

THE LOCKDOWN 2 REGULATIONS

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Introduction

1. Shortly before 5pm on Tuesday, 3 November 2020 the new national lockdown regulations were published: [The Health Protection \(Coronavirus, Restrictions\) \(England\)\(No. 4\) Regulations 2020](#) (“the No. 4 Regulations”). They were made by Matt Hancock MP, the Secretary of State for Health at 2.45pm. The No. 4 Regulations apply to England only.
2. The No. 4 regulations follow the Prime Minister’s announcement of the second national lockdown on Saturday 31 October 2020, suitably coinciding with Halloween. In the [Explanatory Memorandum](#), the Government set out why these regulations are being made:

What is being done and why?

7.1 Data from the Office of National Statistics COVID-19 infection survey for the most recent week of the study (17 -25 October) estimates that an average of 568,100 people had COVID-19 in the community in England – over 30% higher than their estimate from the previous week and equivalent to 1 in 100 people. This is in line with estimates from the latest interim results from the Real-time Assessment of Community Transmission (REACT) Study, led by Imperial College. The Government’s expert modelling group SPI-M estimates that the reproduction rate, or R rate, for the UK is between 1.1 – 1.3, with the epidemic estimated to grow between 2% and 4% per day, with potentially

faster growth in certain areas. R remains above 1 with high prevalence of disease across much of the country. A positive growth rate still reflects an epidemic that is growing rapidly, and the trend is for higher growth in areas of lower prevalence.

7.2 Without further significant restrictions, the number of infections will continue to increase, leading to more deaths, risking the NHS becoming overwhelmed and damaging the economy.

7.3 This instrument therefore imposes a nationwide lockdown for a period of 28 days in order to slow the spread of COVID-19, thus easing NHS capacity and ensuring that the health system is not overwhelmed during the winter months.

3. The No. 4 Regulations revoke the substantive provisions in the Medium, High and Very High Tier Regulations, which only came into force on 14 October. Offences committed under these earlier regulations can still be prosecuted. Consequent amendments are also made to the No.2 and No.3 Regulations, as well as to the Obligations on Undertakings Regulations. Any designations made under the earlier regulations will continue to have effect.
4. The No. 4 Regulations will be debated in Parliament on 4 November and are due to come into force on 5 November. Parliament can either accept or reject the No. 4 Regulations, they cannot amend them. Given the Labour Party has already indicated that they will offer the Government their support, they are highly likely to become law, despite the reported rebellion from the backbenches. The inclusion of a sunset clause, giving the regulations a life of only 28 days, may go a significant way to quelling such a rebellion.
5. So, the No. 4 Regulations expire in 28 days and there is no provision for this period to be extended. If the Government wishes to continue the lockdown for longer it will need to make further or amending regulations.

6. Government Guidance was published in advance [here](#), although it is likely to be updated (not least because the No. 4 Regulations as published depart from the Guidance in several material respects).
7. A summary of the provisions relating to restrictions on movement and gatherings, as well as the businesses restrictions, follows.

Restrictions on movement

8. The restrictions on movement are familiar to students of the initial lockdown regulations. There is a general restriction on movement contained in regulation 5. The rule is that “no person may leave or be outside of the place where they are living without reasonable excuse”.
9. The place where a person is living includes “the premises where they live together with any garden, yard, passage, stair, garage, outhouse or other appurtenance of such premises”. So people who are lucky enough to have a garden, patio or balcony can go into those areas.
10. What might a “reasonable excuse” be? It *includes* the “exceptions” listed in regulation 6 - because they only include these exceptions, there may well be other reasonable excuses on the facts of a given case.
11. Regulation 6 gives 13 categories of reasonable excuse. The most frequently exercised categories, we suspect, will be exceptions 1 and 2.
12. Exception 1 is that “leaving home is reasonably necessary for certain purposes” - it is reasonably necessary to be outside the home to do certain things. We consider in general that the *purpose* does not need to be reasonably necessary - what needs to be reasonably necessary is the need to leave the home to do the thing. So, for example, a defined purpose is to “to buy goods or services” for a shop that is allowed to stay open. It might not be reasonably necessary to obtain a paper bag and some slim-line salad dressing: but if that is the fixed purpose and a shop visit is required to get it, the exception is made out.

13. The “certain purposes” for Exception 1 are:

- (As stated) buying goods and services from a business or service that is permitted to remain open.
- Going to a bank etc to deposit or withdraw money.
- Taking exercise either alone, with members of the same household (or a linked household) or in a “public outdoor place” (defined as an outdoor place to which the public have, or are permitted access whether on payment or otherwise and includes parks, the countryside and highways) or with one other person (who is not a member of the household or a linked household). Following the intervention of Nadine Dorries MP, children under the age of 5 and up to two carers of disabled persons who need continuous care (which we shall refer to hereafter as “carers”) are not counted towards this limit.
- Visiting a public outdoor place for the purpose of recreation, again either alone, with members of the same or a linked household, or with one other person (children under 5 and up to two carers are not counted).
- To attend a place of worship (as we shall come to see this is not for a gathering in such a place).
- To attend Remembrance Sunday or the gathering in Westminster Abbey on 11 November 2020 to commemorate Armistice Day and the centenary of the burial of the Unknown Soldier.
- To undertake house-hunting / house-moving activities;
- To visit a linked household;
- To collect takeaways in a permitted manner (see below);
- To go to the tip.

14. Exception 2 is a wide exception where it is reasonably necessary to leave or be outside home:

- For the purposes of work or to provide voluntary or charitable services *where it is not reasonably possible to work or provide those services from home* - so, as with the original lockdown regulations, working from home (or “WFH” as we

have all come to love/hate it) is *baked in* - if it is reasonably possible for you to work from home then you don't fall within this defined exception.

- For the purposes of education or training.
 - To provide care or assistance (which is subject to a technical definition).
 - To provide emergency assistance.
 - To fulfil a legal obligation, including attending court or satisfying bail, or to participate in legal proceedings.
 - To access critical public services (some examples are given).
 - To access charitable services.
15. Other exceptions of relevance to the general public are exception 4 (medical need etc.), exception 5 (support - 12 step meetings and the like - and respite, not previously recognised as an exception to regulatory restrictions, but surely an important one), exception 9 (children and childcare, which is as per the previous exceptions for gatherings) and exception 10 (animal welfare purposes).
16. Then there are “life event” exceptions: exception 6, the grimly labelled “Death bed visit” (which, despite its singular title, is *not* limited to a single visit), 7: funerals, and 8: marriages and civil partnerships.
17. There are exceptions for elite athletes (3), prison visits (to either a close family member or a “friend” who is in prison, which must cover pretty much the majority of prison visits) (12), births and visiting people in hospitals (13), and (slightly strangely, because surely this would be implicit) “returning home” from any place where a person was on holiday immediately before the No. 4 Regulations came into force.
18. The guidance issued in advance of the regulations said that:

Overnight stays and holidays away from primary residences will not be allowed. This includes holidays abroad and in the UK. It also means you cannot stay in a second home, if you own one, or staying with anyone you do not live with or are in a support bubble with. There are specific exceptions, for example if you need to stay away from home (including in a second home) for work purposes, but this means people cannot travel

overseas or within the UK, unless for work, education or other legally permitted reasons.

19. There is nothing in the regulations preventing “overnight stays”. If you are within an exception, say you live in Penzance and wish to visit a dying relative in Newcastle, then you can stay overnight because that is an exception to leaving the home (exception 6).
20. Indeed, there is nothing in the regulations specifically permitting leaving the home to go on holiday, either domestically or abroad. The restriction is on leaving “the place where they are living” without reasonable excuse. The exceptions listed in regulation 6 are but examples of what might be a reasonable excuse: regulation 5(2)(a). It might be argued that leaving for a holiday is a “reasonable excuse”, indeed it might be argued that leaving for a long holiday abroad is even more so (although the counter-argument is if this were so, why is *returning* from a holiday you were on before the regulations came into force a specific reasonable excuse?). If you are lucky enough to have two homes, then you might also assert it is entirely reasonable to move from one to the other. There are other moves that might well be reasonable: a permanent emigration for instance.
21. For the avoidance of any doubt, any of the exceptions on leaving the home apply to all international flights: if you wish to leave the country to attend an overseas wedding for instance, within the regulations.

Restrictions on gatherings

22. The restrictions on gatherings vary depending on whether the participants are indoors or outdoors. What is “indoors” here is defined by reference to the smoke-free legislation - a place is indoors if it is “enclosed or substantially enclosed” for the purposes of the Smoke-free (Premises and Enforcement) Regulations 2006: essentially (we summarise) any place with a roof (including a retractable roof) and 50% or more solid (counting doors and windows as solid walls) is indoors.
23. So indoors, by regulation 8, no person may participate in a gathering of *two or more* people unless an exception applies. This is the same restriction as currently applies indoors in Tier 2 and 3 areas.

24. Outdoors, by regulation 9, in a “public outdoor place” (defined as an outdoor place to which the public have, or are permitted access, whether on payment or otherwise, and including parks, the countryside and highways) then there can’t be a gathering of *more than two* people unless an exception applies (children under 5 or up to two carers not counting towards the limit) unless an exception applies. In outdoor places which are not public outdoor places (scratching our heads we can only think of private gardens and the like) then the same rules as apply to indoor places operate, and there cannot be a gathering of *two or more* people (again children under 5 or carers not counting) unless an exception applies.
25. As before, the new regulations (confusingly) use “or more” and “more than” rather than one formula of limitation consistently.
26. Essentially, indoors (and outdoors in private places like gardens) it’s a rule of 1 unless an exception applies, and outdoors in public places it’s a rule of 2. For outdoors (but not indoors) children under 5 and up to two carers are not counted to any limit.
27. The exceptions for gatherings understandably very much overlap with the exceptions on movement (there is not much point having an exception for a gathering if you cannot leave the house to get to it).
28. The main point to grasp is that whilst the exceptions to the *movement* restrictions are *examples* of what might constitute a “reasonable excuse”, the exceptions on *gatherings* constitute a *complete code*: if you are not within one of the 14 exceptions in regulation 11, you are in breach, albeit we should stress that a criminal offence only occurs if the breach is “without reasonable excuse”: regulation 20(1).
29. The main exception to the limits on gatherings, Exception 1, however is (by its nature) not an exception to the restriction on movement: it is the same household/linked household exception. Because this is ported over from the previous regulations we will assume reasonable familiarity with it (but see regulation 12).

30. Because Exception 1 is inserted this means that the exception numbers do not correspond with those found to the exceptions on movement. Some other categories are consolidated or split, and others have different labels (so the bleak “Death bed visit” becomes “visiting a dying person”). All this mildly exasperating to the legal profession, but more normal members of society might have fewer concerns.
31. Essentially the following exceptions broadly correspond with each other (the inconsistent capitalisation is as per the original):

Exception to movement restriction	Exception to gathering restriction
2: work, voluntary services, education and training etc	2: gatherings necessary for certain purposes
1(e): to fulfil a legal obligation or participate in legal proceedings	3: legal obligations and proceedings
12: Prison visits	4: criminal justice accommodation
5: Support and respite	5: support groups
	6: respite care
13: “Other visits”	7: births and visiting persons receiving treatment
8: marriages and civil partnerships	8: marriages and civil partnerships
6: “Death bed visit”	9: visiting a dying person
7: funerals etc	10: funerals
	11: commemorative events following a person’s death
3: elite athletes	12: elite sports
9: children	13: children
1(f): to attend an event commemorating Remembrance Sunday or to attend the gathering referred in regulation 11(18)(a)(ii)	14: Remembrance Sunday and Armistice Day

32. Without reciting all of these provisions in this summary article, the following are worthy of comment.
33. **Marriages and civil partnerships.** Gatherings for wedding etc ceremonies (exception 8) are permitted but *only* in limited circumstances where one of the parties is seriously ill and is not expected to recover. If that is the case then wedding etc can proceed so long as it consists of no more than 6 people, whether in a private dwelling, premises operated by businesses, charities, benevolent or philanthropic institutions or public bodies, or in a public outdoor places (so including parks and beaches), so long as it is COVID-19 risk assessed (requirements set out in regulation 14).
34. **Funerals.** Gatherings for funerals (exception 10) are permitted for no more than 30 persons and have to be COVID-19 risk assessed. **Wakes** are permitted for no more than 15 persons: they cannot be in private dwellings and have to be COVID-19 risk assessed.
35. **Informal childcare** – a further exception permits informal childcare for children aged 13 or under by a member of a “linked childcare household” (defined in reg.13).

Business closures and restrictions

Restrictions on service of food and drink for consumption on the premises

36. A person responsible for carrying on a business as a restaurant, bar, pub, cafe, social clubs or workplace canteen (what we shall call a “restricted hospitality business” - the No. 4 Regulations confusingly define the expressions “restricted business” and “restricted service” to mean different things in different places) must close any premises (or that part of it) in which food or drink are provided for consumption *on* those premises and cease to provide food or drink for consumption on the premises: regulation 15(1).
37. Consumption “on those premises” includes an area *adjacent* to the business where seating is made available for its customers (whether or not by the business itself) or which its customers habitually use for consumption of food or drink served by the business: regulation 15(4).

38. There are a number of important exceptions:

- Restricted hospitality businesses may still sell food or drink but *not* alcohol (subject to the next exception), for consumption *off* the premises between 05:00 – 22:00hrs: regulation 17(1)(a). This permits customers to enter the premises to collect their take-aways during these hours.
- Restricted hospitality businesses may still sell *alcohol* for consumption off the premises, *at any time*, in one of the following ways:
 - By making deliveries in response to orders received via a website, phone/text message, or (unlikely as this may be) post.
 - To a purchaser who collects pre-ordered food or drink provided they do not enter inside the premises.
 - Via a drive-thru.

(regulation 17(1)(b) and (2))

(This exception, probably the result of lobbying efforts in recent days, will be welcomed by many licensed restricted hospitality businesses as it may provide them with an important source of income during this lockdown).

- Restricted hospitality businesses may still sell food or drink during the later hours between 22:00 – 05:00hrs for consumption *off* the premises in one of the following ways (as above):
 - By making deliveries in response to orders received via a website, phone/text message, or post.
 - To a purchaser who collects pre-ordered food or drink provided they do not enter inside the premises
 - Via a drive-thru

(Regulation 17(1)(b) and (2)).

- Food or drink provided by a hotel or other accommodation as part of room service is still permitted (in the limited circumstances where hotels might wish to remain open) (regulation 15(3)).
- Food and drink may be served on aircraft, trains and vessels providing a public transport service. Save for seated aircraft passengers, alcohol may not be served (regulation 17(4)).

39. The full list of restricted hospitality businesses that must close (subject to the above exceptions) are :

Hospitality businesses to close

- Restaurants, including restaurants and dining rooms in hotels or members' clubs.
- Cafes, including workplace canteens (unless there is no practical alternative for staff to obtain food), but not including:
 - cafes or canteens at a hospital, care home or school, or provider of post-16 education or training;
 - canteens at criminal justice accommodation or an establishment intended for use for naval, military or air force purposes or for the purposes of the Department of the Secretary of State responsible for defence;
 - services providing food and drink or either to the homeless.
- Bars, including bars in hotels or members' clubs.
- Social clubs.
- Public houses.

40. Businesses which must close completely are:

Other businesses to close

- Cinemas.
- Theatres.
- Nightclubs, dance halls, discotheques and any other venue which—
 - opens at night,

- has a dance floor or other space for dancing by members of the public (and for these purposes members of the venue in question are to be considered members of the public), and
- provides music, whether live or recorded, for dancing.
- Bingo halls.
- Concert halls.
- Museums and galleries.
- Casinos.
- Betting shops and adult gaming centres.
- Spas.
- Nail, beauty salons, hair salons and barbers.
- Tanning salons.
- Massage parlours.
- Sexual entertainment venues.
- Hostess bars.
- Tattoo and piercing parlours.
- Skating rinks.
- The following indoor facilities: dance studios, fitness studios, gyms, sports courts, swimming pools, bowling alleys, amusement arcades, playgrounds or soft play areas or other indoor leisure centres or facilities, including indoor games, recreation and entertainment venues.
- Circuses, funfairs and fairgrounds (whether outdoors or indoors), theme parks and adventure parks and activities.
- Outdoor sports centres or amenities, including water sports, stables, shooting and archery venues, golf courses, driving ranges, outdoor gyms, outdoor swimming pools, water parks and aquaparks.
- Outdoor markets (except for livestock markets, stalls selling food and any other essential retailer).
- Showrooms and other premises, including outdoor areas, used for the sale or hire of caravans, boats or any vehicle which can be propelled by mechanical means, and car washes.
- Auction houses (except for auctions of livestock or agricultural equipment).
- Model villages.

- Visitor attractions at film studios.
- Aquariums, zoos, safari parks, farms, wildlife centres and any place where animals are exhibited to the public as an attraction.
- Indoor attractions at visitor attractions such as—
 - botanical or other gardens, biomes or greenhouses;
 - stately or historic homes, castles or other heritage sites;
 - landmarks, including observation wheels or viewing platforms;
 - sculpture parks.

(Indoor visitor centres at these attractions must be closed but public toilets can remain open, presumably for visitors walking outside).

- Conference centres and exhibition halls, so far as they are used to host conferences, exhibitions, trade shows, private dining events or banquets, other than conferences or events which are attended only by employees of the person who owns or is responsible for running the conference centre or exhibition hall.

The exceptions: businesses permitted to remain open

41. Part 3 of the Schedule to the Regulations lists a number of businesses that can remain *open* during the lockdown. No doubt these are what the Government consider are “essential” (although that word is not used in this context in the Regulations). They are:

- Food retailers, including food markets, supermarkets, convenience stores and corner shops.
- Off licences and licensed shops selling alcohol (including breweries).
- Pharmacies (including non-dispensing pharmacies) and chemists.
- Newsagents.
- Hardware stores.
- Building merchants, and building services.
- Petrol stations.
- Car repair and MOT services.
- Bicycle shops.
- Taxi or vehicle hire businesses.
- Banks, building societies, credit unions, short term loan providers, savings clubs.

- Cash points;
- Undertakings which by way of business operate currency exchange offices, transmit money (or any representation of money) by any means or cash cheques which are made payable to customers.
- Post offices.
- Funeral directors.
- Laundrettes and dry cleaners.
- Dental services, opticians, audiology services, chiropody, chiropractors, osteopaths and other medical or health services, including services relating to mental health.
- Veterinary surgeons and pet shops.
- Agricultural supplies shop.
- Storage and distribution facilities, including delivery drop off or collection points, where the facilities are in the premises of a business included in this Part.
- Car parks.
- Public toilets.
- Garden centres.

42. Businesses premises that are not listed within Part 3 of the Schedule - *and offer goods for sale or for hire in a shop* - must remain closed, but they are entitled to make deliveries or otherwise provides services in response to orders received through a website, telephone (including text message) or by post.

43. Business premises that provides *services*, such as the essential services provided out of solicitors' offices and barristers' chambers, may remain open (subject to the rules on gatherings and it being reasonably necessary for work purposes).

Further business exceptions

44. There are a number of further exceptions within the No.4 Regulations dealing with:
- Motorway service areas.
 - Restricted areas of an airport, maritime port, or Channel Tunnel international rail terminal accessible only to staff or travelling passengers (but not members of the general public)
 - Blood donation sessions
 - Premises used for making films, TV or audio programmes or audio-visual adverts.
 - Training facilities for elite sportspersons.
 - Indoor fitness and dance studios for professional dancers and choreographers
 - Theatres and concert halls for training, rehearsals, performances without an audience for broadcast or recording purposes.
 - Indoor gyms, fitness studios, indoor sports facilities and other indoor leisure centres for supervised activities for children.
 - Indoor gyms, fitness studios, indoor swimming pools, indoor sports courts and other indoor leisure centres and outdoor sports courts and swimming pools by schools or providers for post-16 education or training.
 - Stables.
 - Deliveries by businesses, collections from businesses or service providers in response to orders.
 - Food and drink for the homeless.
45. Hotels and similar accommodation must generally close, but can remain open for a limited group of guests. These include existing guests, people unable to return to their main residence, and people staying in the hotel for work purposes or for any purpose requested by the Secretary of State or a local authority.
46. Places of worship may be used for certain specified purposes including funerals, memorial services, broadcasts of an act of worship, essential voluntary services (including food banks) and for “individual prayer”.

47. Community centres or halls must remain closed except where used for a specified purpose including voluntary or support activities, education or training, support groups, or for the purposes of childcare and supervised activities for children.
48. Crematoriums or burial grounds must remain closed to members of the public except for funerals or burials, commemorative events, or to allow a person to pay respects to a member of their household, a family member or friend.

Enforcement, offences and fixed penalty notices

49. A relevant person may take such action as is necessary to enforce any restrictions imposed by these Regulations.
50. Prohibition notices may be issued if necessary and proportionate to do so. These act as formal warnings.
51. Directions may be given to disperse prohibited gatherings and reasonable force may be used to remove a person from a prohibited gathering.
52. Local authority officers may be designated by the local authority to exercise enforcement powers in relation to business closure and restrictions provisions *only*.
53. Police officers and PCSO powers extend beyond the business restrictions to cover the restrictions on gatherings and movement since it is these officers who are trained and equipped to deal with people in what may be a hostile environment.
54. A contravention of a restriction, requirement, direction or prohibition notice or obstruction of an officer is a criminal offence punishable with an unlimited fine.
55. An alternative scheme of Fixed Penalty Notices (“FPN”) is available where an authorised officer reasonably believes that a person has committed an offence under the Regulations. Police may issue a FPN in relation to any contravention. Local authority officers may also issue a FPN in relation to business closure and restriction contraventions.
56. The amount of the first FPN is £200 (or £100 if paid within 14 days). This amount doubles up to £6,400 for repeat offences. In relation to indoor raves and prohibited gatherings of over 30 in a private dwelling or public outdoor place (not operated by a

business etc) the amount of the FPN is £10,000. In relation to business restriction offences, the FPN amount is £1,000 for the first one, doubling up to £10,000 for repeated contraventions. There is no discretion as to the amount of a FPN. It must be stressed that a FPN is not a “fine” - there is no obligation to pay it: but non-payment may result in a prosecution for the underlying offence.

57. The police power to arrest without warrant is extended to include reasons relevant to maintaining public health and public order. There is no express police power of entry.

Conclusion

58. Any attempt to close down a nation but setting out exceptions in an effort to keep the essentials going, is always going to be a challenge for the statutory draftsman. To their credit, the No.4 Regulations are slightly less perplexing than earlier versions. It helps that they are contained in a single regulation, and are logically laid out. There are still obscure cross references and a certain fluidity in labelling, but in general (for lawyers at least) the new Regulations are an improvement in structure. We say nothing on the content. The accompanying guidance is likely to be a moveable feast as the Government attempts to polish out the rough edges of the regulations. As before, the Regulations are the law, and the guidance is simply that.

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