

ACT 28 AND ITS CONSEQUENCES FOR THE PRACTITIONER

By: Attorney Katherine Findley*

2009 Wisconsin Act 28 was signed into law in July, 2009 and took effect on October 1, 2009. Act 28 includes four new early release programs and modifies existing early release programs for Wisconsin inmates. This article examines the new programs and the modification of existing programs.

At the time this article is published, the Department of Corrections (DOC), the Earned Release Review Commission (ERRC), and the courts are still in the process of implementing procedures to deal with the changes required by Act 28.

According to DOC, they will look at each sentence of each inmate to see if they qualify for any of the release mechanisms. There are no automatic release mechanisms under Act 28; all mechanisms are discretionary and most require the inmate to meet certain conditions. Nearly all of the release mechanisms exclude inmates convicted of sex offenses, violent offenses, and specific offenses listed under sec. 302.113(2)(b)(1m)-(18). There are no early release mechanisms for inmates serving time for Class A or B felonies. Each of the new programs creates new way in which an inmate may end up serving less time than ordered under prior sentencing laws, but the new rules are highly complex and will not always result in a lesser sentence if the inmate fails to establish a positive adjustment record in prison. For some inmates, Act 28 will mean that they may be eligible for release after having served two-thirds of their sentence, similar to what they would have served under the law prior to truth in sentencing.

The new changes will mean that attorneys who wish to be able to advise their clients fully should be aware of Act 28's many changes and the many requirements and opportunities created by Act 28.

Review of Current Sentence Structure Categories

In order to fully understand the current release mechanisms, the practitioner should be aware of the all possible sentence structures for offenses punishable by time in prison. All sentences fall into one of the following categories:

Old Law – offenses committed prior to June 1, 1984. The inmate's MR (mandatory release) date is established by applying statutory good time and extra good time.

New Law – offenses committed on or after June 1, 1984 and prior to December 31, 1999 are sentenced under 1983 Wisconsin Act 528. (When sentenced on an Old Law offense, an inmate could opt into New Law by making the request within 60 days of reception at the intake institution (Dodge Correctional or Taycheedah Correctional Institution).) The MR date is established at 2/3 of the sentence. Certain serious felonies committed on or after 4/21/94 but prior to 12/31/99 have presumptive MR dates.

Truth In Sentencing (TIS) – offenses committed on or after 12/31/99 are sentenced under 1997 Wisconsin Act 283. A sentence to prison must be a bifurcated sentence that includes a period of initial confinement followed by a term of extended supervision (ES).

TIS 1 - offenses committed on or after 12/31/99, but before 2/1/03.

TIS 2 – offenses committed on or after 2/1/03. Inmates are allowed to petition the sentencing court for sentence adjustment under sec. 973.195. The sentencing court determined the amount of reconfinement time upon a revocation of extended supervision.

TIS 3 – applies to sentences imposed on or after 10/1/09. Upon revocation of extended supervision, the amount of reconfinement time is determined by the agent/DOC if the hearing is waived or the administrative law judge is the hearing is not waived.

Current Release Programs

Act 28 adds to existing early release programs rather than replacing them.

All early release programs currently in effect fall into four basic categories:

- Release occurs after judicial approval and results in automatic release.
- Release occurs through DOC implementation of the new rules.
- Release occurs through the ERRC.
- Programs which apply only to inmates sentenced for offenses committed between December 31, 1999 and September 30, 2009.

Release Through Judicial Approval

1. *Challenge Incarceration Program (Boot camp) (CIP) under section 302.045*

- For non-assaultive and non-violent offenders.
- The sentencing court must find that the defendant is eligible for CIP.
- CIP is now available to inmates who need intensive inpatient AODA treatment; inmates who only need AODA education or outpatient AODA treatment and where substance abuse was not a key factor in the criminal behavior; or inmates who have non-AODA treatment needs that are directly related to the criminal behavior.
- For inmates with a TIS sentence who were sentenced before 10/1/09 and found not eligible by the sentencing judge, DOC suggests that the inmate go back to the sentencing court and request that the court find them eligible.

- There is no statutory requirement that the inmate must serve a specified period of initial confinement time before being released. The judge, however, has the authority to set a minimum amount of confinement time that must be served before the inmate may enter the program.
- The age requirement has changed - if sentenced on or after July 26, 2003, the offender will be under the age of 40 when they start the program.
- If sentenced before July 26, 2003, the offender must be under the age of 30 when they start the program.
- The offender cannot have psychological, physical, or medical limitations that preclude participation in the program.

2. *Earned Release Program (ERP) under section 302.05*

- ERP is an intensive 6 month program designed to reduce criminal behavior.
- Inmate does not have to serve a specific percentage of initial confinement time before being released.
- Act 28 now allows for an inmate **without** a substance abuse problem to participate in ERP if the inmate has another identifiable treatment need.
- For inmates with a TIS sentence who were sentenced before 10/1/09 and found not eligible at sentencing because s/he did not have an identified AODA need and therefore did not meet the prior criteria, DOC suggests that the inmate go back to the sentencing court and request that the court find them eligible.
- ERP is intended for non-assaultive and non-violent offenders.
- The inmate is still not eligible if convicted of crimes under Chapter 940 or sexual assault charges under Chapter 948.

3. *Risk Reduction Program under section 302.042*

- The judgment of conviction must include a notice of an imposed Risk Reduction Sentence (RRS). The judgment of conviction is sent to Division of Adult Institutions intake facilities.
- The inmate must agree to cooperate in an assessment and participate in treatment or programming as assigned by the DOC and must maintain good conduct. At the time this article is written, “good conduct” means that major

conduct reports will count against the inmate. Minor conduct reports will not count against the inmate.

- The institution records office will calculate possible release dates, including a Release Eligibility Date (RED).
- DOC will complete an objective, validated risk assessment. They are currently using DOC Form DOC-502 "Assessment of Offender Risk."
- Attorneys should be aware that once accepted into the program, the inmate is fast-tracked through the initial classification process and given priority for programs or treatment enrollment.
- Current programs range in length from three months to one year. The amount of initial confinement time will determine the scheduling of programs.
- The inmate, the assigned institution social worker, and the probation/parole agent begin pre-release planning 6 months prior to the RED.
- Inmate must have served 75% of confinement time and programming must be completed by the time the inmate completes 75% of his/her confinement time.
- A sentence of 18 months or less of initial confinement time may not allow enough time to complete any required programming.
- The sentencing court and the Office of Victim Services are notified when the inmate successfully completes the requirements of the RRS. The sentencing court does not have the authority to veto the release decision. Sec. 302.042(4).
- If released early, the initial confinement time is reduced by up to 25%. The overall length of the sentence is reduced as this time is **NOT** added to the extended supervision.
- When released under RRS, the inmate begins serving the extended supervision portion of the sentence.
- RRS is available only to inmates sentenced on or after 10/1/09.
- There is no statutory authority for inmates sentenced before 10/1/09 to request a RRS from the sentencing court.

4. *Sentence Adjustment under section 973.195*

Under Act 28, courts retain the authority to approve or deny sec. 973.195 sentence adjustment petitions. However, inmates need to know that if they petition directly to the court for a sentence adjustment under sec. 973.195, they are ineligible for release by

ERRC release on *any* of the sentences for which they are currently incarcerated. This means if they want early release on a future, consecutive sentence, they will have to again leave the entire decision up to the trial court following another petition under sec. 973.195. It should also be noted that if an inmate is denied early release by the DOC, s/he can still petition the court for sentence adjustment under sec. 973.195 once s/he reaches the appropriate 75% or 85% date.

5. *Judicial Oversight of Positive Adjustment Time (PAT)*

Although judges are not involved in the determination of eligibility for, or the calculation of, PAT the attorney should be aware that the sentencing judge will be able to review the DOC's or the ERRC's release decision and may overrule the decision. When the inmate is within 90 days of release, DOC must notify the sentencing court. If the court wishes to be involved in the release decision, the court must schedule a review hearing within 30 days of receiving the notice from DOC. The court will notify the district attorney and any victim of the hearing. At that hearing, the court may accept, modify, or deny the release decision.

Release Through DOC Implementing the New Rules *Positive Adjustment Time (PAT)*

Good time is now called Positive Adjustment Time (PAT) and DOC has implemented several levels of PAT. Inmates must be serving a TIS sentence and will earn PAT as long as they do not violate the rules and regulations of the prison or refuse or neglect to perform required or assigned duties. PAT can be reduced by major conduct reports and segregation time. DOC is in the process of developing rules to implement PAT. The amount of PAT an inmate may receive is determined by the class of felony or misdemeanor for which the inmate is serving a sentence. PAT does not apply to any time spent in custody from 1/1/00 to 9/30/09.

Inmates can earn 1 days for every 2 days served under sec. 302.113(2)(b) Wis. Stats., subject to the following rules.:

- Inmate must be sentenced under 973.01 for a misdemeanor or non-violent Class F-I felony. 301.048(2)(bm)1. defines a "violent offense" as:
 - a. A crime specified in s. 940.19(3), 1999 stats., s. 940.195(3), 1999 stats., s. 943.23(1m), 1999 stats., or s. 943.23(1r), 1999 stats., or s. 940.01, 940.02, 940.03, 940.05, 940.06, 940.08, 940.09, 940.10, 940.19(4) or (5), 940.195(4) or (5), 940.20, 940.201, 940.203, 940.21, 940.225(1) to (3), 940.23, 940.285(2)(a)1. or 2., 940.29, 940.295(3)(b)1g., 1m., 1r., 2., or 3., 940.31, 940.43(1) to (3), 940.45(1) to (3), 941.20(2) or (3), 941.26, 941.30, 941.327, 943.01(2)(c), 943.011, 943.013, 943.02, 943.04, 943.06, 943.10(2), 943.23(1g), 943.30, 943.32, 946.43, 947.015, 948.02(1) or (2), 948.025, 948.03, 948.04, 948.05, 948.051, 948.06, 948.07, 948.08, 948.085, or 948.30.

b. A crime under federal law, the law of any other state or, prior to October 29, 1999, the law of this state that is comparable to a crime specified in subd. 1. a.

- Inmate must be determined to not be at a high risk of re-offending. At this time, the DOC is using DOC-502 “Assessment of Offender Risk” to assess an inmate’s risk of re-offending.
- The earliest an inmate can be released is after serving 2/3 of the confinement portion of the sentence.
- If an inmate is released under PAT, the unserved portion of confinement time is added to the extended supervision time so that the total length of the sentence is unchanged.
- 90 days prior to release, DOC must notify the sentencing court. If the sentence court is going to hold a review hearing, it must be done within 30 days of receipt of the notice. If the court does not schedule a review hearing within 30 days, then DOC “shall” release the inmate. Sec. 302.113(2)(b).
- At the review hearing, the sentencing judge may deny early release, reduce the amount of early release time, or agree with the early release decision.

Early Release of Certain Inmates under section 302.113 (9h)

Until recently, this was called “Certain Early Release.” It is now called “Certain Earned Release” (CER).

CER allows DOC to release certain offenders up to a year early if the Secretary of the DOC determines that the inmate has fulfilled the statutory criteria for release. DOC believes that CER is available to eligible inmates serving initial confinement time and those serving reconfinement time.

- Inmate must be sentenced under 973.01 for a misdemeanor or non-violent Class F-I felony
- There must be 12 months or less until the inmate’s extended supervision eligibility date
- The social worker or probation/parole agent has “reason to believe” that the inmate will not engage in assaultive activity in the community.
- The inmate must complete a release plan.
- The current process in DOC involves a multiple step procedure and can take 8-12 weeks for the review process to be completed.

- Notice of release must be provided to the sentencing court and the district attorney.
- The sentencing court does not have veto power over the release decision.
- If an inmate is released under CER, the unserved portion of re/confinement time is added to the extended supervision time so that the total length of the sentence is unchanged.
- If released under CER, it is DOC's policy that the inmate will almost certainly be placed on electronic monitoring and be on high-risk community supervision for a period of time.

Release Through the Earned Release Review Commission (ERRC)

ERRC was formerly called the Parole Commission. Act 28 creates early release mechanisms that require review and approval by the ERRC before the inmate can be released.

1. *Positive Adjustment Time (PAT)*

- a. The inmate can earn 1 day for every 3 days served under sec. 304.06(1)(bg)(1) subject to the following rules:

- The inmate must be sentenced under 973.01 for a misdemeanor or non-violent Class F-I felony and ineligible for PAT under 302.113(2)(b). (See Footnote 1 for definition of "violent offense); **or**
- Sentenced under 973.01 for Class F-I violent felony.
- Once the inmate has served the required confinement time, minus PAT, the statute states that the inmate must petition the ERRC for release to extended supervision. However, it appears that about 4 months before the date an inmate is scheduled for early release based on PAT, DOC is scheduling a hearing with ERRC and not requiring an inmate to apply for release.
- If an inmate is released under PAT, the unserved portion of confinement time is added to the extended supervision time so that the total length of the sentence is unchanged.
- The earliest an inmate can be released is after serving 75% of the confinement portion of the sentence.
- 90 days prior to release, if ERRC is going to modify the inmate's initial confinement time, ERRC must notify the sentencing court. If the sentence court is going to hold a review hearing, it must be done within 30 days of receipt of the notice. If the court does not schedule a review hearing within 30 days, then DOC "shall" release the inmate. Sec. 302.113(2)(b).

- At the review hearing, the sentencing judge may deny early release, reduce the amount of early release time, or agree with the early release decision.
- If ERRC grants PAT early release, DOC has up to 30 days to release the inmate.
 - b. Inmates can earn 1 day for every 5.7 days served under sec. 304.06(1)(bg)2 subject to the following rules:
 - Inmate must be sentenced under 973.01 for Class C-E felony
 - Once the inmate has served the required confinement time, minus PAT, the statute states that the inmate must petition the ERRC for release to extended supervision. However, it appears that about 4 months before the date an inmate is scheduled for early release based on PAT, DOC is scheduling a hearing with ERRC and not requiring an inmate to apply for release.
 - If an inmate is released under PAT, the unserved portion of confinement time is added to the extended supervision time so that the total length of the sentence is unchanged.
 - The earliest an inmate can be released is after serving 85.1% of the confinement portion of the sentence.
 - 90 days prior to release, if ERRC is going to modify the inmate's initial confinement time, ERRC must notify the sentencing court. If the sentence court is going to hold a review hearing, it must be done within 30 days of receipt of the notice. If the court does not schedule a review hearing within 30 days, then DOC "shall" release the inmate. Sec. 302.113(2)(b).
 - At the review hearing, the sentencing judge may deny early release, reduce the amount of early release time, or agree with the early release decision.

2. *Extraordinary Health Conditions/Aged under sec. 302.1135(2)(a), (b) and (c)*

This release mechanism applies only to inmates with a TIS sentence. As before, if inmates serving new law sentences meet the criteria of this section the parole board will determine whether release under this section is appropriate. Inmates convicted of Class A and B felonies can now apply.

- The inmate must be 65 years old and served at least 5 years of confinement on bifurcated sentence or 5 years on life sentence; or
- The inmate must be 60 years old and have served 10 years of confinement of bifurcated sentence or 10 years on life sentence; or

- The inmate has an extraordinary health condition as defined by sec. 302.1135(1)(b).
- The inmate can have counsel represent them at the hearing. The SPD has discretionary power to appoint counsel to represent the inmate. In order to officially be considered for SPD appointed counsel, the inmate needs to contact the SPD's trial office responsible for the county where the inmate was convicted.
- The district attorney and the victim have the right to attend the ERRC hearing.
- If an inmate is released, the unserved portion of confinement time is added to the extended supervision time so that the total length of the sentence is unchanged.
- If ERRC denies release, the inmate cannot file another petition for one year.
- ERRC's release decision can be appealed by the inmate or the district attorney by filing a writ of certiorari in circuit court.

Programs Which Apply Only to Inmates Sentenced For Offenses Committed Between December 31, 1999 and September 30, 2009
Sentence Adjustment under section 973.195

Sentence adjustment is available only to inmates sentenced under TIS 1 and TIS 2. The official court forms to be used when filing a petition can be found on the State Court website. (<http://www.wicourts.gov/forms1/circuit.htm>)

The Remington Center at the University of Wisconsin Law School has pro-se Sentence Adjustment packets which include the forms and instructions on how to petition the court for sentence adjustment.

Tips for the Practitioner

1. What, if anything, is available for an inmate sentenced for crimes under Old Law or New Law?

Most of Act 28 does not apply to inmates sentenced for crimes committed before December 31, 1999. Currently the only release mechanisms for inmates serving a parolable sentence are:

- Release by the ERRC after completing ERP;
- Release by the ERRC after completing CIP;
- Release by the ERRC based on old age or illness;
- Discretionary parole release by the ERRC;
- Release at the MR (mandatory release) date if the inmate has one.

2. What should the practitioner know about extended supervision revocation hearings and parole revocation hearings?

Under Act 28, the offender does not return to the sentencing court for a reconfinement hearing. If the inmate does not waive a hearing, the Division of Hearings and Appeals schedules a hearing before an administrative law judge. (ALJ)

If the inmate waives a hearing, the length of reconfinement is determined by DOC (agent) and included on the revocation order and warrant.

If there is a hearing, the ALJ receives a recommendation from the agent. The ALJ determines the length of reconfinement and issues a decision and order which includes the reconfinement time.

After a revocation hearing, the ALJ generates a written decision and final order. A copy of the final order is sent to the institution but not a copy of the ALJ's decision. The attorney should make arrangements to ensure that the ALJ's decision be included in the client's prison file, either by requesting that the agent forward the decision, along with the revocation summary, to the prison or the attorney should contact Dodge Correctional Institution to make arrangements to send the decision directly to the records department at Dodge.

The revocation summary and warrant is put in the offender's prison file and is used by DOC and ERRC in determining the inmate's programming needs, security levels, and other issues. If there are ANY factually incorrect statements in the revocation summary, it is extremely difficult to get those statements corrected once the document is in the inmate's prison file. Some of these mistakes may be remedied if the attorney ensures that the ALJ's findings of fact and written decision are forwarded to the DOC.

If any information in the revocation summary is incorrect, this should be addressed at the revocation hearing. If the ALJ finds that the department has not proven an allegation or finds that the information as listed in the summary is incorrect, the attorney should request that the agent be ordered to generate a new revocation summary and warrant reflecting the correct facts and/or only the substantiated allegations.

3. What should practitioners know about Risk Reduction Sentences (RSS)?

Currently DOC is using form DOC-502 "Assessment of Offender Risk" to assess the "criminogenic factors." This form was originally developed for use for community corrections agents. DOC is in the process of developing a risk assessment tool.

When discussing the advantages and disadvantages of a RRS with the client, the practitioner should keep in mind that, at the time this article is written, it is not clear who will have access to the results of this assessment and how the results may be used. The consequences of any assessment may follow the client for years.

4. Can clients still petition for Sentence Adjustment under sec. 973.195?

Since 2003, TIS inmates convicted of Class F-I and Class C-E, after serving either 75% or 85% of their initial confinement time, could petition the sentencing court for early release through a sentence adjustment.

Under Act 28, only inmates who were sentenced prior to 10/1/09 may apply for a sentence adjustment.

Inmates with TIS 1 and TIS 2 sentences can also apply to the ERRC for “sentence adjustment” at 75% and 85% of their sentences under sec. 304.06(1)(bg)(3) and (4).

Your client needs to be aware that if an inmates files a petition for sentence adjustment in the trial court, they cannot file with the ERRC for sentence adjustment. Also, if any inmate has filed for sentence adjustment on **any** sentence, they cannot apply with the ERRC for a sentence adjustment on their current sentence or any other sentence. However, if the inmate applies **first** to the ERRC for sentence adjustment and is denied, the inmate can still apply to the sentencing court for a sentence adjustment under sec. 973.195.

5. Can a client still have early discharge from probation?

Yes. While anyone on probation as of 10/1/09 can be considered for early discharge, the offender must meet criteria set by DOC and have completed 50% of the period of probation.

A Wisconsin offender in another state through Interstate Compact can be considered for early discharge. Early discharge takes effect the date it is signed by the Regional Chief.

6. Is there early discharge from Extended Supervision?

Yes. Early discharge is available to offenders sentenced under TIS 1, 2, or 3. The offender must have served a minimum of 2 years on extended supervision, must have met the conditions of extended supervision, and the early discharge must be in the interest of justice. The DOC is working on specific criteria for agents to consider when assessing whether early discharge is in the interest of justice.

A Wisconsin offender in another state through Interstate Compact can be considered for early discharge.

DOC must notify the victim Sec. 973.01(4m) when an offender is granted early discharge.

Early discharge takes effect the date it is signed by the Regional Chief. If early discharge is denied, the offender can request consideration at a later date.

To a significant degree, Wisconsin Act 28 returns Wisconsin sentencing law full circle to the law that applied to “old law” and “new law” cases. The Earned Release Review

Commission assumes some of the functions of the prior Parole Commission and many inmates will earn positive adjustment time much as the older sentencing structures awarded good time.

Because Act 28 is not fully implemented, this article cannot provide a definitive list of advice that attorneys should give their clients, but there are several recommendations that attorneys should present to their clients.

First, inmates need to maintain good conduct records to show a positive adjustment in order to qualify for sentence reductions.

Second, inmates should not refuse any programs as this may them ineligible for entry into an early release program.

Third, counsel needs to challenge any factual errors on the revocation summary and warrant before the documents are placed into the inmate's prison file.

Fourth, inmates on extended supervision should try to meet all of the conditions or supervision, including paying off restitution, as quickly as possible so s/he can be considered for early discharge.

Finally, counsel needs to remain informed as DOC, ERRRC, and the courts implement policies and procedures to deal with the new early release mechanisms. There are resources for the practitioner on the DOC website which are updated as new procedures are put into place. (http://www.wi-doc.com/2009-11budget_documents.htm).

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