

Terms of Service

(Updated: May 10, 2018.)

1. Agreement

- a. By clicking through these terms, or signing the Order to which they are attached, you are entering into an agreement with WP Engine to provide Services to you. That agreement between us is comprised of these Terms of Service, the Order to which they are attached or by which they are referenced, the SLA, AUP, DPA, and Privacy Policy which are referenced herein, and any other terms, exhibits, schedules, or addenda which are referenced by any of the preceding (collectively the "Agreement"). The Agreement sets forth the exclusive terms and conditions between the Parties and supersedes all previous proposals, agreements, negotiations, and other written or oral communications between the Parties with respect to the Services provided hereunder.
- b. If there is a conflict between the terms of the Agreement, the terms shall govern according to the following order of precedence: 1) the Order, 2) these Terms of Service, and 3) any terms incorporated by reference by either of the above. The substantive terms contained in your purchase order, order confirmation, notice of receipt, vendor registration portal, or any other transactional document, form, or notice provided by you shall be void and without effect, even where your customary business practices require a showing of assent to such terms by us such as by signature or reference in an invoice.
- c. We may update these Terms of Service from time to time in our sole discretion; the current version may be found at <https://wpengine.com/legal/terms-of-service/>. In the event of any material change, we will provide you with written notice. Your continued use of the Services following such updates constitutes your acceptance of the same. If you do not agree to the terms of any modification, you may terminate the Agreement in accordance with the Termination section below.

2. Services

- a. We will provide the Services in accordance with the terms of the Agreement and the SLA. You acknowledge that we may engage third parties to provide or enable elements of the Services, provided that we are responsible to you for the performance of such third parties as if we performed the Services ourselves. You shall use the Services solely for the intended purpose in accordance with the Agreement, including the AUP, and provide us with all information, assistance, and materials reasonably required for our ongoing provision of the Services.
- b. We will provide support to you through the standard means we make available to our customers (e.g. knowledgebase, forums, chat, ticket). Authorized Users seeking support must have a basic understanding of the systems and technology related to the Services.
- c. The scope of Services provided under the Agreement may be amended by any reasonable means showing mutual agreement between the Parties including click-through terms, email, support ticket, or your selections in the User Portal. Any associated fees will be clearly and conspicuously provided to you before you agree to any such change.
- d. From time to time, we may provide replacements for certain components of the Services or cease supporting them altogether. No such replacement or end of life shall constitute a breach of the Agreement.
- e. If you request or utilize any Beta Services, such Beta Services shall be provided on an AS-IS basis with all faults. No SLA, indemnity, representation, or warranty shall apply to Beta Services. We reserve the right to terminate the Beta Services at any time and make no representation that Beta Services will be released into production.

3. Authorized Users

- a. You may designate a number of Authorized Users in the User Portal for the purpose of receiving support and making changes to your account. You are responsible for managing your Authorized Users and keeping them up-to-date. You authorize us to provide all applicable support and account information to your Authorized Users and to make modifications to the Services at their direction.

- b. You may only add, modify, or remove Authorized Users through the User Portal. We will not do so on your behalf, and we will only provide support, assistance, and information to your Authorized Users who can verify their identity through the User Portal. Notwithstanding the foregoing, if you pay for the Services with a credit or debit card, we may remove that card as a payment method at the request of any individual who is able to provide reasonably satisfactory evidence that he or she is the named individual on such credit or debit card.
- c. You will require your Authorized Users to abide by the terms of the Agreement, and you acknowledge and agree that you are fully responsible for the actions and omissions of your Authorized Users and for all costs, overages, or other liabilities incurred through your account except to the sole extent that any such use or liability is the result of our breach of the Agreement. An Authorized User, within the scope of permissions granted to such user in the User Portal, may make changes to the Services, and you agree to pay any Fees associated with such changes. You shall promptly notify us in the event that you become aware of any violation of the terms of the Agreement or any unauthorized use of the accounts of you or your Authorized Users.

4. Fees; Invoicing

- a. You agree to pay the Fees beginning on the Effective Date and according to the payment terms set out in the Order. If no payment terms are specified, Fees shall be due in full in advance, except for usage or overage fees which are invoiced monthly in arrears. If the Order sets any limit on your use of Services (such as number of visitors) and that limit is exceeded, you will be responsible for the applicable overages. You agree to pay any applicable taxes (excluding taxes on our income) which we are required to collect unless you provide us with a valid tax exemption certificate. If you elect to make any payment via wire or credit transfer, then you are responsible for any applicable transfer fees. Any applicable overages, taxes, or transfer fees will be added to the Fees. Fees applicable to any Renewal Term will be at our then-current rates, provided that we have notified you of any applicable increase prior to the date by which you may opt out of the renewal. Fees are payable in the currency specified in the Order and are not refundable except as expressly stated herein.
- b. You agree to the issue and acceptance of invoices in electronic format. We will invoice you immediately upon execution of the Order and on each renewal date thereafter. Invoices will be sent to the billing contact you designate in the Order or the User Portal. If you elect to pay via credit or debit card, we will charge the provided credit or debit card immediately upon account activation and on each renewal date thereafter, up to one week prior to the due date. If you elect to pay by any other method, payments are due 30 days from your receipt of the applicable invoice.
- c. It is your responsibility to maintain accurate and up-to-date billing details and ensure the Fees are paid by the due date. If you fail to maintain accurate and up-to-date billing details, your account may be suspended until such details are provided. If you are overdue on any Fees, we may: (i) charge a late fee on the unpaid balance at the lesser of 1.5% per month or the maximum lawful rate permitted by applicable law, (ii) suspend provision of the Services, and (iii) terminate the Agreement in accordance with Section 5(b) below. You will be responsible for any charges associated with our collection efforts related to unpaid Fees.

5. Term; Termination

- a. Upon expiration of the Initial Term, this Agreement will renew for successive Renewal Terms, each equal to the immediately preceding term, unless one Party notifies the other in writing of its intent not to renew no later than 30 days prior to the expiration of the then-current term.
- b. You may terminate the Agreement prior to the end of the Term: (i) if we materially breach the Agreement and fail to cure such breach within 10 days of your notice to us; (ii) if you provide us with at least 30 days notice; or (iii) for any other cause stated herein. We may terminate the Agreement prior to the end of the Term: (i) if you materially breach the Agreement and fail to cure such breach within 10 days of our notice to you; (ii) if we reasonably believe that your use of the Services endangers or negatively affects our network or systems, violates the law, or interferes with our ability to provide services to our other customers; (iii) if you abuse, harass, or threaten any of our employees; (iv) if we provide you with at least 30 days notice; or (v) for any other cause stated herein.
- c. Upon termination, we will provide you with a prorated refund of any unused Fees paid annually in advance for Services beyond the date of termination (adjusted for any discounts that are rendered void due to such termination and any other amounts which you owe).

6. Proprietary Rights

- a. Customer Content is and remains your exclusive property, and we claim no rights whatsoever in the Customer Content except to the extent explicitly granted herein. For the Term of the Agreement, you hereby grant to us, our affiliates, providers of Third-Party Services, and subcontractors a non-exclusive, fully-paid, royalty-free, fully sub-licensable, transferable, worldwide license to use, modify, publicly perform, publicly display, reproduce, prepare derivative works of, and distribute the Customer Content (in whole or in part) solely and strictly to the extent required to provide the Services to you under the terms of the Agreement.
- b. We and our licensors own and shall continue to own all right, title, and interest in and to the Services and the systems and networks used to provide such Services, including all system-generated data (e.g. performance data), modifications, improvements, upgrades, derivative works, and all intellectual property rights in and to any of the foregoing. Except for the express rights granted herein, we do not grant any other licenses, express or implied, to any of our intellectual property including software, services, or products.
- c. We may solicit and you or your Authorized Users may provide feedback about the Services. If you or your Authorized Users provide feedback, you agree that such feedback is provided freely. Except to the limited extent such feedback contains any of your Confidential Information, we are free to use and disclose such feedback for any purpose without an accounting to you or any other person, and we shall own all right, title, and interest in and to such feedback along with any changes, modifications, or upgrades we make to our current products or services and any new products or services that we develop using the feedback you or your Authorized Users provide.

7. **Confidentiality.** Each Party agrees to preserve the confidential nature of the other Party's Confidential Information by retaining and using the Confidential Information in trust and confidence, solely for its use as permitted and in connection with the Agreement, and by using the same degree of protection that it uses to protect its own similar confidential information, which in no event shall be less than reasonable care. Notwithstanding the foregoing, either Party may disclose the other Party's Confidential Information to the limited extent such disclosure is required by law, legal process, or court order, including any requirement under applicable data privacy regulations that a notice of data breach be given to a supervisory authority or regulatory agency. Information disclosed for these reasons will not cease to be Confidential Information. To the extent practicable, a Party will provide prompt notice of any such required disclosure and shall cooperate with all reasonable efforts by the disclosing Party to minimize or exclude the Confidential Information from such disclosure. Upon termination or expiration of the Agreement for any reason, any license granted herein to use the Confidential Information shall terminate immediately, and each Party will either return or destroy any Confidential Information in its possession which belongs to the other Party, or it shall continue to protect the Confidential Information in accordance with the Agreement for as long as it is retained as part of that Party's customary business practices. Notwithstanding any other terms to the contrary herein, each Party will have the right to seek an injunction in any court of competent jurisdiction to prevent a breach or threatened breach of this Section.

8. Security; Data Privacy

- a. We will maintain commercially reasonable technical and operational measures designed to protect our internal networks from malicious activity and provide for the security and integrity thereof. You acknowledge that we are not responsible for any loss or harm suffered by you resulting from a security incident. You are responsible for determining whether the Services meet applicable regulatory standards and otherwise comply with your own security requirements. You agree to configure your use of the Services in such a way as to maintain the security of the Services and our network (e.g. by only uploading software that has been demonstrated to be secure, installing patches, and not sharing passwords).
- b. Should we determine that our network has been accessed in an unauthorized manner, and that unauthorized access impacts your Services, we agree to notify you as soon as reasonably practicable after we have investigated the unauthorized access and fulfilled our legal obligations. Likewise, you agree to notify us should you identify unauthorized access to the Services.
- c. We will adhere to the Privacy Policy. Where applicable under the data privacy laws of the European Union and its member states, we are the data controller for the personal data belonging to you and your Authorized Users which is provided or made available to us through the User Portal. For all other personal data collected by you from your employees, customers, or end users or otherwise stored, transferred, or processed by any part of the Services, we

are the data processor. Where we are the data processor, we will use such personal data only as instructed by you or required by law, and not for any other purpose. In all cases, the Parties agree to comply with the terms and obligations of the DPA throughout the term of the Agreement.

9. Warranties. Each Party represents and warrants that (i) it has the power, authority, and legal right to enter into the Agreement and perform the obligations and grant the licenses set out herein; and (ii) it will comply with all laws and regulations applicable to its performance under the Agreement.

10. Indemnification. You agree to indemnify, defend, and hold harmless WP Engine; its affiliates, subsidiaries, and vendors; and their respective officers, directors, agents, and employees from and against any and all liabilities, obligations, losses, damages, penalties, fines, amounts in interest, and other expenses (including reasonable attorney fees) in connection with a claim or demand brought by a third party related to your violation of the AUP. We reserve the right to control the defense of any indemnified matter under this Section and approve any proposed settlement. You will pay us the amounts due under this Section as they are incurred.

11. Limitations

- a. Although we may perform regular backups of your site and Customer Content (as described in the Order), we do not guarantee there will be no loss or corruption of data. Corrupt or invalid backup points may be caused by, among other things, content that is corrupted prior to being backed up or that changes during the time a backup is performed. We will provide support to you and attempt to troubleshoot any known or discovered issues that may affect your backups, but you acknowledge that we have no liability related to the integrity of your backups or the failure to successfully restore your content to a usable state. You agree to maintain a complete and accurate copy of any Customer Content in a location independent of the Services.
- b. EXCEPT AS EXPRESSLY PROVIDED IN THE AGREEMENT, NEITHER PARTY MAKES ANY WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND WP ENGINE AND ITS LICENSORS SPECIFICALLY DISCLAIM ALL IMPLIED WARRANTIES INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, UNINTERRUPTED OR ERROR FREE SERVICE, AVAILABILITY, ACCURACY, AND ANY AND ALL IMPLIED WARRANTIES ARISING FROM STATUTE, COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE OF TRADE TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. OTHER THAN AS EXPRESSLY SET OUT IN THE AGREEMENT, THE SERVICES ARE PROVIDED AS-IS, AS AVAILABLE, AND WITH ALL FAULTS.
- c. IN NO EVENT SHALL OUR LIABILITY ARISING OUT OF OR RELATED TO THE AGREEMENT FOR ANY REASON (INCLUDING, BUT NOT LIMITED TO, CONTRACT, TORT, OR ANY OTHER THEORY OF LIABILITY) EXCEED IN THE AGGREGATE THE AMOUNT OF FEES PAID OR OWED BY YOU TO US IN THE 3 MONTHS PRECEDING THE CLAIM.
- d. IN NO EVENT SHALL WE OR OUR LICENSORS HAVE ANY LIABILITY FOR INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR PUNITIVE DAMAGES, NOR ANY COVER OR LOST PROFITS, HOWEVER CAUSED, ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE AGREEMENT WHETHER OR NOT WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
- e. THE SLA SETS OUT YOUR SOLE REMEDIES FOR DOWNTIME, UNAVAILABILITY, OR OTHER SLA FAILURES.
- f. The limitations in this Section 11 do not apply to the extent prohibited by applicable law or to your payment obligations for Services provided.

12. General Provisions

- a. **Assignment.** Neither Party may assign the Agreement, in whole or in part, without the other Party's prior written consent except in connection with a merger, reorganization, sale of assets or similar transaction. In case of the latter, the assigning Party will provide notice as soon as reasonably practicable and without undue delay. Any purported assignment in violation of this Section shall be null and void. The Agreement shall be binding on all permitted successors and assigns.
- b. **Force Majeure.** We shall not be deemed to be in default of the Agreement, or to have breached any of its provisions, as a result of a delay, failure in performance, or interruption in the Services which result, either directly

or indirectly, from any circumstances beyond our reasonable control including acts of god, acts of civil or military authority, civil disturbance, war, strikes, fire, laws, regulations, governmental acts, third-party network unavailability, and/or failure of telecommunication facilities.

- c. **Governing Law and Venue.** The Agreement is governed by the laws of the State of Texas, without regard to its choice of law statutes. Subject to Section 12(d), any disputes must be brought in the state or federal courts located in Travis County, Texas. No claim may be brought as a class or collective action and you may not actively assert a claim arising out of the Agreement as a member of a class or collective action. The United Nations Convention on the International Sale of Goods shall not govern the Agreement. **EACH PARTY WAIVES ANY RIGHT TO JURY TRIAL IN CONNECTION WITH ANY ACTION OR LITIGATION IN ANY WAY ARISING OUT OF, OR RELATED TO, THE AGREEMENT.**
- d. **Arbitration.** Both Parties agree that all disputes will be resolved by binding, individual arbitration under the American Arbitration Association's rules. Judgment on the award rendered by the arbitrator may be entered in any court having competent jurisdiction. Any provision of applicable law notwithstanding, the arbitrator will not have authority to award damages, remedies or awards that conflict with this Agreement. WP Engine will pay all arbitration fees (excluding attorneys' fees) for claims less than \$10,000. WP Engine will not seek its attorneys' fees and costs in arbitration unless the arbitrator determines that your claim is frivolous. **You may opt out of this agreement to arbitrate.** If you do so, neither Party may require the other to participate in an arbitration proceeding. To opt out, you must notify us in writing at the following address within 30 days of the date that you first became subject to this arbitration provision: WP Engine, Inc., ATTN: LEGAL – Arbitration Opt-Out, 504 Lavaca, Suite 1000, Austin, TX 78701. You must include your account name, contact address, and a clear statement that you wish to opt out of this arbitration agreement. If you choose to opt out, or if this Section is found to be unenforceable for any reason, disputes will be resolved as provided in the Agreement. This Section will be interpreted in accordance with the Federal Arbitration Act.
- e. **Notices.** Except as otherwise required herein, notices shall be effective when delivered, as indicated by a delivery receipt, or, in the case of notices delivered by post, 5 business days after being mailed to the designated address by first class mail. Notices to you shall be made to the address recorded in the User Portal or via electronic mail to an Authorized User. Notices to us should be delivered to: WP Engine, 504 Lavaca Street, Suite 1000, Austin, TX 78701, ATTN: Legal Department.
- f. **Publicity.** The Parties may disclose that they have entered into a business relationship and may include the name and logo of the other Party in lists of their respective customers or vendors (as the case may be), subject to any provided usage guidelines with respect to a Party's trademarks and so long as neither Party mischaracterizes the nature of the actual relationship between them. Any other use of a Party's name, logo, or other trademarks or service marks shall require prior written consent. Specifically, and without limiting the generality of the foregoing, neither Party may disclose or advertise any other details of the Agreement or use the name, logo, or trademarks of the other Party in connection with a product or service based upon or similar to a product or service that Party offers. Neither Party may hold itself out as a reseller or a partner of the other, or any other similar designation, unless granted such license or authority under a separately executed agreement.
- g. **Severability.** Any provision in the Agreement that is held to be illegal or unenforceable in any jurisdiction shall be effective only up to the extent of such illegality or unenforceability, if possible, and shall not invalidate the remaining provisions of the paragraph or the Agreement. To the largest extent possible, the illegal or unenforceable provision shall be restated to reflect the Parties' intent.
- h. **Survival.** Any provision of the Agreement that contemplates performance or observance subsequent to termination or expiration of the Agreement (including, without limitation, confidentiality, limitation of liability, and indemnification) survive termination or expiration and continue in full force and effect.
- i. **Third-Party Beneficiaries; Relationships.** There are no third-party beneficiaries to the Agreement. Nothing contained in the Agreement shall be deemed or construed as creating a joint venture or partnership between the Parties hereto. No Party is by virtue of the Agreement authorized as an agent, employee, or legal representative of any other Party. Neither Party has the authority to make any representations, claims, or warranties of any kind on behalf of the other Party, nor on behalf of that Party's affiliates, agents, subcontractors, licensors, or third-party suppliers.

- j. Waiver. If one Party fails to exercise, or delays exercising, any right, remedy or power set out in the Agreement, this shall not operate as a waiver of that right, remedy or power, whether under the Agreement or at law or equity.

13. Definitions

- a. "Agreement" has the meaning provided in Section 1(a).
- b. "AUP" means the Acceptable Use Policy located at <https://wpengine.com/aup> as it may be updated by us from time to time.
- c. "Authorized User" means a user whom you have authorized to access and manage your account through the User Portal.
- d. "Beta Services" means any services which are clearly and conspicuously designated by us as Beta Services. Beta Services may be in early stages of testing or development, are not recommended for production use, and are subject to additional disclaimers and limitations as described in the Agreement.
- e. "Confidential Information" means information disclosed by one Party to the other, directly or indirectly, in writing, orally, or by inspection of tangible objects, that should be reasonably understood to be confidential by its particular identification or designation, the circumstances of its disclosure, or the nature of the information itself. Confidential Information does not include information which, at such time: (i) is generally known or available to the public without breach of the Agreement by the receiving Party; (ii) is rightfully disclosed to the receiving Party without restriction as to further use or disclosure; or (iii) is independently developed by the receiving Party without use of or reference to the disclosing Party's Confidential Information, as shown by documents and other competent evidence in the receiving Party's possession. Confidential Information is and shall remain the property of the disclosing Party (or its licensors, as applicable), and no rights are granted to the Confidential Information other than those rights expressly granted in the Agreement.
- f. "Customer," "you," or "your" means the entity entering into this Agreement with WP Engine upon the actions taken by its authorized representative.
- g. "Customer Content" means the text files, images, photos, videos, sounds, or other materials or works of authorship belonging to you or your end users that you cause to be stored within the Services, excluding Customer Data.
- h. "Customer Data" means the information about you or your Authorized Users which is required by us in order to provide the Services to you.
- i. "DPA" means the Data Privacy Addendum located at <https://wpengine.com/legal/dpa> as it may be updated by us from time to time in order to comply with applicable laws or guidance.
- j. "Effective Date" means the date your account is activated.
- k. "Initial Term" means the term stated in the Order.
- l. "Order" means the order form or online transaction which describes the Services and incorporates these Terms of Service.
- m. "Party" means either Customer or WP Engine; "Parties" means both Customer and WP Engine.
- n. "Privacy Policy" means the policy located at <https://wpengine.com/legal/privacy/> as it may be updated from time to time.
- o. "Renewal Term" means any successive term after the Initial Term.
- p. "Services" means the hosting, support, and other related services we provide to you as described in the Order.
- q. "SLA" means the Service Level Agreement located at <https://wpengine.com/sla/> as it may be updated by us from time to time.

- r. "Term" means the entirety of the Initial Term and all Renewal Terms.
- s. "Third-Party Services" means certain third-party products or services which are not sold or licensed by us but which are made available for you, in your sole discretion, to enable or integrate with the Services (e.g. third-party themes and plugins available through the WordPress administrative portal). We maintain no control over and disclaim any and all liability for Third Party Services, even where we may have provided limited support or advice to you in relation to such services. Such support and advice are provided in good faith, AS-IS and AS-AVAILABLE, and solely for your convenience
- t. "User Portal" means the web site located at <https://my.wpengine.com> which we make available to our customers for the purpose of managing their account and the Services.
- u. "WP Engine," "we," or "our" means WP Engine, Inc., a Delaware corporation located at 504 Lavaca St., Ste. 1000, Austin, Texas 78701.