

INSIGHT: The First Step Act— Earned Time Credits on the Horizon

By Alan Ellis, Mark Allenbaugh and Nellie Torres Klein

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People hold signs during a rally calling for criminal justice reform outside the U.S. Capitol July 10, 2018. In support of the First Step Act. Aaron P. Bernstein/Getty Images

The First Step Act will enable some prisoners to earn time credits that can be used for pre-release custody options, like entering a halfway house or home confinement. But federal sentencing and prison experts Alan Ellis, Mark Allenbaugh, and Nellie Torres Klein explain that impediments still exist to full implementation by 2022 for the recidivism reduction program.

One of the remaining programs to be implemented under the First Step Act is set to begin shortly, enabling some prisoners to earn time credits. But some impediments still exist.

As of January, all inmates in the Bureau of Prisons (BOP) custody will have undergone an initial assessment pursuant to implementing a new risk and needs assessment program pursuant to the First Step Act ([The First Step Act of 2018: Risk and Needs Assessment System](#)).

By January 2022, it is anticipated the BOP will begin providing all eligible inmates recidivism reduction programming based on their identified needs. As an incentive for participating in such programming, the First Step Act directs that eligible inmates be able to earn time credits which, while not expressly reducing their sentence, under some circumstances can be used toward increasing pre-release custody (e.g., halfway house and/or home confinement). The BOP has stated it will post available programming opportunities on its website soon.

According to a [2018 Congressional Report](#), the new programming “will: (1) determine the recidivism risk level (minimum, low, medium, or high) of each prisoner at intake; (2) assess and determine the risk of violent or serious misconduct of each prisoner; (3) determine the type, amount, and intensity

of programming for each prisoner and assign programming accordingly; (4) reassess each prisoner periodically and adjust programming assignments accordingly; and (5) determine when a prisoner is ready to transfer into prerelease custody.”

Certain inmates can earn time credits by completing rehabilitative programming and engaging in “productive activities” like helping deliver programming to other inmates. Depending on an inmate’s risk level, an inmate can earn up to 15 days of credit for every 30 days of programming or productive activities.

In theory, these time credits can then be redeemed by eligible inmates for early transfer into a halfway house, home confinement, or supervised release. Earned time credits thus do not reduce a prisoner’s sentence, per se, but rather allow eligible prisoners to serve their sentence outside prison walls.

Large Categories of Inmates Not Eligible

Importantly, potentially large categories of inmates will not be eligible to receive earned time credits based on the crime they committed. Additionally, non-citizens with immigration detainers will not be able to benefit.

Earned time credit is not to be confused with “good conduct time.” Good conduct time results in an actual reduction in an inmate’s sentence and awarded for maintaining good behavior during incarceration. All incarcerated individuals, other than those serving a life sentence, are eligible for good conduct time.

However, several classes of offenders are ineligible to receive earned time credits, for example, those trafficking in fentanyl, and

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heroin or methamphetamine traffickers who played a leadership role in the offense of conviction, sex offenders, some immigration offenders and inmates convicted of violent offenses.

Offenders who complete rehabilitative programs serving sentences for offenses not eligible to receive earned time credits are nonetheless eligible for other incentives including increased telephone and email time, expanded visitation and more options at the commissary. Incentives for privileges will be decided by individual wardens at each institution.

The current limits on time in a halfway house (up to 12 months) and home confinement (six months or 10% of the sentence, whichever is less) will not apply to earned time credits. Thus, a person can be released to a halfway house and/or home confinement even earlier, meaning, inmates can spend more than 12 months in a halfway house or more than ten percent of their sentence in home confinement after accumulating earned time credits.

DOJ Must Create, Use New PATTERN Tool

The BOP currently uses a risk assessment tool to decide which prison to put people in, based on security level. The First Step Act requires the DOJ to create and use a new risk assessment tool—known as PATTERN—that will be periodically applied to assess each inmate’s risk of reoffending on an on-going basis.

Prisoners will be assessed at least once each year, with more frequent assessments for medium- and high-risk prisoners who are within five years of release. The tool will look at, among other factors, a person’s age and criminal record to determine whether the person is at minimum, low, medium, or high risk of reoffending.

If properly implemented, this aspect of the First Step Act could not only significantly lower the number of inmates in an already over-crowded and under-staffed system, but actually reduce recidivism and thereby provide important insights to criminal justice professionals and legislators on best practices for keeping people out of prison.

Potential Impediments to Implementation

As of now, no one can earn time credits for completing the program or productive activities until the DOJ completes and releases PATTERN, and the BOP creates or expands existing evidence-based programming or productive activity. As a result, earned time credits received prior to the implementation of the Risk Assessment Tool will not be eligible for redemption until the Tool is implemented.

Unfortunately, the ability to start earning credits may not actually come for most prisoners until even later than that, depending on how long it takes the BOP to apply PATTERN and create programming and productive activities and assign prisoners to them. PATTERN was the subject of a [House Judiciary Committee Oversight Hearing](#) where some experts expressed concern about its “[racial bias and lack of transparency, fairness, and scientific validity.](#)”

The DOJ has been somewhat circumspect as to how close PATTERN is to being finalized, stating only that it “is currently

[undergoing fine-tuning.](#)” Nonetheless, indications are that inmates will begin being scored under a preliminary version soon.

Another potential impediment to full implementation will be the availability of half-way house beds. In certain parts of the country, there is a shortage of available half-way house beds for federal inmates. The act did not mention any additional funding or resources for the BOP to implement this program. This obviously could potentially delay or otherwise limit the implementation of other aspects of the program.

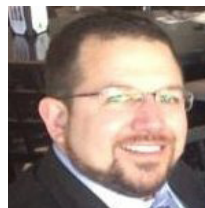
Congress’ intent under the First Step Act is well-intentioned, but without adequate funding, it may not benefit qualifying inmates it was designed to serve.

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About the Authors

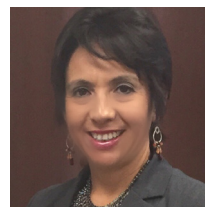


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