Does Temporary Layoff of Commissioned Employee Trigger Need for ROE?

The *Employment Insurance Regulations* require employers to issue a Record of Employment form after an employee has experienced an interruption in earnings. The common perception is that the requirement is triggered when the employee wracks up 7 days with no earnings or work. But it's not quite as simple as that. This scenario, which is based on an actual court case (*Canada (Attorney General) v. Fox*, 1997 CanLII 5592 (FCA)), illustrates some of the complexities involved.

Situation

Inga Jett is an electronics salesman at Buy Best in Ontario. She works purely on commissions except when her commissions for a pay period aren't enough to meet minimum wage requirements. On those rare occasions, the store pays her the difference. Inga's sales skills are top-notch but people just aren't buying electronics in this market. So, Buy Best lays off Inga, effective Sat., June 27, 2026. The layoff is supposed to be temporary and Inga is told that she'll be recalled in the fall. Inga is scheduled to work on June 27 but calls in sick and doesn't work that day. So, her actual last day of work is Friday, June 26. Inga's regular earnings in her final week are reduced 25% as a result of absences related to illness. Wednesday July 1, 2026, is a statutory holiday (Canada Day) and Inga is entitled to be paid for the day.

Question

Does Buy Best have to issue an ROE for Inga for June 26?

A. No, because the stat holiday pay Inga received for Canada Day prevents her from experiencing an interruption of earnings on June 26.
B. No, because employees paid primarily by commission need an ROE only upon termination.
C. Yes, because once 7 days pass after June 26, Inga will experience an interruption of earnings.
D. Yes, because Inga experienced an interruption of earnings since her earnings were reduced in her final week.

ANSWER

B. Inga isn't entitled to an ROE because employees paid primarily by commission are entitled to an ROE only upon termination.

EXPLANATION

One of the tricky issues on whether an ROE is due arises when employees are paid primarily by commission. Under the EI regulations, commissioned salespersons must only be issued an ROE when they're either terminated or have experienced more than a 40% reduction in normal weekly earnings for a reason that would entitle them to special, rather than regular EI benefits, such as illness or injury, parental or maternity leave or the need to provide compassionate care for a family member or close relative. Neither of these situations pertain to Inga. She hasn't been terminated since the layoff is temporary; and while she experienced a reduction in earnings in her final week, it's not enough of a reduction to entitle her to special EI benefits. Accordingly, B is the correct answer.

Why Wrong Answers Are Wrong

A is wrong because stat holiday pay is an exception to the rule regarding no earnings or work in 7 consecutive days. In the example above, the July 1 holiday falls within the 7-day window after the last day worked on June 26. But the regulations don't take stat holiday pay into account under the test for determining if a person has worked or had earnings in 7 consecutive days. So, payment under the Ontario ESA for Inga's July 1 stat holiday entitlement has no impact on Buy Best's need to issue an ROE.

C is wrong because the normal rules for issuing an ROE don't apply to commissioned sales employees (nor to persons with a licence to sell real estate). Normally, a layoff or termination, together with 7 consecutive days with no earnings or work, trigger the need for an ROE. But employees paid mainly by commission (and real estate agents or brokers) only have an interruption of earnings when they're terminated, not when they're laid off temporarily the way Inga was.

D is wrong because for an interruption of normal weekly earnings to occur due to illness or injury under the regulations, earnings must fall at least 40%. Inga's earnings did drop in the last week she worked, but only by 25%. Incidentally, the EI laws don't define the term "normal weekly earnings." So, employers must use common sense to decide if the 40% test has been met. Courts have also held that earnings must be paid on a regular, periodic basis to be considered "normal weekly earnings."