

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General



In the Matter of UP Fitness DC, LLC

SETTLEMENT AGREEMENT

The Attorney General for the District of Columbia, on behalf of the District of Columbia (“District”), and Respondent UP Fitness DC, LLC (“UP Fitness” or “Company”) (together, the “Parties”), hereby enter into this Settlement Agreement, and agree as follows:

I. THE PARTIES

1. The Attorney General for the District of Columbia is the chief legal officer for the District of Columbia. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest.

2. UP Fitness is a District limited liability company that operates at several locations in the District, including at 1919 M Street NW, Washington D.C., 20036. UP Fitness DC, LLC is a subsidiary of UP Fitness Limited, a British corporation headquartered at 3rd Floor, Acresfield, 8-10 Exchange Street, Manchester, M2 7HA, United Kingdom.

II. COVERED CONDUCT

3. The District investigated the Company’s compliance with the minimum wage and overtime pay requirements of the District’s Minimum Wage Revision Act (“MWRA”), D.C. Code § 32-1001, *et seq.*, and Wage Payment and Collection Law (“WPCL”), D.C. Code § 32-1301,

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et seq., including payment of minimum wages required by law, payment for all hours worked, and where required by law, payment for overtime for hours worked over forty hours in a workweek, from January 1, 2020 through the present.

4. The District alleges that from January 1, 2020 through the present, the Company routinely failed to pay employees wages and overtime for all hours worked. The District alleges that the Company used a compensation scheme that it described as a “commission,” whereby employees were paid a percentage of the amount the Company charged to customers for each training session the employee worked. The District further alleges that trainers were paid nothing for time worked outside of training sessions, which included time spent in administrative meetings, weekly ongoing education meetings, homework, and additional responsibilities including daily communication with customers through the Company’s mobile application. The District further alleges that UP Fitness did not pay trainers overtime rates when they worked over forty hours in a work week.

5. The District alleges that because workers’ pay was tied directly to their hours worked, the Company’s purported “commission” scheme was not a bona fide commission, and the Company therefore violated the District’s Minimum Wage Revision Act (“MWRA”), D.C. Code § 32-1001, *et seq.*, and Wage Payment and Collection Law (“WPCL”), D.C. Code § 32-1301, *et seq.*, by failing to pay its trainers for every hour worked and by failing to pay overtime for hours worked over forty hours in a work week. The District’s allegations in Paragraphs 3-5 are hereinafter referred to as the “Covered Conduct.”

6. The Company denies the District’s allegations. Nothing contained in this Settlement Agreement is or may be construed to be an admission by the Company of any violation of law or regulation, any other matter of fact or law, or any liability or wrongdoing.

III. DEFINITIONS

7. “**Effective Date**” shall be the date this Settlement Agreement is fully executed by all parties.

8. “**Eligible Employee**” is an employee eligible to receive a payment pursuant to this Settlement Agreement.

IV. INJUNCTIVE TERMS

9. **Compliance with District Law.** The Company agrees to comply with the MWRA and WPCL. To this end, on or before December 1, 2023, the Company will begin paying its trainers as non-exempt employees via the fluctuating workweek method. Under the fluctuating workweek method, trainers will receive a salary, they may receive additional remuneration aside from their salary, and they will receive overtime pay for hours worked over 40 in a workweek. Trainers’ regular rate for overtime purposes will be calculated by dividing total remuneration for that workweek that is includable in the regular rate by total hours worked that workweek, and trainers will be compensated an additional 0.5x of their regular rate for overtime hours. Trainers will be guaranteed compensation of at least the District’s relevant minimum wage for every hour worked, and their compensation for hours over 40 (including their salary and their OT pay) will always be at least 1.5 times the District’s relevant minimum wage for every overtime hour worked. The Company will track all time worked by its trainers. Trainers will sign new compensation acknowledgments consistent with the requirements of the law and explaining how they are paid. The Company may modify its method of payment to trainers, so long as they are paid consistent with the MWRA and WPCL, including that trainers will be guaranteed compensation of at least the District’s relevant minimum wage for every hour worked, and at least 1.5 times the District’s relevant minimum wage for every overtime hour worked.

10. **Reporting.** The Company shall submit an Annual Report to the District for the one-year period following the Effective Date that identifies all trainers who performed work for the

Company in the District of Columbia during that year, providing copies of their pay records for the covered period, and including a signed certification from a corporate representative attesting to compliance with the MWRA and WPCL. The Company shall submit this report to the District pursuant to Paragraph 21 of this Agreement no later than thirteen calendar months after the Effective Date.

11. **Corrective Action.** If the Company becomes aware, through an audit or other source, that any Company location in the District of Columbia is in violation of the MWRA and WPCL, the Company shall take action to correct any confirmed violations within fourteen (14) business days to ensure the location comes into compliance, and the Company shall pay restitution, if any, to any affected worker to remedy the violation.

12. **Non-Compete Agreements.** The Company shall immediately cease its use of non-compete agreements and/or employee non-solicitation agreements, if any, for current or future trainers who work in the District and do not meet the definition of “highly compensated employees” under D.C. Code § 32-581.01(10). The Company shall provide notice to all of its current trainers in the District who do not meet the definition of “highly compensated employees” under D.C. Code § 32-581.01(10) and who signed or otherwise entered a non-compete agreement or provision in calendar years 2020 through 2022 that they are no longer bound by any non-compete agreements they previously entered into with the Company.

13. **Employee Loans.** The Company agrees to immediately forgive the outstanding balances on any employee loans and/or payroll advances for any employee who works in the District and will not seek to collect such balances from any employee who works in the District.

V. **PAYMENT TERMS**

14. **Payments to Eligible Employees.** The Company shall make payments totaling **\$254,190.08** to Eligible Employees. The Company shall be responsible for distribution of these

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payments and will manage the distribution as follows:

- a. *Claims Administrator.* Within fifteen (15) business days after the Effective Date, the Company shall retain a third-party claims administrator (the “Administrator”) to administer a claims procedure to distribute payments to Eligible Employees. The Company shall pay for all expenses related to the Administrator and claims procedure.
- b. *Eligible Employee List.* Within twenty (20) business days of the Effective Date, the Company shall provide the Administrator the Eligible Employee List. The Eligible Employee List will be in an electronic format, preferably Excel, that includes the names, last known addresses, social security numbers, last known phone numbers, and last known email addresses, as well as the amounts of Base Damages, Liquidated Damages, and Total Payments Due as listed in Appendix A (hereinafter referred to as “Claim Payment Amounts”).
- c. *Claims Notice.* The Administrator shall send the Notice, Claim Form, and Release, attached hereto as Appendix B, to Eligible Employees via first class mail, text message, and email, and, if mail or email methods are deemed to be undeliverable, will perform a skip trace and resend any Notice and Claim Form returned without a forwarding address, or resend to those with a new forwarding address.
- d. *Claims Period.* To be eligible for payment, all claims must be postmarked or received (by mail or electronically) within 60 days of the date that the Claims Administrator effected notice to the Eligible Employee under paragraph 19.c.
- e. *Claims Procedure.* To file a claim, Eligible Employees must complete and submit (by mail or electronically) the Notice, Claim Form, and Release. The Administrator shall permit Eligible Employees to submit claims electronically.
- f. *Claim Payment Amounts and Tax Treatment.* Claim Payment Amounts will be determined based on the amounts listed in Appendix A. Each Eligible Employee who submits a claim within the Claims Period shall be paid the Total Payment Due amount listed in Appendix A. For tax purposes, Base Damages amounts shall be treated as wage income subject to required withholdings and deductions and reported on IRS Form W-2, and Liquidated Damages amounts shall be treated as nonwage income and shall not be subject to withholdings or deductions and shall be reported on IRS Form 1099.
- g. *Payment Timing.* The Administrator shall issue payments of all Claim Payment Amounts by check or electronic funds transfer within 21 days of the close of the Claims Period. Claimants shall have at least 60 days to deposit any Claim Payment Amounts issued by check, and any payments by check shall state prominently any deadline to deposit the payment.
- h. *Records and Reporting.* The Administrator shall record the dates and methods (*i.e.*, direct deposit or cashed check) by which payments were distributed to Eligible Employees. Within 180 days of the Effective Date, the Company shall provide the District with a final report that shows all payments distributed to Eligible Employees and all payments remaining unclaimed by Eligible Employees (the total of which is referred to as the “Undistributed Funds”).

- i. *Payment of Undistributed Funds to the District.* Within 30 days after providing the records required by paragraph (h) above, the Company shall make a payment to the District in the amount of the Undistributed Funds. Payments made to the District pursuant to this term may be used by the District for any lawful purpose, including, but not limited to: deposit to the District's litigation support fund or restitution fund; defrayal of the costs of the inquiry leading hereto; defrayal of the costs of administration or distribution; or for other uses permitted by District law, at the sole discretion of the Attorney General for the District of Columbia.

15. **Payment to the District.** In addition to the payments described in Paragraph 14, the Company shall also pay **\$195,809.92** to the District as a civil penalty, within forty-five (45) days of the Effective Date.

16. All payments to the District shall be made by cashier's check made payable to "D.C. Treasurer" and delivered to Conny Tello, Office of Attorney General for the District of Columbia, 400 6th Street NW, 10th Floor, Washington, DC 20001, unless another method of payment is specified by the District.

VI. RELEASE

17. The Parties have agreed to the terms of this Settlement Agreement to resolve the District's allegations against the Company concerning the Covered Conduct. In exchange for the performance of the Company's obligations under this Settlement Agreement, and upon payment of all amounts due under this Agreement, the District hereby releases the Company from any and all civil claims that the Attorney General could have asserted under the WPCL and MWRA for claims arising out of the Covered Conduct through the Effective Date of this Settlement Agreement.

VII. ADDITIONAL TERMS

18. This Settlement Agreement shall be considered effective and fully executed on the Effective Date. This Settlement Agreement may be executed in counterparts, and a facsimile or .pdf signature shall be deemed to be, and shall have the same force and effect, as an original

signature. Copies of signature pages transmitted electronically shall have the same effect as originals of those signature pages.

19. The Company shall not knowingly permit third parties authorized by the Company to act on its behalf to engage in practices that would be violative of this Settlement Agreement.

20. This Settlement Agreement represents the full and complete terms of the settlement entered by the Parties. In any action undertaken by the Parties, neither prior versions of this Settlement Agreement nor prior versions of any of its terms may be introduced for any purpose whatsoever.

21. All notices sent pursuant to this Settlement Agreement shall be provided to the following address via first class and electronic mail, unless a different address is specified in writing by the party changing such address:

Graham Lake
Chief, Workers' Rights and Antifraud Section
Office of the Attorney General
400 6th St., NW, 10th Floor
Washington, D.C. 20001
Graham.Lake@dc.gov

Counsel for the District of Columbia

Marty Heller
Fisher & Phillips, LLP
8200 Greensboro Drive, Suite 900
McLean, VA 22102
mheller@fisherphillips.com

Counsel for UP Fitness

22. Any failure by any party to this Settlement Agreement to insist upon the strict performance by any other party of any of the provisions of this Settlement Agreement shall not be deemed a waiver of any of the provisions of this Settlement Agreement, and such party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Settlement Agreement.

23. If any clause, provision, or section of this Settlement Agreement shall, for any reason, be held illegal, invalid, or unenforceable, such illegality, invalidity, or unenforceability shall not affect any other clause, provision, or section of this Settlement Agreement and this Settlement Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable clause, section, or other provision had not been contained herein.

24. Nothing in this Settlement Agreement shall be construed as relieving the Company of the obligation to comply with all state and federal laws, regulations, or rules, nor shall any of the provisions of this Settlement Agreement be deemed to be permission to engage in any acts or practices prohibited by such laws, regulations, or rules.

25. The Company shall provide a copy of this Settlement Agreement to any of its current and future principals, officers, directors, and managers having decision-making authority with respect to the subject matter of this Settlement Agreement.

26. The Company shall not form a separate entity or corporation for the purpose of engaging in acts or practices in whole or in part that are prohibited in this Settlement Agreement.

BRIAN L. SCHWALB
Attorney General for the District of Columbia

James Graham Lake
Graham Lake
Chief, Workers' Rights and Antifraud Section
Office of the Attorney General
400 6th St., NW, 10th Floor
Washington, D.C. 20001

Date: 10/16/23

Counsel for the District of Columbia

S. Bruce

Date: 10/16/2023

UP Fitness Signatory

STEVE BRUCE