Should Calling in Sick—When You're Not—Be a Felony?

By Kamal Ghali

The wire fraud statute, codified at Title 18, United States Code, Section 1343, makes it a crime to devise a "scheme or artifice" to defraud or to "obtain money or property" through materially false representations or promises.

According to at least one poll, over 40% of American workers have called in sick when they weren't. Assuming those numbers are accurate, has nearly half the American work force committed a felony?

On May 21, the U.S. Department of Justice filed criminal charges against a Georgia man who lied to his employer about testing positive for COVID-19. According to the press release, the man "falsely claimed to have contracted COVID-19 and submitted a falsified medical record to his employer." The man's employer, an unidentified Fortune 500 company, reacted by "clos[ing] its facility for cleaning and paid its employees during the shutdown. This caused a loss in excess of $100,000 to the corporation and the unnecessary quarantine of several of the defendant's coworkers." DOJ and the FBI secured a warrant for the man's arrest and filed a criminal complaint charging him with felony wire fraud, a federal offense that subjects defendants to 20 years in prison.

As dishonest, selfish and offensive as the alleged conduct is, is it a federal crime? Is it a wire fraud? Have the millions of people who have taken a sick day (when they weren't actually sick) committed a serious felony that could subject them to 20 years in prison?

The wire fraud statute, codified at Title 18, United States Code, Section 1343, makes it a crime to devise a "scheme or artifice" to defraud or to "obtain money or property" through materially false representations or promises. In other words, the statute makes it a crime to scheme to cheat someone and to act on that scheme. But because there is no catch-all federal fraud statute and because federal jurisdiction has limits, a defendant is only guilty if she takes steps to accomplish the fraud by transmitting "wires," including electronic communications such as emails, text messages, television broadcasts or other electronic "signals," through interstate commerce. So, under DOJ's theory, because the defendant communicated with his employer through interstate wires, (i.e., text messages and emails that crossed state borders), he committed a wire fraud. Theories like that are likely why the Congressional Research Service's overview of the mail and wire fraud statutes begins by declaring that "[t]he mail and wire fraud statutes are exceptionally broad."

But the wire fraud statute doesn't criminalize all lies told over email or text message. As the U.S. Supreme Court just reaffirmed in its decision throwing out the wire fraud convictions arising out of Bridgegate—the infamous scandal perpetrated by ex-Governor Chris Christie's staff to shut down lanes of traffic from Fort Lee, New Jersey as political payback— the wire fraud statute has limits. That is, the wire fraud statute only applies to schemes to "obtain money or property."

As the U.S. Supreme Court put it, "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." Obtaining property must be "the object of the fraud." It doesn't matter if the property loss is foreseeable, obtaining property must be "the object," i.e., the point of the fraudulent conduct.

So what was the "object" of the Georgia man's fraud when he lied to his employer? Assuming the employer offered paid leave for employees with COVID-19, the "object" of the fraud was almost certainly obtaining paid leave under false pretenses. Although the DOJ press release emphasizes the downstream consequences of the man's conduct (that other employees had to quarantine, that the employer had to shut down the facility for cleaning, that the employer incurred over $100,000 to pay its quarantined employees), those "property" losses weren't the "object" of the fraud. Just as ex-Governor Christie's aides caused the New Jersey Port Authority to foreseeably incur property losses (i.e., the costs of paying Port Authority employees overtime as a direct result of the traffic lane closures), the foreseeable property losses to the Georgia employer weren't the "object" of the fraud. In other words, the purpose behind the Georgia man's fraud scheme was to get paid leave (without having to work for it), not to trigger a business closure. But even if he had intended to shut down the business, those monetary losses don't constitute "money or property" that he obtained as a result of the fraud. They're just a terrible consequence of his outrageous conduct.

So, assuming that the only valid "property" theory that the government can rely on involves "paid leave," we're left with a wire fraud theory that transforms every employee's lies about being sick (so long as it's over email, text message or bounces through interstate commerce) into a felony wire fraud offense.

Of course, that assumes that an employer offers paid sick leave. To that end, let's assume that the Georgia man didn't want paid leave. Assume that he lied to his employer (via email) and said, "I'm COVID-19 positive, and I'd like to take unpaid leave." That's not a wire fraud. But the employer would still have had to shut down its facility, quarantine exposed employees and incur the same $100,000. So whether the defendant committed a federal felony, with all the consequences that comes with it including prison time, ends up turning on the employer's paid leave policies (and not the most outrageous consequences of the man's conduct).

As the COVID-19 pandemic unfolded, DOJ officials announced that they planned to ignore traditional "loss" thresholds (i.e., the amount of financial harm that may warrant federal criminal prosecutions) when it comes to COVID-19 fraud. That policy is designed to permit DOJ to more readily pursue scam artists harming the elderly, public safety threats caused by the sale of COVID-19 miracle "cures," and individuals stealing stimulus funds intended to help struggling businesses, to name just a few examples. But that doesn't mean that the wire fraud statute is always the best vehicle for vindicating those interests. Given the Supreme Court's recent ruling clarifying limits on the scope of the wire fraud statute, broad wire fraud theories—especially theories that would criminalize conduct engaged in by nearly half the American workforce—may well encounter resistance from courts looking to cabin the statute's expansive breadth.

Kamal Ghali leads the white-collar criminal defense practice at Bondurant, Mixson & Elmore and is a former federal prosecutor at the U.S. Attorney's Office in Atlanta. He can be reached at ghali@bmelaw.com.

This article originally appeared on Law.com.