

Instana Terms of Service SaaS License Agreement

THIS SAAS TERMS OF SERVICE LICENSE AGREEMENT, TOGETHER WITH ANY ORDER FORM, (THIS "AGREEMENT") BETWEEN INSTANA, INC., A DELAWARE CORPORATION, WITH ITS PRINCIPLE PLACE OF BUSINESS AT 222 MERCHANDISE MART PLAZA, SUITE 1212, CHICAGO, IL 60654 ("INSTANA") AND YOU OR THE END USER REFERENCED IN THE ORDER FORM (AS DEFINED BELOW) ("CLIENT") IS EFFECTIVE THE EARLIER OF THE DATE THE INITIAL ORDER FORM IS EXECUTED OR YOU FIRST USE THE SERVICE (THE "EFFECTIVE DATE").

BY REGISTERING FOR AN ACCOUNT, INSTALLING, USING OR OTHERWISE ACCESSING THE SERVICE, CLIENT ACCEPTS THIS AGREEMENT AND WARRANT THEY ARE AUTHORIZED TO BIND THE COMPANY THEY REPRESENT. IF CLIENT DOES NOT ACCEPT THE TERMS OF THIS AGREEMENT, PLEASE DO NOT INSTALL, USE OR OTHERWISE ACCESS THE SERVICE.

INSTANA RESERVES THE RIGHT, IN ITS SOLE DISCRETION, TO CHANGE, MODIFY, ADD OR REMOVE PORTIONS OF THIS AGREEMENT AT ANY TIME BY POSTING THE AMENDED AGREEMENT AT [HTTPS://DOCS.INSTANA.IO/INSTANA-TERMS-LATEST.PDF](https://docs.instana.io/instana-terms-latest.pdf). CLIENT WILL BE DEEMED TO HAVE ACCEPTED SUCH CHANGES BY CONTINUING TO USE THE SERVICE. IF AT ANY POINT CLIENT DOES NOT AGREE TO ANY PORTION OF THE THEN-CURRENT VERSION OF THE AGREEMENT, INCLUDING ANY OTHER INSTANA POLICY INCORPORATED THEREIN, RULES, OR CODES OF CONDUCT, CLIENT'S LICENSE TO USE THE SERVICE SHALL IMMEDIATELY TERMINATE, AND CLIENT MUST IMMEDIATELY STOP USING THE SERVICE.

1. **DEFINED TERMS.** Any terms not defined in this Agreement but defined in the Order Form shall have those definitions.
 - 1.1 **"Service"** is Instana's IT Monitoring services hosted by Instana and includes an Agent and Sensors, as described in Instana's documentation located at <https://docs.instana.io/> ("Documentation"), installed in the Client's servers and application environment(s). Instana may update or change the Service, Agent and/or Sensors with no prior notice to you, and you may be required to install updates to the Agent or Sensors installed on your computers to continue to receive the Service.
 - 1.2 **"Order Form"** means the document signed by both parties setting forth prices and quantities and/or duration of usage for Client's purchase of the Service.
 - 1.3 **"Support Services"** are set forth in Exhibit B hereto and invoiced at the cost set forth in the Order Form.
 - 1.4 **"Service Availability"** means the service availability uptime as described in Exhibit A.
2. **TERM.** The term of this Agreement shall commence on the date Client accepts these Terms of Service and shall continue until terminated pursuant to the provisions of Section 9 of these Terms and Conditions or any Order Form, whichever comes first.
3. **INTELLECTUAL PROPERTY**
 - 3.1 **License.** Subject to this Agreement, Instana hereby grants to Client a nonexclusive, revocable, nonsublicensable, nontransferable license to access and use the Service during the Term solely for its internal business operations. Client is solely responsible for providing all telecommunications, computer and other equipment necessary for accessing the Service. Instana retains the right, in its sole discretion and with no notice to Client, to restrict or terminate access to the Service by Client if Instana has a good faith belief that Client has materially breached the terms of this Agreement, any Instana policies, or is using the Service as not intended or in a way that violates any applicable federal, state, local or international laws or regulations, or the rights of any third party.
 - 3.2 **Ownership.** Instana retains all rights not expressly granted to Client in this Agreement. Client acknowledges and agrees that Instana retains all rights, title and interest in and to the Service, including without limitation copyrights, patent rights, trademarks and trade names, and trade secrets.
 - 3.3 **Restrictions on Use.** Except as otherwise specifically permitted under this Agreement, Client shall not, nor will Client permit any third party to (i) copy, modify, distribute, sell, assign, pledge, sublicense, lease, loan, deliver or otherwise transfer the Service or any of its components to any third party in whole or in part,

provided that Client may copy Instana's Documentation as needed for internal business use; (ii) derive or attempt to derive the source code of any portion of the Service by any means; (iii) reverse engineer, decompile, disassemble, or translate the Service or any part thereof; (iv) upload, post, mail, publish, transmit or distribute in any way the Service or its components; (v) make available through the Service any material or information that infringes the intellectual property rights, rights of publicity, or right of privacy of any entity or person, or impersonates another person including without limitation an Instana employee

- 3.4 **No Trademark License.** No license, right or interest in the trademarks, trade names or service mark of either party is granted hereunder, except as either party may agree in writing.

4. CONFIDENTIAL INFORMATION AND CLIENT DATA

- 4.1 **Confidential Information.** By virtue of this Agreement, either party may come into contact with the other party's non-public or proprietary information ("Confidential Information"). Confidential Information shall include, without limitation, any information or materials supplied to, obtained by or observed by either party or its employees, agents, consultants or subcontractors including proprietary software, source code documents, financial information, Documentation, data, benchmark tests, specifications, customers, marketing strategies, business practices and any other proprietary information supplied to one party by the other and identified as proprietary or confidential, user identification and passwords, and account information. The terms of any Order Form and these Terms and Conditions are also considered Confidential Information. Each party shall hold the Confidential Information of the other party in strict confidence and not disclose the Confidential Information to third parties nor use it for any purpose not authorized herein, nor permit access to Confidential Information, except to those of its employees or authorized representatives having a need to know and who are bound by confidentiality obligations at least as restrictive as those contained herein. Upon learning of any unauthorized use or disclosure of a disclosing party's Confidential Information, the other party shall immediately notify the disclosing party. Client Data, as defined in Section 4.4, shall be considered Client's Confidential Information.

- 4.2 **Exceptions.** The above restrictions of Section 4.1 shall not apply to: (i) information that becomes, through no act or fault of the party receiving the Confidential Information ("Receiving Party"), publicly known or generally known in the relevant industry; (ii) information received from a third party not obligated under a confidentiality agreement with the party disclosing the Confidential Information ("Disclosing Party"); (iii) information independently developed by either party without reference to the Confidential Information; (iv) information required to be disclosed by law or court or governmental agency order, provided the party gives prompt notice of such requirement to the other party, or; (v) disclosures to a professional advisor under a duty of confidentiality.

- 4.3 **Ownership and Return of Confidential Information.** All Confidential Information shall remain the property of the Disclosing Party. Upon written request of the party disclosing the Confidential Information, ("Disclosing Party"), the other party shall promptly return to the Disclosing Party all documents and other tangible materials representing the disclosing party's Confidential Information, together with all copies thereof; at Disclosing Party's expense.

- 4.4 **Client Data.** Instana's Service collects data that may include Service usage data, Service quality management and monitoring data, and Service user lists ("Client Data"). Client will not configure the Service to collect any personally-identifiable information or payment information ("Personal Data") without Instana's prior written approval. Title to ownership of all data transmitted to Instana pursuant to Client's use of the Services shall remain with Client, provided, however, that Client hereby grants Instana a worldwide, exclusive, irrevocable license to access, use and analyze Client Data, which may be used by Instana for the purpose of improving the Instana Service, bill and invoice the Client for Service Usage and to assist the Client in operating the Service. Upon request by Client made within thirty (30) days of the effective date of termination, Instana will delete all Client Data. After such a thirty day period, Instana shall have no obligation to maintain or provide any of Client's Data.

5. **DISCLAIMER OF WARRANTY.** The Instana service, access thereto, and any services provided hereunder are provided on an “as is” basis, and Instana and its affiliates and agents: (a) do not make, and hereby expressly disclaim, any and all warranties, whether express or implied, including but not limited to warranties of merchantability, noninfringement, fitness for a particular purpose, and any warranties arising from course of dealing, usage, or trade practice; (b) do not warrant that access to the Instana service will be uninterrupted, error-free, or secure, or that any information, software, or other material accessible through the Instana service is free of viruses (although Instana represents that it will use commercially reasonable efforts to avoid viruses) or other harmful contents or components; (c) shall in no event be liable to Client or anyone else for any inaccuracy, error or omission in, or loss, injury or damage (including loss of data) caused in whole or in part by, or failures, delays or interruptions of the Instana service. Some jurisdictions may not allow the exclusion or limitation of certain warranties. In such jurisdictions, Instana’s liability shall be limited to the maximum extent permitted by law.

6. **INDEMNIFICATION**

6.1 **By Instana.** Instana agrees to indemnify, defend and hold harmless Client from any third party suits, losses, claims, demands, liabilities, costs and expenses (including reasonable attorney and accounting fees) that Client may sustain or incur arising from any actual or asserted infringement or misappropriation by Instana of any patent, copyright, trademark or trade secret of a third party. In the event that the Service is, or in Instana’s sole opinion only after the assertion of a third party claim is likely to be, enjoined due to the type of infringement described in this Section 6, Instana, at its option and expense, may (a) replace the applicable Service with functionally equivalent non-infringing technology or (b) obtain a license for Client continued use of the Service, or, if the foregoing alternatives are not reasonably available to Instana, (c) terminate the Agreement and immediately refund all sums prepaid hereunder. The foregoing provisions of this section state the entire liability and obligations of Instana and the exclusive remedy of Client, with respect to any alleged or actual infringement of patents, copyrights, trade secrets, trademarks or other intellectual property rights by the software.

6.2 **Indemnification Requirements.** In claiming any indemnification under this Section 6, the indemnified party shall promptly provide the indemnifying party with notice of any claim that the indemnified party believes is within the scope of the obligation to indemnify. The indemnified party may, at its own expense, assist in the defense if it so chooses, but provided that the indemnifying party promptly acknowledges its indemnity obligation hereunder and undertakes defense of any applicable third party claim, the indemnifying party shall control the defense and all negotiations relative to the settlement of any such claim, provided further that it may not make any admission on behalf of the indemnified party or agree to any liability or payment which will not be made immediately and in full by the indemnifying party without the indemnified party’s prior written consent. Any settlement intended to bind the indemnified party shall not be final without the indemnified party’s written consent, which consent shall not be unreasonably withheld or delayed. A party’s indemnification obligations hereunder shall be reduced to the extent the indemnified party fails to comply with this Section 6.2 or to cooperate reasonably in the defense of any indemnified claim hereunder and such failure prejudices the defense of such claim.

7. **LIMITATION OF LIABILITY.**

7.1 **Exclusion of Consequential Damages.** In no event shall Instana or Instana’s suppliers be liable for any indirect, incidental, special or consequential damages, including without limitation damages for loss of profits, data or use, incurred by Client or any third party, whether in an action in contract or tort, even if Instana has been advised of the possibility of such damages.

- 7.2 **Limitation of Direct Damages.** The aggregate and cumulative liability of Instana and its suppliers for damages hereunder shall in no event exceed the amount of fees paid by Client for the previous six (6) months under this Agreement.
8. **FEES AND PAYMENTS.** All fees and amounts due to Instana shall be set forth in one or more Order Forms. All fees are non-refundable, and do not include any applicable taxes, which are the sole responsibility of the Client. All payments are due within thirty (30) days from the date of invoice. All payments not made within such thirty (30) day period shall be Delinquent Payments. Late fees shall accrue on all Delinquent Payments at the lesser of (i) 1.5% per month, or (ii) the maximum rate allowed under law. If Delinquent Payments are not made within fifteen (15) days of written notice to Client by Instana, Instana may, in its sole discretion, immediately terminate the applicable Order Forms, and Client's access to the Service with no further liability to Client.
9. **TERMINATION.** This Agreement shall continue to be in force until terminated by either party in accordance with this Section 9.
- 9.1 **Termination for Breach.** If either party materially breaches this Agreement or an Order Form and such breach is not cured within thirty (30) days after written notice is given to the breaching party, then the other party may, by giving written notice to the breaching party, terminate the applicable Order Form as of the end of such thirty (30) day period or such later date as is specified in such notice of termination. Instana may also immediately terminate this Agreement pursuant to the terms of Section 3.1.
- 9.2 **Termination for Account Inactivity.** Instana may close any Client account and terminate this Agreement if Client's account is inactive for 180 days or longer, with no prior notice or compensation to Client.
- 9.3 **Effect of Termination.** Upon termination of any Order Form due to Client's breach, Client shall pay all amounts due to Instana under all Work Orders and shall not be entitled to a refund for any amounts already paid.
10. **MISCELLANEOUS.** The laws of the State of California shall govern this Agreement without reference to its conflict of law principles. All claims under, or otherwise with respect to, this Agreement shall be brought and maintained in the state and federal courts located in San Francisco, California, USA, and the parties hereby expressly consent (and waive any right to otherwise object) to the exclusive venue and jurisdiction of such courts.
- 10.1 Neither party may assign this Agreement, or its rights or duties hereunder, to any third party, in whole or in part, except that it is agreed that a change in control is not an assignment subject to this section; provided, however, that Instana may terminate this Agreement if a Client change in control results in Client ownership by an entity that Instana reasonably deems to be its competitor; provided, further, Instana may assign this agreement to any of its affiliates.
- 10.2 All notices must be in writing and delivered personally or sent by overnight courier service to the address indicated in the Order Form, or such other address as either party may indicate by written notice, and will be deemed effective upon the earlier of actual or two business days after deposit with an overnight courier.
- 10.3 The provisions of this Agreement are severable. If any one is held to be invalid, the invalid provision will be replaced by a valid clause coming closest to the invalid clause's intention.
- 10.4 In the event of any litigation arising out of or in connection with this Agreement or its interpretation or performance, the prevailing party shall be awarded reasonable attorneys' fees and expenses, court costs, and reasonable costs for expert and other witnesses attributable to the prosecution or defense of that controversy or dispute.
- 10.5 This Agreement constitutes the entire, exclusive and final statement of the agreement of the parties with respect to this subject matter, and supersedes all prior and contemporaneous representations, proposals, negotiations, discussions, and agreements between the parties, whether oral or in writing. There are no intended third-party beneficiaries under this Agreement.

- 10.6 This Agreement may be executed in counterparts, which taken together shall be considered one original Agreement.
- 10.7 The provisions of Sections 3.3, 4, 5, and 7 shall survive and the obligations thereof continue for a period of four (4) years following termination.
- 10.8 Except for Client's obligations to make payments as set forth in this Agreement, each party shall be excused from performance for any period during which, and to the extent that, it or its subcontractor(s) is prevented from performing any obligation or service, in whole or in part, as a result of causes beyond its reasonable control and without its fault or negligence. Such acts shall include without limitation acts of God, strikes, lockouts, riots, acts of war, epidemics, governmental laws and regulations imposed after the fact, fire, communication line failures, power failures, earthquakes, floods or other natural disasters (a "Force Majeure Event"). Delays in delivery or in meeting completion dates due to Force Majeure Events shall automatically extend such dates for a period equal to the duration of such events.

EXHIBIT A
SERVICE AVAILABILITY

Service Availability:

Instana will use commercially reasonable efforts to (a) provide bandwidth sufficient for Client's use of the Services provided hereunder and in an applicable Order Form and (b) operate and manage the Services with a 99.5% uptime Service Availability goal, excluding situations identified as "Excluded" below. For purposes of the foregoing uptime Service Availability goal, the Instana network extends to, includes and terminates at the data center located router that provides the outside interface of each of Instana's WAN connections to its backbone providers (the "Instana Network").

"Excluded" means any outage that results from any of the following:

- a. Any maintenance performed by Instana during Instana's standard maintenance windows. Instana will notify Client within 48 hours of any standard maintenance and within 24 hours for other non-standard emergency maintenance (collectively referred to herein as "Scheduled Maintenance").
- b. (a) Client's information content or application programming, acts or omissions of Client or its agents; (b) delays or failures due to force majeure or other circumstances beyond Instana's reasonable control that could not be avoided by its exercise of due care; or (c) failures of Internet backbone itself and the network by which Client connects to the Internet backbone or any other network unavailability outside of the Instana Network.
- c. Any window of time when Client agrees that Services availability/unavailability will not be monitored or counted.
- d. Client's failure to provide Instana with reasonable advance prior notice of any pending unusual large deployments of new nodes (i.e., adding over 10 percent total nodes in under 24 hours).
- e. Client's failure to consult with Instana and obtain Instana's prior approval reasonably in advance prior to implementing any significant configuration changes, including changes that lead to a greater than thirty percent (30%) change in a one week period or greater than fifty percent (50%) change in a one month period in the number of objects under management in the system including but not limited to Agents, Sensors, metrics, events and traces.
- f. A mis-configuration by the Client (as determined in Instana's discretion). Mis-configuration includes but is not limited to configuration errors and bad or unintended usage of the Services. Instana will notify Client where any issue falls under this category.
- g. Client's failure to upgrade the Instana Agents to keep the Agent versions within 6 months of the Controller version.

- h. Any problems resulting from Client combining or merging the Services with any hardware or software not supplied by Instana or not identified by Instana in writing as compatible with the Services. For clarification, all systems (both hardware, software and virtualization) currently being used by Client as of the Effective Date, are hereby approved by Instana as being compatible with the Services.
- i. Interruptions or delays in providing the Services resulting from telecommunication or Internet service provider failures outside of the Instana Network.
- j. Any interruption or unavailability resulting from Client's use of the Services in an unauthorized or unlawful manner.
- k. Any problems resulting from Client's or any Client third party's acts, errors or omissions or any system not provided by Instana.

Instana will provide seventy-two (72) hours notice for any Schedule Maintenance. Notwithstanding the foregoing and upon being notified by Client after a Scheduled Maintenance notification, Instana will work in good faith with Client to reschedule a Scheduled Maintenance session that will materially impact Client's business operations.

In the event Instana fails to provide the 99.0% availability target for the Services as set forth above in any month, Client's sole and exclusive remedy, and Instana's sole and exclusive liability, will be for Client to receive a service credit equal to a percentage of the Services fees paid for such month for the applicable Services, as set forth in the table below. The service credit may be applied to fees owed in subsequent months. Service credits will not accrue (i.e., no service credits will be issued and an outage will not be considered unavailability for purposes of this Exhibit A) if Client is not current in its payment obligations either when the outage occurs or when the service credit would otherwise be issued. To receive a service credit, Customer must submit a written request within fifteen (15) days after the end of the month in which Instana failed to provide the 99.0% availability target for the Services.

<u>Services Availability</u>	Percentage of Monthly Service Fees Credited
≥ 99.0%	0%
≥ 95.0% - < 99.0%	5%
≥ 90.0% - < 95.0%	10%
≥ 80.0% - < 90.0%	20%
≥ 70.0% - < 80.0%	30%
≥ 60.0% - < 70.0%	40%
≥ 50.0% - < 60.0%	50%
≥ 40.0% - < 50.0%	60%
≥ 30.0% - < 40.0%	70%
≥ 20.0% - < 30.0%	80%
≥ 10.0% - < 20.0%	90%
< 10%	100%

EXHIBIT B
STANDARD SUPPORT

GENERAL REQUIREMENTS. Instana will provide access to a ticketing system and email address, which will be available 24 hours per day, 7 days per week. The phone number and email account will be maintained by qualified support specialists, who shall use commercially reasonable efforts to answer questions and resolve problems regarding the Services.

HOURS OF OPERATION. Support is available 24 hours per day, 7 days per week.

ERROR CLASSIFICATION. The reported errors and defects are classified in the following manner:

Error Classification	Criteria
Urgent	A production application is down or there is a major malfunction, resulting in a business revenue loss and impacting the application functionality for a majority of users.
High	Critical loss of application functionality or performance, impacting the application functionality for a high number of users.
Medium	Moderate loss of application functionality or performance, impacting multiple users.
Low	Minor loss of application functionality or product feature in question.

FUNCTIONAL DEFINITIONS. For the purposes of error classification, essential or major functions include: data capture features, SLA and alarming features, performance management features and application performance problem resolution features.

RESPONSE TIME. Instana shall use commercially reasonable efforts to respond to error reports within four (4) hours for Urgent and High errors. Instana will use reasonable means to repair the error and keep Client informed of progress. Instana makes no representations as to when a full resolution of the error may be made.

Error Classification	Initial Response and Acknowledgement	Manager Escalation	VP Escalation	CEO Escalation	Email Status Updates for Open Cases
Urgent	4 Hrs.	Immediate	1 Business Day	1 Week	Daily
High	12 Hrs.	1 Business Day	1 Week	2 Weeks	Weekly
Medium	1 Business Day	Monthly Review for All Open Issues	Quarterly Review for All Open Issues	None	None
Low	1 Business Day	Monthly Review for All Open Issues	Quarterly Review for All Open Issues	None	None

AUTHORIZED SUPPORT CONTACTS. Support and maintenance will be provided solely to Client's authorized support contacts. Client will be asked to designate its authorized support contacts, including its primary email address.

CLIENT'S OBLIGATION TO ASSIST. Should Client report a purported defect in the Services to Instana, Instana may require Client to provide Instana with the following information:

- A general description of the operating environment
- A list of all hardware components, operating systems and networks
- A reproducible test case
- Any log files, trace and systems files

Client's failure to provide this information may prevent Instana from identifying and fixing the reported defect.