

The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (the Regulations) are likely to delay landlords recovering debts and their properties from struggling tenants.

From 4 May 2021, individuals can apply for a moratorium (or “breathing space”) to shield debts from creditors’ enforcement action. The Regulations are the latest in a series of measures to protect tenants who have suffered during the COVID-19 pandemic. Where other measures helping corporate tenants are temporary (for instance, the ban on forfeiture for non-payment of rent recently extended until 30 June 2021), the Regulations are here to stay.

Any landlord letting a premises to an individual may face a moratorium. Both residential and commercial landlords with individual tenants should consider how the Regulations might affect them.

This article considers the main features of the Regulations through the lens of the landlord and tenant relationship, in which the creditor is typically the landlord.

Two New Protections for Tenants With Debt

The Regulations allow tenants to apply to their local authority or to an FCA-authorized debt advice provider (DAP) for either:

- A **standard breathing space moratorium**, open to anyone with debt and lasting up to 60 days
- A **mental health crisis moratorium**, open to anyone receiving mental health crisis treatment and lasting for the duration of that treatment plus 30 days

These breathing spaces are open to individuals living in England and Wales with a wide range of “qualifying debts”. These include amounts due under a court judgment, utility bill arrears and rent arrears. Debts that relate solely to the business of VAT-registered tenants do not qualify for protection. This means that not all sole traders will be eligible for a moratorium.

The breathing spaces are not a debt holiday; tenants must still pay debts as they fall due during the moratorium period.

Main Impact of the Regulations

No Enforcement Action

For the duration of the moratorium, landlords cannot take any enforcement action to recover the protected debt (unless the court has given permission). This includes any step to recover that debt (either by itself or via an agent, including taking control of goods under the Tribunals, Courts and Enforcement Act 2007), to enforce a judgment or court order, to start new court proceedings (including bankruptcy) and to apply for default judgment.

The tenant may owe a number of debts to the landlord that are not eligible for moratorium protection. Landlords are free to pursue enforcement action in respect of those debts.

Importantly, a landlord is unable to serve notice under section 8, 10 or 11 of Schedule 2 of the Housing Act 1988 to take residential possession during breathing spaces. If such notice has been served, a landlord cannot issue proceedings to recover such residential property until the moratorium has expired. There are equivalent provisions of rented property in Wales.

No Progression of Existing Proceedings

Landlords cannot progress existing proceedings to recover the debt during a breathing space. If there is an active bankruptcy petition related to the landlord’s debt, this will be stayed.

The court will not allow any other enforcement action to progress during breathing spaces. This means that any hearings, orders, writs, summons and warrants may be delayed until the end of the moratorium.

No Charges, Fees or Interest on the Protected Debt

The charges, fees and interest that would ordinarily be payable on the protected debt are frozen for the duration of the moratorium and cannot be recovered by the landlord when it ends.

What the Regulations Mean for Landlords

Residential landlords are more likely to rent to individual tenants and encounter these moratoria, but all landlords should be aware of the commercial implications of the Regulations.

When a debt enters a breathing space, the landlord will be notified by the Insolvency Service, which keeps details of all moratoria on an electronic register.

Dealing With Notifications From the Insolvency Service

The landlord should check that the debt described in the Insolvency Service’s notification matches its own record of what is owed. The landlord may also need to get in touch with other parties:

- If there are any creditors by assignment, the landlord must tell them that the debt is now protected by a moratorium. If a landlord fails to do so, it will be liable for any losses caused to the debtor by failure of such reporting.
- If records show that the tenant owes other debts or that there is a creditor by assignment, the landlord must notify the tenant’s DAP of this.

- If court proceedings in relation to a protected debt or a tenant's residential property are underway, it is the landlord's obligation (and at its own cost) to inform the court that the debt has entered a breathing space.

Landlords with many struggling tenants may experience an influx of Insolvency Service notifications in the first few months of the Regulations. In the run-up to May, landlords should consider how these will be processed and by whom in order to stay compliant.

Considerations During the Moratorium

Contact with the tenant – The Regulations aim to relieve pressure on people with problem debt. For the duration of the breathing space (unless the debtor prompts such discussion), neither the landlord nor its agent may contact the tenant about recovering that debt. This includes any inadvertent communication. Any IT systems that automatically request payment of debts or add on interest should be suspended during the moratorium as this may be considered a prohibited step.

A landlord may still contact a tenant to discuss other matters, including debts not protected by the moratorium. A landlord is also able to contact the tenant's DAP to discuss the debt and any solution to such debt.

Challenging the moratorium – If the landlord wants to contest a breathing space, it has 20 days from the moratorium starting to provide evidence in writing to the DAP that:

- The landlord is suffering from unfair prejudice
- That there is some material irregularity (for example, the tenant was not actually eligible for a moratorium or the debt is not a qualifying debt)

The DAP then has a period of 35 days (calculated from the beginning of the relevant moratoria) to make its decision. If the DAP decides not to cancel the breathing space, the landlord can apply to the County Court within 50 days of the moratorium starting for a review of the DAP's decision.

If the breathing space is deemed legitimately in place, a landlord can submit evidence to the DAP for its "midway review" (between 25 to 35 days of the moratorium), which may present an opportunity for the moratorium to be cancelled early.

End or Cancellation of the Moratorium

Provided that the tenant has not entered a formal arrangement with its creditors, at the end of the breathing space, the landlord can once again:

- Contact the debtor to resume enforcement action
- Apply interest, fees, penalties and charges to the debt
- Begin new or continue existing legal proceedings

Consequences of Not Complying With the Scheme

- Any action by a landlord that breaches the Regulations will be null and void (e.g. trying to take a form of enforcement action during the moratorium period).
- The landlord risks becoming liable for the losses of other parties (e.g. not searching its records and notifying the DAP of any creditors by assignment).
- Repeated breaches may see the landlord referred to its regulator (where appropriate).

If you are a landlord wishing to discuss how you might be impacted by the Regulations, please feel free to contact our team.

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