shall have the right to terminate our service agreement with you. Notwithstanding the foregoing, we shall have no liability or obligations with respect to any patent, copyright, or trade secret infringement claim based upon or arising out of (i) any modification or alteration to the Daxko Future of Membership system not approved by us, (ii) any combination or use of the Daxko Future of Membership system with products or services not supplied by us or approved in writing by us in advance of such combination, (iii) any patent, copyright or trade secret in which you or your affiliates have an interest, or (iv) use of the Daxko Future of

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Membership system not in accordance with its documentation or outside the scope of the license granted under a service agreement between us. You agrees to defend, indemnify, and hold harmless us and our directors, members, officers, employees, and agents, from and against any and all claims, losses, damages, suits, fees, judgments, costs, and expenses, including reasonable attorneys' fees, arising out of any and all third party claims enumerated in clauses (i) through (iv) above. The foregoing states our entire liability with respect to infringement of patents, copyrights, trade secrets, or other proprietary rights by the Daxko Future of Membership system or any part thereof. You will immediately inform us as soon as you become aware of any threatened or actual liability claim by a third party relating to the Daxko Future of Membership system.

- c. **Exclusive Remedy:** This section states the indemnifying party's sole liability to, and the indemnified party's exclusive remedy against, the other party for any type of claim described in this section.

10. CANCELLATION AND TERMINATION

- a. **Export Your Data First:** All of your information will be immediately deleted from the Service upon cancellation. You must export your information before canceling your account. Your information cannot be recovered once your account is cancelled.
- b. **No Abuse:** Any abuse of the Service will lead to termination of your account.
- c. **Default:** If you are in Default then we may block your access to the Service. In addition, we may retain all payments you have made to us and recover charges and costs you owe us as well as any other damages we may have sustained because of your Default, including but not limited to attorney and collection agency fees. "Default" means you become the subject of a voluntary or involuntary bankruptcy, insolvency, reorganization or liquidation proceeding not dismissed within thirty (30) days; you make an assignment for the benefit of creditors; you admit in writing your inability to pay debts when due; or you fail, within thirty (30) days after receiving written notice from us, to remedy any breach of these Terms of Service or a service agreement between us.
- d. **Terminate With Cause:** You may terminate use of the Service by providing us with a notice of termination for cause. Such notice shall describe with reasonable specificity the alleged material default or failure of performance. If we are unable to substantially cure such material default or failure of performance within thirty (30) days then your termination for cause shall be effective on the date of the original notice. If you terminate the Service for cause then you agree to pay us any service fees you have incurred up to the termination date.
- e. **Terminating Without Cause:** If you terminate the Service for any other reason besides for cause as described above then you agree to pay us a termination charge equal to 100% of the total monthly charges that would have become due for the remainder of the scheduled minimum term if such cancellation had not occurred. Such termination charge shall be paid to us within thirty (30) days after such cancellation.

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11. NOTICES

- a. **Ways to Provide Notice:** Any notices or other communications permitted or required of either you or us under these Terms of Service, including those regarding modifications to these Terms of Service, shall be in writing and given: (i) via United States mail, postage prepaid, or via a recognized national overnight delivery service to the address provided in the service agreement between us, (ii) via email to address provided in the service agreement between us (provided email shall not be sufficient for notices of termination or an indemnifiable claim), or (iii) by posting to the Service.
- b. **Use of Your Email Address:** By registering with us, you understand that we may send you communications or data from us regarding the Service, including but not limited to (i) notices about your use of the Service, including any notices concerning violations of use, (ii) updates, and (iii) promotional information and materials regarding our products and services, via e-mail. We give you the opportunity to opt-out of receiving e-mail from us by following the opt-out instructions provided in the message.

12. GENERAL

- a. **Severability:** If any part of these Terms of Service are determined to be invalid or unenforceable pursuant to applicable law including, but not limited to, the warranty disclaimers and liability limitations set forth above, then the invalid or unenforceable provision will be deemed superseded by a valid enforceable provision that most closely matches the intent of the original provision, and the remainder of this agreement shall continue in effect.
- b. **Printed Version:** A printed version of these Terms of Service and of any notice given in electronic form shall be admissible in judicial or administrative proceedings based upon or relating to these Terms of Service to the same extent and subject to the same conditions as other business documents and records originally generated and maintained in printed form.
- c. **Reservation of Rights:** All rights not expressly granted herein are reserved.
- d. **Waiver:** If we fail to exercise or enforce any right or provision of these Terms of Service then it shall not constitute a waiver of such right or provision.
- e. **Section Headings:** The section titles in these Terms of Service are for convenience only and have no legal or contractual effect.
- f. **Assignment:** You may not assign or transfer these Terms of Service, by operation of law or otherwise, without our prior written consent, which shall not be unreasonably withheld. Any attempt by you to assign or transfer these Terms of Service, without such consent, will be null and of no effect. We may assign or transfer these Terms of Service, at our sole discretion, without restriction. Subject to the foregoing, these Terms of Service will bind and inure to the benefit of the parties, their successors and permitted assigns, but is not intended to inure to the benefit of any other third parties.

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- g. **Claims:** Any claim related to this contract or the Service must be brought within one year. The one-year period begins on the date when the claim first could be filed. If it is not, then that claim is permanently barred. This applies to you and you successors. It also applies to us and our successors and assigns.
- h. **Force Majeure:** Neither party shall be responsible for any failure to perform, or delay in performing any of its respective obligations under these Terms of Service, except for payment obligations, where and to the extent that such a failure or delay results from causes outside the control of such party. Such causes shall include, without limitation, delays caused by the other party, failures caused by a third-party service, acts of God or of the public enemy, acts of the government in its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, freight embargoes, strikes, civil commotion, or the like.

13. CHOICE OF LAW AND LOCATION FOR RESOLVING DISPUTES

- a. **Choice of Law:** These Terms of Service shall be governed and construed in accordance with the laws of the State of Alabama, excluding its conflicts-of-law principles.
- b. **Arbitration:** You agree that any disputes arising with us or our affiliates, subsidiaries, employees, contractors, officers, directors, or third party providers from or related to this contract shall be resolved by binding arbitration conducted under the auspices of the American Arbitration Association in Birmingham, Alabama. You shall be responsible for initial payment of one-half of any arbitration fees, but upon final resolution the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs.

14. QUESTIONS

- a. If you have any questions about these Terms of Service, please contact us at legal@daxko.com.