

Understanding and Troubleshooting the First Step Act's Earned Time Credits (ETC)

Laura S. Wasco

Research & Writing Attorney

Office of the Federal Public Defender

What are we Looking at with this Presentation?

- ◆ First Step Act (FSA) – What it is and what did it do?
- ◆ Where we are getting the most questions – Incentives and Rewards (ETC).
- ◆ Earned Time Credits (ETC) –
 - ◆ Who can earn
 - ◆ How to earn
 - ◆ When are credits applied
- ◆ Troubleshooting Common Questions/Problems

First Step Act (FSA) –
What it is and what did it do?

First Step Act (FSA) – What it is and what did it do?

- ◆ On December 21, 2018, then-President Trump signed into law the First Step Act.
- ◆ **CRIMINAL JUSTICE REFORM BILL** - It was a culmination of a bi-partisan effort to improve criminal justice outcomes and to reduce the federal prison population while also maintaining public safety. These are the most memorable adjustments –
 - ◆ Changes to mandatory minimums for some offenses and increasing the threshold for prior convictions counting towards triggering higher mandatory minimums for repeat offenders.
 - ◆ Making the FSA's crack cocaine penalties retroactive.
 - ◆ Expanding the safety valve for low-level, nonviolent drug offenders with minor criminal histories to less than the required mandatory minimum for an offense.
- ◆ **RECIDIVISM AND PRODUCTIVITY** - Importantly, the First Step Act required the Attorney General to develop a risk and needs system for the BOP to use in assessing prisoners' recidivism risk and criminogenic needs. The idea was to put prisoners into programs aimed at reducing recidivism and increasing productivity to address their overall needs.
 - ◆ The result of this system was the PATTERN Tool.

First Step Act (FSA) – What it is and what did it do?

- ◆ INCENTIVES FOR CHANGE = EARNED TIME CREDITS - The First Step Act amended 18 U.S.C. § 3624(b) permitting inmates to earn up to 54 days of good time credit for every year of imposed sentence (rather than for every year of sentence served) and permits eligible inmates to earn time credits for pre-release custody. (BUT THERE ARE EXCLUSIONS! *See also Valladares v. Ray*, 130 F.4th 74 (4th Cir. 2025)(for death results cases, there must be a conviction under the death-resulting enhancement element).
- ◆ CHANGES TO CONFINEMENT – The First Step Act additionally amended 18 U.S.C. § 3621(b), requiring the BOP to house inmates as close to their primary residences as possible (i.e., 500 miles). It also created a pilot program permitting BOP to place some elderly and terminally ill inmates on home confinement to serve the remainder of their sentences.
- ◆ CORRECTIONAL REFORMS – Included criminal-justice provisions prohibiting the use of restraints on pregnant inmates and requirement to provide tampons and sanitary napkins meeting industry standards for free and in quantities meeting inmate needs. It also requires BOP to provide correctional officers and other employees/contractors with training to de-escalate encounters, to identify and respond to incidents with cognitively impaired inmates and prohibited solitary confinement for juveniles.

First Step Act (FSA) – What it is and what did it do?

◆ Where can I find all of this information? The First Step Act is Codified in: 18 U.S.C. §§ 3621, 3624, 3631-3635.

- ◆ 18 U.S.C. § 3621 – Imprisonment of a convicted person (Changes to Confinement)
- ◆ 18 U.S.C. § 3624 – Release of a prisoner (Incentives for change and ETCs)
- ◆ 18 U.S.C. §§ 3631 – Duties of the Attorney General
- ◆ 18 U.S.C. §§ 3632 – Risk and Needs Assessment (PATTERN Form)
- ◆ 18 U.S.C. §§ 3633 – Evidence-Based Recidivism Reduction Program and Recommendations
- ◆ 18 U.S.C. §§ 3634 – REPORT (Oversight for ETC programs)
- ◆ 18 U.S.C. §§ 3635 - Definitions

Where we are getting the most questions –
Incentives and Rewards (ETC).

Where we are getting the most questions – Incentives and Rewards (ETC).

- ◆ When it comes to what inmates are receiving and not receiving with respect to earned time credits - this is where we've been getting all kinds of questions from clients.
- ◆ The focus here will be on the basics of Earned Time Credits under 18 U.S.C. § 3624.
 - ◆ Who can earn them?
 - ◆ How do you earn them?
 - ◆ How are credits used?
 - ◆ Some important points to remember
- ◆ Clients are reaching out for help left and right. Accordingly, we will “troubleshoot” some sample scenarios of common problems/issues.

Earned Time Credits – ETC

WHO CAN EARN?

HOW TO EARN?

HOW ARE CREDITS APPLIED?

Earned Time Credits – ETC (Who Can Earn?)

- ◆ Prisoner serving term of imprisonment of more than one year (but not life)
- ◆ Sentence must be for an eligible statute (see handout for exclusions)
 - ◆ If serving any part of a sentence with ineligible statute, the prisoner cannot earn credits
- ◆ Prisoner must be “making satisfactory progress” towards high school diploma (or equivalent)
- ◆ Pre-Release Custody = BOP must afford prisoners reasonable opportunities to adjust to and prepare for reentry (not to exceed 12 months); Prisoners with low recidivism risks and low needs may be placed on Home Confinement for 6 months or 10 percent of the prison term (whichever is shorter)
- ◆ Upon release, BOP shall provide – suitable clothing, money (no more than \$500), and transportation to place of conviction, home, or place authorized in US
- ◆ *See 18 U.S.C. § 3624*

Earned Time Credits – ETC (Who Can Earn?)

- ◆ What statutes are eligible and what statutes are not eligible for ETC?
- ◆ It's easier to look at the statutes that are *not eligible*. Refer to your handout as part of your materials.
- ◆ *See 18 U.S.C. § 3632(d)(4)(D)*

Earned Time Credits – ETC (How to Earn?)

- ◆ Eligible prisoner must successfully complete evidence-based recidivism reduction programming or productive activities
- ◆ Eligible to: (a) earn 10 days of time credits for every 30 days of successful participation, (b) if at a minimum or low risk for recidivism
 - ◆ If have 2 consecutive assessments without increasing recidivism, can earn up to 5 extra days for every 30 days of successful participation
- ◆ To be “in earning status”, a prisoner must satisfy five steps – be at a designated facility, have an eligible conviction, have PATTERN completed, have Needs Assessment completed, and not be in a refused or declined status (expand and do graphic)

Earned Time Credits – ETC (How to Earn?)

- ◆ This doesn't apply to programming completed prior to the date of enactment, or during official detention prior to date of sentence commencing.
- ◆ Time credits go towards prerelease custody or supervised release and is handled by the Director of BOP under 3624(g).
- ◆ Risk assessments and level adjustments are held not less than annually; those with medium or high risk for recidivism with less than 5 years until projected release date will receive more frequent risk assessments.
- ◆ Those who violate prison rules can lose rewards and incentives.
- ◆ *See* 18 U.S.C. § 3632(d)(4)(A)-(C), (d)(5), (e)

Earned Time Credits – ETC (When are Credits Applied?)

- ◆ ETC must be “equal to the remainder” of the “imposed term of imprisonment”
- ◆ Early Release – the first 365 days go towards early release (for those with minimum or low recidivism risk only)
- ◆ Pre-Release – all additional/remaining days go towards pre-release placement (if minimum or low recidivism risk for last two assessments or with Warden approval (this is “ordinarily considered inappropriate” unless the prisoner is not a danger to society, there are good faith efforts to reduce recidivism, and is unlikely to recidivate.
- ◆ *See* 18 U.S.C. §§ 3632(d)(4)(C) and 3624(g)

Earned Time Credits – ETC

IMPORTANT THINGS TO REMEMBER

Earned Time Credits – ETC

(Important Things To Remember)

- ◆ Note there are placements that prevent earning: placement in SHU, Non-BOP designation (hospital, furlough, writ), mental health/psychiatric hold
- ◆ Client can also be in a “refused” status (refusing to complete assessments, refusing requirements such as FRP/GED/drug program) or “declined” status (declining programs to address needs areas)
- ◆ Don’t like this new arrangement?
 - ◆ Negotiate around excludable offenses and facts – for example, use excludable offenses to argue for a downward variance.
 - ◆ Remember facts that can increase a PATTERN Risk level include “history of violence” (from a prior offense narrative”) and history of escape
 - ◆ Make sure to ask for at least one day of supervised release and terminate old ineligible SRV cases in exchange for a longer sentence on a new case – this will avoid “serving a sentence” for an ineligible offense

Troubleshooting Common Questions/Problems

Troubleshooting Common Questions/Problems: Specific Statute of Conviction

You get this voicemail:

“Hi, Ms. Defender. I heard from someone in here that I should be getting my FSA credits, and I asked my counselor, and he said I can’t because of something about fentanyl. Can you call my counselor and tell him to make me eligible for FSA credits?”

- ◆ Check the conviction against 18 U.S.C. 3632(d)(4)(D) to see if it’s FSA credit eligible.
 - ◆ Conviction is Possession with Intent to Distribute 40 Grams of More of Fentanyl 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(B)
- ◆ Using your HANDOUT, you will see convictions for Fentanyl under 841(b)(1)(A) or (B) are expressly excluded by statute.

Troubleshooting Common Questions/Problems: Incarceration on Sentence Under a Year

- ◆ You represent a client who was recently sentenced to 5 months' incarceration on a qualifying ETC offense. He is awaiting a self-surrender date, and you believe he will be classified as minimum/low recidivism risk. Will he be able to earn FSA credits on this 5-month sentence?
- ◆ Technically, yes, but he's unlikely to benefit from much. Client is eligible to earn as soon as he completes his risk/needs assessments. (§ 3632(d)). He needs to participate for 30 days (after completing assessments) to earn 10 days. (§ 3632(d)(4)(A)(i)). He can earn 5 more days per 30 days of participation, but not until he's had 2 reassessments, which he probably never will reach given the length of the sentence (§ 3632(d)(4)(A)(ii)). Also, the current BOP regulations imply he needs 2 assessments to apply his credits (*id.*)

Troubleshooting Common Questions/Problems: Supervised Release Violations

- ◆ You have a client who had his supervision revoked on a prior 924(c) conviction based on new criminal conduct for possession of heroin. Can this client get ETC?
- ◆ Is the 924(c) conviction ETC eligible? Is the possession of heroin (no role enhancement) ETC eligible?
 - ◆ 924(c) is ETC ineligible and possession of heroin is ETC eligible
- ◆ When two sentences are imposed on the same day or when the client gets to BOP custody with two undischarged sentences, it is BOP policy to aggregate these sentences. When the BOP aggregates two sentences, and one of the sentences is ETC ineligible, the client is deemed ETC ineligible for their entire time in custody. *See 28 C.F.R. § 205.*

Troubleshooting Common Questions/Problems: Supervised Release Violations II

- ◆ You have a client who has his supervision revoked on a felon in possession conviction based on new criminal conduct for possession of a quantity of cocaine. But your judge does not impose any supervision term to follow. Can this client get ETC?

How do you analyze this?

- ◆ Is the FIP conviction ETC eligible?
 - ◆ FIP is ETC eligible
- ◆ Is the possession of cocaine ETC eligible?
 - ◆ possession of cocaine is ETC eligible
- ◆ Can this client earn credits if there's no supervision term to follow?
- ◆ No! There is a statutory requirement for a term of supervision after imprisonment be imposed pursuant to section 3583, which then gives the Director of BOP the ability to transfer the client to supervised release at an earlier date (not to exceed 12 months) based on a time credit application under 3632. *See* 18 U.S.C. § 3632(g).

Troubleshooting Common Questions/Problems: Halfway House/Home Confinement Question (disguised as FSA)

You get this email:

MY CASE MANAGER SAYZ I CANT GO TO A HALFWAY HOUSE OR HOME RELEASE SOMETHING ABOUT THE TRAFFIC WARRANT!!!! HELP I NEED MY FULL TIME CREDITZ!!

- ◇ This is a bit tricky because it isn't an FSA problem, it's a halfway house barrier issue.
- ◇ Check the PSR. You're looking for common barriers to halfway houses (BOP Program Statement # 7310.04 – but is it available? If not – FAMM may have it.)
- ◇ Take reasonable steps to get proof that the case is resolved. For example,
 1. Call the state public defender's office and ask if there still is a pending case, and if so, if they can help get it dismissed.
 2. Have records collected from the case, including any dismissal or clerk statement that there is no such case.
- ◇ Send proof of resolution to client and anyone they ask you to send it to.

Troubleshooting Common Questions/Problems: EBRRP's

- ◆ You have a client who filed a pro se compassionate release motion. He claims that upon filing the motion, his prison began requiring him to pay \$100 a month in restitution. Unable to pay it and unwilling to have his family pay it for him, he fell in arrears. He now says that he has been stripped of his FSA good time credits and has been told he will not release to a halfway house due to his lack of payment of restitution. Is this something the BOP can do? How can you help?
- ◆ Unfortunately, failure to participate in the voluntary IFRP is opting out of recidivism reduction programs. 3632(b), 3624(g)(bb), 28 CFR 523.41(c)(4)(v)(iii) and 523.44
- ◆ You can help with either a habeas petition in the district of incarceration (to try to suspend the payment of restitution until released from custody) or file with the sentencing judge under 3664(k) (or if it's a fine, then 3572(d)(3)) for the same.

Troubleshooting Common Questions/Problems: Non-Citizens

- ◆ You have a client who is convicted of Felon in Possession. Client is a national of another country, and client wants to get out as soon as possible to take care of family. Can the client get ETC's?
- ◆ Is the statute of conviction eligible for ETC? Yes!
- ◆ But here you need more – what is the citizenship status?
 - ◆ You see in the file that an ICE detainer exists only.
 - ◆ Yes, client may earn and apply ETC's.
- ◆ Deportable prisoners are ineligible to apply time credits (§3632(d)(4)(E)), (those who are “the subject of a final order of removal”)

QUESTIONS?

Check your materials for:

- ◆ Handout on Exclusions
- ◆ Statutes
- ◆ EBRR Programs & Activities
- ◆ USSC FSA ETC Chart
- ◆ PowerPoint (basics only, without graphics)

Laura_Wasco@fd.org

919-856-4236, ext. 9071