

What To Know About Complying With GDPR

By **Allison Grande**

Law360 (May 31, 2018, 9:55 PM EDT) -- While the long-awaited deadline for companies to get into step with the European Union's sweeping General Data Protection Regulation has come and gone, companies should reconsider if they have decided that it's too late to fill in compliance gaps, attorneys say.

Companies that have any contact with EU residents or that process personal data within the bloc have long had May 25 circled on their calendars. The date marked the end of the two-year window that EU officials had given businesses, regulators and everyone else to figure out how to comply with the GDPR, which was drafted to replace a patchwork of member state requirements with a uniform and more stringent law that tightened restrictions on the use and flow of personal data.

Some companies, including Microsoft and Facebook, have touted the steps they have taken to comply with their new data protection obligations and appeared confident in their standing as of May 25, while others are still either working on putting the necessary policies and procedures in place or have just recently woken up to their compliance obligations, attorneys say. But no matter what a business' posture may be, one thing is certain across the board: No one's work is done.

"May 25 was never meant to be a destination," said Dominique Shelton, a Perkins Coie LLP partner and co-chair of the firm's ad tech privacy and data management group. "What European regulators had in mind was that GDPR compliance was going to be an ongoing part of business for companies that are involved with EU residents' personal data and that it should be a living and breathing document."

Because of this reality, companies that are in the beginning stages of compliance or still need to finalize some pieces still have time to catch up, and those that feel like they've crossed the finish line shouldn't take a victory lap quite yet, experts say.

"My advice would be, don't pat yourself on the back too much, because things do change, and factors such as enforcement actions and introducing new technologies may change your status in terms of compliance," said Debbie Reynolds, director of e-discovery at Eimer Stahl LLP and adjunct professor at the Georgetown University School of Continuing Studies. "For people who were waiting on May 25, it's time to keep going, because it's not a sprint. It's a marathon that you have to continue to run over and over."

It's Not Too Late to Comply

While attorneys admit that not much has changed practically since last Friday, one of the biggest behavioral shifts they've noticed is a spike in awareness about the new law's existence and obligations.

"The fact that most businesses couldn't avoid seeing some GDPR news on Friday really helped to enforce that there are risks to not complying," said Alope S. Chakravarty, a Snell & Wilmer LLP partner and co-chair of the firm's white collar defense and investigations practice group.

Several attorneys said that they have received inquiries in the past week from businesses that hadn't thought seriously — or even thought at all — about GDPR compliance to date, an increase that can most likely be attributed to the widespread media coverage of the law's implementation, the influx of emails alerting users to GDPR-inspired privacy policy changes, and an enforcement action launched by Austrian privacy activist Max Schrems through his new nonprofit None Of Your Business hours after the regulation took effect. Schrems accuses Google, Facebook, Instagram and WhatsApp of not getting the regulation's consent obligations right.

"All of the recent activity around GDPR woke people up a little bit and created some desire for them to at least think about the law and what their risk profile is," said O'Melveny & Myers LLP special counsel Scott W. Pink.

For companies that are just discovering or warming up to GDPR, attorneys had a consistent message: They haven't missed their chance to fall into line with the regulation, but they need to start now.

"Regulators have said they're not going to delay enforcement because GDPR has been out for two years, but their first targets are likely to be companies that are deliberately flouting or intentionally ignoring that law, so that weighs in favor of taking steps even after the effective date to close any compliance gaps," Shelton said.

There are several basic compliance steps that companies "can and should do right away," including issuing appropriate privacy notices, revising internal policies and procedures related to data subjects, evaluating IT systems and data repositories for data protection purposes, and confirming that vendors and other third parties with EU data access are also following the law, according to Tess Blair, a Morgan Lewis & Bockius LLP partner and founder of the firm's e-data practice.

Given the regulatory and legal risks of not complying and the potential fines of up to €20 million or 4 percent of their annual worldwide revenue, whichever is higher, "it makes sense for companies to continue to work on GDPR compliance," Chakravarty said.

Compliance is Ongoing

Even if a company has reached all of its pre-implementation goals, there's always room for improvement and the need to reevaluate its compliance posture, experts say.

"This isn't like a Y2K phenomenon," said Omer Tene, vice president of research and education at the International Association of Privacy Professionals. "It's a process, so companies should still work towards complying."

The introduction of new products or services, the collection of additional consumer data, and complying

with new requests that EU individuals are allowed to make under the law will require companies to constantly think about the regulation for years to come, according to experts.

"The exercises that the companies that have chosen to comply with GDPR by May 25 [have done] are ongoing exercises," said Mark McCreary, chief privacy officer for Fox Rothschild LLP. "I easily could see a company expanding its use of data and not appreciating the additional consent requirements, for example, or making changes to its website that would require different disclosures to website visitors."

"In other words, I am not sure how many companies that are required to comply with GDPR will appreciate the ongoing compliance obligations, especially those companies based in the United States that were shocked to learn they have GDPR compliance obligations at all," he added.

Another "simple, yet often overlooked task" that companies will need to keep in mind is to revisit, update and enforce company record retention policies and schedules to ensure that information that is covered by the regulation is retained only for the requisite period of time, Blair noted.

"Compliance should be regarded as an ongoing data protection vigilance program that is likely to evolve over time," Blair said.

Businesses covered by the regulation will also likely be kept busy by their obligations to respond to requests from data subjects in the EU to access, erase and transfer or to dispute or limit the processing of their data under the new regulation, which will require companies to know and keep track of where the data they've collected lives at all times, McCreary said.

While many companies have developed broad policies for reacting to these requests, dealing with them in real time is likely to produce unexpected hiccups.

"It helps to make sure there's a consistent approach and policy that's thoughtful, but these policies can't anticipate what the request will be or how it will be articulated or what data the individual is asking for," Pink said.

Managing these requests will be especially tricky for companies that are subject to discovery in litigation, where they may have an obligation to preserve data that an EU individual seeks to have erased, according to Blair.

"Time will tell how U.S. courts react to data loss blamed on GDPR compliance," Blair added.

Regulators' Actions Could Prompt Changes

No matter their compliance state, all companies will need to pay careful attention to the actions national data protection authorities decide to take and the complaints EU residents lodge with these regulators for insight into how the law will be interpreted and what pitfalls should be avoided.

"A lot of companies are still trying to figure out how this law is really going to be applied," Pink said. "It's a very long and broad regulation, and there are many questions that still need to be answered about how it works in particular scenarios, and what compliance really looks like is yet to be determined."

National data protection regulators — who will operate both on their own and as part of the newly formed European Data Protection Board, which will replace the Article 29 Working Party — are expected

to take advantage of their greatly enhanced enforcement and fining powers under the regulation fairly quickly, and which actions they decide to bring is likely to play a major role in shaping how companies approach compliance.

"Companies have to be monitoring any guidance issued by the regulators or any statements or enforcement actions, as those all will help shed some light on how regulators are viewing the law's protections and how they'll be implemented, and help guide companies to make sure they're complying in the right way," said Pink.

Watching what privacy advocates and consumers are concerned about will also be key, given that regulators have the power to act on their complaints in a way that could change the way a certain protection is implemented, attorneys say. Companies already have the first batch of complaints to track, with both Schrems' nonprofit and French digital rights group La Quadrature du Net filing complaints within the past week accusing tech heavyweights including Google, Facebook and Amazon of violating the GDPR by "forcing" consumers to consent to privacy policies that lay out their data collection and use practices.

"The idea that things would slow down significantly after GDPR took effect is just the opposite," Shelton said. "As with any regulation, implementation is usually the beginning of the process, not the end of it."

--Editing by Pamela Wilkinson and Breda Lund.