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# Allowing or encouraging attendance at the office during England lockdown 2.0 – the new Regulations

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*This note is current as at 5 pm on 5 November 2020*

## 1. What does the new lockdown mean for office workers?

England entered a new period of national lockdown from Thursday 5 November for four weeks. While certain businesses have been ordered to close, there is no such restriction on offices. Instead, the Government has strongly discouraged office working with possible criminal sanctions for those who encourage or allow it without reasonable excuse.

The new national lockdown is brought into law by [The Health Protection \(Coronavirus, Restrictions\) \(England\) \(No. 4\) Regulations 2020](#) (the “Regulations”), which were published in the evening of 3 November and came into effect on 5 November.

Similar to the position between March and the end of May, under the Regulations it will be a criminal offence to leave home or gather in groups of more than two people unless it is for one of the permitted reasons.

In addition to the Regulations, the Government has also published guidance on the [New National Restrictions](#), which covers a range of different matters including going to work and protecting people more at risk from coronavirus.

On 5 November, the Government also updated its various workplace guides, including the guide for offices and contact centres, to align with the Regulations.

## 2. What do the Regulations say?

### Restrictions on movement

It is now a criminal offence for a person to leave their home without “reasonable excuse”, which includes where one of the exceptions applies. Those exceptions include:

- Where it is “*reasonably necessary .. for the purposes of work .. where it is not reasonably possible for the individual to work .. from home*”; and

- Where it is “*reasonably necessary .. to avoid injury or to escape a risk of harm*”.

The wording of the exception for work is the same wording as was used in the original version of the Regulations/the original lockdown.

#### Restrictions on gatherings

It is also now a criminal offence to participate in a gathering (indoors or outdoors) which consists of two or more people, unless one of the exceptions applies. Those exceptions include:

- Where it is “*reasonably necessary .. for work purposes*”; and
- Where it is “*reasonably necessary .. to enable one or more persons in the gathering to avoid injury or to escape a risk of harm*”.

The wording of the exception for work here is notably different from the wording used in the original version/lockdown, where only gatherings “essential for work purposes” were permitted.

#### Enforcement

As noted above, it is a criminal offence for an individual to breach the restrictions on movement and gatherings, punishable by a fine (starting at £100).

It is also a criminal offence for a corporate body to obstruct any person carrying out a function under the Regulations. It is possible that an employer encouraging employees to breach their obligations could be found to be obstructing the police in requiring those employees to stay at home. A company could also be liable for inchoate or secondary offences of assisting/encouraging/aiding/procuring the breach under existing criminal legislation.

### **3. What do the guidance on the new restrictions and the workplace guides say?**

Rather unhelpfully, in relation to attending work, the guidance on the new restrictions uses completely different language to the Regulations (and to the updated guide for offices and contact centres). It states:

*“To help contain the virus, everyone who can work effectively from home must do so. Where people cannot do so - including, but not limited to, people who work in critical national infrastructure, construction, or manufacturing - they should continue to travel to their workplace. This is essential to keeping the country operating and supporting sectors and employers.”*

Whilst the word “effectively” is still used here, there is nevertheless a change in emphasis, with the specific examples given of work that cannot be done from home being very limited.

But in any event, since the Regulations set out the law, and a breach of them carries a criminal sanction, they obviously trump this guidance.

The workplace guide on offices and contact centres is now aligned with the Regulations. It changes the previous message that employees who could work “effectively” from home should do so over the winter. All of the references to “effectively” have been removed (as have all the references to consulting with staff about returning to the workplace), instead the guide simply says that anyone who can work from home should do so.

## 4. What does all that mean?

The exception to the restrictions on movement for work is pretty confusing – what does “reasonably necessary for the purposes of work where it not reasonably possible to work from home” mean? But it certainly sets the bar higher than the previous workplace guidance.

And how does that interrelate with the exception to the restrictions on gatherings for those which are simply “reasonably necessary for work purposes” – which seems to set the bar a bit lower again? That exception to the restrictions on gatherings (of varying sizes) has been in place for some time and we have previously advised that it could be interpreted quite widely, potentially even to encompass requiring an employee with no health issues to return to a safe workplace to improve their productivity.

Could it be reasonably possible to work from home but still reasonably necessary to attend a gathering for work purposes?!

## 5. So who can still attend the office?

The exception to both restrictions for avoiding injury or escaping a risk of harm would appear to cover allowing an employee to attend a safe workplace where working from home is having a negative impact on their mental health, although it is interesting that the word “illness” has been removed from the previous iterations of this exception, potentially indicating that the threshold is intended to be fairly high.

For employers who want people in work, the “reasonably” qualification would appear to give them leeway to say that, whilst it might be possible for someone to work from home, it is not *reasonably* possible for them to do so where there are specific tasks which logistically require office attendance, or where for mental health reasons they need to go in.

However, an employee would certainly now be committing an offence if they went to work simply because they preferred being there, and their employer could in principle be liable for assisting, encouraging, aiding or procuring that offence.

## 6. Can we insist that someone attends the office?

We think it will now be difficult for employers to force (or even allow) employees to attend the office on the basis they are more effective there, when it is logistically possible for them to work from home – particularly when that could now potentially involve encouraging or assisting employees to commit a criminal offence. As noted above, whilst the word “effectively” currently remains in the guidance on the new restrictions, it has been specifically and deliberately removed from the workplace guides.

In all the circumstances, we think it is advisable to tell employees that they should not now attend the office unless it is not possible for them to work from home, and if they consider it is not possible for them to work from home for any reason they should discuss that with and seek approval from their manager and/or HR.

## 7. What about employees who are shielding?

It would be now be very risky for an employer to encourage or even allow a clinically extremely vulnerable employee to attend the workplace.

The Government paused shielding on 1 August 2020. However, the guidance on the new restrictions now states that during the four week period of lockdown extremely vulnerable employees should work from home, but if they cannot they are advised not to go to work, and statutory sick pay, Employment Support Allowance or Universal Credit may be available. The recently updated guidance on shielding also explains that employees may be eligible to be furloughed if they were on the payroll before 30 October 2020.

## 8. Do the changes apply across the UK?

No, the Regulations and the four week lockdown only apply in England. Different restrictions apply across the rest of the UK.



**Catherine Taylor**  
**Partner**

**T** +44 20 7067 3588

**E** [catherine.taylor@cms-cmno.com](mailto:catherine.taylor@cms-cmno.com)



**Melanie Lane**  
**Partner**

**T** +44 20 7067 3653

**E** [melanie.lane@cms-cmno.com](mailto:melanie.lane@cms-cmno.com)

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