XUXER - Terms of Service

Last updated: November 27, 2019

This Agreement (together with our Privacy Policy) governs Neck Empire LLC's ("Neck Empire", "We", or "Our") relationship with you, the subscribing entity ("you", "your", or the "Subscriber") and any individual granted a license by the Subscriber (each an “Authorized User,” and together with the Subscriber, the “Customer”) using our software (the "Software"), our services (the "Services"), and our website https://xuxer.com/ (the "Website"). Together, the Website, the Software, and the Services are the "Neck Empire Suite".

BY USING THE NECK EMPIRE SUITE, YOU ACCEPT AND AGREE TO THIS AGREEMENT. IF YOU DISAGREE WITH ANYTHING HERE, YOU'RE WELCOME TO CONTACT US AT HELP NECKEMPIRE@GMAIL.COM, AND WE'LL BE HAPPY TO ADDRESS ANY QUESTIONS OR CONCERNS.

1. The Neck Empire Suite We will be responsible for hosting the Software and the Website, and you will be responsible for providing the resources necessary for the Customer to access and utilize the Neck Empire Suite. The Software and the Website will be accessible 24 hours per day, 7 days per week, 99.5% of the time, except for (i) maintenance, (ii) required repairs, and (iii) any loss or interruption of the Neck Empire Suite caused by any reason where the failure to perform is beyond the control and not caused by the negligence of the Neck Empire.

1.1 Software/Website Errors. We will use commercially reasonable efforts to correct any reproducible errors that prevent the Software and the Website from performing with the then-current specifications as promptly as possible. Unless otherwise agreed to in writing, support offered by Neck Empire will be limited to providing email, online, and phone support.

1.2 Software/Website Documentation. We may provide you with access to guides (the "Documentation") for the Software and Website, as may be updated from time to time. The Documentation will solely be used in connection with your use of the Software and Website, and you will not remove any copyright, trademark, or other notices from the Documentation.

1.3 Fees and Payment Terms. (a) We offer (unless otherwise noted or agreed to in writing) monthly subscription plans that are priced based on the number drivers using the Services. Neck Empire may offer a discount for annual subscription. We will notify you in advance of any changes to your current plan.

(b) Upon subscribing and providing your payment information, unless otherwise stated or agreed in to in writing, your account will be debited, and all payments will be billed to you in U.S. dollars. Payments can be made using a credit card (AMEX, Visa, or Mastercard), debit card, or by check.
(c) If your payment information is not valid as provided, we have the right to suspend your account and refuse your use of the Neck Empire Suite until the payment information is updated. We may also participate in programs supported by your card provider (e.g., updater services and recurring billing programs) to try and update your payment information, and you authorize us to continue billing your account with the updated information obtained by us.

(d) Unless otherwise agreed to in writing, payments will be due on the first day of the month. You will pay any sales, use, or other tax related to the fees for the Neck Empire Suite.

2. License Grant; Restriction on Use

Neck Empire grants you a non-exclusive, revocable, worldwide, royalty-free, non-transferable license (the “License”) to access and use the Neck Empire Suite for your internal business purposes in creating and managing independent contractor and driver procurement for yourself or your clients. You will not, and will not attempt to, directly or indirectly (a) reverse engineer, decompile, disassemble, or otherwise attempt to discern the source code, underlying ideas, algorithms, or any files contained in or generated by the Neck Empire Suite; (b) copy, modify, adapt, or translate the Neck Empire Suite, or otherwise make any use, resell, distribute, or sublicense the Neck Empire Suite other than in connection with this Agreement; (c) access the Neck Empire Suite on behalf of a competing service or permit any individual acting on behalf of a competing service to access the Neck Empire Suite for any reason; (d) remove or modify any proprietary marking or restrictive legends placed in the Neck Empire Suite; or (e) use the Neck Empire Suite in violation of any applicable law or regulation. In general, you may not sub-license the License, but you may grant sublicenses to any contractors you employ for the sole purpose of using the Neck Empire Suite to provide assistance to you or your employees.

2.1 Authorized Users (a) Authorized Users may be provided read-only access of records and intake forms to your client’s users. An Authorized User has a license to use the Neck Empire Suite.

(b) You are solely responsible for your interactions with Authorized Users. We reserve the right, but have no obligation, to monitor disputes between you and other Authorized Users.

(c) This Agreement does not give you any title, ownership, or interest (including any intellectual property rights) in the Neck Empire Suite or any of the content within.

3. Registration and Accounts Users are required to keep your account information current so Neck Empire can ensure you receive timely notices that may be important to you and your continued use of the Services. Neck Empire will have no liability for failure to deliver notices that result from inaccurate, incomplete, or out of date account information.

You will not create an account for anyone other than yourself, your business, or your clients and collaborators.
without permission, or any other false or fraudulent pretenses.

You will not share your password or let anyone else who is not an Authorized User access your account and will not do anything else that would endanger the security of your account. Please notify us of any breach of security by emailing us at neckempire@gmail.com. You will use best efforts to prevent unauthorized access to or use of the Services. You agree to notify us immediately of any such unauthorized access or use.

Neck Empire is not responsible for revoking access to the Neck Empire Suite if the status of an Authorized User or designated employee changes. It is the responsibility of the Subscriber to remove all access to former Authorized Users and designated employees.

4. Confidential Information Neck Empire confidential information includes the Software, all source and object code, the Documentation, and all non-public information or material about our legal or business affairs, financing, customers, or data (“Neck Empire Confidential Information”), but it does not include any data relating to your clients or potential clients. Customer Confidential Information (“Customer Confidential Information”) means information pertaining to your legal or business affairs, clients, and data.

4.1 Use and Disclosure of Neck Empire Confidential Information. You will: (i) only use the Neck Empire Confidential Information to perform obligations and rights under this Agreement, (ii) restrict disclosure of Neck Empire Confidential Information within the receiving party’s organization to only those employees or contractors and the Subscriber’s own clients or potential clients that need to know and are required to comply with your obligations under this Agreement; and (iii) not disclose Neck Empire Confidential Information to any third party unless authorized by Neck Empire in writing.

4.2 Protection of Neck Empire Confidential Information. You will protect the confidentiality of Neck Empire Confidential Information using at least the degree of care that it uses to protect its own confidential information (but no less than a reasonable degree of care). If you receive a request to disclose the Neck Empire Confidential Information under a judicial or governmental order, you will not disclose the Neck Empire Confidential Information without first giving us notice of the request and sufficient opportunity to contest the order, to the extent legally permissible.

4.3 Use and Disclosure of Customer Confidential Information. We will: (i) only use the Customer Confidential Information to perform obligations and rights under this Agreement, (ii) restrict disclosure of Customer Confidential Information within our organization to only those employees or contractors that need to know and comply with our obligations under this Agreement; and (iii) not disclose Customer Confidential Information to any third party unless authorized by the disclosing party in writing.

4.4 Protection of Customer Confidential Information. We will protect the confidentiality of any Customer Confidential Information disclosed by the disclosing party using at least the degree of care that we use to protect our own confidential information but no less than a reasonable degree of care. The specific information
we collect and how we use this data is detailed in our Privacy Policy. If we receive a request to disclose the Customer Confidential Information under a judicial or governmental order, we will not disclose the Customer Confidential Information without first giving you notice of the request and sufficient opportunity to contest the order, to the extent legally permissible.

5. Representations and Warranties

5.1 Power and Authority. If you are using the Neck Empire Suite on behalf of an organization, you agree to these terms for that organization and warrant that you have the authority to bind that organization to this Agreement. In that case, “you” and “your” in this Agreement will refer to that organization.

5.2 NO OTHER WARRANTIES. EXCEPT AS PROVIDED ABOVE UNDER THE HEADING NECK EMPIRE SUITE, THE NECK EMPIRE SUITE IS PROVIDED "AS IS," WITHOUT EXPRESS OR IMPLIED WARRANTY OR CONDITION OF ANY KIND. WE DISCLAIM ALL IMPLIED OR STATUTORY WARRANTIES, INCLUDING IMPLIED WARRANTIES OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND UNINTERRUPTED OPERATION. SOME STATES MAY NOT ALLOW THESE LIMITATIONS, SO THEY MAY NOT APPLY, AND THE WARRANTY WILL BE THE MINIMUM PERMITTED UNDER SUCH LAW.

6. LIMITATION OF LIABILITY TO THE FULLEST EXTENT PERMITTED UNDER LAW, (A) IN NO EVENT WILL WE, OUR AFFILIATES, OFFICERS, EMPLOYEES, AGENTS, DIRECTORS, INVESTORS, OR LICENSORS BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR CONSEQUENTIAL (INCLUDING LOSS OF USE, DATA, BUSINESS, OR PROFITS) DAMAGES, LOSSES, EXPENSES, INCLUDING REASONABLE ATTORNEYS’ FEES, RIGHTS, CLAIMS (INCLUDING THIRD PARTY CLAIMS), ACTIONS OF ANY KIND, AND INJURY (INCLUDING DEATH) REGARDLESS OF LEGAL THEORY, EVEN IF NECK EMPIRE HAS BEEN WARNED OF THE POSSIBILITY OF SUCH DAMAGES AND EVEN IN THE CASE OF CLAIMS BASED ON NEGLIGENCE OR STRICT LIABILITY, AND (B) THE MAXIMUM LIABILITY FOR ALL CLAIMS RELATING TO THE NECK EMPIRE SUITE WILL NOT EXCEED THE AGGREGATE AMOUNT OF FEES PAID AND PAYABLE TO US DURING THE THREE MONTH PERIOD PRECEDING THE DATE ON WHICH THE CLAIM ARISES.

Neck Empire will not be held responsible for any use, disclosure, modification, or deletion of Customer Data that is transmitted to, or accessed by a product that is not within the Neck Empire Suite.

You understand and agree that Neck Empire is not a party to any Agreements entered into between you and an Authorized User. Additionally, Neck Empire is not responsible for regulating the conduct of Authorized Users and you specifically acknowledge that we are not liable to any conduct issues between you and an Authorized User to the maximum extent permitted by law.

Your client’s user is solely responsible for reviewing the accuracy of any and all information input into Xuxer.
YOU AGREE TO WAIVE ALL RIGHTS TO INTERPOSE ANY CLAIMS, DEDUCTIONS, SETOFFS, OR COUNTERCLAIMS OF ANY NATURE (OTHER THAN COMPULSORY COUNTERCLAIMS) IN ANY ACTION OR PROCEEDING WITH RESPECT TO THIS AGREEMENT OR ANY MATTER ARISING THEREFROM OR RELATING HERETO OR THERETO.

7. Force Majeure Neither you nor Neck Empire will be liable for any delay, interruption, or any other failure to perform under the terms of the Agreement to the extent caused by a condition that was beyond the party's reasonable control (i.e. natural disasters, governmental decrees, etc.) for as long as such conditions persist.

8. Termination You may stop using the Neck Empire Suite at any time and such termination will take effect at the end of your current billing cycle. We reserve the right to suspend or end the Neck Empire Suite at any time, with or without cause, and with or without notice. If we suspend or terminate your use of the Neck Empire Suite, we'll let you know in advance to help you retrieve your data, though in some cases (such as a flagrant violation of our Terms of Service, or a court order), we may have to terminate immediately. In the event that we terminate or suspend your use of the Neck Empire Suite, we will refund any remaining unused fees for the current billing period.

We believe that your data is your own and preserving your access to your data is important to us. If your account is suspended, terminated, you stop using the Neck Empire Suite, or we discontinue any part of the Neck Empire Suite, where possible, we will provide you with reasonable advance notice and an opportunity to export your data out of Neck Empire. In addition, you are able to download your data through the Neck Empire Suite at any time. If you would like to have your data deleted, please contact us and we will do so. If you need any help, please contact our support team at neckempire@gmail.com.

In the event of termination or expiration of this Agreement, you will pay us for all amounts payable as of the effective date of termination or expiration. All rights and licenses granted by Neck Empire will immediately cease, and any Neck Empire Confidential Information in your possession will be immediately destroyed. All information associated with your account may be irrevocably deleted from the Neck Empire Services.

The sections entitled Termination, Confidential Information, Intellectual Property, Representations and Warranties, Limitation of Liability, and Miscellaneous will survive any termination or expiration of this Agreement.

9. Intellectual Property
9.1 Feedback. By providing comments and suggestions to us, or recommendations for improvements or changes to the Neck Empire Suite, you grant us, under all right, title, and interest in these comments and suggestions, a non-exclusive, royalty-free, worldwide, transferable, sub-licensable, irrevocable, and perpetual license to use these comments and suggestions or to incorporate it into the Neck Empire Suite.
9.2 **Our Rights.** The Neck Empire Suite, including our features, functionality, and appearance, are owned by Neck Empire and are protected by United States and international copyright, trademark, patent, trade secret, and other applicable intellectual property, property, and proprietary rights laws. You agree not to copy, modify, create derivative works of, republish, publicly display, sell, offer to sell, or exploit any of our protected materials (unless it’s expressly permitted by Neck Empire). If you have questions whether or how to use material or information on in the Neck Empire Suite or the Documentation, please contact us at neckempire@gmail.com.

10. **Third Party Services** In providing the Neck Empire Suite, we also make certain services and integrations available to you from third parties, which are not under Neck Empire’s control nor endorsed by Neck Empire. If you use these services from third parties, you do so at your own risk and you have a separate contractual relationship exclusively with that third party for those services.

11. **Publicity** Except as prohibited by law, upon payment for the Neck Empire Suite, Neck Empire may list you as a customer and include your name on a list of clients on Neck Empire’s website, investment materials, and sales collateral distributed to potential customers. You may opt-out from this provision by sending an email to neckempire@gmail.com.

12. **Miscellaneous**

12.1 **Waiver.** Neck Empire’s failure to exercise or enforce its rights under this Agreement will not be a waiver of those rights or sections. Neck Empire can waive certain rights, but only if made in writing and signed by an authorized representative.

12.2 **Relationship.** Each party is an independent contractor of the other party, and nothing in this Agreement should be considered a partnership or a joint venture or cause either party to be an agent of the other.

12.3 **Entire Agreement.** This Agreement along with our Privacy Policy represents the entire Agreement between you and Neck Empire and governs your interactions with Neck Empire and use of the Neck Empire Suite. It supersedes all prior agreements (including prior versions of this Agreement). To the extent you and Neck Empire have entered into a separate written agreement, that agreement will govern any provision of this Agreement superseded by such separate agreement.

12.4 **Severability.** If a court of competent jurisdiction determines that a section of this Agreement is invalid, illegal, or unenforceable for any reason, that section will be limited or amended to the minimum extent necessary, and all of the other sections of this Agreement will remain in full force and effect.

12.5 **Assignability.** Neck Empire, in its discretion, may assign this Agreement to any subsidiary or affiliate, or under a sale, merger,
or transfer of Neck Empire to another entity. To the extent possible, we will provide you notice if there is such a transfer so that you can choose to deactivate your account or terminate the use of the Neck Empire Suite before the transfer.

12.6 Transferability. If Customer elects to replace you as the representative with ultimate authority for the Customer account, you agree to take any actions reasonably requested by us or Customer to facilitate the transfer of authority to a new representative of Customer.

12.7 Modification. Neck Empire, in its sole discretion, reserves the right to amend this Agreement from time to time. You can see the date of our last change to this Agreement at the top of this page. Any updates will be made available here and will be effective immediately. We will do our best to let you know of any significant changes, but by continuing to use the Service after any changes to this Agreement, you accept and agree to the revised Agreement. Neck Empire also reserves the right to modify or discontinue any feature associated with the Service, with or without notice. Continued use of the Service following any modification constitutes your acceptance of the modification.

12.8 Third Party Solutions. Neck Empire relies on third party vendors and partners to provide the necessary infrastructure, software, storage, and related technology solutions to offer the Neck Empire Suite. You acknowledge and agree to Neck Empire's use of these vendors and partners. In particular, Neck Empire relies on a combination of web hosting and data storage services, including those provided by Amazon Web Services (AWS).

12.9 Choice of Law and Venue. The laws of the State of New York (even if your use is outside the State of New York) will govern this Agreement without giving effect to conflict of law principles, and you agree to submit to the exclusive jurisdiction and venue of New York state and federal courts located in New York, NY.

12.10 Ethical Obligations. You and/or your organization are solely responsible for complying with all applicable ethical regulations when using any part of the Neck Empire Suite, including any data services offered by Neck Empire.

12.11 Binding Arbitration. Both parties shall use their best efforts to settle in good faith and through amicable negotiations any disputes which may occur between them arising out of or relating to this Agreement; the existence, validity, termination, interpretation of any term hereof; and disputes regarding your use of the Services. The only forum and remedy for any disputes and claims relating to or arising out of this Agreement or any or all of the Neck Empire Suite will be final and binding arbitration, except that Neck Empire may seek injunctive relief in state or federal court in New York County, New York for any violation of this Agreement by the Customer. If Neck Empire seeks injunctive relief, you agree that arbitration is not an adequate remedy at law and Neck Empire may seek injunctive or other relief.

12.12 Dispute Process. If you have any dispute or claim relating to or arising out of this Agreement, including use of the Neck Empire Suite, you agree that before you commence any proceeding or request for arbitration or
take any action that is intended or would reasonably be expected to harm Neck Empire or its reputation, you will first contact Neck Empire about the problem at neckempire@gmail.com. You agree to provide Neck Empire with 45 calendar days to investigate the dispute and attempt to provide a consensual resolution. You agree that you will negotiate and act in good faith during this period.

12.13 **Class Action/Jury Trial.** All claims must be asserted in the Customer's individual capacity and not as a plaintiff or class member in any class action, collective action, private attorney general action, or other representative proceeding. This waiver also applies to class arbitration, and unless Neck Empire consents, the arbitration may not consolidate more than one person's claims. You also agree that under this Agreement, you and Neck Empire are each waiving the right to a trial by jury.

12.14 **Arbitration Process.** To the extent arbitration remains necessary, all arbitration will be conducted by the American Arbitration Association under its Commercial Arbitration Rules, unless you are an individual or otherwise qualify for its Supplementary Procedures for Consumer-Related Disputes. The exclusive forum for the arbitration process shall be in New York, NY.

12.15 **Notices.** Any notices to you will be sent to the e-mail address you used for registration. Any notices to Neck Empire should be sent to neckempire@gmail.com. You consent to the use of electronic notices under this Agreement.