



Complying with the new duty to prevent sexual harassment at work

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Speakers



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What are we going to cover today?

Why this matters

What is the current position?

What is changing?

What are the consequences of breaching the duty?

How can employers discharge the new duty?

Our top tips for getting started

Why this matters

Risks for the business

- Grievances and disciplinaries to deal with
- Legal claims
- Reputational damage
- Regulatory / EHRC / criminal processes

Risks for the victim

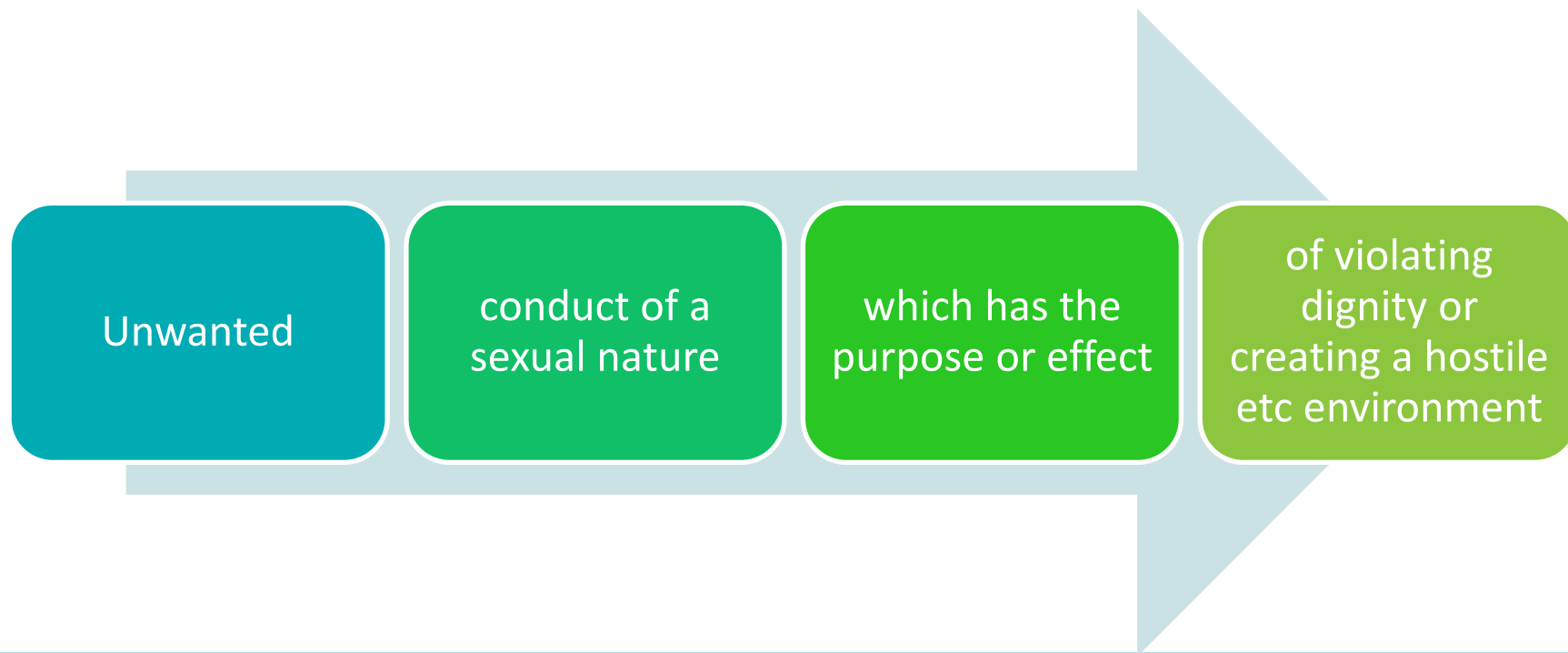
- Trauma and mental health impact
- Victimisation
- Reputational impact
- Legal costs

Risks for the alleged perpetrator

- Disciplinary sanction
- Legal claims
- Regulatory sanction
- Criminal process
- Reputational/personal consequences

A RECAP OF THE CURRENT POSITION

What is sexual harassment?



Employer's vicarious liability and the “all reasonable steps” defence

Vicarious liability
for harassment by
employees in the
course of
employment

The diagram consists of three overlapping circles. The leftmost circle is light blue and contains text about vicarious liability for harassment by employees. The middle circle is light green and contains text about the 'all reasonable steps' defence. The rightmost circle is light grey and contains text about no vicarious liability for harassment committed by third parties. The circles overlap in a way that suggests the defence applies to the first two categories, while the third category is outside the scope of the defence.


Defence available
if **all reasonable
steps** taken to
prevent it from
happening

No vicarious
liability for
harassment
committed by
third parties

WHAT IS CHANGING ON 26 OCTOBER 2024?

What is the new duty to prevent?

An ongoing duty to take some (but not all) reasonable steps to prevent sexual harassment in the course of employment



Employers must:

1. **Anticipate** situations where workers might be exposed to sexual harassment and take steps in advance to prevent it

2. **Respond** to situations where sexual harassment occurs by taking steps to prevent it from happening again

Does the new duty extend to sexual harassment by third parties?

- **Yes - even though the employer cannot be held vicariously liable**
- What is a “third party”? Anyone outside the organisation e.g.

Contractors

Clients

Customers

Service users

*Family and
friends of
colleagues*

*Professional
contacts*

*Delegates at a
conference*

*Others in a
shared
working space*

*Members of
the public*

But there will be challenges in practice – an example

Verity works for an ad agency and is assigned to work on a very important client account

A star employee from the client company sexually harasses Verity on the way home from an evening work event

She reports it to her employer and is removed from the account while it decides what to do

The agency eventually decides not to raise it with the client for fear of upsetting them

Verity is taken off the account for good and a decision is made to allocate only male employees to that client to prevent it from happening again



What are the risks with this approach?

WHAT ARE THE CONSEQUENCES OF BREACHING THE DUTY?

Uplift to Tribunal compensation

If an employee succeeds in a claim of harassment, which includes sexual harassment “*to any extent*” and compensation is to be awarded...

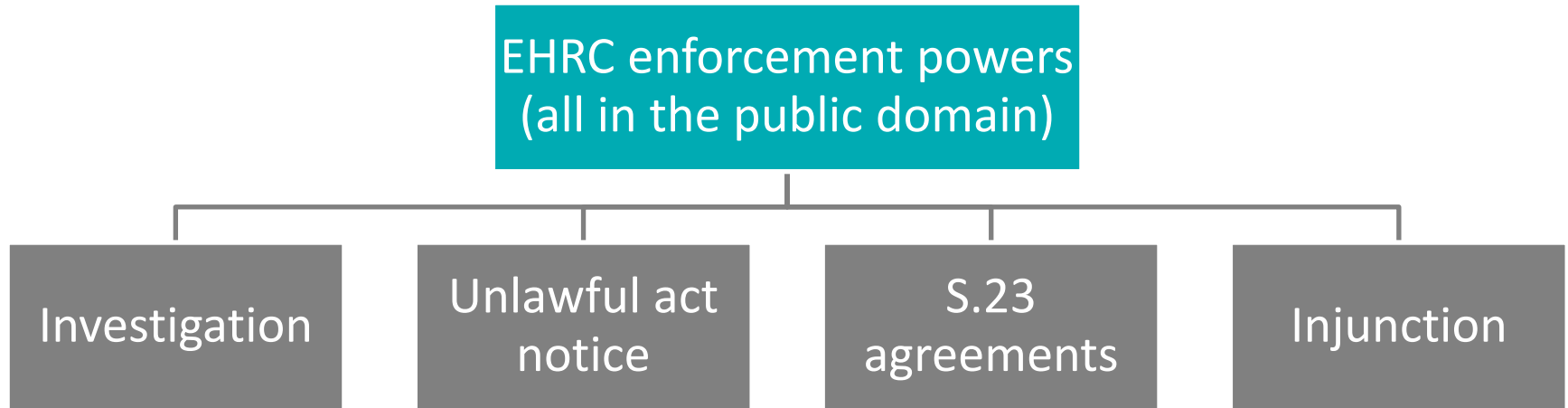


...the Tribunal **MUST** consider whether, and to what extent, the employer has breached the duty...



...and if the duty has been breached, the Tribunal **MAY** uplift compensation by up to 25%


Action by the Equality and Human Rights Commission



HOW CAN EMPLOYERS DISCHARGE THE NEW DUTY?

How to approach the new duty


1. Assess the risks of sexual harassment occurring in the course of employment



2. Identify the possible steps that could reduce those risks

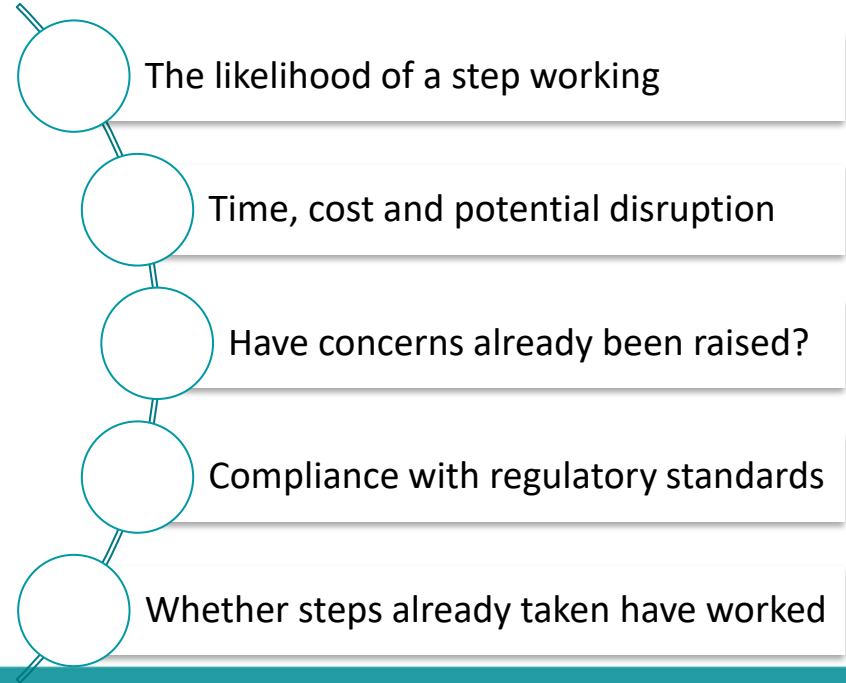
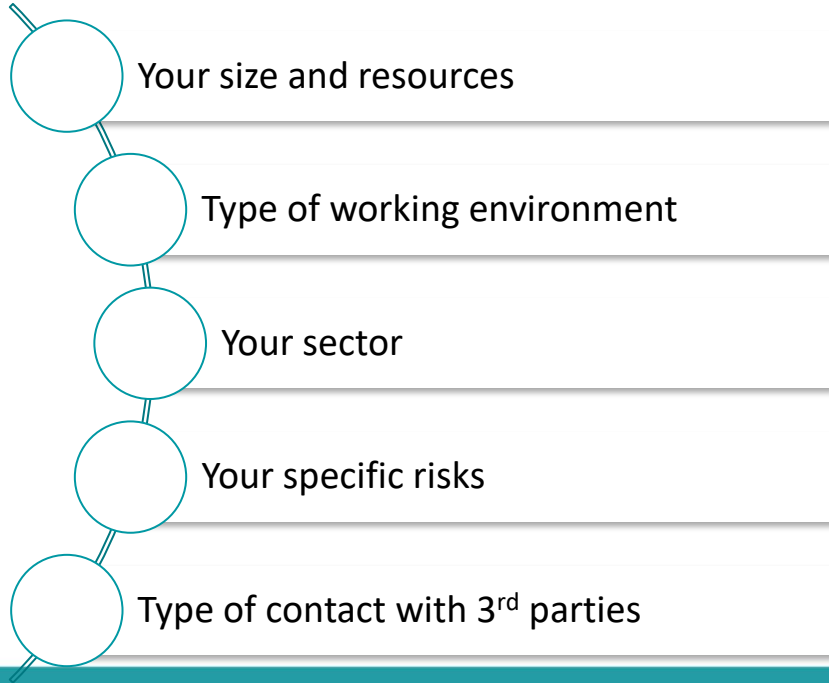


3. Decide which steps would be reasonable for you to take by reference to relevant factors (see next slide)



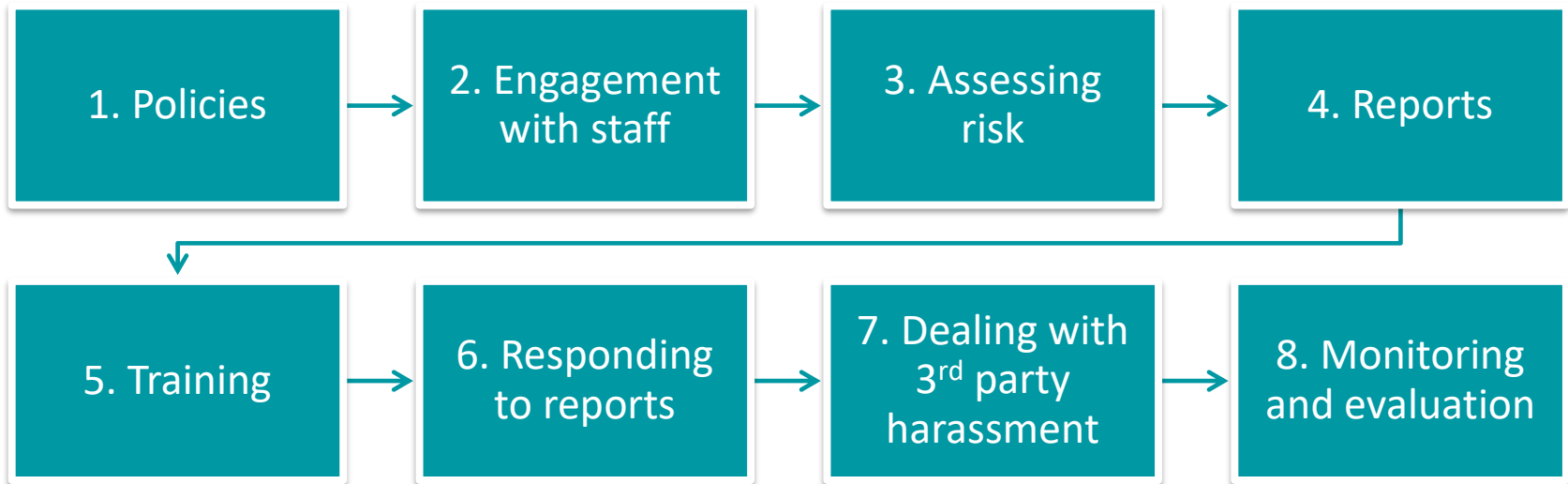
4. Implement the steps that are deemed reasonable

Which factors are relevant to whether a step is “reasonable”?



What kinds of steps will most employers be expected to take?

See: ***EHRC's 8-step guide to preventing sexual harassment at work***



Step 1 – Policies



- Devise a stand-alone policy for sexual harassment (or have it clearly delineated from other types of harassment)
- Cover the law, reporting, investigation process, consequences of breach and 3rd party harassment
- Ensure it coheres with other relevant policies / rules/ codes of conduct
- Conduct an annual health check

Step 2 – Engagement with staff

- Give policies to staff when onboarded and at other intervals and communicate your approach in other ways
- Consult directly with your staff about risks e.g.
 - 1-2-1s / performance reviews / return-to-work meetings
 - Trade unions / employee representative groups
 - Staff surveys
 - Exit interviews



Step 3 – Assessing risk



Assessing the specific risks is an **essential step** in discharging the duty




Consider different sources of information to conduct this assessment



Produce an action plan

- Common risk factors:
 - Power imbalances
 - Lone / night working
 - Alcohol
 - Lack of diversity
 - Insecure roles / groups
 - External events
 - Customer-facing duties

Step 4 – Reporting sexual harassment



Explain to staff how to report incidents in policies and training

Offer different methods of reporting e.g. in person, online, telephone, anonymously

Store information securely and in a way which permits the identification of trends or red flags

Step 5 – Training



- Training for **all** staff on law and procedure
- More in-depth training for managers and HR
- High quality and refreshed on a regular basis

Step 6 – Responding to reports

Confidential investigation

Take steps to prevent further harassment or victimisation

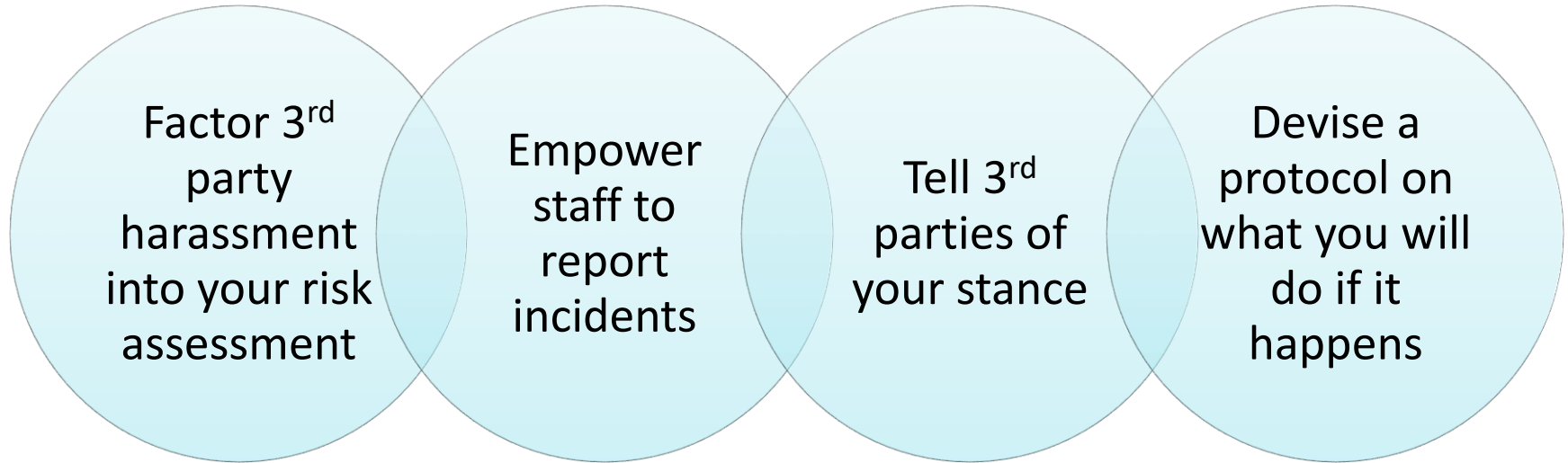
Provide support

If upheld, take disciplinary action against perpetrator

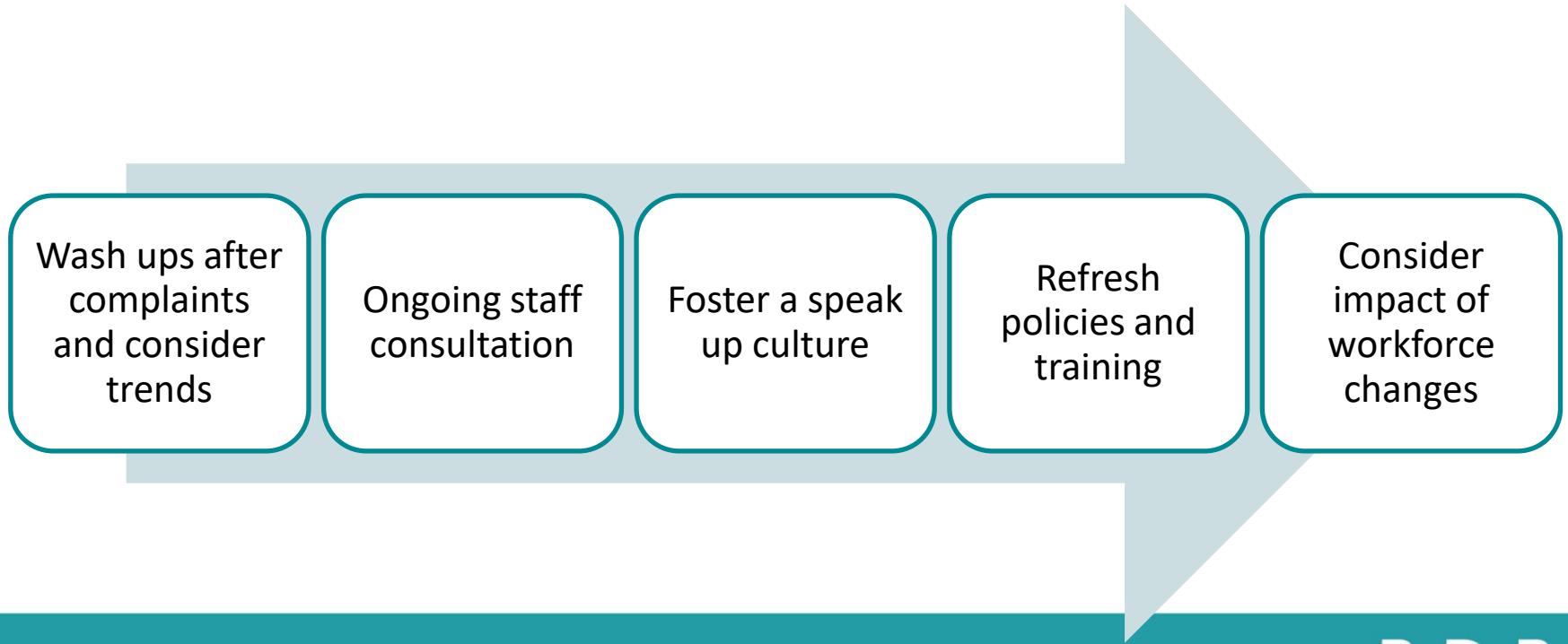
Disclosures to a regulator and/or the police

Reflect on learning points

Step 7 – Dealing with 3rd party harassment



Step 8 – Monitoring and evaluation



Impact on settlements

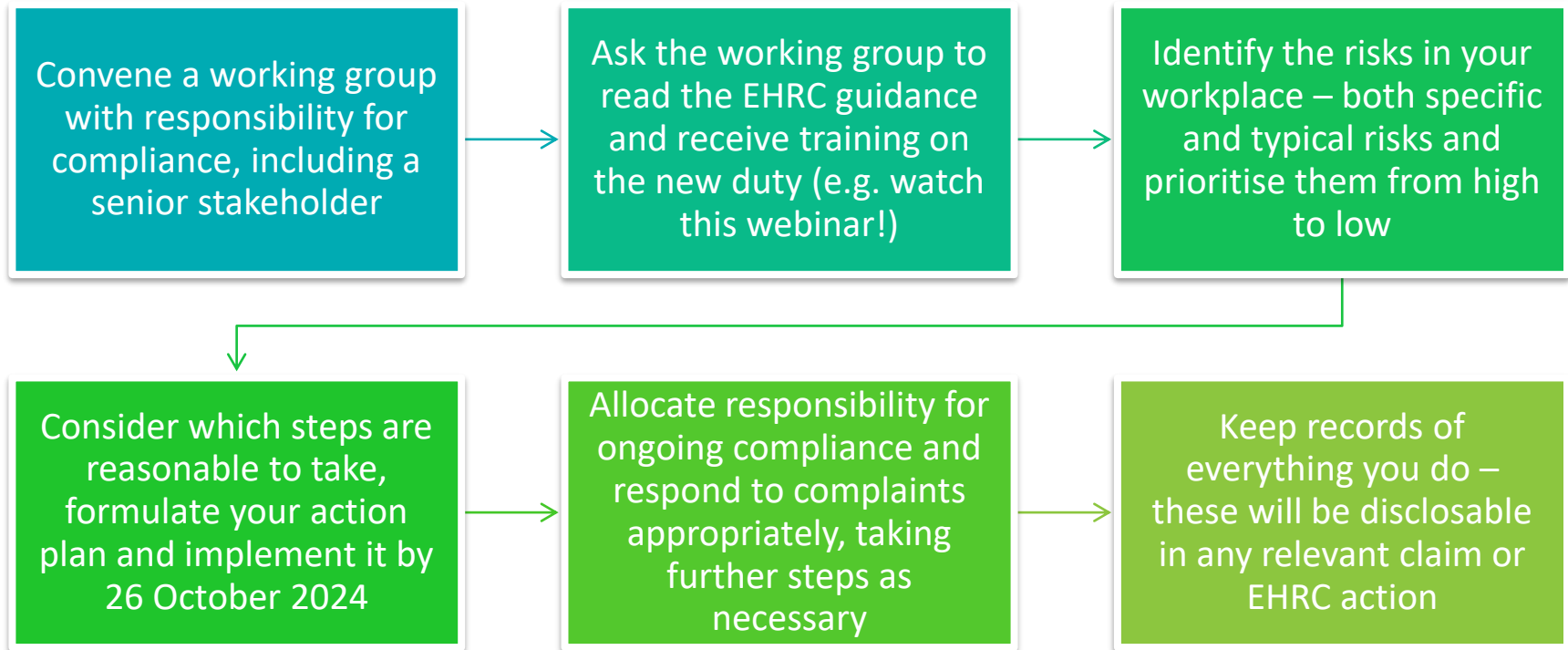
Settlement agreements may not gag employees from blowing the whistle to a regulator

The EHRC is the prescribed body for whistleblowing about breaches or suspected breaches of equality law

Even after a settlement agreement is signed, an individual will remain entitled to blow the whistle about a breach or suspected breach of duty to the EHRC

Any clause intended to prevent or dissuade such reports (e.g. a warranty and clawback provision) could not be signed off by a solicitor acting on either side

OUR TOP TIPS FOR GETTING STARTED



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