

*The Legal Intelligencer*

# First Step Act of 2018 Aims to Reform Sentencing Laws

February 04, 2019

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In one of Congress's last acts before the government shutdown, it passed, and the president signed, the First Step Act of 2018 (the act). The act represents progress toward reducing the rate of mass incarceration and ameliorating the extensive personal and societal problems it has caused. Its successful passage was the result of years of lobbying by a coalition of left and right-wing activists and leaders (and a Kardashian) working together to start reducing a prison population inflated by over-criminalization and over-penalization.

Broadly viewed, the act is intended to achieve its aims in two principal respects: first, on the front end, by modifying sentencing laws, including reducing the application of certain mandatory minimum sentences; and second, on the back end, by providing for various re-entry services for returning citizens. While the bulk of the act is targeted toward this latter goal of reducing recidivism, its sentencing modifications, although few, are significant and will have practical effects.

## **THOSE AFFECTED**

The act is somewhat limited in scope as it only applies to those charged with or serving sentences for federal offenses. It will have no application to the substantial number of individuals incarcerated for violations of state law. According to the U.S. Bureau of Justice statistics, there are approximately 2.2 million individuals incarcerated in local, state or federal prisons. Of that total, approximately 215,000—9.7 percent—are in the federal system. It is expected that the act's retroactive provisions will affect only about 1.5 percent of current federally detained individuals charged with drug and drug-related offenses. However, going forward, these provisions will impact about 12,000 cases per year involving over 25,000 defendants. Thus, in practice, the act will have a measurable impact.

## **THE FIRST STEP ACT APPLIED**

The sentencing modifications set forth in the act can be best illustrated with an example. In our example, the case begins with law enforcement buying a kilogram of heroin from Individual A. At the time of this operation, law enforcement observes Individual A with a firearm. After buying the heroin, law enforcement obtains a search warrant for Individual A's residence and finds another firearm in close proximity to tools used to weigh and package drugs. Based on these facts the U.S. Attorney's Office charges Individual A with one count of distribution of one kilogram or more of heroin, and two counts of possession of a firearm in furtherance of a drug trafficking offense. Individual A, who was previously convicted of possession with intent to distribute a small amount of marijuana and received a sentence of time-served (70 days) in 1998, pleads guilty, and begins preparing for sentencing.

Prior to passage of the First Step Act, Individual A could have received a mandatory minimum sentence of 50 years incarceration. The federal drug laws call for a mandatory minimum sentence of 10 years for distribution of one kilogram or more of heroin. But because Individual A already has a prior conviction for a felony drug offense, he could be sentenced to mandatory minimum sentence of 20 years. Individual A's possession of the two guns further increases the potential mandatory minimum sentence. A single count of possession of a firearm in furtherance of a drug trafficking crime carries a five-year sentence that must be served consecutively to any other sentence of imprisonment. But federal law provides that a second count of the same charge carries a 25-year consecutive sentence that must be "stacked" to the five years sentence for the first count and the sentence for the underlying drug count. In this scenario, a federal judge would have no discretion and must sentence Individual A to a sentence of imprisonment of at least 50 years.

Two points require emphasizing at this stage concerning charging and sentencing discretion. First, the decision to charge a defendant with multiple counts of possession of a firearm in furtherance of a drug trafficking crime is within the discretion of the prosecuting U.S. Attorney. Second, the U.S. Attorney also has discretion to file, or not file, an "information" charging Individual A with a prior felony drug conviction. This discretion, however, is limited by current Department of Justice policy, set forth in the May 10, 2017, memorandum from former Attorney General Jeff Sessions to all federal prosecutors that "it is a core principle that prosecutors should charge and pursue the most serious, readily provable offense ... which are those that carry the most substantial guidelines sentence, including mandatory minimum sentences." Under the Sessions Memorandum, federal prosecutors are effectively required to pursue all available mandatory minimum sentences.

Thus, under the law as it currently stands, Individual A will likely spend the remainder of his life in prison.

The act dramatically changes this result with key amendments to: application of the prior felony/drug conviction enhancement in 21 U.S.C. Section 841; the government's ability to "stack" charges under 18 U.S.C. Section 924; and the potential availability of the safety valve provision.

## **PRIOR FELONY DRUG CONVICTION**

Whereas under existing law Individual A faced an additional 10-year statutory enhancement for his prior felony drug conviction, the act replaces "prior conviction for a felony drug offense" with "prior conviction for a serious drug felony or serious violent felony." The act defines "serious drug felony" to mean an offense for which "the offender served a term of imprisonment of more than 12 months" and "the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense." Under the act, a relevant prior offense can now grow stale and it must have included a material term of incarceration. Moreover, even if triggered, this enhancement as modified by the act would result in the imposition of a mandatory 15-year term of incarceration. Additionally, while existing law contains a "three strikes" provision mandating life in prison for anyone convicted of a third drug offense, the act reduces that mandatory minimum to 25 years. Finally, this amendment includes limited retroactivity, applying to "any offense that was committed before the date of enactment of this act, if a sentence for the offense has not been imposed as of such date of enactment."

Accordingly, in our example, where Individual A committed the instant offense 20 years after receiving a 70-day time-served sentence for a drug violation, the Section 841 enhancement does not come into play and our example is facing merely the 10-year mandatory minimum related to drug weight.

## THE FIREARM ENHANCEMENT

The act makes a small but significant change to the firearm enhancement to eliminate the stacking of charges. The act amends Section 924 to make clear that the 25-year enhancement applies only to subsequent convictions in separate cases. Put succinctly, whereas Individual A previously would have faced a mandatory sentence of 30 years for the two gun charges, he now would face a mandatory term of only five years for those charges. Altogether, the act would reduce the mandatory minimum sentence Individual A faces from 50 years imprisonment to a mandatory 15 years imprisonment.

## THE SAFETY VALVE

The act also expands the so-called “safety valve” provision. Previously, a defendant convicted of a drug crime could escape the mandatory minimum provisions if he had an insignificant criminal history; did not use violence or a firearm in the subject offense; was not a leader or organizer of a criminal enterprise; and fully accepted responsibility for the offense. The act modifies the safety valve to provide sentencing judges with greater discretion whether to apply a mandatory minimum sentence by making the safety valve available more widely. This provision is now available to defendants who have had prior convictions. The defendant must, of course, meet all of the other existing requirements. In our example, Individual A would remain subject to the statutory mandatory minimum sentences because the government has charged him with firearm offenses. However, if the prosecutor declined to bring or withdrew the gun charge, Individual A would become eligible for the safety valve. Individual A has served a single prior sentence of 70-day incarceration, which would have made him ineligible for the safety valve under existing law. Under the guidelines, this calculates to two criminal history points, thus the sentencing judge would be able to sentence Individual A without regard to the mandatory minimum sentences otherwise applicable to his offenses. Because of the act’s changes, a sentencing judge would now be freed to sentence Individual A to a sentence less than the mandatory minimum.

As shown, in certain cases the act will yield substantial changes from existing law. It is a real and important “First Step” toward sentencing reform.

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