NEXSTART

COMMENTARY V.1

PUBLIC HEALTH, ENGLAND

The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 [No. 684]

Made at 10.00 a.m. on 3rd July 2020

Laid before Parliament at 3.00 p.m. on 3rd July 2020

The latest version of the Coronavirus Regulations have created confusion.

Key points to note are

- **There is no restriction on numbers of people who can gather indoors**
- **"Gatherings" of up to 30 people outdoors does not equate to the overall capacity of premises outdoors**
- **It is not mandatory to follow Government Guidance in compiling risk assessments.**

These new Regulations repeal and replace the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (1st Regulations No. 350 as amended] which are repealed from 00:01 hours on 4 July 2020 in respect of restricting businesses, restrictions on movement, and restrictions on gatherings.

For the purposes of restaurants, bars, public houses the restrictions are repealed from 06:00 hours on 4 July 2020. For theatres and cinemas, the restrictions are repealed from 00:01 hours.

The businesses that remain listed in Schedule 2 must continue to desist from carrying on that business or providing that service. Those that are not listed may reopen.

SCHEDULE 2 Regulation 4

Businesses subject to closure

1. Nightclubs.

2.—(1) Dance halls, discotheques, and any other venue which—

(a) opens at night,

(b) 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);

(c) provides music, whether live or recorded, for dancing.

(2) A business does not fall within paragraph (1) if it ceases to provide music and dancing.

3.—(1) Sexual entertainment venues and hostess bars.

(2) For the purposes of this paragraph—

(a) "sexual entertainment venue" has the meaning given in paragraph 2A of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982(a);

(b) "hostess bar" has the meaning given in paragraph 3B of that Schedule(b).

4. Casinos.

5. Nail bars and salons.

6. Tanning booths and salons.

7.—(1) Spas, and beauty salons, and for these purposes, "beauty salon" includes any premises providing beauty services including cosmetic, aesthetic and wellness treatments.

(2) Sub-paragraph (1) does not require the closure of a hairdresser or barber which does not provide other beauty services within sub-paragraph (1).

8. Massage parlours.

9. Tattoo parlours.

10. Body and skin piercing services.

11. Indoor skating rinks.

12. Indoor and outdoor swimming pools, including water parks.

12. Indoor and outdoor swimming pools, including water parks.

13. Indoor play areas, including soft play areas.

14. Indoor fitness and dance studios.

15. Indoor gyms and sports courts and facilities.

16. Bowling alleys.

17.—(1) Conference centres and exhibition halls, so far as they are used to host conferences, exhibitions or trade shows 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.

(2) For the purposes of this paragraph, a "trade show" is an event held to bring together members of a particular industry to display, demonstrate and discuss their latest products and services with members of the public".

Particular types of premises.

No descriptions of premises (eg: nightclubs or dance halls) are defined in the interpretation section.

Dance halls and nightclubs.

The Regulations specify that dance halls, discos and similar may re-open if they do not provide music or dancing. We are of the view that the courts would interpret "music and dancing" as "music and facilities for dancing", such as a dance floor. There appears to be no practical difference between a "dance hall" or "disco" and a "nightclub" for all practical purposes. There is nothing within the Regulations that would prevent a nightclub from providing licensable activities within the authorisation of its premises licence, as long as it did not operate as a nightclub, ie: does not provide facilities for music or dancing. [See NEXSTART Note on Nightclubs operating as public houses.]

The Regulations specify that a business that is in Schedule 2 and which must not trade can nevertheless operate a shop café or restaurant, if the shop café or restaurant is separate from the premises used for the closed business. The shop, café or restaurant is separate from premises used for the closed business where the shop, café or restaurant is a self-contained unit, and it is possible for a member of the public to enter the shop café or restaurant from a place outside the closed premises.

SEVs

If a venue has a SEV licence but refrains from offering relevant entertainment before a live audience for financial gain, it is not a "sexual entertainment venue" under the Regulations and can trade as a bar.

In some local authority areas public houses have restricted SEV licences for match days. These venues, so long as they do not provide relevant entertainment under those SEV licences, are not sexual entertainment venues for the purposes of the Regulations.

Indoor Sports

Simply because a public house has a pool or snooker table, it is not an indoor sports facility. It is a matter of fact and degree as to when licensed premises might be more an indoor sports facility rather than a public house. Whether or not a public house permits use of a pool table by customers is a matter for risk assessment.

Regulation 5 – Gatherings

The changes in these Regulations to the rules concerning gatherings are extensive. There appears to be a difference between the terms of the Regulations and the spirit and intentions of the COVID-19 Secure Guidance which the Government has published. Nevertheless, the Regulations as laid before Parliament are law. It will be for every business to undertake their own risk assessments, particularly for the purposes of the Health and Safety at Work Act 1974 and to do what is appropriate to keep people safe.

The Regulations refer to "private dwellings" (which include vessels, such as a house boat) and "public outdoor spaces". They do not refer to "indoors" at all, with the single exception of a reference to indoor raves.

The Regulations state that nobody can participate in a "gathering" which consists of more than thirty persons and which takes place in a private dwelling; or in a public outdoor space.

There are exceptions to this rule.

A group of more than 30 people can participate in a gathering in a public outdoor space if:

(i) that public outdoor space is either operated by a business, an institution or a public body as a "visitor attraction", (not defined), or

(ii) the public outdoor space is "part of premises" used for the operation of a business, institution or a public body.

A group of more than 30 people can also gather in public outdoor spaces (or vessels) if:

(i) the gathering has been organised by a business, an institution, a public body, or a political body,

(ii) the person responsible for organising the gathering ("the gathering organiser") has carried out a risk assessment which would satisfy the requirements of regulation 3 of the Management of Health and Safety at Work Regulations 1999(a), and

(iii) the "gathering organiser" has taken all reasonable measures to limit the risk of transmission of the coronavirus.

For the purposes of this paragraph only (ie: the "gathering organiser" has taken all reasonable measures to limit the risk of transmission of the coronavirus), in determining whether "all reasonable measures" have been taken to limit the risk of transmission of the coronavirus for the purposes of paragraph (3)(a)(iii), any guidance issued by the Government relevant to the gathering in question must be taken into account.

By interpretation, therefore, it is not mandatory ("must") to take into account Government Guidance before determining whether a business in another context has taken "all reasonable measures" to limit risk. You could conclude that they had taken all reasonable measures, even where the Guidance has not been taken into account. This is another way of saying that the Government Guidance is not mandatory; it is not the law that it must be followed.

The express mention in the Regulations of Government Guidance when taking into account whether a "gathering organiser" has taken all reasonable measures to limit the risk of transmission, *but not in any other part of the Regulations*, underlines the general approach that businesses which can now open (such as restaurants and public houses) have no obligations *imposed by these Regulations* as to how they operate. Rather they must comply with their existing statutory health and safety obligations by undertaking and operating to risk assessments, including (now) a specific COVID-19 risk assessment. In undertaking the risk assessment it is in their self-interest to have regard to Government Guidance (not least because it will demonstrate compliance with the

statutory obligations). It should be noted however that it is the intention of the Government Guidance to give operators “freedom within a practical framework to think about what you need to do continue, or restart, operations during the COVID-19 pandemic”. It is not a list of rules.

This also underlines the point that any regulator or enforcer who states that it is mandatory to follow the letter of the Government Guidance is not correct to do so.

A group of more than 30 people can also gather in public outdoor spaces (or vessels) if:

(c) the gathering is reasonably necessary—

(i) for work purposes, or for the provision of voluntary or charitable services,

(ii) for the purposes of education or training.

And/or

(d) the person concerned is fulfilling a legal obligation.

The only restriction that the Regulations impose upon gatherings of people indoors is specifically in relation to raves. No-one can participate in a gathering of more than 30 people which takes place indoors but would meet the description of a rave if it were outdoors, (“rave” as set out in s63(1) of the Criminal Justice and Public Order Act 1994).

Other than this single example, there is no other restriction on numbers of people who can gather indoors.

The Regulations define “Gathering” like this:

“(6) For the purposes of this regulation—

(a) there is a gathering when two or more people are present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other.

This is not particularly clear. It is not clear, for example, whether people are able to start a social interaction or other activity with each other during the course of their visit which was not their intention when they set out for the visit.

No-one is required by these Regulations to be in a “gathering” of any description or number whilst indoors.

“Gatherings” of up to 30 people outdoors does not equate to the overall capacity of premises outdoors. Premises with sufficient space could, in accordance with their own risk assessments, accommodate more than one gathering of up to 30 people, as long as each gathering was appropriate distanced from each other and all other risk assessed mitigation could be applied.

Offences

Regulation 5 states that:

“No person may participate in a gathering”…

Regulation 8, which sets out offences and penalties states:

“8.—(1) A person who without reasonable excuse contravenes a requirement in regulation 4, 5, 6(10), (11) or 7 commits an offence”.

This makes it plain that, where groups of people gather in contravention of the restriction on numbers, it is the individuals in the gathering who commit the offence, and not those upon whose premises it occurs.

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3 July 2020