

First Step Act: Everything You Ever Wanted to Know and More

On December 21, 2018, the President signed into law the bipartisan [First Step Act of 2018](#). The Law Office of Brandon Sample has assembled this detailed analysis of the First Step Act to help the public understand the ins and outs of the bill. If you are looking for a quick answer to your questions about the First Step Act, we suggest you revisit our [prior articles](#).

We want to be crystal clear about our position: the FIRST STEP Act is not perfect by any stretch of the imagination. There will be thousands of inmates who are largely ineligible to benefit from many of the reforms contained in this law. But the legislation is, by its name, a FIRST STEP.

Since the FIRST STEP Act is broken out into six separate titles, we will break down the bill using that same organization. We are going to change it up and start from the end and work our way back towards Title I of the bill. If you would like to print a copy of this article for your loved one in prison, you may do so at this link: [Law Office of Brandon Sample First Step Analysis](#).

Title VI- Miscellaneous Criminal Justice - First Step Act

Section 601. Placement of prisoners close to families.

Under current law, the Federal Bureau of Prisons (BOP) essentially has unlimited discretion to decide which prison to send inmates to for service of their sentence. For instance, criminal defendants sentenced in Miami, Florida are often routinely sent to serve lengthy sentences as far away as California.

The FIRST STEP Act works to address family separation caused by imprisonment. Under the Section 601 of the bill, the BOP will now be required to “place the prisoner in a facility as close as practicable to the prisoner’s primary residence,” and to the extent possible within 500 driving miles of the inmate’s home.

Further, inmates already in BOP prisons will be given the opportunity to decide if they want to stay at their current facility or transfer to another prison closer to the inmate’s home. This is true even if the inmate is already within 500 driving miles of their primary residence.

However, the FIRST STEP Act still provides some caveats to the “place inmates no further than 500 miles from home” rule. Placement of an inmate will still be subject to that inmate’s “security designation,” medical needs, bed availability and other security concerns of the BOP.

“Security designation,” is just a different way of saying whether an inmate is eligible to go to a medium security, low security, or high security prison based on factors evaluated by the BOP (more on that below).

These are all separate reasons the BOP can still rely on to place an inmate further than 500 driving miles from the inmate’s primary residence. We anticipate that BOP will try to rely on the “other security concerns” catch-all in most cases when denying requests to transfer closer to home.

One glaring weakness in the FIRST STEP Act is that although it says BOP “shall” send inmates as close as practicable to their home, it also specifically provides that no court can review BOP’s placement decision. We believe this is a significant potential problem since inmates will have no way to challenge BOP’s decisions except through the BOP’s administrative remedy program.

At rock bottom, however, the FIRST STEP Act will allow thousands of families to be within traveling distance of their loved ones who are in prison. On this point, the FIRST STEP Act is a good initial change in the right direction.

Section 602. Home Confinement For Low-Risk Prisoners.

This part of the First Step Act changes current law to make clear that Congress intends for low-risk inmates to spend as much time as possible on home confinement. The First Step Act directs BOP to place these lower risk prisoners on home confinement during the end of their sentence “for the maximum amount of time” permitted by law.

Under existing law, inmates can spend up to 10% of their sentence or 6 months (whichever amount of time is less) on home confinement. So, the FIRST STEP Act instructs BOP to make sure “to the extent practicable” that all lower risk inmates spend as much as 6 months at the end of their sentence in their own home.

The limitation on serving ten percent of the sentence, or six months, whichever is less, on home confinement DOES NOT apply to the extended prerelease custody period that may be earned through time credits under the bill.

Section 603. Elderly Offender Home Detention And Compassionate Release Reform

Section 603 revives and expands the Elderly Home Detention Pilot Program and makes critical changes to how compassionate release requests are considered.

A. The Prior Version Of The Elderly Offender Home Detention Pilot Program

When Congress passed the Second Chance Act of 2007, it authorized an elderly home detention pilot program. 34 U.S.C. 60541(g). The pilot program was only available in a handful of BOP facilities, limited to 2009 and 2010, and eligibility was defined as applying to anyone:

(i)

who is not less than 65 years of age;

(ii)

who is serving a term of imprisonment that is not life imprisonment based on conviction for an offense or offenses that do not include any crime of violence (as defined in section 16 of title 18), sex offense (as defined in section 20911(5) of this title), offense described in section 2332b(g)(5)(B) of title 18, or offense under chapter 37 of title 18, and has served the greater of 10 years or 75 percent of the term of imprisonment to which the offender was sentenced;

(iii)

who has not been convicted in the past of any Federal or State crime of violence, sex offense, or other offense described in clause (ii);

(iv)

who has not been determined by the Bureau of Prisons, on the basis of information the Bureau uses to make custody classifications, and in the sole discretion of the Bureau, to have a history of violence, or of engaging in conduct constituting a sex offense or other offense described in clause (ii);

(v)

who has not escaped, or attempted to escape, from a Bureau of Prisons institution;

(vi)

with respect to whom the Bureau of Prisons has determined that release to home detention under this section will result in a substantial net reduction of costs to the Federal Government; and

(vii)

who has been determined by the Bureau of Prisons to be at no substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention.

B. The First Step Act Expands The Elderly Home Detention Pilot Program

The First Step Act reauthorizes the Elderly Home Detention program for fiscal years 2019-2023, and expands eligibility for the program. Under the expanded eligibility criteria:

- (1) The program is now available at all BOP facilities;
- (2) The age for qualification is reduced from 65 years to 60 years of age; and only
- (3) 2/3 of the sentence must be served to be eligible (2/3 is equal to 66.6 percent).

Importantly, Section 504(b)(1)(B) of the First Step Act ELIMINATES the prior requirement that prisoners have served 10 years or 75 percent of their sentence, whichever is greater.

Additionally, the First Step Act allows eligible terminally ill offenders to also be placed on home confinement for the duration of their sentences. An eligible terminally ill offender is anyone who:

- (i) is serving a term of imprisonment based on conviction for an offense or offenses that do not include any crime of violence (as defined in section 16(a) of title 18, United States Code), sex offense (as defined in section 111(5) of the Sex Offender Registration and Notification Act (34 U.S.C. 20911(5))), offense described in section 2332b(g)(5)(B) of title 18, United States Code, or offense under chapter 37 of title 18, United States Code; “(ii) satisfies the criteria specified in clauses (iii) through (vii) of subparagraph (A); and “(iii) has been determined by a medical doctor approved by the Bureau of Prisons to be—

“(I) in need of care at a nursing home, intermediate care facility, or assisted living facility, as those terms are defined in section 232 of the National Housing Act (12 U.S.C. 1715w); or “(II) diagnosed with a terminal illness.”

C. The First Step Act Allows Prisoners To Petition Courts For Compassionate Release

Currently, compassionate release is difficult to understand and even more difficult to obtain. Existing law only allows for compassionate release if the BOP files a motion with an inmate’s sentencing court seeking a sentence reduction under certain limited circumstances.

The two biggest limitations to compassionate release prior to the First Step Act were these: 1) only the BOP could bring a motion seeking compassionate release; and 2) if BOP did not want to bring a motion for compassionate release even if you met their criteria there was nothing an inmate could do to have their request reviewed by a court.

The result has been that many eligible inmates never received a sentence reduction despite clearly being eligible for compassionate release. Here is how the First Step Act changes the way compassionate release requests are handled.

1) Incarcerated Individuals Can Now Bring Their Own Compassionate Release Motion

In a massive change, the FIRST STEP Act now provides that a motion for compassionate release can be brought by either the inmate or the BOP with the sentencing court. This means that inmates will no longer have to simply accept denial of a compassionate release request by the BOP as the last word.

But before an inmate can request compassionate release from a judge, the prisoner must submit an administrative request to the BOP. If the Warden fails to act within 30 days of the prisoner’s request, the inmate can proceed to court immediately. Alternatively, the prisoner can move for compassionate release with the court 30 days after the prisoner’s grievances have been exhausted.

The First Step Act does not change the statutory standard for receiving compassionate release. Specifically, for compassionate release to be granted, a prisoner must have:

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission

18 U.S.C. 3582(C)(1)(A)(i)-(ii). The “applicable policy statements issued by the Sentencing Commission” refers to U.S.S.G. 1B1.13, a provision of the Sentencing Guidelines. In light of the First Step Act, we expect the Commission to amend 1B1.13 to provide district courts with further clarity about what constitutes “extraordinary and compelling reasons.”

2) Mandatory Notification to Family Members After Diagnosis Of Terminal Illness

The First Step Act contains a number of provisions which also require BOP to inform an inmate’s attorney, family, and partner after an inmate receives a terminal illness diagnosis. The phrase “terminal illness” is defined by the First Step Act as a “disease or condition with an end-of-life trajectory.”

Within 72 hours of an inmate being diagnosed with a terminal illness, the BOP must inform the “defendant’s attorney, partner, and family members” about the inmate’s condition. This is a massive change from current practice where family members are typically left in the dark.

As part of this 72-hour notification, BOP is also required to tell the attorney and family members that they may prepare and submit a compassionate release request on the prisoner’s behalf. This means that the prisoner’s attorney or family members can submit the mandatory initial request to a warden for compassionate release rather than forcing the very sick inmate to write his or her own request.

3) Mandatory 7-day In-Person Visit

Within 7 days of a person being diagnosed with a terminal illness, the FIRST STEP Act requires BOP to provide the inmate with the opportunity to visit with their family members in-person. There is no limiting language on this requirement about “security concerns” or “to the extent practicable.”

4) BOP Employees MUST assist Terminally Ill Inmates in Requesting a Sentence Reduction

The First Step Act also requires BOP employees to assist inmates in the “preparation, drafting, and submission of” a request for compassionate release if the family members or attorney asks for assistance.

5) BOP has 14 days to process a Compassionate Release Request

Within 14 days of receiving a compassionate release request from a terminally ill inmate (or their attorney, or their family) the BOP is required to process the request. This is an important provision of the First Step Act because typically the BOP is not required to do anything on a schedule set by Congress.

In practice if BOP has 14 days to process compassionate release requests and they wait until the 14th day to process them (which they probably will) they will only have 16 days to grant or deny that request before an inmate can seek judicial review. Remember, if 30 days passes without action on the request under the FIRST STEP Act a defendant can file his or her own motion with the Court seeking compassionate release.

6) BOP Must Provide Education on Compassionate Release Law

The First Step Act requires BOP to visibly post information and provide information on request to inmates about the procedures for seeking compassionate release. Under the FIRST STEP Act the BOP would not be allowed to use a lack of information about compassionate release to stonewall inmates.

7) Annual Report to Congress Required

The First Step Act also requires the BOP to make annual reports to Congress about compassionate release requests and how they are working in practice.

IMPORTANT NOTE: The Law Office of Brandon Sample assists federal prisoners across the United States with making requests for compassionate release. Because this is an important part of our practice, we have dedicated a new, entire website to the issue of compassionate release. That website is <https://compassionaterelapse.com>. We encourage you and/or your family members to visit this website for important information about compassionate release. If you would like to hire our office to assist you with a compassionate release request, please contact us at 802-444-HELP (4357).

Section 604. BOP Required to Help Inmates Obtain ID's Prior to Release

One of the most commonly overlooked portions of the FIRST STEP Act is the new requirement listed under the innocuous title "Identification for Returning Citizens." Anyone who has ever worked with citizens as they try to re-enter society after a prison sentence knows that a lack of proper identification such as driver's license or birth certificate can pose a huge obstacle.

The FIRST STEP ACT requires BOP to assist inmates in obtaining identification including social security cards, driver's licenses, and a birth certificate before inmates leave prison or the halfway house.

Section 605. Expanding Inmate Employment Through Federal Prisons Industries.

The First Step Act also makes changes to the way Federal Prison Industries or "UNICOR" is allowed to operate and who they can sell products to. In addition, inmates working in UNICOR will be required to put 15 percent of all monies earned in UNICOR into a release fund. The funds may then be used by the prisoner "to assist the inmate with costs associated with release from prison."

Section 606. Required De-Escalation Training.

Within 1 year of the FIRST STEP ACT becoming law, the BOP is required to incorporate certain de-escalation training into its employee training. The idea is that BOP should be required to teach their officers to de-escalate encounters with inmates and appropriately respond to incidents involving people with mental illness.

Section 607. Evidence Based Treatment for Opioid and Heroin Abuse.

Within 90 days of the First Step Act becomes law, the BOP is required to submit a report to Congress on the availability of evidence-based programs in BOP for treating heroin and opioid abuse. What the FIRST STEP Act importantly includes here are a number of provisions that favor "medication-assisted" treatment for these terrible addictions.

BOP has traditionally either outright refused or declined to provide medication-assisted treatment for drug abuse despite the large amount of evidence showing these are the most successful treatment regimes. Methadone and similar medications have been shown to significantly reduce long-term opioid abuse in ways not achieved by most other treatment programs.

The First Step Act would also require a submission of a similar report on the availability of evidence-based treatments to people on supervised release within 120 days. Both reports are required to include description of plans to expand access to these programs, which is a good thing.

Section 608. Pilot Programs.

BOP is required to establish two different types of pilot programs for 5 years in at least 20 facilities and report on them to Congress. The first type of program is a mentorship program which connects volunteers from community organizations and inmates. The second is a program to provide inmates with skills to provide training to animals seized by law enforcement or otherwise rescued.

Section 609. Ensuring Supervision of Released Sexually Dangerous Persons.

This is simply a small textual change to make clear that Probation officers also must provide additional information to the court about people on supervised release for sex offenses but under civil commitment orders. This is not much of a change to existing law.

Section 610. Data Collection.

One of the biggest challenges to passing meaningful sentencing and criminal justice reform is a lack of good information about how BOP operates and the people who are locked away in its prisons. The FIRST STEP Act has a lot of new requirements on the types of information that BOP has to provide to the National Prisoner Statistics Program.

There are 26 different types of new information that BOP will be required to provide each year, so we won't go through each of them. But here are the highlights:

- Number of veterans incarcerated
- Number of prisoners placed in solitary confinement each year
- Number of pregnant female prisoners and certain other information about births
- Number of prisoners who volunteered for substance abuse programs
- Number of prisoners who receive medication-assisted treatment for substance abuse
- Number of prisoners who are a parent or guardian of a minor child

- Number of prisoners who are single, married, or otherwise in committed relationships
- Number of prisoners without GED or high school diploma before prison
- Number of prisoners who received GED each year
- Vacancy rate for BOP medical and healthcare staff positions
- For each BOP facility, the total number of violations that resulted in reductions in rewards, incentives, or time credits, the number of such violations for each category of violation type, and a demographic breakdown of prisoners who received such violations

Section 611. Healthcare Products.

The FIRST STEP Act requires the BOP to provide female inmates with tampons or sanitary napkins for free instead of forcing women to buy these from the commissary.

Section 612. Adult and Juvenile Collaboration Programs.

This provision of the First Step Act requires the Attorney General to use more of their funding towards giving assistance to state and local programs. It also requires the A.G. to use a minimum of 8% of funds appropriated towards mental illness offender programs at the state level.

Section 613. Juvenile Solitary Confinement.

This provision restricts the use of juvenile solitary confinement.

TITLE V- SECOND CHANCE ACT OF 2007 REAUTHORIZATION

Section five of the First Step Act is largely devoted to providing grant monies for Second Chance Act programs at the state level. There are few technical changes to the law discussed in this portion of the bill, but those changes are discussed elsewhere in our comprehensive analysis.

TITLE IV- SENTENCING REFORM - FIRST STEP ACT

Section 401. Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies.

The FIRST STEP Act makes very significant changes to drug sentencing laws and mandatory minimums for repeat offenders in general. Importantly, these

changes in applicable mandatory minimums are going to apply to anyone who has not yet been sentenced for their crimes.

The changes are not yet retroactive, which is a problem. We are hopeful that these changes will be made retroactive in future legislation to give current inmates the justice they deserve. Let's walk through some of these significant changes:

- The term “serious drug felony” is added to the definitions section of the Controlled Substances Act in 21 U.S.C. 802. A “serious drug felony” includes any conviction for a qualifying “serious drug offense” crime listed in 18 U.S.C. 924(e)(2)
 1. Resulted in 12 months or more of prison for this particular defendant;
and
 2. The defendant was released from prison within 15 years of the current offense.
- The term “serious violent felony” is added to the Controlled Substances definitions also. A “serious violent felony” is defined as a prior conviction for:
 1. Any offense described in 18 U.S.C. 3559(c)(2)(F) [listing specific qualifying crimes, and containing an elements and residual clause] that resulted in 12 months or more of prison for this particular defendant;
and
 2. Any offense under 18 U.S.C. 113 [crimes within maritime and territorial jurisdiction of U.S.] which resulted in a 12 month or longer sentence for this defendant.

Before we move on, there are a few very important changes to existing law in these definitions. First, both definitions require that for any prior conviction to be used, the particular defendant must have received a sentence of more than 12 months imprisonment. This is a change from current law which applies to all prior convictions where a sentence of 12 months or more could have been imposed for the offense.

Second, the prior “serious drug felony” definition incorporates a time limitation for penalty enhancements. This is extremely important since it will no longer allow massively higher mandatory minimums for offenses where the

defendant was released from prison more than 15 years prior to his or her current offense.

- Changing 841(b)(1)(A)(vii) mandatory minimums for offenders with one prior qualifying “serious drug felony” or “serious violent felony.” The current mandatory minimum is 20 years, but the FIRST STEP Act reduces the minimum to 15 years.
- Making a similar change to mandatory minimums for offenders with two or more prior convictions. Current mandatory minimum is life imprisonment, but the FIRST STEP Act reduces the minimum to 25 years.

These two changes in the criminal justice reform bill end the so-called “three strikes” law that has forced mandatory lifetime sentences on thousands of inmates in the last 30 years. There would no longer be mandatory minimum life sentences for these crimes; instead, a floor of 25 years would be imposed for any sentence. Additionally, repeat offenders with only one prior qualifying conviction would be facing mandatory minimums of 15 years instead of 20 under this law.

One other negative about this change in law is that 21 U.S.C. 851 enhancements will now no longer be limited to drug priors. The enhanced penalties under 851, going forward, will also apply to priors for serious violent felonies as defined by 21 U.S.C. 802(58) per the First Step Act. And since there is no 15 years from release language for serious violent felonies, very old “violent” felonies can now be used to impose higher mandatory minimum sentences that otherwise were not previously available for federal drug convictions.

Section 402. Broadening of Existing Safety Valve.

18 U.S.C. 3553 is commonly referred to as the “safety valve” because it allows a court to avoid otherwise applicable mandatory minimums for certain non-violent drug offenders with no prior criminal history who meet other conditions. This sounds fantastic on paper, but in reality, it applies to very few people and only to a small set of criminal offenses.

The biggest issue with the safety valve has always been that it is only available to defendants with no more than 1 criminal history point under the Sentencing Guidelines. The FIRST STEP Act addresses this problem.

The First Step Act changes the “safety valve” to make relief available to people with:

1. no more than 4 total criminal history points [without counting prior 1-point convictions for sentences less than 60 days long including fines only, probation, and deferred sentences]
2. no prior 3-point sentences [(sentences served over 1-year +1 month)]
3. no prior 2-point “violent” offense [“crime of violence” sentence more than 60 days long but less than 1-year+1 month]

These specific changes allow courts to apply safety valve relief to a wide range of offenders who were previously ineligible because they had more than 1 criminal history point. How criminal history points are calculated is set out by the Sentencing Guidelines and is beyond this primer.

The expansion of the “safety-valve” is an important change, but it only applies going forward and cannot help out people already serving their time.

Section 403. Clarification of Section 924(c).

The First Step Act resolves an existing ambiguity in 18 U.S.C. 924(c)(1)(c) about when to apply enhanced penalties for using a firearm during certain crimes based on a defendant’s prior convictions.

The FIRST STEP Act makes clear that the enhanced mandatory minimums for using a firearm during certain crimes only applies when the qualifying prior conviction was already final at the time of the new offense.

In the past, the Government had previously sought to apply 924(c) to offenders convicted of multiple counts on the same day, but with no prior convictions under this section, to obtain the higher mandatory minimum penalties on each count of conviction. This change would unfortunately not apply retroactively to the over 700 inmates with these unjust sentences already.

Section 404. Application of Fair Sentencing Act.

In 2010, the Fair Sentencing Act was enacted by Congress under President Obama. That law changed the disparity between how crack-cocaine offenses and powder-cocaine offenses were punished since the difference overwhelmingly punished people of color. Unfortunately, the Fair Sentencing Act initially only applied going forward.

The FIRST STEP Act will now make the change retroactive and provide justice to many long-time incarcerated offenders.

Offenders who are currently incarcerated in BOP and whose sentencing range would be lower under the current version of the applicable drug-quantity Sentencing Guidelines for crack-cocaine prior to 2010 will be allowed to file a motion to reduce their sentence.

The new law would allow a defendant to file a motion seeking to reduce their sentence as if the revised guidelines had been in effect on the day they were originally sentenced. A defendant will only get one opportunity to file a motion under this change and the court is not required to impose the change.

According to the Congressional Budget Office, nearly 3,000 inmates could be affected by this change in the law.

Important Note: The Law Office of Brandon Sample is available to assist you with your [motion for retroactive application of the Fair Sentencing Act](#). However, our office will not accept representation in a large number of these cases in order to ensure that we provide excellent, individualized assistance to each person that we represent. Receiving relief pursuant to this change in the law is DISCRETIONARY. It is absolutely imperative that you put forward a compelling motion for relief. If you would like to discuss hiring our office to assist you, please call 802-444-HELP (4357).

Section 405. Reinvestment of Savings in Evidence-Based Recidivism Reduction Programs.

This provision of the First Step Act simply says that any cost savings achieved as a result of the legislation should be reinvested into recidivism reduction programs in BOP. There is no teeth to this measure to make it enforceable.

TITLE III- RESTRAINTS ON PREGNANT PRISONERS PROHIBITED - FIRST STEP ACT

Section 301. Use of Restraints on Prisoners During the Period of Pregnancy and Postpartum Recovery Prohibited.

Generally speaking, this section of the First Step Act prohibits the use of restraints on pregnant and postpartum prisoners except under limited conditions. The FIRST STEP Act also provides that even if restraints may be used, BOP must only utilize the “least restrictive means” to restrain females during and after pregnancy.

This section of the First Step Act also imposes a number of reporting requirements on BOP related to the use of restraints during and after pregnancy. BOP is directed to conduct training regarding the use of restraints during these periods and develop guidelines for their use in consultation with healthcare officials.

TITLE II- BOP SECURE FIREARMS STORAGE

BOP is directed to ensure that each facility provides a secure storage area located outside the prison’s secure perimeter to allow BOP employees to store their firearms. BOP is also directed to allow employees to store their firearms in a vehicle lockbox approved by the BOP Director.

TITLE I- RECIDIVISM REDUCTION - FIRST STEP ACT

Section 101. Risk and Needs Assessment Program.

Within 210 days after the First Step Act becoming law, the Attorney General is required to develop a “Risk and Needs Assessment System.” As previously covered in our May 11, 2018 blog post on <https://sentencing.net>, this system will determine individual prisoner “recidivism risk,” and help BOP staff decide which programs individual prisoners should participate in.

The First Step Act does allow the BOP to use existing tools as appropriate to satisfy this requirement under the new law. This new system will also be used to provide guidance on housing decisions in BOP.

A. Inmates Can Receive Incentives for Participating in Recidivism Reduction Programs.

The First Step Act offers significant incentives to inmates for participating in recidivism reduction programs offered at BOP institutions. These potentially include:

- Phone privileges, or, if available, video conferencing privileges for up to 30 minutes per day, and up to 510 minutes per month;
- Additional time for visitation at the prison as determined by the Warden;
- Placement in a facility closer to the prisoner's release residence, subject to bed availability, security level, and Warden support of request;
- Increased commissary spending limits and product offerings;
- Extended opportunities to access the email system;
- Consideration of transfer to preferred housing units (including transfer to different prison facilities);
- Other incentives solicited from prisoners and determined appropriate by the BOP Director.

Of all the incentives on this list, only the additional phone minutes appear to be non-discretionary. The language of the Act specifically provides that "A prisoner who is successfully participating in an evidence-based recidivism reduction program SHALL RECEIVE" the additional phone minutes.

B. Prisoners Can Accumulate Time Credits Toward More Halfway House or Home Confinement Time.

Eligible prisoners who successfully complete recidivism reduction programming or "productive activities" are eligible to receive time credits that increase the amount of time a prisoner spends in pre-release custody. Pre-release custody is typically either time in a halfway house or on home confinement, but both options allow a prisoner to sleep outside of a BOP prison.

There are a lot of ineligible prisoners who cannot earn "time credits," which is discussed in more detail later. Programs taken prior to the First Step Act becoming law will not count towards any "time credit." Here is how the time credits will work:

- All eligible prisoners will earn 10 days of time credit for every 30 days of successful program participation;
- Prisoners who BOP determines are at a "minimum" or "low risk" for recidivating and have not increased their risk over 2 consecutive

assessments, will earn an additional 5 days of time credit for every 30 days of successful program participation.

C. The First Step Act Allows Time Credits to Apply Towards Up to One Year of Supervised Release.

The First Step Act provides that “the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits under section 3632.” In other words, up to one year of the time credits earned under this Act may be used to reduce the post-confinement period of supervised release.

D. Wide Array of Prisoners Excluded from Earning Time Credits.

Unfortunately, the First Step Act excludes large categories of offenders from earning the “time credits” that apply to pre-release custody or supervised release. The excluded offenses are:

“(i) Section 81, relating to arson within special maritime and territorial jurisdiction.

“(ii) Section 111(b), relating to assaulting, resisting, or impeding certain officers or employees using a deadly or dangerous weapon or inflicting bodily injury.

“(iii) Paragraph (1), (7), or (8) of section 113(a), relating to assault with intent to commit murder, assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 16 years, or assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate.

“(iv) Section 115, relating to influencing, impeding, or retaliating against a Federal official by injuring a family member, except for a threat made in violation of that section.

“(v) Section 116, relating to female genital mutilation.

“(vi) Section 117, relating to domestic assault by a habitual offender.

“(vii) Any section of chapter 10, relating to biological weapons.

“(viii) Any section of chapter 11B, relating to chemical weapons.

- “(ix) Section 351, relating to Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault.
- “(x) Section 521, relating to criminal street gangs.
- “(xi) Section 751, relating to prisoners in custody of an institution or officer.
- “(xii) Section 793, relating to gathering, transmitting, or losing defense information.
- “(xiii) Section 794, relating to gathering or delivering defense information to aid a foreign government.
- “(xiv) Any section of chapter 39, relating to explosives and other dangerous articles, except for section 836 (relating to the transportation of fireworks into a State prohibiting sale or use).
- “(xv) Section 842(p), relating to distribution of information relating to explosives, destructive devices, and weapons of mass destruction, but only if the conviction involved a weapon of mass destruction (as defined in section 2332a(c)).
- “(xvi) Subsection (f)(3), (h), or (i) of section 844, relating to the use of fire or an explosive.
- “(xvii) Section 924(c), relating to unlawful possession or use of a firearm during and in relation to any crime of violence or drug trafficking crime.
- “(xviii) Section 1030(a)(1), relating to fraud and related activity in connection with computers.
- “(xix) Any section of chapter 51, relating to homicide, except for section 1112 (relating to manslaughter), 1113 (relating to attempt to commit murder or manslaughter, but only if the conviction was for an attempt to commit manslaughter), 1115 (relating to misconduct or neglect of ship officers), or 1122 (relating to protection against the human immunodeficiency virus).
- “(xx) Any section of chapter 55, relating to kidnapping.
- “(xxi) Any offense under chapter 77 relating to peonage, slavery, and trafficking in persons, except for sections 1593 through 1596.
- “(xxii) Section 1751, relating to Presidential and Presidential staff assassination, kidnapping, and assault.
- “(xxiii) Section 1791, relating to providing or possessing contraband in prison.

- “(xxiv) Section 1792, relating to mutiny and riots.
- “(xxv) Section 1841(a)(2)(C), relating to intentionally killing or attempting to kill an unborn child.
- “(xxvi) Section 1992, relating to terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air.
- “(xxvii) Section 2113(e), relating to bank robbery resulting in death.
- “(xxviii) Section 2118(c), relating to robberies and burglaries involving controlled substances resulting in assault, putting in jeopardy the life of any person by the use of a dangerous weapon or device, or death.
- “(xxix) Paragraph (2) or (3) of section 2119, relating to taking a motor vehicle (commonly referred to as ‘carjacking’) that results in serious bodily injury or death.
- “(xxx) Any section of chapter 105, relating to sabotage, except for section 2152.
- “(xxxi) Any section of chapter 109A, relating to sexual abuse.
- “(xxxii) Section 2250, relating to failure to register as a sex offender.
- “(xxxiii) Section 2251, relating to the sexual exploitation of children.
- “(xxxiv) Section 2251A, relating to the selling or buying of children.
- “(xxxv) Section 2252, relating to certain activities relating to material involving the sexual exploitation of minors.
- “(xxxvi) Section 2252A, relating to certain activities involving material constituting or containing child pornography.
- “(xxxvii) Section 2260, relating to the production of sexually explicit depictions of a minor for importation into the United States.
- “(xxxviii) Section 2283, relating to the transportation of explosive, biological, chemical, or radioactive or nuclear materials.
- “(xxxix) Section 2284, relating to the transportation of terrorists.
- “(xl) Section 2291, relating to the destruction of a vessel or maritime facility, but only if the conduct that led to the conviction involved a substantial risk of death or serious bodily injury.

“(xli) Any section of chapter 113B, relating to terrorism.

“(xlii) Section 2340A, relating to torture.

“(xliii) Section 2381, relating to treason.

“(xliv) Section 2442, relating to the recruitment or use of child soldiers.

“(xlv) An offense described in section 3559(c)(2)(F), for which the offender was sentenced to a term of imprisonment of more than 1 year, if the offender has a previous conviction, for which the offender served a term of imprisonment of more than 1 year, for a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111), voluntary manslaughter (as described in section 1112), assault with intent to commit murder (as described in section 113(a)), aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242), abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)), kidnapping (as described in chapter 55), carjacking (as described in section 2119), arson (as described in section 844(f)(3), (h), or (i)), or terrorism (as described in chapter 113B).

“(xlvi) Section 57(b) of the Atomic Energy Act of 1954 (42 U.S.C. 2077(b)), relating to the engagement or participation in the development or production of special nuclear material.

“(xlvii) Section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122), relating to prohibitions governing atomic weapons.

“(xlviii) Section 101 of the Atomic Energy Act of 1954 (42 U.S.C. 2131), relating to the atomic energy license requirement.

“(xlix) Section 224 or 225 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275), relating to the communication or receipt of restricted data.

“(l) Section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), relating to the sabotage of nuclear facilities or fuel.

“(li) Section 60123(b) of title 49, relating to damaging or destroying a pipeline facility, but only if the conduct which led to the conviction involved a substantial risk of death or serious bodily injury.

“(lii) Section 401(a) of the Controlled Substances Act (21 U.S.C. 841), relating to manufacturing or distributing a controlled substance in the case of a conviction for an offense described in subparagraph (A), (B), or (C) of

subsection (b)(1) of that section for which death or serious bodily injury resulted from the use of such substance.

“(liii) Section 276(a) of the Immigration and Nationality Act (8 U.S.C. 1326), relating to the reentry of a removed alien, but only if the alien is described in paragraph (1) or (2) of subsection (b) of that section.

“(liv) Section 277 of the Immigration and Nationality Act (8 U.S.C. 1327), relating to aiding or assisting certain aliens to enter the United States.

“(lv) Section 278 of the Immigration and Nationality Act (8 U.S.C. 1328), relating to the importation of an alien into the United States for an immoral purpose.

“(lvi) Any section of the Export Administration Act of 1979 (50 U.S.C. 4611 et seq.)

“(lvii) Section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705).

“(lviii) Section 601 of the National Security Act of 1947 (50 U.S.C. 3121), relating to the protection of identities of certain United States undercover intelligence officers, agents, informants, and sources.

“(lix) Subparagraph (A)(i) or (B)(i) of section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) or paragraph (1)(A) or (2)(A) of section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)), relating to manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, dispense, or knowingly importing or exporting, a mixture or substance containing a detectable amount of heroin if the sentencing court finds that the offender was an organizer, leader, manager, or supervisor of others in the offense, as determined under the guidelines promulgated by the United States Sentencing Commission.

“(lx) Subparagraph (A)(vi) or (B)(vi) of section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) or paragraph (1)(F) or (2)(F) of section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)), relating to manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, or any analogue thereof.

“(lxi) Subparagraph (A)(viii) or (B)(viii) of section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 11 841(b)(1)) or paragraph (1)(H) or (2)(H) of

section 1010(b) the Controlled Substances Import and Export Act (21 U.S.C. 960(b)), relating to manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, or knowingly importing or exporting, a mixture of substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers, if the sentencing court finds that the offender was an organizer, leader, manager, or supervisor of others in the offense, as determined under the guidelines promulgated by the United States Sentencing Commission.

“(lii) Subparagraph (A) or (B) of section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) or paragraph (1) or (2) of section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)), relating to manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, a controlled substance, or knowingly importing or exporting a controlled substance, if the sentencing court finds that—(I) the offense involved a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, or any analogue thereof; and (II) the offender was an organizer, leader, manager, or supervisor of others in the offense, as determined under the guidelines promulgated by the United States Sentencing Commission.”

E. Non-Citizens Ineligible for Applying Time Credits.

The First Step Act bars non-citizens who are subject to a final removal order from APPLYING time credits under the bill. That means time credits could be earned, but they cannot be used for early release to pre-release custody.

F. Prisoners Reassessed at Least Every Year.

The new law requires BOP to individually reassess each inmate who is participating in the risk assessment programs or “productive activities” at least every year. Prisoners who have less than 5 years until their release and are at a medium or high risk of recidivating assessment must receive more frequent evaluations.

G. BOP to Establish Penalties for Loss of Incentives.

Unsurprisingly, the First Step Act also requires BOP to establish policies and procedures for the reduction of rewards and incentives prisoners earn under the First Step Act. Importantly, any reduction that includes the loss of time credits requires written notice to the prisoner and cannot include the loss of any future time credit.

H. Evidence-Based Recidivism Reduction Program Evaluations.

Rather than start from scratch, the First Step Act directs the Attorney General to evaluate the effectiveness of currently existing programs in the BOP and at state correctional facilities. The new law instructs the Attorney General to identify the most effective evidence-based programs and direct the BOP regarding the addition of new programs.

I. 5 Years of Detailed Reporting to Congress on First Step Act.

Starting two years after the First Step Act became law, the Attorney General is required to provide extensive detailed reporting to Congress on a number of subjects covered by the new law. The Attorney General is required to provide this report for a minimum of 5 consecutive years.

The Attorney General's report must include, among other things: 1) a summary of the "activities and accomplishments" in carrying out the First Step Act; 2) an assessment of the types and effectiveness of the evidence-based recidivism reduction programs operated by BOP; 3) rates of recidivism among former inmates after release from prison based on six separate criteria; 4) the status of prison work programs and availability at BOP facilities; and 5) an assessment of any savings associated with placing more prisoners in pre-release custody.

J. Definitions of Terms Used.

"Evidence-based recidivism reduction program" is defined generally as an activity that "has been shown by empirical evidence ... or is based on research indicating that it is likely to be effective in reducing recidivism," and is "designed to help prisoners succeed in their communities upon release from prison."

"Productive Activity" is defined as an activity that is designed to allow prisoners of minimum or low risk of recidivating to "remain productive," and it may include "the delivery of" the evidence-based recidivism reduction programs to other prisoners.

Section 102. Implementation of System and BOP Recommendations.

A. 180 Days to Implement Risk and Needs Assessment.

180 days after the Attorney General develops the risk and needs assessment system, the BOP is required to implement the system for each prisoner by conducting an initial assessment. The First Step Act specifically provides that

it does not matter how long a prisoner's sentence may be: everyone is going to be assessed.

B. Two-Year Phase-In Period.

At the same time, the BOP must begin to assign prisoners to appropriate evidence-based recidivism reduction programs based on these assessments. The BOP is given a 2-year phase-in period to provide all inmates with access to the appropriate evidence-based programming.

During the 2-year phase-in period inmates with the most immediate release dates will be given priority for participation in the programs that can earn "time credit" towards pre-release custody.

Within 2 years of the BOP completing the risk and needs assessment tool the BOP must provide access to the evidence-based programs for all prisoners.

C. Preliminary Expansion of Existing BOP Programs.

The First Step Act gives the BOP authority to expand any existing evidence-based recidivism reduction programs immediately. The BOP is also permitted to offer prisoners the incentives and rewards such as "time credit," phone privileges, commissary benefits, etc. immediately.

D. Rules for Outside Partnerships.

The Attorney General is directed to develop policies in order to expand the availability of evidence-based programs through partnerships with nonprofits, higher education institutions, and certain private entities.

E. BOP Required to Provide Programs to All Prisoners.

The First Step Act establishes a clear requirement that the BOP provide all prisoners throughout their entire sentence with the opportunity to "actively participate in evidence-based recidivism reduction programs," according to the specific needs of each prisoner.

Priority for participation in these evidence-based programs will be given to medium and high risk prisoners. Only minimum risk and low risk prisoners will be allowed to participate in the "productive activities" created by the First Step Act.

F. Fixing the "54 Day" Problem with Good Conduct Time Credit.

In addition to allowing federal prisoners the opportunity to spend longer amounts of time in pre-release custody, the First Step Act criminal justice

prison reform fixes a longstanding problem with how federal good conduct time is calculated.

The First Step Act requires the BOP to award 54 days of good conduct time for each year of the sentence that was imposed. Additionally, the law changes the way that prorated good conduct time is credited. Under the First Step Act, “credit for the last year of imprisonment shall be credited on the first day of the last year of the term of imprisonment.”

This provision of the law is RETROACTIVE. The effective date of the change, however, is in dispute. Advocates for the bill understood this provision to take effect immediately. The BOP, on the other hand, asserts that this will not go into effect until 210 days from December 21, 2018, which is July 19, 2019

G. Pre-release Custody or Supervised Release Transfer for “Time Credits.”

Inmates who earn credits for participating in the First Step Act evidence-based recidivism risk reduction programs may be transferred to pre-release custody or supervised release. Transfer to supervised release cannot be for more than 12 months. There is no 12 month restriction on how long a prisoner can remain on home confinement or in a halfway house through the use of earned time credits.

Inmates with enough credits and minimum-risk or low-risk assessment for the last two assessment periods are automatically eligible for transfer.

Inmates who are otherwise qualified to use their time credits for a pre-release custody transfer but were not low-risk for the last 2 assessments can still obtain a transfer, but they must obtain approval of their petition for transfer by their warden, who must determine that: 1) the prisoner would not be a danger to society if transferred; 2) the prisoner made a good faith effort to lower their recidivism risk level; and 3) the prisoner is unlikely to recidivate.

H. Pre-Release Terms.

Inmates sent to home confinement are subject to 24-hour electronic monitoring. This is consistent with existing federal law. The prisoners on home confinement can only leave their home with permission for certain allowed activities such as work or community service.

Any prisoner placed on home confinement must remain on home confinement until they have served at least 85% of their imposed sentence. There are no

changes to how a residential re-entry center (halfway house) placement for a prisoner would operate under the First Step Act.

I. Supervised Release Transfer.

The BOP Director is authorized to transfer a prisoner to begin their term of supervised release at an earlier date based on the application of time credits. This use of the time credits earned under the First Step Act represents a significant change to current practice.

J. BOP to Work with Probation and Pretrial Services.

Since there are going to be many more prisoners serving their sentence on home confinement, the First Step Act directs BOP to work with Probation to allocate resources effectively. Probation is specifically required by Congress to offer assistance to any prisoner it can who is on pre-release custody.

We anticipate a significant expansion in the number of Probation officers nationwide to accommodate the changes put in place by this new law. We also believe that existing programs such as the Federal Location Monitoring Program (FLMP) will be expanded through Probation's work with BOP.

K. BOP Must Ensure Enough Pre-Release Space Is Available.

Currently there are hundreds if not thousands of BOP prisoners who are eligible for pre-release placement in a halfway house but are not able to take advantage of those placements. BOP routinely claims that there is simply not enough capacity in the halfway homes to accommodate everyone who is eligible to transfer to them.

The First Step Act eliminates this problem. Under the new law, the Director of BOP is required to ensure there is sufficient prerelease custody capacity "to accommodate all eligible prisoners." This alone would help many incarcerated prisoners transition into the community earlier than they would without the First Step Act.

Section 103. GAO Report.

The Government Accountability Office is required to conduct an audit every two years of the BOP's use of the risk and needs assessment system created by the First Step Act. There are a number of required topics which the GAO must include in their bi-annual audit which are not discussed here.

Section 104. Authorization of Appropriations.

In the past, Congress has often passed laws stating high ideals but with little money to back them up in the real world. That is not the case for the First Step Act. This bill authorizes \$75 **million dollars annually from 2019-2023** to carry out the First Step Act.

Congress is clearly putting its money where its mouth is with this criminal justice reform Act. Also, 80% of these funds are to be used only to implement the risk and needs assessment system so BOP cannot use these dollars for their general budget.

Section 105. Rule of Construction.

Nothing in the First Step Act can be read to create any authority to place a prisoner into pre-release custody who are not serving a sentence for a federal crime only.

Section 106. Faith-Based Considerations.

In evaluating the use or implementation of any program under the First Step Act, the BOP cannot discriminate against any program on the ground that it is faith-based in any way.

Section 107. Independent Review Committee.

Under the First Step Act, an Independent Review Committee is established to assist the Attorney General in developing the risk and needs assessment tool. The Committee is directed to conduct a review of existing tools used by BOP, develop recommendations regarding programming for prisoners, and conduct research on the effectiveness of programs used by BOP. The Committee will terminate two years after the risk and needs assessment system is released.