

# What does a second national lockdown mean for employers?

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## Employment Law News

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### What does a second national lockdown mean for employers?

On 31 October 2020, the Prime Minister announced a second national lockdown across England starting on Thursday, 5 November 2020. In this briefing, we outline the consequences of the new “stay at home” guidance for employers and the one-month extension to the furlough scheme.

## 1. How long will the second lockdown last?

The second lockdown will operate in England for 28 days beginning on 5 November 2020 and ending on 2 December 2020. Until 5 November 2020, the [local COVID alert levels](#) – also known as tiers – will remain in force and employers should follow the restrictions that apply to their local area.

After 2 December, 2020, the Government intends to return to the localised approach, however, Michael Gove MP, Minister for the Cabinet Office, has said that the second lockdown may have to be extended if the “R rate” (i.e. the rate at which the virus is reproducing) does not fall below 1.

The lockdown will not apply to [Wales](#), [Scotland](#) and [Northern Ireland](#), where the devolved administrations have implemented their own restrictions.

## 2. What are the basic rules of the second lockdown of interest to employers?

On 31 October 2020, the Government published the [New National Restrictions from 5 November](#) guidance (**Guidance**), which summarises the restrictions that will apply during the second lockdown. The relevant regulations and detailed guidance have yet to be published.

The key rules for employers to note are as follows:

- **Businesses and venues:** certain businesses and venues have been ordered to close for the duration of the lockdown (**see 3 below**).
- **Stay at home:** people will be required to stay at home, except for specific defined purposes, which includes attending work where the workplace is open, and the employee cannot work from home (**see 4 below**). There are special rules for vulnerable employees (**see 5 below**).
- **Social distancing:** people will be required to minimise time spent outside the home and maintain social

distancing with anyone not belonging to their household or support bubble. Workplaces that are open should already have implemented social distancing measures in line with the [COVID-19 Secure Guidelines](#).

- **Travel:** people should avoid travelling in or out of their local area and should look to reduce the number of journeys they make. However, people may travel for a number of reasons including travelling to and from work where this cannot be done from home. Overnight stays away from home will also not be allowed (both within the UK and overseas), except for specific defined purposes, which includes for work purposes.
- **Financial support:** the Coronavirus Job Retention Scheme (the **furlough scheme**) has been extended until the end of the lockdown period (**see 6 below**).

### 3. Which businesses must close during the lockdown?

The following types of business **must** close during the lockdown:

- **All non-essential retail businesses** (e.g. clothing and electronic stores) although they may remain open for delivery and click and collect.
- **All hospitality venues** (e.g. restaurants, bars and pubs) although they may remain open for delivery and takeaway services.
- **Hotels and other accommodation** although they may remain open for those travelling for work purposes and certain other limited cases.
- **Indoor and outdoor leisure facilities** (e.g. gyms and swimming pools).
- **Entertainment venues** (e.g. theatres, museums and cinemas).
- **Personal care facilities** (e.g. hairdressers and beauty salons).

Food shops, supermarkets, garden centres and other essential

retailers may remain open. A number of public services will also remain open including the NHS, medical services and the Courts.

A full list of businesses required to close will be set out in the regulations.

#### **4. If the business is open, can employees be required to attend the workplace?**

The primary position in the Guidance is that people must not leave their home, except for specific defined purposes, which includes attending work where the workplace is open, and the employee cannot work from home. In some cases, it will be obvious that an employee cannot work from home and must attend the workplace (e.g. a retail employee).

The position is less clear for office employees. Elsewhere in the Guidance, it states that “everyone who can work effectively from home must do so”. This is the same wording used in the last iteration of the COVID-19 Secure Guidelines for office-based employers (published before the announcement of the second lockdown). At the time, this was understood to give employers (and employees) greater latitude about where employees may work – we discuss this further in our briefing [here](#).

However, given that the primary feature of the lockdown is that people must not leave their home (and it will probably be a criminal offence to do so without reasonable excuse), it’s fair to say that the needle has shifted decisively towards working from home. The ability to work from the office remains, but the circumstances in which this may be done have narrowed. Office-based employers should give consideration to what reasons might justify attendance in the workplace where the employee is otherwise able to work from home.

#### **5. Are there any special rules for vulnerable employees?**

The Guidance says that anyone who is pregnant, “clinically vulnerable” or aged over 60 must be especially careful to follow the rules and minimise contact with others (“clinically vulnerable” includes those with asthma, diabetes and a body mass index of 40 or more). All such employees may still attend work, but employers will have to give special consideration to whether such employees are able to work safely.

Different rules apply to “[clinically extremely vulnerable](#)” employees. In the first national lockdown, such employees were required to shield and were not able to attend work. If they were unable to work from home, the employer was able to furlough them. However, from 1 August 2020, such employees were able to return to work where they could not work from home, provided that they were offered the safest available on-site role which enabled them to maintain social distancing.

The new Guidance reverses this position. Clinically extremely vulnerable employees are “advised” to work from home for the duration of the lockdown and not to go to work. The Guidance says that such employees may be eligible for Statutory Sick Pay or Employment Support Allowance. No mention is made of whether such employees can be furloughed under the extended furlough scheme (**see 6 below**), but it would be surprising if this were not permitted. Full guidance for clinically extremely vulnerable people is due to be published shortly.

## **6. What wage support is available for businesses?**

The furlough scheme was due to close on 31 October 2020 and be replaced by the less generous Job Support Scheme (**JSS**) on 1 November 2020. The JSS had recently been expanded to provide different levels of support for businesses which were open (but were experiencing reduced demand) and businesses which had been required to close by virtue of local COVID restrictions. However, the second lockdown means that the furlough scheme will be extended until the end of the lockdown

period. The JSS has been put on ice and will only come into force after the closure of the extended furlough scheme.

Further guidance on the terms of the extended furlough scheme is awaited. However, we know the following details:

- **Continuous wage support:** there will be no gap in eligibility between the previously announced end date (i.e. 31 October 2020) and the date upon which the first round of claims can be made under the extended furlough scheme.
- **Open to new entrants:** the extended furlough scheme will be open to new entrants. This means employers who have not made a claim under the furlough scheme before can apply for a grant and also employers can apply for grants for employees who have not been furloughed before. To be eligible under the extended furlough scheme, employees must have been on the employer's payroll on 30 October 2020 and a Real Time Information submission notifying payment for that employee to HMRC must have been made on or before 30 October 2020.
- **Full or flexible furlough available:** the flexible furlough rules will continue to apply, meaning employees can work part time (on any arrangement) and be placed on furlough for the remainder of their normal working time. Alternatively, employees can be fully furloughed. This means the scheme will support employers that are open but experiencing reduced demand and those that have had to close (whether because of the lockdown rules or out of choice).
- **Pay for hours worked:** employers will be responsible for paying the employee's salary in full (plus the associated employer's National Insurance Contributions (NICs) and employer's pension contributions) for any hours that the employee works.
- **Pay for hours not worked:** employees will be entitled to up to 80% of their pay for hours not worked, capped at

£2,500 per month. Employers will not have to contribute anything towards the employee's pay for the unworked hours but will have to pay employer's NICs and employer's pension contributions. This is more generous than the position under the furlough scheme in September or October and is comparable to the position in August (discussed further in our [previous guide to the scheme](#)).

- **Calculations:** calculations for the grant are expected to follow broadly the same methodology used under the original furlough scheme and employers will need to report and claim for a minimum period of seven consecutive calendar days.

We will update our detailed guide to the furlough scheme once the guidance on the extended scheme is published.

**BDBF is currently advising many employers and employees on the challenges presented by the coronavirus. If you or your business needs advice on the implications of the second lockdown, the extended furlough scheme or any other coronavirus-related matter please contact Amanda Steadman ([amandasteadman@bdbf.co.uk](mailto:amandasteadman@bdbf.co.uk)) or your usual BDBF contact.**

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