



IBM Terms of Use – SaaS Specific Offering Terms

IBM Phytel Cloud Services

The Terms of Use (“ToU”) is composed of this IBM Terms of Use - SaaS Specific Offering Terms (“SaaS Specific Offering Terms”) and a document entitled IBM Terms of Use - General Terms (“General Terms”) available at the following URL: www.ibm.com/software/sla/sladb.nsf/sla/tou-gen-terms/.

In the event of a conflict, the SaaS Specific Offering Terms prevail over the General Terms. By ordering, accessing or using the IBM SaaS, Client agrees to the ToU.

The ToU is governed by the IBM International Passport Advantage Agreement, the IBM International Passport Advantage Express Agreement, or the IBM International Agreement for Selected IBM SaaS Offerings, as applicable (“Agreement”) and together with the ToU make the complete agreement.

1. IBM SaaS

The following IBM SaaS offerings are covered by these SaaS Specific Offering Terms:

- IBM Phytel Patient Engagement
- IBM Phytel Remind
- IBM Phytel Outreach
- IBM Phytel Engage
- IBM Phytel Coordinate
- IBM Phytel Transition

2. Charge Metrics

The IBM SaaS is available under the charge metric specified in the Transaction Document:

- a. Authorized User is a unit of measure by which the IBM SaaS can be obtained. Client must obtain separate, dedicated entitlements for each unique Authorized User given access to the IBM SaaS in any manner directly or indirectly (for example: via a multiplexing program, device, or application server) through any means. Sufficient entitlements must be obtained to cover the number of Authorized Users given access to the IBM SaaS during the measurement period specified in Client’s Proof of Entitlement (PoE) or Transaction Document.
- b. Ten Thousand Patient Records is a unit of measure by which the IBM SaaS can be obtained. A Patient is a person receiving or registered to receive medical treatment. A Patient Record is a set of unique attributes for a Patient. Sufficient entitlements must be obtained to cover the total number of Patient Records, rounded up to the nearest Ten Thousand, managed, processed, or tracked by the IBM SaaS during the measurement period specified in Client’s Proof of Entitlement (PoE) or Transaction Document.
- c. Health Care Provider is a unit of measure by which the IBM SaaS can be obtained. Health Care is the maintenance or improvement of a person’s physical or mental health. A Provider is a Health Care institution or person of a Health Care team rendering Health Care services. Sufficient entitlements must be obtained to cover the total number of Health Care Providers managed, processed, or tracked by the IBM SaaS during the measurement period specified in Client’s Proof of Entitlement (PoE) or Transaction Document.
- d. Instance is a unit of measure by which the IBM SaaS can be obtained. An Instance is access to a specific configuration of the IBM SaaS. Sufficient entitlements must be obtained for each Instance of the IBM SaaS made available to access and use during the measurement period specified in Client’s Proof of Entitlement (PoE) or Transaction Document.
- e. Request is a unit of measure by which the IBM SaaS can be obtained. A Request is the act by the Client that authorized IBM to perform a service. Depending upon the service, the Request can be in the form of a written notice or a support request which is made by phone call, email or online case. Sufficient entitlements must be obtained to cover the total number of Requests submitted to the IBM SaaS during the measurement period specified in Client’s Proof of Entitlement (PoE) or Transaction Document.

- f. Access is a unit of measure by which the IBM SaaS may be obtained. An Access is the rights to use the IBM SaaS. Client must obtain a single Access entitlement in order to use the IBM SaaS during the measurement period specified in Client's Proof of Entitlement (PoE) or Transaction Document.

3. Charges and Billing

The amount payable for the IBM SaaS is specified in a Transaction Document.

3.1 Set-Up Charges

On-Demand set-up charges will be invoiced in the month the on-demand option is ordered by Client at the rate set forth in the Transaction Document.

3.2 Overage Charges

If Client's actual usage of the IBM SaaS during the measurement period exceeds the entitlement stated on the PoE, then Client will be invoiced for the overage, as set forth in the Transaction Document.

4. Term and Renewal Options

The term of the IBM SaaS begins on the date IBM notifies Client of their access to the IBM SaaS, as documented in the PoE. The PoE will specify whether the IBM SaaS renews automatically, proceeds on a continuous use basis, or terminates at the end of the term.

For automatic renewal, unless Client provides written notice not to renew at least 90 days prior to the term expiration date, the IBM SaaS will automatically renew for the term specified in the PoE.

For continuous use, the IBM SaaS will continue to be available on a month to month basis until Client provides 90 days written notice of termination. The IBM SaaS will remain available to the end of the calendar month after such 90 day period.

5. Technical Support

Technical support and simple configuration requests for the IBM SaaS are provided through electronic submission and telephone. Technical support contact information and other details regarding support operations can be found at: <http://www.ibm.com/software/support/watsonhealth/phytelsupport.html>

Technical support is offered with the IBM SaaS and is not available as a separate offering.

6. IBM SaaS Offering Additional Terms

6.1 Definitions

Capitalized terms not otherwise defined in this Terms of Use document are defined elsewhere in this Agreement and will have the same meaning in this Terms of Use as ascribed to them therein.

Client Data — all information provided to IBM by the Client (including, if applicable, Participant Data) for use with the IBM SaaS. Such Client Data includes Client's Protected Health Information and information related to patients and operations (for example, clinical, operational, or financial).

Complex Organization — a network of Participants that coordinates and collaborates on the delivery of healthcare services to a given patient population (for example, accountable care organizations, physician health organizations and clinically integrated networks).

Data Source — a source of Client Data that is identified as having a unique origin, back-end database, and workflow implementation.

Electronic Communications — communications to Client's patients and/or patient designees via email and/or voice that are facilitated by the IBM SaaS.

HIPAA — the Health Insurance Portability and Accountability Act and the Health Information Technology for Economic and Clinical Health Act, both as amended, including their implementing regulations promulgated at 45 C.F.R. Parts 160 and 164.

IBM Materials — all materials provided by IBM to Client to facilitate Client's use of the IBM SaaS, including but not limited to reports, summaries, presentations, plans, user guides, training materials, product release notes, marketing materials for their patients, and EMR reports.

Participant — each physician, hospital or other healthcare organization or entity that is an affiliate or subsidiary of, or has contracted with, a Complex Organization and has agreed to participate in such Complex Organization's clinical integration activities.

Participant Data — the collective information (including Protected Health Information) provided to IBM by Participants, or by Client on behalf of its Participants, for use with the IBM SaaS.

Protected Health Information (“PHI”) — has the meaning set forth in HIPAA.

6.2 Security Description

This IBM SaaS follows IBM’s data security and privacy principles for IBM SaaS which are available at <https://www.ibm.com/cloud/resourcecenter/content/80> and any additional terms provided in this section. Any change to IBM’s data security and privacy principles will not degrade the security of the IBM SaaS.

IBM agrees to maintain security capabilities and procedures with respect to the Electronic Protected Health Information provided by Client in accordance with the BAA.

Client will not transfer any information from outside the U.S., to or by using the IBM SaaS, unless Client and IBM have mutually agreed in writing that IBM can accept such data and Client and IBM have first executed EU model clauses or other agreed applicable and appropriate cross-border transfer mechanism documents.

6.3 Client Responsibilities

Client agrees to the following during the IBM SaaS term:

- a. Client agrees that it is solely responsible for its Participants’ (if any) and its authorized users’ use of the IBM SaaS. Client shall also: (a) safeguard any authorized user login credentials; (b) notify IBM promptly if a compromise of a authorized user login credential is suspected or detected; (c) be responsible for assigning appropriate user roles and access levels to each authorized user; (d) verify that an applicable authorized user has obtained any legally required Institutional Review Board approvals or other necessary approvals for such authorized user requests to access any Client Data in connection with “research”; (e) promptly terminate authorized user accounts when applicable and (f) promptly reassign user roles and access level as applicable.
- b. Client will:
 - (1) make available to IBM (provided that a BAA is properly in place between IBM and Client as described earlier) Protected Health Information from Client’s (and any Participants’, if applicable) Data Sources (including existing and future electronically-stored data regarding diagnoses, procedures, treatments, costs, claims, medications, outcomes, and all other pertinent data related to Client’s patients). Such data must include the minimally necessary Client Data to enable IBM to provide the IBM SaaS;
 - (2) continue to make Protected Health Information available to the IBM SaaS a minimum of once per day, during the IBM SaaS term. Such Protected Health Information will include: (i) information with respect to healthcare services provided by Client after the start of the IBM SaaS term; and (ii) Protected Health Information with respect to healthcare services provided by Client before the start of the IBM SaaS term and that is translated into electronic form after the IBM SaaS term start;
 - (3) screen any transactions or patients whose Protected Health Information will be used with, or processed by, the IBM SaaS against the Office of Foreign Assets Control (“OFAC”) Specially Designated Nationals (“SDN”) list or any other state or local sanctions list;
 - (4) use the IBM SaaS to communicate with patients and/or their patients’ designees in compliance with applicable state and federal “Do Not Call” laws, rules and regulations, and any other state or federal laws, rules or regulations and
 - (5) inform IBM of any services to be enabled that require Client to provide IBM with an evidence-based checklist of clinical care and/or patient outreach steps. Client will verify the parameters of any evidence-based checklist that it will implement through the IBM SaaS and is solely responsible for the content it provides to IBM for implementation.

Any failure by Client to carry out its responsibilities under Item a. or b. of this section will constitute a material breach of the Agreement.

6.4 Data Rights and Use

Client agrees and represents that it has obtained, and is responsible for maintaining, all necessary rights, permissions, consents, authorizations, and permitted waivers of the same (including those required by applicable federal and state law) to grant the assignments and licenses described below:

- a. License to Client Data. Client hereby grants IBM a worldwide, perpetual, fully-paid, royalty-free, irrevocable license to use, import, modify, copy, transmit, display, reproduce, sublicense (for the purposes of creating De-identified Data or Limited Data Sets only), aggregate, compile, decompile, manipulate, supplement, adapt, translate and create derivative works based on the Client Data for the purposes of a) providing the IBM SaaS to Client; b) de-identifying the Client Data in accordance with the requirements of HIPAA (“De-identified Data”); c) creating limited data sets in accordance with HIPAA (“Limited Data Sets”); and d) generating analyses or reports. Client further agrees that IBM may provide data aggregation services, as defined by HIPAA, with any PHI provided by Client in connection with IBM’s provision of the IBM SaaS. Any Protected Health Information included in the Client Data will be treated by IBM in accordance with the BAA in place between the parties
- b. Assignment of De-identified Data. Client hereby assigns to IBM all right, title and interest in and to any and all De-identified Data and/or Limited Data Sets that IBM creates from the Client Data, including the right to use, license, import, modify, copy, transmit, display, reproduce, distribute (directly or indirectly), publish, create derivative works based on, and otherwise exploit such De-identified Data and/or Limited Data Sets.
- c. Client agrees to cooperate with IBM and to sign any further documents and to take any other actions to effectuate the assignment and/or license of rights set forth in this section.
- d. This section shall survive any termination of the IBM SaaS.

6.5 Email and Voice Functionality

- a. The IBM SaaS may include functionality that permits Client to send Electronic Communications. Client acknowledges and agrees that it will obtain consent from its patients and/or their designees, as appropriate, to send Electronic Communications, prior to directing IBM to transmit them. Client will provide its patients and/or their designees the opportunity to request to receive Electronic Communications by alternative means or at alternative locations and accommodate reasonable requests by making appropriate changes to the Client Data prior to using the IBM SaaS to send an Electronic Communication to patients and/or their designees.
- b. IBM may provide templates or content that Client may use with the Electronic Communication features, which Client may customize. Client acknowledges and agrees that it is solely responsible for the content of any Electronic Communications sent and will manage its criteria for sending Electronic Communications and its content.
- c. The IBM SaaS will send Electronic Communications to individuals using the contact information provided by the Client. If the contact information provided by Client is not the patient, but the patient’s designee, Client represents and warrants that it has obtained any necessary proxy required under state law to send Electronic Communications to the patient’s designee.
- d. Client warrants that it has conducted a risk assessment, and has concluded that it is reasonable and appropriate to use unencrypted email and voice messages to transmit Protected Health Information to its patients and/or their designees. In the event that the Electronic Communication features are used to disclose Protected Health Information to someone other than the patient and/or their designees, due to Client’s provision of inaccurate patient phone numbers and/or email addresses to IBM, Client agrees that as between Client and IBM, IBM will not have caused any security incident or breach, as defined in state or federal law, that may occur as a result. Client agrees to indemnify IBM, its subsidiaries, affiliates, officers, directors, agents, employees, and assigns from and against any third party claims, damages, or losses, including without limitation penalties imposed by any federal or state government agency, arising from such disclosures.

6.6 Changes to Data Sources

Client acknowledges and agrees that changes to its Data Sources or changes to implement new codes due to HHS required changes to the International Statistical Classification of Diseases and Related Health Problems may cause compatibility issues with the IBM SaaS for which IBM is not responsible. IBM will perform services to resolve the compatibility issues caused by such change, at Client’s request, pursuant to a separate SOW and for an additional charge.

6.7 Medical Device/Practice Disclaimer

Client acknowledges and agrees the IBM SaaS are in no way intended to provide diagnosis, medical practice, prescribing guidelines, protocols for delivering medical care or otherwise be used as a medical device, as defined under applicable law. Client agrees that it is solely responsible for any practice of medicine or medical services, including any medical decisions, judgments, and actions that it or its

authorized users may undertake, as well as being solely responsible for ensuring that the documentation of any medical care or patient information provided by it, its employees or agents is accurate and complete. Client agrees that IBM and its employees have no responsibility for any decisions made or actions taken or not taken in rendering medical care, or for information provided to patients or caregivers.

6.8 Participants

If Client is a Complex Organization, it may allow its Participants to access and use the IBM SaaS, subject to the terms of this section. Prior to allowing a Participant to access and use the IBM SaaS, Client will enter into a separate agreement with such Participant in order to bind it to the terms of this Agreement, including but not limited to the terms of the Data Rights and Use section. Client will also obtain and maintain from each Participant that accesses and uses the IBM SaaS all necessary rights, permissions, consents, authorizations and permitted waivers of the same (including those required by applicable federal and state law) for Client to grant to IBM the rights and licenses described herein to any Participant Data that may be provided to the IBM SaaS. Client acknowledges and agrees that any BAA entered into between IBM and Client: a) engages IBM as a business associate of Client and b) engages IBM as the downstream business associate of each Participant through operation of the business associate agreements between such Participants and Client. Client also agrees and acknowledges that IBM is not separately executing business associate agreements directly with such Participants. Therefore, Client further acknowledges and agrees that it is solely responsible for a) entering into any required upstream business associate agreements with each Participant; b) ensuring that such upstream arrangements authorize Client to engage IBM as the downstream business associate of all Participants; and c) ensuring that such upstream arrangements contain all necessary terms to enable the disclosure of Participant Data that constitutes PHI to IBM and for the Client and Participants to comply with their respective obligations under this Agreement..

Client is solely responsible for enforcing the terms of the Agreement on its Participants, overseeing the Participants' use of the IBM SaaS and confirming such use is compliant with this Agreement and paying all applicable charges arising from its Participants' access and use of the IBM SaaS. For the avoidance of doubt, in no event will IBM have any liability with respect to any claims brought by, or relating to, a Participant and a Participant's sole recourse as between the parties shall be recourse against the Client. Furthermore, in no event may a Participant seek indemnification, or file any action or claim against IBM in connection with or with respect to any matter arising out of the Agreement. Client's agreement with each Participant shall explicitly acknowledge these aforementioned provisions. Notwithstanding IBM's obligation to indemnify Client for an infringement of a third party patent or copyright by the IBM SaaS, IBM will have no obligation to indemnify in respect to any third party claim brought against a Participant for infringement of a third party patent or copyright by an IBM SaaS offering.

Client will notify each Participant within thirty (30) calendar days if an amendment to the Agreement is made and will notify IBM, in writing, of any termination of the participation of a Participant within two (2) calendar days of such termination. Client will also promptly contractually bind its Participants to any amendment made to the Agreement.

Client will maintain and provide IBM with a current list of all Participants (including the Participants' business address) who are accessing and using the IBM SaaS, and promptly provide IBM with updates to such list, including upon request. All communications with IBM regarding any Participants, or users affiliated with any Participants, will originate from Client. Neither Participants, nor users affiliated with Participants, may communicate directly with IBM.

Provided that Client has complied with the requirements of this section, IBM will allow Client's Participants to access and use the IBM SaaS. Upon written notice from IBM, Client will promptly take any and all action required to terminate a Participant's access use of the IBM SaaS, without penalty, if a Participant materially breaches, in IBM's sole judgment, any terms of the Agreement.

Upon reasonable notice during the term of the IBM SaaS, IBM may audit Client's compliance with this section if it has reasonable cause to believe that Client is in breach of this section. Additionally, IBM may audit Client's compliance with this section without cause, but no more than once per calendar year during the term of the IBM SaaS.

Client represents and warrants that it has obtained the necessary rights, permissions, consents authorizations, permitted waivers of the same and documentation from any Participants using the IBM SaaS to grant the license rights described herein to any Participant Data provided to the IBM SaaS. Client will indemnify, defend, and hold IBM harmless from and against any claims and/or damages that arise from or are related to (i) Client's Participant's use of the IBM SaaS or (ii) Client's breach of the terms

of this section. Client agrees that a breach of this section shall constitute a material breach of the Agreement.

6.9 Termination

6.9.1 Termination for Cause

Either IBM or Client may terminate Client's subscription to the IBM SaaS for cause and without penalty, immediately, if an individual employed by IBM or Client (or one of Client's Participants, if applicable) has been placed on the sanctions list issued by the Office of the Inspector General of the Department of Health and Human Services pursuant to the provisions of 42 U.S.C. § 1320a(7), has been excluded from government contracts by the General Services Administration or has been convicted of a felony or any crime relating to healthcare.

6.9.2 Effect of Termination or Expiration of Subscription

Upon termination or expiration of Client's subscription to the IBM SaaS for any reason:

- a. IBM will discontinue Client's (and any Participants', if applicable) access to the IBM SaaS and be under no further obligation to provide such access to Client or any Participant.
- b. The parties may continue to use any information, Client Data, analyses, or reports generated prior to the termination date. All such use must be in accordance with the terms of the Agreement. For clarity, the assignment of rights in De-identified Data, Limited Data Sets, and licenses to Client Data granted to IBM and set forth herein will survive any termination or expiration.

6.10 Derived Benefit Locations

Where applicable, taxes are based upon the location(s) Client identifies as receiving benefit of the IBM SaaS. IBM will apply taxes based upon the business address listed when ordering an IBM SaaS as the primary benefit location unless Client provides additional information to IBM. Client is responsible for keeping such information current and providing any changes to IBM.

Appendix A

1. IBM SaaS Description

The IBM Phytel SaaS offering is a collection of integrated cloud-based subscription offerings designed to help healthcare providers improve the quality and long-term outcome of patient care. Once implementation services have been completed, the IBM Phytel Cloud Services provide enhanced insights to patients' clinical status from healthcare information systems (practice management systems, electronic medical/health records) and enables provider-led intervention and engagement of patient populations, from preventive wellness through disease management. The population analytics and patient engagement capabilities help improve the efficiency and effectiveness of care.

Each cloud-based service automates a separate care management process, such as patient engagement, quality reporting, care coordination, discharge follow-up and patient self-management.

1.1 IBM Phytel Core Services

IBM Phytel includes the following core services:

1.1.1 IBM Phytel Patient Engagement

IBM Phytel Patient Engagement uses intelligent, automated technology to help healthcare organizations reach their entire population and motivate patients to participate in their own care. By integrating clinical data with a powerful evidence-based protocol engine, Client can set up communication tools that automate the process so that care managers can devote themselves to the patients who need the most attention.

1.1.2 IBM Phytel Remind

IBM Phytel Remind integrates data from practice management systems to provide automated, customizable reminders and confirmations — helping to reduce the burden on staff, enhance the patient experience, and improve profitability. Reports include real-time details about the status of scheduled appointments and the progress of communications.

1.1.3 IBM Phytel Outreach

IBM Phytel Outreach collects information from practice management systems and electronic medical records in order to identify gaps in care (based on guidelines chosen by Client) and sends automated messages to the patients to help reduce gaps in care. It identifies patients who need recommended care and initiates customizable notifications regarding visits, tests, procedures or other follow-up care.

1.1.4 IBM Phytel Engage

IBM Phytel Engage enables a scalable, high touch model of care management. It identifies patients that require immediate attention, delivers history and health data on those patients, and documents the user's activities and results. It maximizes scheduling, care plans, work list management and assessments, and enables the user to personalize and track goals, tasks, interactions, and barriers.

1.1.5 IBM Phytel Coordinate

IBM Phytel Coordinate integrates practice management and clinical data to allow for the creation of custom patient cohorts. The patients in these cohorts may be identified because of their need for pre-visit preparation, a specific campaign message, or both. For patient campaigning, the solution delivers automated messages to patients. The data, which includes patient care plans and clinical trending data, allow care managers and coordinators to effectively prepare for follow-up patient visits, increasing efficiency, patient satisfaction and quality performance.

1.1.6 IBM Phytel Transition

IBM Phytel Transition takes a list of patients discharged from a hospital or emergency room, and sends an automated assessment to each patient. The assessment questions are customizable but generally include asking about how they are feeling, if they have questions on medications, if they have scheduled a follow-up, and if they have other questions. Depending on the response, the patient may be placed on an 'alert' or follow-up list. During the setup phase, the Client chooses which questions trigger the alert.

1.2 IBM Phytel Additional Options and Services

In addition to the core IBM SaaS offerings, IBM Phytel provides the following optional components and services:

1.2.1 Additional Providers

Provides the setup of incremental Health Care Providers beyond the initial quantity set forth in the Transaction Document.

1.2.2 IBM Phytel Care Management GPRO Report

An optional pay-per-use (on demand) add on for IBM Phytel Coordinate. This offering delivers a curated data set from the IBM Phytel system, in electronic form, that supports reporting for the Centers for Medicare and Medicaid Services (CMS) Physician Quality Reporting System (PQRS) Group Practice Reporting Option (GPRO).

1.2.3 IBM Phytel Risk Manager

An optional add-on subscription for IBM Phytel Outreach, IBM Phytel Risk Manager streamlines the tracking and reporting of the Centers for Medicare and Medicaid Services (CMS) Hierarchical Condition Category (HCC) coding. It delivers risk scores and coding specifics for each patient, highlighting HCC codes already documented, and those still pending. Providers can document more accurately during each visit, with fewer gaps to capture during post-visit review. Setup of this add-on is required.

1.2.4 IBM Phytel Engage Training Environment

A monthly subscription service which provides an instance of an IBM Phytel Engage environment, not including patient personal or sensitive personal information (PI, SPI), to enable train-the-trainer programs for the Phytel Engage solution.

2. Personal Information and Regulated Content

The IBM SaaS will enable Client to input and manage content containing information which may be considered personally identifiable information and/or sensitive personal information (PII/SPI) under applicable privacy laws:

- Protected Health Information, as defined under HIPAA, e.g.
 - information regarding an individual's physical or mental health
 - patient information
 - medical procedure codes
 - medical diagnostic information that is created, collected or maintained by a covered entity

PHI may only be used with the applicable IBM SaaS offering provided that a business associate agreement that will govern such PHI has been validly executed between Client and IBM and is linked to the transaction documents by which Client has acquired access to the IBM SaaS ("BAA"). Such BAA shall govern any PHI used with the IBM SaaS.