



TEXAS HOUSE OF REPRESENTATIVES
COMMITTEE ON AGRICULTURE & LIVESTOCK

DEWAYNE BURNS
CHAIR

CHARLES "DOC" ANDERSON
VICE-CHAIR

January 11, 2022

Via Electronic Mail

(opinion.committee@oag.texas.gov)

Office of the Attorney General

Attention: Opinion Committee

P.O. Box 12548

Austin, Texas 78711-2548

Re: Request for an opinion regarding whether a merchant, operating under the authority of Section 124.001 of the Texas Civil Practices and Remedies Code, may offer a theft deterrent course in lieu of arrest and prosecution and whether or not doing so would expose a merchant or educational provider to civil or criminal liability

Dear General Paxton:

The retail industry in the United States has yet to solve its growing problem of "retail shrink," which is defined as ¹*"the difference between the amount of merchandise (or inventory) that the retail company owns on its books, and the results of a physical count of the merchandise."* In 2019, it was estimated that \$49 Billion was lost in this country to retail shrink, which involves loss from theft, shoplifting, error, or fraud.

A large portion of the industry's astronomical annual retail shrink can be attributed to shoplifting. According to the National Association of Shoplifting Prevention (NASP)², stores lose over \$45,000,000 *each day* to shoplifting alone.

The National Retail Foundation ³warns that the problem is escalating, too. From NRF Vice President for Research Development and Industry Analysis Mark Mathews:

"Between an increase in incidents and new ways to steal, shrink is at an all-time high. Loss prevention experts are facing unprecedented challenges from individual shoplifters to organized gangs to highly skilled cybercriminals. Retailers are responding with both traditional methods and the latest technology, but this is an ongoing challenge that can only be won with the support of lawmakers and law enforcement."

The escalating trend in retail shrink means that stores across Texas and elsewhere in this country are becoming more and more focused on ways to stop people from taking merchandise without paying for it. Not only are local police or sheriff's deputies being called to businesses in response to a complaint about

¹ How to Calculate Shrinkage in Retail, Loss Prevention Magazine, August 2020

² The Shoplifting Problem in the Nation, NASP

³ Retail shrink totaled \$61.7 billion in 2019 amid rising employee theft and shoplifting/ORC, National Retail Federation, July 2020



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someone being caught taking things, but store employees and management are constantly on the lookout for potential thieves on their premises which creates a significant drain on both public and private resources.

Moreover, the sheer number of shoplifting arrests and detentions each year continue to increase the burden on our criminal justice system to detain low-level offenders and prosecute crimes that could be resolved with alternative forms of education diversion. Programs similar to defensive driving courses, called educational/pre-arrest diversion programs, are being offered by merchants as a way to help free up time and resources for police departments, prosecutors, judges, and the many other professionals that support the legal system. In fact, a recent Loss Prevention Research Council (LPRC) study shows that educational/pre-arrest diversion programs save eighty-five percent (85%) more time and two hundred dollars (\$200) per apprehension versus traditional law enforcement mechanisms.

In Texas, as well as other states, pre-arrest diversion programs are yielding very positive results. Case in point, a pilot program deployed in Arlington, Texas in 2015 produced the following results:

- 43.2% reduction in shoplifting offenses
- 59.8% reduction in arrests
- 4,728 hours of police officers time saved by not having to respond to low-risk offenders that shoplifted
- \$218,000 overall economic impact for the City of Arlington

And, while Texas law is clear, Section 124.001 of the Texas Civil Practices and Remedies Code (*aka Shopkeepers Privilege*) allows a retailer to detain a suspected offender for a reasonable amount of time to determine if a theft has occurred, the law is silent as to whether-or-not a retailer may offer an education alternative in lieu of immediate arrest.

In an effort to clarify the right of retail merchants in this state, I hereby write to request an opinion regarding whether a merchant, operating under the authority of Section 124.001 of the Texas Civil Practices and Remedies Code, may offer a theft deterrent course in lieu of arrest and prosecution and, additionally, if doing so would expose a merchant or educational provider to civil or criminal liability.

Thank you for considering this request.

Sincerely,

A handwritten signature in black ink that reads "DeWayne Burns".

Representative DeWayne Burns
Chairman, House Committee on Agriculture and Livestock