

FAILING TO REGISTER AS A SEX OFFENDER

The sex offender registration statute (G.L. c. 6, §§ 178C-178Q) imposes different registration requirements on sex offenders depending on their circumstances and their classification level. For example, a sex offender moving into Massachusetts must initially register with the Sex Offender Registry Board on a Board-approved form within 2 days, providing all the information required by that form and signing under the penalties of perjury (§ 178E[g]), while a sex offender moving out of Massachusetts need only “notify” the Board of his or her change of status within 10 days (§ 178E[l]). Level 2 or 3 offenders must appear at the police department in the community where they live to verify their registration data or to notify the Board of certain changes in their status.

A summary of the statute by section and subsection is provided at the end of the notes following this instruction and can be used as a quick guide to finding pertinent sections of this complex statute. The judge may wish to narrow the issues to be tried by asking the Commonwealth to identify at the beginning of trial precisely which registration provisions the defendant is alleged to have violated.

Section 178H of chapter 6 of our General Laws provides that it is a crime for a person who is a designated sex offender to knowingly (fail to register with) (fail to verify information with) (fail to provide notice of [change of address] [change of employment] [school enrollment status] to) (provide false information to) the Sex Offender Registry Board.

To prove that the defendant committed this offense, the Commonwealth must prove beyond a reasonable doubt each of the following four elements:

To avoid confusion, the jury should be instructed on only one of the following unless the complaint is charged in the alternative. Alternatives are indicated throughout this instruction by a raised bullet.

First: that the defendant

- (resided) (intended to reside) in Massachusetts.
- (worked) (intended to work) in Massachusetts.
- (worked) (intended to work) at an institution of higher learning in
Massachusetts.
- (attended) (intended to attend) an institution of higher learning in
Massachusetts.
- *Applicable only to non-residents:* (attended) (intended to attend) a secondary
school, trade or professional institution in Massachusetts.

Second: that the defendant was previously

- (convicted of the offense of [offense]).
- (adjudicated as a youthful offender by reason of [offense]).
- (adjudicated a delinquent juvenile by reason of [offense]).
- (released from incarceration or parole or probation supervision, or
custody with the Department of Youth Services, for a conviction
or adjudication of [offense]).
- (adjudicated a sexually dangerous person on or after August 1,
1981).
- (released from commitment as a sexually dangerous person on or

after August 1, 1981).

Third: that the defendant knew that he (she) was required to

- (register with)
- (verify registration data with)
- (provide notice of a change of address to)
- (provide correct information to)

the Sex Offender Registry Board.

and **Fourth:** that the defendant

- (failed to register).
- (failed to verify registration information).
- (failed to provide notice of a change of address).
- (provided false information when [registering] [verifying information] [reporting a change in employment or school status] [reporting a change of address]).

To prove the second element, the Commonwealth must prove that the defendant who is here in the courtroom is the same person who was previously

- (convicted of the offense of _____ [offense] _____).
- (adjudicated as a youthful offender by reason of _____ [offense] _____).

- (adjudicated a delinquent juvenile by reason of _____ [offense] _____).
- (released from incarceration or parole or probation supervision, or custody with the Department of Youth Services, for a conviction or adjudication of _____ [offense] _____).
- (adjudicated a sexually dangerous person on or after August 1, 1981).
- (released from commitment as a sexually dangerous person on or after August 1, 1981).

The Commonwealth cannot prove that the defendant is the same person simply by showing that this defendant has the same name — even the identical name — as the person who was previously (convicted) (adjudicated). The Commonwealth must prove beyond a reasonable doubt that this is actually the same person.

To prove the third element — that the defendant knew he (she) was required to

- (register)
- (verify registration data)
- (provide notice of a change in employment or school status)
- (provide notice of a change of address)

- **(provide correct information)**

— the Commonwealth must prove beyond a reasonable doubt that the defendant had actual notice of that obligation. The Commonwealth is not required to prove that notice of the obligation was provided to the defendant in any particular way, but it must prove that the defendant knew of his (her) obligation.

Before elaborating on the third (scienter) element, infra, the specific statutory provisions that the defendant is accused of violating should be identified.

Offenses under this statute will fall into one of four categories:

1. *Failure to initially register with the Board;*
2. *Failure to report a change in status (e.g., new address, employment or school);*
3. *Failure to periodically verify (e.g., annual verification of registration information); or*
4. *Knowingly providing false information.*

Within each of these categories, there are four different variables that the jury must be instructed on:

1. *The circumstance that triggers the requirement to register, report a status change, or provide periodic verification;*
2. *The timeframe within which the sex offender must register, report a status change, or provide periodic verification;*
2. *The manner in which such registration, status change report, or periodic verification must be done (either by mail or in person at the police department); and*
3. *The form that must be used to register, report a status change, or provide periodic verification.*

Because of statutory amendments, the date of the alleged offense must also be checked. For offenses occurring on or after 7/1/2006, secondary addresses or intended secondary addresses must be included in the information provided to the Board. The time interval for periodic verification was reduced from 90 days to 45 days for offenses committed on or after 7/1/2006 by those classified as sexually violent predators, and for offenses committed on or after 12/20/2006 by homeless sex offenders.

The Board-approved form requires that the sex offender provide his or her name, date of birth, home address or intended home address (and, if the offense occurred on or after 7/1/2006, any secondary addresses or intended secondary addresses), work address or intended work address, and the name and address of any institution of higher learning where the sex offender is or intends to become an employee or student. The form must be signed under the penalties of perjury.

A. *Violations involving initial registration.*

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that he (she) had to

- § 178E (a). **(register by mailing to the Sex Offender Registry Board, at least 2 days before release from custody, a Board-approved form that included all of the required information and was signed under the penalties of perjury).**
- § 178E (b) or (c). **(register by mailing to the Sex Offender Registry Board within 2 days**
[of receiving notice from the sentencing court]
[of receiving notice from the probation department]
[of receiving notice from the parole board]
[where sentence was less than 90 days: after release from custody])
a Board-approved form that included all of the required information and was signed under the penalties of perjury).
- § 178E(g). *If defendant is a level 1 sex offender:* **(register by mailing to the Sex Offender Registry Board within 2 days after moving to Massachusetts a Board-approved form that included all of the required information and was signed under the penalties of**

perjury).

- §§ 178E(g) and 178F½. *If defendant is a level 2 or 3 sex offender:* **(register in person with the police department by completing and delivering within 2 days after moving to Massachusetts a Board-approved form that included all of the required information and was signed under the penalties of perjury).**
- § 178E(o). **(register by mailing to the Sex Offender Registry Board, within 10 days before commencing employment or enrollment at an institution of higher education, a Board-approved form that included all of the required information and was signed under the penalties of perjury).**
- § 178E(q). **(register by mailing to the Sex Offender Registry Board, within 10 days of attending an educational institution as a non-resident of Massachusetts, a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

B. *Violations involving reporting status changes.*

- § 178E(h). *If defendant is a level 1 sex offender:* **(notify by mailing to the Sex Offender Registry Board, at least 10 days before moving to a different town, a Board-approved form that included all of the required information and was signed under the penalties of perjury).**
- §§ 178E(h) & 178F½. *If defendant is a level 2 or 3 sex offender:* **(notify by reporting in person to the police department of the town where he [she] resided at least 10 days before moving to a different town, and delivering by hand a Board-approved form that included all of the required information and was signed under the penalties of perjury).**
- § 178E(h). *If defendant is a level 1 sex offender:* **(notify the Sex Offender Registry Board in writing at least 10 days before moving within a town).**
- §§ 178E(h) & 178F½. *If defendant is a level 2 or 3 sex offender:* **(notify by reporting in person, at least 10 days before moving within a town, to the police department of that town and delivering by hand a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

- § 178E(l). *If defendant is a level 1 offender:* **(notify the Sex Offender Registry Board at least 10 days before moving out of Massachusetts).**
- §§ 178E(l) & 178F½. *If defendant is a level 2 or 3 sex offender:* **(notify by reporting in person to the police department of the town where he [she] resided at least 10 days before moving out of Massachusetts, and delivering by hand a Board-approved form that included all of the required information and was signed under the penalties of perjury).**
- § 178E(j). *If defendant is a level 1 sex offender:* **(notify the Sex Offender Registry Board in writing at least 10 days before changing work address).**
- §§ 178E(j) & 178F½. *If defendant is a level 2 or 3 sex offender:* **(notify by reporting in person to the police department of the town where he [she] resided, at least 10 days before changing work address, and delivering by hand a Board-approved form that included all of the required information and was signed under the penalties of perjury).**
- § 178E(p). **(notify by mailing to the Sex Offender Registry Board, at least 10 days before he [she] [transferred from] [stopped attending] an institution of higher education, a Board-approved**

form that included all of the required information and was signed under the penalties of perjury).

C. *Violations involving periodic verification.*

- § 178F. **(verify periodically by mailing to the Sex Offender Registry Board annually a Board-approved form that included all of the required information and was signed under the penalties of perjury).**
- § 178F. *If defendant is a level 1 sex offender:* **(verify annually by mailing to the Sex Offender Registry Board, within five days of receipt of notice from the Board, a Board-approved annual verification form that included all of the required information and was signed under the penalties of perjury).**
- §§ 178F & 178F½. *If defendant is a level 2 or 3 sex offender:* **(verify annually by reporting in person to the police department of the town where he [she] resided within five days of receipt of notice from the Sex Offender Registry Board, and delivering by hand a Board-approved form that included all of the required information and was signed under the penalties of perjury).**

- § 178F. *If defendant is a level 1 sex offender:* **(having listed a homeless shelter as his [her] place of residence, verify every [before 12/20/2006: 90 days] [as of 12/20/2006: 45 days] by mailing to the Sex Offender Registry Board a Board-approved form that included all of the required information and was signed under the penalties of perjury).**
- §§ 178F & 178F½. *If defendant is a level 2 or 3 sex offender:* **(having listed a homeless shelter as his [her] place of residence, verify every [before 12/20/2006: 90 days] [as of 12/20/2006: 45 days] by reporting in person to the police department of the town where he [she] resided within five days of receipt of notice from the Sex Offender Registry Board, and delivering by hand a Board-approved form that included all of the required information and was signed under the penalties of perjury).**
- § 178F1/2. **(As a sexually violent predator, verify every [before 12/20/2006: 90 days] [as of 12/20/2006: 45 days] by appearing in person at the police department of the town where he [she] resided and verifying under the penalties of perjury that all information remained true and accurate).**

SUPPLEMENTAL INSTRUCTION

“Secondary addresses.” **Secondary addresses are:**

***First*, the addresses of all places where a sex offender lives, abides, lodges, or resides for a period of 14 or more days in the aggregate during any calendar year and which is not a sex offender’s primary address; and**

***Second*, any place where a sex offender routinely lives, abides, lodges, or resides for a period of 4 or more consecutive or non-consecutive days in any month and which is not a sex offender’s permanent address, including any out-of-state address.**

G.L. c. 6, § 178C requires that for offenses which occurred after July 1, 2006, sex offenders must provide information relating to secondary addresses on the Board-approved form.

Conclusion.

You may not infer that the defendant is guilty of this offense because it is alleged that he (she) is a sex offender. He (she) is presumed innocent of the charge before you, that he (she) failed to comply with the sex

offender registry law, unless and until the Commonwealth proves each element of the offense beyond a reasonable doubt.

To repeat, the Commonwealth must prove beyond a reasonable doubt each of the following four elements:

***First:* that the defendant**

- **(resided) (intended to reside) in Massachusetts;**
- **(worked) (intended to work) in Massachusetts;**
- **(worked) (intended to work) at an institution of higher learning in
Massachusetts;**
- **(attended) (intended to attend) an institution of higher learning in
Massachusetts;**
- *Applicable only to non-residents:* **attended an educational institution in
Massachusetts.**

***Second:* that the defendant was previously**

- **(convicted of _____ [offense] _____).**
- **(adjudicated as a youthful offender by reason of _____ [offense] _____).**
- **(adjudicated a delinquent juvenile by reason of _____ [offense] _____).**
- **(released from incarceration or parole or probation supervision, or
custody with the Department of Youth Services, for a conviction**

or adjudication of _____ [offense] _____).

- (adjudicated a sexually dangerous person on or after August 1, 1981).
- (released from commitment as a sexually dangerous person on or after August 1, 1981).

Third: that the defendant knew that he (she) was required to

- (register with)
- (verify registration data with)
- (provide notice of a change [of address] [in employment] [in school enrollment status] to)
- (provide correct information to)

the Sex Offender Registry Board.

Fourth: that the defendant

- (failed to register).
- (failed to verify registration information).
- (failed to provide notice of [a change of address] [change in employment] [school or employment status]).
- (provided false information).

If the Commonwealth has proved all four elements beyond a

reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the four elements beyond a reasonable doubt, you must find the defendant not guilty.

NOTES:

1. **Statutory amendments.** The statute has been frequently amended. The model instruction reflects amendments through St. 2008, c. 215 (effective July 31, 2008).

2. **Initial statutory implementation.** The original sex offender registration statute provided that “any sex offender residing in the commonwealth shall, on or before [October 1, 1996], register in person at the police department in the city or town where he resides.” G.L. c. 6, § 178E(h), as enacted by St. 1996, c. 239, § 1 (effective October 1, 1996).

In 1999, the statute was amended to provide that “a sex offender residing or working in the commonwealth or working at or attending an institution of higher learning in the commonwealth shall, within ten days of the effective date of this section,” register with the Board. G.L. c. 6, § 178E(l), as enacted by St. 1999, c. 74, § 2 (effective September 10, 1999). No appellate decision has considered whether this provision imposes any obligations on those who became sex offenders after the 1999 effective date of § 178E(l).

3. **Non-resident sex offenders employed in Massachusetts.** In 1999, sex offenders who were not residents of Massachusetts but who were “working in the commonwealth” were required to register with the Board within ten days of the September 10, 1999 effective date of G.L. c. 6, § 178E(l). See note 2, *supra*.

No section of the statute explicitly requires registration by a non-resident convicted of a sex offense outside of Massachusetts if his or her only contact with Massachusetts is employment that commenced after September, 1999 at a place other than an institution of higher learning. If employed at a place of higher education, registration is specifically required by §§ 178E(c) and 178E(o).

4. **Elements of offense.** The first two elements are taken from the definition of “sex offender” in G.L. c. 6, § 178C. By proving those elements, the Commonwealth proves that the defendant was a sex offender required to register with the Sex Offender Registry Board. The second two elements pertain to the state of knowledge required by G.L. c. 6, § 178H, which is the prescriptive and penalty portion of the sex offender registry statute. Failure to provide all the statutorily-required information could result in a charge of failing to register. An offender who has registered but failed to fully complete the verification form may be charged with failing to verify.

5. **Registration in person at police department.** The model instruction is drafted with the assumption that the in-person annual registration requirements of § 178F¹/₂ govern only level 2 and level 3 sex offenders. Since § 178F establishes a procedure for verification by mail “except as provided in section 178F¹/₂ for a sex offender finally classified by the board as a level 2 or a level 3 sex offender,” it seems clear that the in-person provisions of § 178F¹/₂ apply only to level 2 and 3 offenders. Even if a level 2 or 3 offender is intending to move to another town, § 178F¹/₂ requires that he or she report to the police department of the community where he or she currently lives to register annually and to report the intended change of address.

6. **Relief from registration requirement.** A sex offender may be relieved from the obligation to register. See G.L. c. 6, §§ 178E(e), 178E(f), 178G. The model instruction has been drafted with the view that the defendant has the burden of raising a claim of exemption, and that the Commonwealth need not routinely prove as an element that a defendant who fits the definition of a sex offender is not exempt. See Mass. R. Crim. P. 14(b)(3)

and Instruction 3.160 (License or Authority).

Doe v. Sex Offender Registry Board, 450 Mass. 780, 882 N.E. 2d 298 (2008), held that the statutory prohibition on the Board granting discretionary relief from the registration requirement to any offender convicted of a "sexually violent offense" may not constitutionally be applied retroactively to those whose offenses predate the registration law. While the law is generally regulatory rather than punitive, this "conclusive presumption of risk" raises double jeopardy problems when applied retroactively because it is significant, permanent, and could be accomplished in a less burdensome manner. The Board may not automatically deny such offenders relief from the annual registration requirement, but must grant them a hearing and an opportunity to demonstrate that they should be granted such discretionary relief.

7. **False information: intent to deceive; free speech rights.** In a prosecution for providing false information, the Commonwealth is not required to prove that the defendant intended to deceive the Sex Offender Registry Board. The defendant's failure to provide information is not justified on free speech grounds. *Commonwealth v. Fondakowski*, 62 Mass. App. Ct. 939, 821 N.E.2d 481 (2005).

8. ***Doe v. Attorney General***, 426 Mass. 136, 686 N.E.2d 1007 (1997), found the original statute to be unconstitutional in part. That section of the statute was subsequently amended.

9. **Notice by publication insufficient.** The Sex Offender Registry Board's notices in Massachusetts newspapers about the obligation of sex offenders to register are insufficient to support a conviction for "knowingly" failing to register (G.L. c. 6, § 178H[a]), if the Commonwealth presents no evidence that the defendant routinely read any newspaper when the notices were published. "While the defendant's knowledge may be proven by circumstantial evidence, the proof must be specific to *this* defendant, rather than to the general population or some subset thereof. Absent a defendant's conscious disregard of the information necessary to provide him with the requisite knowledge, the Commonwealth cannot meet its burden merely by establishing that the knowledge was available to the defendant." *Commonwealth v. Ramirez*, 69 Mass. App. Ct. 9, 865 N.E.2d 1158 (2007).

10. **Summary of statute by section and subsection.** The sex offender registration statute is complex because its myriad variables result in different registration and verification requirements. Those variables include an offender's actual or intended place of residence, employment or schooling, and the offender's classification. The following list is a quick guide to finding pertinent sections of the statute:

<u>Statutory Reference</u>	<u>Relevant Contents</u>
G.L. c. 6, § 178C	Definitions for such terms as employment, secondary address, sex offender, sex offense, sex offense involving child, and sexually violent offense, and sexually violent predator.
G.L. c. 6, § 178E(a)	Requires that a sex offender be informed of the duty to register when in custody and has particulars about registering with the sex offender registry board prior to his/her release from custody.
G.L. c. 6, § 178E(b)	Requires that a sex offender be informed of the duty to register while on probation or parole and has particulars about registering with the sex offender registry board.
G.L. c. 6, § 178E(c)	Requires that a sex offender be informed by the sentencing court of the duty to register and has particulars about registering with the sex offender registry board.
G.L. c. 6, § 178E(g)	Particular registration requirements for one who moves into Massachusetts.
G.L. c. 6, § 178E(h)	Particular registration requirements for one who intends to move to a different city or town within Massachusetts or to a new address in a city or town.
G.L. c. 6, § 178E(i)	Particular registration requirements for one who intends to move out of Massachusetts.
G.L. c. 6, § 178E(j)	Registration requirements for one who intends to change his/her work address.
G.L. c. 6, § 178E(l)	Notification and registration requirements for sex offenders at the time of the enactment of the registration statute.

- G.L. c. 6, § 178E(o) Registration requirements for one who plans to work at or attend an institution of higher learning.
- G.L. c. 6, § 178E(p) Registration requirements for one who intends to transfer from or stop attending an institution of higher learning.
- G.L. c. 6, § 178E(q) Registration requirements for a nonresident sex offender in another state who is enrolled in school in Massachusetts.
- G.L. c. 6, § 178F Continuing verification requirements for sex offenders who are not finally classified as level 2 or 3 offenders (annually) and for homeless offenders (every 45 days)
- G.L. c. 6, § 178F^{1/2} In-person verification and registration requirements for level 2 and level 3 sex offenders and sexually violent predators, incorporating requirements of § 178E(g)-(j).
- G.L. c. 6, § 178H Sets penalties for failing to register and verify information.