

Don't Overlook First Step Act Pilot Programs

The First Step Act,¹ signed into law in December 2018, is the first comprehensive criminal justice reform bill passed by Congress in years and contains many meaningful reforms.

Much attention has been paid to the provisions in the law designed to address systemic issues for defendants in drug cases. For example, the law reduces mandatory minimums for drug manufacturing or distribution charges for defendants with prior drug convictions.² The law also reduces the disparity between crack cocaine and powder cocaine by making the reforms of the Fair Sentencing Act of 2010 retroactive.³ And it also broadens the “safety valve” in 18 U.S.C. § 3553(f) to allow more defendants with prior convictions to avoid mandatory minimums.⁴

The First Step Act also includes numerous changes to address quality-of-life issues for current inmates and to help individuals transition back to society following their incarceration. For example, the law restricts the use of shackles on pregnant prisoners,⁵ requires prisoners to be incarcerated closer to their homes,⁶ restricts the use of juvenile solitary confinement,⁷ and assists prisoners in getting IDs prior to release.⁸ The law also increases good time credits by one week per year,⁹ and expands compassionate release for terminally ill prisoners.¹⁰

All of these changes are substantial and will have meaningful impacts on those serving prison sentences.

However, two programs are particularly notable because of the potential they hold to reduce prison sentences for certain prisoners by up to one-third. The first is a pilot program that will allow the Bureau of Prisons to release to home confinement inmates over 60 years old who have served at least two-thirds of their sentences. The second is a recidivism reduction program that will allow prisoners to earn credit worth up to one-third of their sentences for participation in programming designed to reduce recidivism.

Both programs have their faults and come with caveats. As others have written,¹¹ Congress gave the attorney general great power to decide how to implement the programs, which could hamper their effectiveness. But combined, the two programs have the potential to offer substantial reductions in sentences, particularly to elderly and nonviolent prisoners.

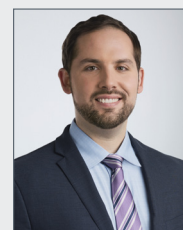


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¹ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

² First Step Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5194, 5220-21 (2018); 21 U.S.C. § 841.

³ First Step Act of 2018, Pub. L. No. 115-391, §404, 132 Stat. 5194, 5222 (2018).

⁴ First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221 (2018); 18 U.S.C. § 3553(f).

⁵ First Step Act of 2018, Pub. L. No. 115-391, § 301, 132 Stat. 5194, 5217-18 (2018); 18 U.S.C. § 4322.

⁶ First Step Act of 2018, Pub. L. No. 115-391, § 601, 132 Stat. 5194, 5237 (2018); 18 U.S.C. § 3621.

⁷ First Step Act of 2018, Pub. L. No. 115-391, § 613, 132 Stat. 5194, 5247-48 (2018); 18 U.S.C. § 5043.

⁸ First Step Act of 2018, Pub. L. No. 115-391, § 604, 132 Stat. 5194, 5240 (2018); 34 U.S.C. § 60541.

⁹ First Step Act of 2018, Pub. L. No. 115-391, § 102, 132 Stat. 5194, 5210 (2018); 18 U.S.C. § 3624.

¹⁰ First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194, 5239-40 (2018); 18 U.S.C. § 3582.

¹¹ Lara Yeretsian, Barr Could Steer First Step Act Off Course, Law360.com (Jan. 27, 2019, 8:02 PM), <https://www.law360.com/articles/1122358/barr-could-steer-first-step-act-off-course>.

Though there are ramp-up periods associated with both programs, certain aspects of both programs went into effect immediately, and there are steps that current prisoners can take to begin reducing the amount of time they spend in prison.

Early Home Confinement for Elderly Prisoners

One of the most profound changes that the First Step Act makes for currently incarcerated individuals is to reauthorize and expand a pilot program that allows for early release to home confinement for elderly, nonviolent prisoners.¹²

The pilot program was created by the Second Chance Act of 2007,¹³ but it contained some important restrictions that reduced the impact of the program. First, it was not required at all BOP facilities. Second, it only applied to prisoners over 65 years old who had served the greater of 75 percent of their sentence or 10 years in prison. Third, prisoners who were serving life sentences or who had been convicted of crimes of violence, sex offenses or terrorism-related offenses were ineligible, as were prisoners who attempted to escape.

The First Step Act changed the first two of these restrictions (though it left the requirements in the third). The First Step Act directed the attorney general to make the program available at all BOP facilities, reduced the eligibility age to 60 years old, reduced the amount of time that a prisoner had to serve before being eligible from 75 percent to two-thirds of his or her sentence, and, most importantly, removed the requirement that the prisoner must serve at least 10 years prior to becoming eligible.

The result of these changes is that nonviolent prisoners over 60 could serve as much as one-third of their prison sentence in home confinement rather than in a BOP facility.

Unfortunately, these substantial reductions in terms of imprisonment are not yet guaranteed. Though the law says that the attorney general “shall conduct a pilot program” in all facilities, it does not require release of anyone, saying only that the attorney general “may release some or all eligible elderly offenders” to home confinement.

However, while the attorney general is not required to release any prisoners under the pilot program, a separate provision of the First Step Act mandates that the BOP shall “to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted” under the law.¹⁴ Thus, the elderly release pilot program, coupled with the directive to move low-risk prisoners to home confinement, sends a clear signal that Congress intended for the attorney general to utilize the benefits of home confinement.

The pilot program began with the start of fiscal year 2019, and the attorney general is given authority to release eligible offenders upon written request from the BOP or prisoners who meet the criteria described above. For that reason, nonviolent prisoners over 60 years old who have served more than two-thirds of their sentence should request to take part in the program immediately.

Earned Time Credits for Recidivism Reduction Programming

Another major change that the First Step Act makes for currently incarcerated individuals is the creation of a systemwide recidivism reduction program that will allow prisoners to earn time credits for participation in programs or activities associated with reduced recidivism.¹⁵

Within 210 days of the law’s enactment, the attorney general must develop and release publicly “a risk needs assessment system” to determine the recidivism risk of each prisoner, assess and determine the risk of violent or serious misconduct of each prisoner, determine the type and amount of evidence-based recidivism reduction programming appropriate for each prisoner, and assign each prisoner to the appropriate programming.

¹² First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194, 5238 (2018); 34 U.S.C. § 60541.

¹³ 34 U.S.C. § 60541(g)

¹⁴ First Step Act of 2018, Pub. L. No. 115-391, § 602, 132 Stat. 5194, 5238 (2018); 18 U.S.C. § 3624(c)(2).

¹⁵ First Step Act of 2018, Pub. L. No. 115-391, §§ 101-107, 132 Stat. 5194, 5195-5216 (2018); 18 U.S.C. § 3631(b).

“Evidence-based recidivism reduction” programs are programs that have been shown to or are likely to reduce recidivism and may include: programs relating to social learning and communication, interpersonal, anti-bullying, rejection response, and other life skills; family relationship building, structured parent-child interaction, and parenting skills; classes on morals or ethics; academic classes; cognitive behavior treatment; mentoring; substance abuse treatment; vocational training; faith-based classes or services; civic engagement; prison work programs; victim impact classes and more.

An eligible inmate who successfully completes “evidence-based recidivism reduction programming or productive activities” earns 10 days of time credits for every 30 days of successful participation in the programming while inmates who BOP determines to be minimum or low risk for recidivating earn 15 days of time credits for every 30 days of successful participation in the programming.¹⁶

There is no cap on the amount of earned time credits an inmate may earn, meaning that, in theory, minimum and low risk prisoners who regularly participate in the relevant programming can reduce the time they are incarcerated by up to one-third. The only restriction is the amount of programming available.

It is also worth noting that prisoners can earn additional incentives by participating in the available programming as well, such as additional phone or video conferencing privileges, additional visitation time, transfer to an institution closer to the inmate’s release residence, increased commissary spending limits, and extended opportunities to access the email system.

As with the elderly release pilot program, time credits earned through the recidivism reduction programming reduce the amount of time a prisoner spends in prison but do not reduce the total amount of time under supervision. Unlike the elderly release pilot program, release from prison under the recidivism reduction program is mandatory. Once the number of time credits earned through recidivism reduction programming equals the amount of time remaining on the prisoner’s sentence, the BOP “shall transfer” the prisoner into prerelease custody or supervised release, so long as the prisoner has been deemed low or minimum risk.

Though prisoners with enough earned time credit must be released, as-yet-unreleased guidelines will govern the appropriate type of prerelease custody for individual prisoners (i.e., halfway house, home confinement, or supervised release). Still, the First Step Act includes certain requirements that will govern how prisoners are released.

First, if the sentencing court included a term of supervised release as part of the prisoner’s sentence, then BOP may transfer the prisoner to supervised release at an earlier date based on the application of earned time credits for a period up to 12 months.¹⁷

Second, in determining the appropriate conditions, the director of the BOP “shall, to the extent practicable, provide that increasingly less restrictive conditions shall be imposed on prisoners who demonstrate continued compliance with the conditions of such prerelease custody.”¹⁸

Third, the current time limits on how much time a prisoner can spend in home confinement (six months or 10 percent of the sentence, whichever is less) or a halfway house (12 months) do not apply to earned time credit.¹⁹

Lastly, the BOP must ensure that there is sufficient prerelease custody capacity to accommodate all eligible prisoners.²⁰

Though the guidelines will ultimately dictate the specifics regarding transfer, putting these sections together, it seems likely that prisoners who have accumulated more than 12 months of earned time credit prior to their release will be transferred to either home confinement or a halfway house for the balance of their earned time prior to being transferred to supervised release 12 months earlier than previously expected.

One important caveat regarding the recidivism reduction program is that programming may not be immediately available.

¹⁶ 18 U.S.C. § 3632.

¹⁷ 18 U.S.C. § 3624(g)(3).

¹⁸ 18 U.S.C. § 3624(g)(4).

¹⁹ 18 U.S.C.A. § 3624 note (Ex Post Facto Application).

²⁰ 18 U.S.C. § 3624(g)(11).

The BOP was given authority to begin expanding its existing recidivism reduction programming starting the day the First Step Act was enacted, and time credits can be earned immediately. However, after the attorney general develops the risk needs assessment system within 210 days of enactment, the BOP then is allowed six months to complete its initial assessment of each prisoner. At that time, the BOP is required to start expanding its programming, but the agency is given two years from the end of the initial intake to make sure it has enough programming for all prisoners.²¹

During the two-year phase-in, priority is given to prisoners closest to their release dates. Because there may not immediately be enough programming for all prisoners, it is important for eligible prisoners to seek out any available programming immediately so that they can start earning time credits as soon as possible.

It is difficult to know today how these two programs will be implemented and therefore precisely what impact they will have. However, in theory, both the elderly release program and the recidivism reduction program hold the potential to drastically reduce sentences (by up to one-third) for large swaths of the current prison population. Eligible prisoners and the lawyers who represent them should take immediate action to begin reducing the time they spend in prison.

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²¹ 18 U.S.C. § 3621(h).