

**Einstein Bros. Bagels  
Shmear Society Rewards Program  
Terms and Conditions  
(Effective 4/11/18)**

**UPDATES: See bottom for update information.**

These Shmear Society Rewards Program Terms and Conditions (these “Program Terms”) set forth the terms and conditions applicable to the Shmear Society Rewards program (the “Program”). In these Program Terms, “you,” “your,” “they,” “their” or “member” refer to the person who has successfully registered for the Program (as described below) or who is an existing Shmear Society member as of March 5, 2018. “We,” “us,” “our” and “ENRG” refers to Einstein Noah Restaurant Group, Inc.

**Your registration for the Program and/or continued membership in the Program indicates your acceptance of and agreement to all of these Program Terms, including, without limitation the arbitration provision in Section 18 below. Be sure to check these Program Terms (located at <http://www.einsteinbros.com/shmearsocietyterms.pdf>) periodically for updates, as your continued membership in the Program signifies your acceptance of these Program Terms as they exist from time to time, including, without limitation, any changed provisions.**

**You agree ENRG may change, add, or eliminate Program rewards or benefits, or participating locations; or change or end the Program or any feature of the Program, in whole or in part, at any time, and without notice or compensation, even though such actions may affect rewards in the Program or your participation in the Program.**

**You agree that we may provide notices, disclosures, and amendments to these Program Terms, and other information relating to the Program by electronic means, including posting these materials online at <http://www.einsteinbros.com/shmearsocietyterms.pdf>.**

**1. Shmear Society Program Overview.**

The Program is a membership loyalty program offered by ENRG. As described below, for all eligible participants, the Program offers various promotional rewards (such as, for example, a birthday reward). For eligible participants, the program also features a points earning and rewards component that rewards participants for making purchases or participating in other qualifying activities at participating Einstein Bros. Bagels locations and earning corresponding points.

The Program is only valid at participating Einstein Bros. Bagels locations, which may change from time to time in ENRG’s sole discretion. Non-participating locations include, without limitation, non-participating franchisee locations, and restaurants in airports, college campuses, hospitals, hotels and military bases.

**2. Program Membership Qualifications; Registration; Legacy.**

To be an eligible participant in the Program, you must be (a) a lawful resident of one of the 50 states of the U.S. or the District of Columbia, at least 13 years of age, (b) have a valid email address that is used only by you, and (c) represent only yourself as an individual (such that any corporations, groups, associations, or other commercial participants are not eligible). A new eligible participant must register for the Program online at [www.shmearsociety.com](http://www.shmearsociety.com); to participate in the Program, you must complete and submit all registration information. Existing Shmear Society members are also eligible to participate in the Program. New Program participants registering for the Program may download their account to a digital wallet accepted by ENRG and use their “Program Card” (which is an electronic card) for Program Participation. Only one Program account per person and only one Program Card per Program account. For additional help, please call our customer support team at 1-800-BAGELME (800-224-3563) 5:30 a.m. to 9:30 p.m. EST Monday - Friday and 7:00 a.m. to 6:30 p.m. EST Saturday – Sunday.

Your Program username and password are for your personal use only. You are responsible for maintaining the security and confidentiality of your Program account, username and password, your Program Card, and your registered phone number, and you agree to be responsible for all activities that occur with any of the foregoing or otherwise in connection with the Program. Neither ENRG nor its service providers are responsible for use of any of the foregoing without your permission.

### **3. Program Rewards; Expiration; Redemption.**

All eligible members whose Program account is in good standing are eligible to receive the following Program rewards, which may be redeemed and are subject to expiration as described below.

a. Welcome Reward. After registering for the Program, we will post a one-time Welcome Reward (“Welcome Reward”) for one (1) complimentary bagel and shmeor of your choice to your Account. A Welcome Reward requires a separate purchase of a separate item at the time of redemption, and excludes modifiers such as toppings and gourmet bagels, and taxes and assessments, all of which are the responsibility of and must be paid by participant at the time of sale. The Welcome Reward is valid for fourteen (14) days after it is posted to your Program account.

b. Birthday Reward. We will post a reward for one (1) complimentary egg sandwich of your choice to your Account on your birthday (“Birthday Reward”). Birthday Rewards are not received retroactively. A Birthday Reward requires a separate purchase of a separate item at the time of redemption, and excludes modifiers such as additional egg(s), toppings and gourmet bagels, and taxes and assessments, all of which are the responsibility of and must be paid by participant at the time of sale. Birthday Rewards expire fourteen (14) days after posting to your Program account. You are eligible to receive one (1) Birthday Reward per year.

c. Promotional Offers. We may post certain promotional offers (“Promotional Offers”) to your Program account. Promotional Offers will be subject to the terms and conditions of each respective Promotional Offer, including, without limitation, qualifying purchases, additional limits on participating locations, and applicable expiration dates.

You may only redeem Welcome Rewards, Birthday Rewards and Promotional Offers (collectively, “Program Rewards”) at participating Einstein Bros. Bagels locations. Only one (1) redemption of a Program Reward or Points Reward (as defined below) per visit, which you may choose at the point of sale. To redeem a Program Reward, visit a participating Einstein Bros. Bagels location, “check in” at the point of sale using your phone number registered to your Program account, with the barcode in any email from us notifying you of your Program Reward, or by using your Program Card, and let the cashier know of your Program Reward selection. Each time you redeem a Program Reward, we will remove it from your Program account. Program Rewards are subject to change, elimination or substitution at any time at ENRG’s discretion without notice. Program Rewards (i) have no cash value, (ii) may not be redeemed or exchanged for cash or any cash equivalent, (iii) may not be combined with other offer, promotion, discounts or coupons (including, without limitation, any other Program Reward or Points Reward (as defined below)), (iv) may not be used to satisfy any requirement of any offer that requires you to purchase any item, (v) are not transferable, and (vi) may not be substituted (except by ENRG, in its discretion). Redemption of Program Rewards do not earn Program points. You are not obligated to accept or utilize any Program Rewards. Program Rewards will be deemed forfeited if not used within allotted time frame. You may check your available Program Rewards online at [www.shmearsociety.com](http://www.shmearsociety.com) by logging into your Program account. Your Program Rewards shall be as reflected in our records, unless you can prove otherwise to our satisfaction.

### **4. Earning Program Points; Points Rewards; Redemptions; Expiration.**

An eligible member whose Program account (a) is in good standing, and (b) has a member profile with the member’s state of residency and/or favorite store location in a state of a participating location, may earn 2 points per 1 U.S. dollar (\$1) spent on eligible purchases at participating Einstein Bros. Bagels

locations. "Eligible purchases" are limited to all in-store transactions (excluding past purchases, catering purchases, and purchases of gift cards and gift certificates). Points are earned only on the actual amount paid by a participant in an eligible transaction (after any applicable discounts and before taxes). Purchases at nonparticipating locations, taxes and online transactions are not eligible. Points will not be earned on charitable donations. Participating locations are subject to change in ENRG's sole discretion without notice.

To earn rewards based on making eligible purchases ("Points Rewards"), you must "check-in" at the point of sale at a participating Einstein Bros. Bagels location prior to completing your purchase using your phone number registered to your Program account or by using your Program Card. Currently, Points Rewards are limited to receiving a \$5 in-store credit upon reaching 120 Program points; specifically, once you accumulate 120 Program points in your Program account, you will automatically receive a \$5 in-store credit to be posted in your Program account, and your Program points balance will return to zero. To redeem a Points Reward, visit a participating Einstein Bros. Bagels location, "check in" at the point of sale using your phone number registered to your Program account, with the barcode in any email from us notifying you of your Points Reward, or by using your Program Card, and let the cashier know of your Points Reward use in your transaction. Each time you redeem a Points Reward, we will remove it from your Program account. Points Rewards expire fourteen (14) days after posting to your Program account. You may only redeem one (1) Points Reward or Program Reward per visit, which you may choose at the point of sale. A Points Reward may only be used for further eligible purchases; however, use of a Reward will not earn a participant Program points.

If you have no activity on your Program account for six (6) months, the points in your Program account (no matter when they were earned) will expire and will no longer be available for redemptions. "Activity" is defined as a "check-in" with an eligible purchase or a Points Reward redemption at a participating Einstein Bros. Bagels location. If you check-in with an eligible purchase after being inactive for six (6) months or more, you will continue to be a member, but your Program account point balance will start again at zero points.

Points Rewards may not be substituted (except by ENRG in its discretion). A Points Reward must be taken in a single transaction and any unused portion of a Points Reward is forfeited, for which no consideration will be given. Points and unused earned Points Rewards (if you have any) will be identified on your account page accessible by logging into your account at [www.shmearsociety.com](http://www.shmearsociety.com). Points may also be viewed in your Program Card. Your points and Points Rewards shall be as reflected in our records, unless you can prove otherwise to our satisfaction.

Points Rewards are subject to change, elimination or substitution at any time at ENRG's discretion without notice. Points and Points Rewards (a) have no cash value, (b) may not be redeemed or exchanged for cash or any cash equivalent, (c) may not be combined with other offer, promotion, discounts or coupons (including, without limitation, any other Program Reward or Points Reward), (d) are not transferable, and (e) may not be substituted (except by ENRG, in its discretion). Redemption of Points Rewards do not earn Program points. You are not obligated to accept or utilize any Points Rewards. Points Rewards will be deemed forfeited if not used within allotted time frame.

## **5. Contact.**

You authorize ENRG to contact you via email or postal mail with Program administrative or transactional information both during your participation in the Program and after your participation has ended. You also authorize ENRG to contact you by email or postal mail about Einstein Bros. Bagels (or its affiliates) related promotions, special offers, discounts or contests. Neither ENRG nor its service providers are responsible for undeliverable, lost, returned or misdirected emails or other correspondence related to your account. You are responsible for keeping your Program account contact information current.

## **6. Disclaimers.**

ENRG may conduct test programs from time to time in certain markets which may have additional/different terms than those described in these Program Terms. ENRG has no obligation to expand or continue any test or the Program, and may discontinue the Program at any time. Program Rewards and/or Points Rewards (collectively “Rewards”) may not be capable of being earned or redeemed if technical difficulties arise. ENRG has no responsibility to retroactively apply Program points or Points Rewards. ENRG is not responsible for undeliverable, lost, returned, or misdirected emails or other correspondence, or for use of your Program account, Program Card or Rewards issued, without your permission.

ENRG is not responsible for: (a) incorrect or inaccurate transcription or posting of Program information, including points, transactions and Rewards, (b) technical failures of any kind, including but not limited to the malfunctioning of any telephone, computer online systems, computer equipment, website, server provider, network, hardware or software; (c) the unavailability or inaccessibility of any website or service; (d) unauthorized intervention in any part of the Program; (e) any injury or damage to persons or property, including but not limited to entrant’s computer, phone or other devices, which may be caused, directly or indirectly, in whole or in part, from entrant’s participation in the Program, or from viewing, playing, uploading or downloading any material to or from Sponsor’s website(s) or applications; or (f) lost, stolen or expired Program Rewards, Points Rewards or Points, none of which will be replaced.

#### **7. Information We Collect and How We Use It.**

See ENRG’s Privacy Policy and Terms of Use, as amended from time to time at, [www.einsteinbros.com/privacy](http://www.einsteinbros.com/privacy) and [www.einsteinbros.com/terms](http://www.einsteinbros.com/terms).

#### **8. Contact Us.**

Please notify us immediately of unauthorized use of your Program account or Program Card. If you need to update or verify your personal information, or to remove your personal information from our active database (this will be completed as soon as reasonably possible, unless we need to retain information for dispute resolution, troubleshooting or other valid legal or business reasons; please note that we will not remove your historical usage information), or if you have questions related to privacy, visit our website at [www.einsteinbros.com](http://www.einsteinbros.com), contact us on our website at [www.einsteinbros.com/feedback](http://www.einsteinbros.com/feedback) or write to us at Guest Services – Shmear Society Program, Einstein Noah Restaurant Group, Inc, 555 Zang Street, Suite 300, Lakewood, CO 80228.

#### **9. Your Right to Terminate Your Participation in the Program.**

You may terminate your participation in the Program by discontinuing checking in at Einstein Bros. Bagels locations. Your participation in the Program may be discontinued by us in connection with actual or suspected unauthorized or fraudulent use of the Program, your Program account or Program Card, or violation of these Program Terms.

#### **10. ENRG’s Remedies.**

ENRG reserves the right to seek all remedies available at law and in equity for violations of any of these Program Terms, including suspending or blocking your access to your Program account and/or Program Card. ENRG has the right to deactivate a Program account if there is no point accumulation or Reward redemption activity in the Program account for one (1) year.

#### **11. No Representations, Warranties, or Conditions.**

**ENRG, its affiliates, ours/their franchisees, and suppliers make no representations, warranties or conditions of any kind, express or implied, with respect to the Program, including, but not limited to, any implied warranty of merchantability, fitness for a particular purpose, title, or non-infringement, or any warranty arising by usage of trade, course of dealing or course of**

performance. ENRG does not represent or warrant that your Program Card will always be accessible or accepted or that your Program account will always be accessible.

#### **12. Limitation of Liability.**

In the event that ENRG, its affiliates, our/their franchisees, and/or suppliers are found liable to you for any reason, you shall only be entitled to recover actual and direct damages and such damages shall not exceed \$100. ENRG and its parents, subsidiaries and affiliates shall have no liability for any incidental, indirect or consequential damages (including without limitation loss of profit, revenue or use) arising out of or in any way connected with the Program, whether in contract, warranty, tort (including negligence, whether active, passive or imputed), product liability, strict liability or other theory, even if we or our authorized representatives have been advised of the possibility of such damages. In no event shall ENRG or its affiliates have any liability for unauthorized access to, or alteration, theft or destruction of your Program account or Program Card through accident, misuse, or fraudulent means or devices by you or any third party, or as a result of any delay or mistake resulting from any circumstances beyond our reasonable control.

#### **13. No Liability for Third-Party Partners.**

ENRG may engage third-party partner companies to provide certain Program and Rewards services. ENRG is not responsible, and assumes no liability, for the goods and services of such partner companies (including any changes to or discontinuances of such partner companies' goods or services). NEITHER ENRG, ITS AFFILIATES, OUR/THEIR FRANCHISEES AND/OR SUPPLIERS WILL BE LIABLE FOR ANY ACTS, ERRORS, OR OMISSIONS OF ANY THIRD PARTY OR PROGRAM PARTNER OR ANY PARTNER'S LOYALTY OR REWARDS PROGRAM.

#### **14. Restrictions of State Law.**

The laws of certain states or other jurisdictions do not allow limitations on implied warranties, or the exclusion or limitation of certain damages. If these laws apply, some or all of the above disclaimers, exclusions or limitations may not apply to you, and you may have rights in addition to those contained in these Program Terms. In any such jurisdiction, our liability is limited to the greatest extent permitted by law.

#### **15. Indemnification.**

By participating in the Program, you agree to release ENRG and all of its affiliates, parents, subsidiaries, franchisees, vendors and suppliers, and each of their officers, directors, employees and agents from any and all liability, loss or damage incurred through your participation in the Program including, but not limited to, the earning of points and Rewards, and the receipt, possession, redemption, use and/or misuse of any Reward.

#### **16. Governing Law.**

These Program Terms and any disputes arising under or related to them will be governed by United States federal law and the laws of the State of Colorado, without reference to its conflict of law principles.

#### **17. Changes to these Program Terms.**

ENRG may amend these Program Terms at any time. We will post the amended Program Terms to our website at <http://www.einsteinbros.com/shmearsocietyterms.pdf>. As permitted by applicable law, any amendment will become effective at the time we post the revised Program Terms to our website. Your continued participation in the Program will constitute your acceptance to any amendment to these Program Terms.

## **18. Confidential Arbitration.**

Please review this provision carefully. It provides that any dispute may be resolved by binding arbitration. Arbitration replaces the right to go to court and the right to have a jury decide a dispute. Under this provision, your rights may be substantially limited in the event of a dispute. You may opt out of this Arbitration provision by following the instructions below.

By accepting these Program Terms, unless you opt out by following the instructions below, you agree that either you or we, at our sole discretion, can choose to have any dispute arising out of or relating to Rewards, the Program, these Program Terms, your Program account or our relationship resolved by confidential, binding arbitration. If arbitration is chosen by any party, neither you nor we will have the right to litigate that dispute in court or to have a jury trial on that dispute. Pre-arbitration discovery will be permitted only as allowed by the arbitration rules. In addition, you will not have the right to participate as a representative or member of any class of claimants pertaining to any dispute subject to arbitration. The arbitrator's decision will generally be final and binding. Other rights that you would have if you went to court may also not be available in arbitration. It is important that you read the entire Arbitration provision carefully before accepting the terms of this Agreement.

For purposes of this Arbitration provision, "dispute" shall be construed as broadly as possible, and shall include any claim, dispute or controversy (whether in contract, regulatory, tort or otherwise, whether pre-existing, present or future and including constitutional, statutory, common law, intentional tort and equitable claims) arising from or relating to your Program account; your Program Card, Rewards; the Program or the operation or use thereof; the actions of yourself, us, or third parties; or the validity of these Program Terms or this Arbitration provision. It includes disputes brought as counterclaims, cross claims, or third party claims. A party that has brought a dispute in a court may elect to arbitrate any other dispute that may be raised in that litigation. Disputes brought as part of a class action or other representative basis are subject to arbitration on an individual (non-class, non-representative) basis. IF YOU DO NOT OPT OUT, THEN YOU WILL HAVE WAIVED YOUR RIGHT TO INDICATE OR PARTICIPATE IN A CLASS ACTION RELATED TO THIS AGREEMENT. In this Arbitration provision, the words "we," "us," and "our" shall include ENRG and any assignees of any of ENRG's rights, as well as their/our respective affiliates, parents, subsidiaries, franchisees, vendors, suppliers, and further assigns.

Any arbitration under this Arbitration provision shall be administered by the American Arbitration Association ("AAA") under the rules applicable to the resolution of consumer disputes in effect when the dispute is filed. The arbitrator shall have no authority to hear any disputes on a class action or representative basis. Neither you nor we may consolidate or join the disputes of other persons who may have similar disputes into a single arbitration. You may obtain rules and forms by calling the AAA at 1-800-778-7879 or visiting [www.adr.org](http://www.adr.org). Any arbitration hearing that you attend will take place in the Federal judicial district where you reside. We will not elect arbitration of any dispute that is filed as an individual matter by you in a small claims or similar court, so long as the dispute is pending on an individual basis in such court.

A single, neutral arbitrator will decide any disputes. The arbitrator must be either a retired or former judge or a lawyer with no less than 10 years' experience, selected in accordance with the AAA's rules. The arbitrator will apply applicable substantive law consistent with the Federal Arbitration Act ("FAA") and applicable statutes of limitations, will honor claims of privilege under applicable law, and will have the power to award to a party any damages or other relief provided under applicable law. Any party may choose to have a hearing and may choose to be represented by counsel. The arbitrator will issue an award in writing and, upon request, will provide a written explanation for the award. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

The party initiating an arbitration must pay the AAA's initial filing fee, although you can ask the AAA to waive the filing fee and we will consider your request that we pay the filing fee on your behalf. We will pay any subsequent administration fees imposed by the AAA, and we will pay the arbitrator's fee for up to one day of hearings. All other fees will be allocated as provided by the AAA's rules and applicable law. If you

prevail in arbitration, we will reimburse you any fees paid to the AAA. However, even if we prevail, we will not seek reimbursement from you of any fees we paid to the AAA unless the arbitrator determines that your dispute was brought in bad faith. Each party shall bear its own costs of attorneys, experts, and witness fees, regardless of which party prevails in the arbitration. However, if applicable substantive law gives you the right to seek reimbursement of attorneys' fees or other fees or costs, then that right shall also apply in the arbitration.

You have the right to opt out of this Arbitration provision, but you may only do so in the first 30 days after receiving initial notification of these Program Terms via email from us or registering for the Program. In order to opt out, you must write us at Shmear Society/Arbitration, c/o Einstein Noah Restaurant Group, Inc., 555 Zang Street, Suite 300, Lakewood, CO 80228. You must inform us of your decision to opt out, and sign the notice.

This Arbitration provision shall survive termination of your participation in the Program. This Arbitration provision is made in connection with interstate commerce, and shall be governed by the Federal Arbitration Act, 9 USC Sections 1 through 16. If any part of this Arbitration provision is determined to be void or unenforceable, then this entire Arbitration provision shall be considered null and void; however, it shall not affect the validity of the rest of this Agreement.

#### **19. Force Majeure.**

ENRG is not responsible or liable to you, or any person claiming through you, for failure to supply or fulfill an award, benefit or points in the Program in the event the Program or its operations are affected by any acts of god, any action, regulation, order, or request by any governmental or quasi-governmental entity, equipment failure, actual threatened terrorist acts, weather, natural phenomenon, war (declared or undeclared), fire, embargo, labor dispute or strike, labor or material shortage, transportation, interruption of any kind, civil disturbance, insurrection, riot, or any laws, rules, regulations or orders or other action adopted or taken by any national, federal, state, provincial, or local government authority, or any other cause, whether or not specifically mentioned above.

#### **20. Law Enforcement/Government Requests.**

You agree that nothing contained in these Program Terms prevents ENRG from complying with law enforcement or governmental requests or requirements relating to your participation in the Program or information provided to or gathered by ENRG with respect to such participation.

#### **21. Program Void.**

The Program is void where prohibited or restricted by federal, state or local law. If any provision of these Program Terms is found to be invalid or unenforceable by a court of competent jurisdiction, such provision shall be severed from the remainder of these Program Terms, which will otherwise remain in full force and effect.

#### **22. Entire Agreement.**

These Program terms constitute the entire and exclusive agreement between you and ENRG with respect to the Program. These Program Terms supersede all prior or contemporaneous communications, agreements, advertising, and proposals, whether electronic, oral, or written, with respect to the Program or any other version of a participant loyalty program from ENRG or an ENRG affiliate. Both you and ENRG acknowledge that neither you nor ENRG has been induced to enter into these Program Terms by any representations or promises not specifically stated in these Program Terms.

#### **23. Precedence; Waiver; Interpretation.**

If and to the extent that there is any conflict among or between any ENRG website (including the Program webpages) or other Program marketing materials and these Program Terms, the language in these Program Terms will control. ENRG's failure to or decision not to enforce any provision in these Program Terms will not constitute a waiver of that or any other provision. The invalidity or unenforceability of any provision of these Program Terms will not affect the validity or enforceability of any other provision.

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**UPDATES:**

3/7/18: Updates to Sections 3, 3(b), 4 and 6.

4/11/18: Updates to Sections 1, 2, and 4.