

ISSUE BRIEF

Discrimination in Mortgage Lending on the Basis of Pregnancy and Maternity Leave

*"My husband and I are in the process of buying our first home. I am currently on paid maternity leave from my well paying job, and will return full-time 2 weeks after our closing date. Because my husband is a stay-at-home dad, the lenders my mortgage broker has contacted want me to be at work in order to get a loan. I'm willing to go back to work a little bit early, but I find it offensive that they assume I may not return on my own."*¹

*"I had great credit, but my husband did not. My husband had the income to support the loan, but because I was on unpaid maternity leave I thought that I did not. I thought my dreams of home ownership were unobtainable until my baby was born and my pocket book rejoined the work-force. Many people agreed that we would not be able to obtain a mortgage loan at this time."*²

*A 33 year-old oncologist was notified via e-mail that she was approved for a loan but that e-mail prompted an automatic, "out of the office" e-mail reply from her work account, which said she was out on maternity leave. The next day, her loan approval was denied. Since "maternity leave is classified as paid via short-term or temporary disability income," the e-mail message said, it could not be used because it would not continue for three years. "The lender suggested that she get a co-signer—her husband is a graduate student, so his income was not enough to qualify—or reapply after she returned to work."*³

Recent press coverage has shed light on a new arena in which mothers experience discrimination based on their family responsibilities: mortgage lending. This issue brief addresses what is—and what is not—unlawful when a lender considers a woman's pregnancy or maternity leave in making a lending decision.

Under current law, it is illegal to discriminate against pregnant women and mothers in selling, renting, or financing a dwelling. Discrimination in mortgage lending is primarily regulated by two federal Acts—the Fair Housing Act and the Equal Credit Opportunity Act. A number of state laws also prohibit this type of discrimination.

- *Title VIII of the Civil Rights Act of 1968, as amended by the 1988 Fair Housing Amendments Act, prohibits discrimination in the sale, rental, and financing of dwellings based on certain protected classifications including "sex" and "familial status"—defined as being domiciled with a minor child or being pregnant or in the process of securing legal custody of a minor child.*⁴

- *Fair lending laws apply to mortgage programs administered through the Federal Housing Administration (FHA.)*⁵ The FHA is the federal agency within the Department of Housing and Urban Development (HUD) that is charged with overseeing housing standards and insuring mortgage loans. Mortgagees must ensure that they do not treat a mortgagor less favorably than other mortgagors on certain grounds, including sex, marital status, and familial status (as defined in Title VIII).⁶
- *The Equal Credit Opportunity Act (ECOA),*⁷ is a federal law that makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction”⁸ on the basis of certain protected classifications, including sex and marital status.
- Based on these laws, the *Federal Trade Commission* clearly states in their consumer guidelines that a lender cannot ask prospective homebuyers “about your plans for having a family, although they can ask questions about expenses related to your dependents.”⁹
- Above and beyond these federal laws, *certain state’s laws* also prohibit discrimination in lending.¹⁰

While it is unlawful to discriminate in lending on the basis of sex, pregnancy, or familial status, it is *not* unlawful to discriminate on the basis of “creditworthiness.” As researchers working on racial discrimination in lending point out, “Much of the current debate about mortgage lending discrimination stems from disagreement about the extent to which differential success in obtaining a mortgage is due to credit-relevant factors that vary with race or ethnicity and how much is due to ongoing discrimination.”¹¹ Despite the difficulties in untangling lawful credit-based decisions from unlawful discrimination based on a protected category, recent studies have been successful in documenting the persistence of discrimination in mortgage lending, especially discrimination based on race.¹²

Pregnancy and maternity leave have been factored into mortgage lenders’ evaluations of an applicant’s “creditworthiness.” When a woman is on maternity leave and applies for a mortgage, her income level is unnaturally low at the very moment when she is applying for credit. If a mortgage lender refuses to grant her credit, it may thereby justify this as a lack of creditworthiness rather than sex or pregnancy discrimination. As one mortgage company president explained, “Maternity leave or any other leave of absence often prevents a person from obtaining a mortgage.”¹³ This may be lawful if the woman does not have adequate income or states an intention not to return to work; however, if the woman has adequate income and documents her intention to return to work, it is unlawful to refuse her a mortgage based on income (or lack of income) as assessed during her leave: a lender cannot make assumptions about her return to work and deny her credit opportunities accordingly.

Being on pregnancy, maternity, or parental leave can negatively impact an applicant’s required income evaluation. While noting that “[l]enders *must not* ask the borrower about possible, future maternity leave,” FHA guidance requires that lenders analyze a loan applicant’s income for a probability of continuing for at least three years; any income that does not satisfy this requirement will often not be considered for underwriting purposes, but may be considered as a compensating factor.¹⁴ Short-term disability, medical leave, and unemployment compensation all likely fall in to this category.¹⁵ Thus being on pregnancy or parental leave may place mothers and other caregivers in the position of falling into the “no income” category while

on leave. While state and federal leave laws like the Family and Medical Leave Act (FMLA) guarantee those employees covered by the laws the right to return to the same or equivalent job, for lending and underwriting purposes, a lender may claim it has no guarantee that the individual will return to work. As one mortgage firm owner explained, “If you are not back at work, it’s a huge problem....Banks only deal in guaranteed income these days. It makes sense, but the guidelines are sometimes actually harsher than they need to be.”¹⁶

To ensure creditworthiness, some lenders are now asking women to provide “maternity contracts” that state a return date for work and are approved by the employer. The situation varies by lender, but if an applicant has a maternity leave contract and can verify future income, the lender must take this into account in making mortgage calculations.¹⁷ Yet even with a maternity contract and a guaranteed stream of future income, there is anecdotal evidence that the new conservatism of some lenders is leading them to require the applicant to return to work before they will close the loan, sometimes requiring a pay stub before closing.¹⁸

Existing lending practices that rely on stereotypes will have a disproportionately negative effect on women. Current lending practices that discount an applicant’s stated intention to return to work after a pregnancy or maternity leave are grounded in stereotypes and assumptions about working women’s commitment to the workplace once they become pregnant or mothers, as well as stereotypes of men as breadwinners. Pregnant women and new mothers are far more likely to shoulder the absence of income in relation to the birth of a new child than men; single mothers and women who are primary income providers will likely experience an even greater impact.

Recent developments show promise. In the wake of recent press coverage, HUD announced that it was launching an investigation into mortgage lenders believed to discriminate against loan applicants who are pregnant or on a short-term disability.¹⁹ In a recent press statement announcing the investigation, HUD reiterated the FHA guidelines, stating: “HUD’s Federal Housing Administration requires its approved lenders to review a borrower’s income to determine whether they can reasonably be expected to continue paying their mortgage for the first three years of the loan. FHA-insured lenders cannot, however, inquire about future maternity leave. If a borrower is on maternity or short-term disability leave at the time of closing, lenders must document the borrower’s intent to return to work, that the borrower has the right to return to work, and that the borrower qualifies for the loan taking into account any reduction of income due to their leave.”²⁰

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For more information, visit www.worklifelaw.org.

Endnotes

¹ Alison Rogers, *Do I Have to Skip My Maternity Leave to Buy a Home?*, CBSMoneyWatch.com, May 13, 2009, <http://moneywatch.bnet.com/saving-money/blog/ask-agent/do-i-have-to-skip-my-maternity-leave-to-buy-a-home/404/> (last visited Aug. 31, 2010).

² Unwirklich Vin Zant, *Applying for a Mortgage While on Maternity Leave*, Associatedcontent.com, Oct. 01, 2009, http://www.associatedcontent.com/article/2209015/applying_for_a_mortgage_while_on_maternity.html?cat=25 (last visited Aug. 31, 2010).

³ Tara Siegel Bernard, *Need a Mortgage? Don't Get Pregnant*, N.Y. TIMES, Jul. 19, 2010, at B1, available at <http://www.nytimes.com/2010/07/20/your-money/mortgages/20mortgage.html>.

⁴ The Fair Housing Act, 42 U.S.C. 3601 *et seq.*, prohibits discrimination by direct providers of housing, such as landlords and real estate companies, as well as people or entities in the residential real estate business, such as banks or other lending institutions, whose discriminatory practices make housing unavailable to persons on the basis of protected classifications, including sex and familial status. Section 3602 of the Act defines “familial status” as follows:

(k) “Familial status” means one or more individuals (who have not attained the age of 18 years) being domiciled with--

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

⁵ See U.S. Dept. of Housing & Urban Development, “Fair Lending,” [http://portal.hud.gov/portal/page/portal/ HUD/topics/fair_lending](http://portal.hud.gov/portal/page/portal/HUD/topics/fair_lending) (last visited Aug. 31, 2010); U.S. Dept. of Housing & Urban Development, “Federal Housing Administration,” http://portal.hud.gov/portal/page/portal/ HUD/federal_housing_administration (last visited Aug. 31, 2010) (“FHA provides mortgage insurance on single-family, multifamily, manufactured homes and hospital loans made by FHA-approved lenders throughout the United States and its territories. While borrowers must meet certain requirements established by FHA to qualify for the insurance, lenders bear less risk because FHA will pay the lender if a homeowner defaults on his or her loan.”)

⁶ §805 (42 U.S.C. 3605) of the Fair Housing Act regulates fair lending. See also John R. Walter, *The Fair Lending Laws and Their Enforcement*, 81 Federal Reserve Bank of Richmond Economic Quarterly 61, 63 (1995) (“The FHAct is enforced by the Department of Housing and Urban Development (HUD), by individuals, and by the Justice Department. Under the act, HUD may take enforcement actions against lenders based on complaints from individuals or on its own initiative. Individuals, or organizations representing individuals, may pursue civil court actions under the act for discrimination against them. A civil action may be brought in a federal court by the Justice Department whenever it believes that a lender is engaged in a pattern of discrimination”).

⁷ The Equal Credit Opportunity Act (ECOA), 15 U.S.C. §1691 *et seq.*

⁸ 15 U.S.C. §1691(a)(1).

⁹ See Federal Trade Commission, *FTC FACTS for Consumers: Mortgage Discrimination, A Guide to Understanding Your Rights & Taking Action 2* (Jan. 2009), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea08.pdf>.

¹⁰ For example, in Massachusetts housing discrimination is regulated by the Massachusetts Commission Against Discrimination (MCAD). “Individuals who apply for credit or mortgage loans from Massachusetts lenders are protected from discrimination. Mortgage lenders are prohibited from discriminating based on race, color, religious creed, national origin, ancestry, sex, age, handicap (disability), sexual orientation, whether the individual has a child, and retaliation. In addition, banks and other creditors are prohibited from

discriminating based on sex, age, sexual orientation, marital statutes, public assistance, and retaliation.” Massachusetts Commission Against Discrimination, “For Individuals and Employees,” <http://www.mass.gov/mcad/forIndividualsEmployees.html> (last visited Aug. 31, 2010).

¹¹ Margery Austin Turner & Felicity Skidmore, *Introduction, Summary, and Recommendations, in MORTGAGE LENDING DISCRIMINATION: A REVIEW OF EXISTING EVIDENCE 3* (Margery Austin Turner & Felicity Skidmore, eds. 1999).

¹² See *id.* at 3.

¹³ Bernard, *supra* note 3 (quoting John Councilman, president of AMC Mortgage in Fallston, Md.).

¹⁴ See Federal Housing Administration, *FHA Handbook: HUD 4155.1, Mortgage Credit Analysis for Mortgage Insurance 4.D.2.a.*, available at <http://www.fhaoutreach.gov/FHAHandbook/prod/contents.asp?address=4155-1.4> (“The income of each borrower who will be obligated for the mortgage debt *must* be analyzed to determine whether his/her income level can be reasonably expected to continue through at least the first three years of the mortgage loan. In most cases, a borrower’s income is limited to salaries or wages. Income from other sources can be considered as effective, when properly verified and documented by the lender.”)

¹⁵ See *id.* at 4.D.1.a., 4.E.3.c. (“Income may not be used in calculating the borrower’s income ratios if it comes from any source that cannot be verified, is not stable, or will not continue.” *Id.* at 4.D.1.a. “Income received from government assistance programs is acceptable as long as the paying agency provides documentation indicating that the income is expected to continue for at least three years. If the income from government assistance programs will not be received for at least three years, it may be considered as a compensating factor. Unemployment income must be documented for two years, and there must be reasonable assurance that this income will continue.” *Id.* at 4.E.3.c.).

¹⁶ Bernard, *supra* note 3 (quoting Rick Cason, owner of Integrity Mortgage, a mortgage firm in Orlando, Fla.).

¹⁷ See Federal Housing Administration, *supra* note 14, at 4.D.1.c. (“When analyzing the probability of continued employment, lenders must examine...the employer’s confirmation of continued employment). See also Press Release, U.S. Dept. of Housing & Urban Development, HUD to Investigate Lenders Who Discriminate Against Expectant Mothers and New Parents (Jul. 21, 2010), http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-158 (“If a borrower is on maternity or short-term disability leave at the time of closing, lenders must document the borrower’s intent to return to work...”).

¹⁸ See Rogers, *supra* note 1.

¹⁹ See HUD Press Release, *supra* note 17. See also Nick Timiraos, HUD Warns Lenders on Discrimination of Expectant Mothers, WSJ BLOGS Developments, July 23, 2010, <http://blogs.wsj.com/developments/2010/07/23/hud-warns-lenders-on-discrimination-of-expectant-mothers/> (last visited Aug. 31, 2010).

²⁰ HUD Press Release, *supra* note 17.